

THE AMICUS CURIAE AND ARBITRATION

BY

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1. Introduction

The Latin term ‘Amicus Curiae’ is defined in Blacks’ Law dictionary¹ as ‘friend of the Court’. The dictionary goes on to state thus:

“a person who is not a party to a lawsuit but who petitions the Court or is requested by the Court to file a brief in the action because that person has a strong interest in the subject matter... also termed friend of the Court”

In the Nigerian case of *Atake v. Afejuku*², the Court stated thus:

“A friend of the Court. One who calls the attention of the Court to some point of law or fact, which would appear to have been overlooked; usually a member of the Bar. On occasion the law officers are requested or permitted to argue a case which they are not instructed to appear”

Historically, the terminology is regarded as having originated in ancient Rome in an instance where a Court was provided with “legal information that was beyond its notice or expertise³. Some jurisdictions have drawn up rules of Court for the filing of amici briefs.⁴ The practice of filing amicus briefs have evolved over the years and is now widely accepted in international Law, particularly in the area of Human Right and civil legal cases including arbitration cases.⁵

In this paper, the role of the amici in the Court system and its applicability in the arbitral system will be examined. The extent to which arbitral institutions as “gate keepers” to the arbitration field can and do assist the Courts preserve the integrity of the arbitral system will be highlighted. The importance of realizing and maintaining the difference between being an amicus i.e. a friend of the Court or being a “friend of the party” is emphasised.

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¹8th edn. Bryan A Gerdner

² [1994] 9 NWLR (Pt. 368)379 at 410

³ See REAGAN WM. SIMPSON & MARY VASALY, *The Amicus Brief: How To Write It And Use It Effectively 1* (3rd edn. 2010); see also Ernest Angnell. *The Amicus Curiae: American Development of English Institutions*, 16th INTL & COMP. L.Q. 1017 (1967) (explaining the characteristics of Amicus Curiae in Roman Law).

⁴ See US Supreme Court Rules, 2017 Rule 37, Supreme Court of Canada Rules, 2002 Rule 92.

⁵ On the work of the CIArb, in relation to third party intervention in Human Right Cases, see <https://www.ciarb.org/news/resolving-business-and-human-rights-disputes-by-arbitration/> by Juliane Hughes-Jennet and Marjun Parasio (The Head Partner of and Associate in Hogan Lovells) accessed on the 21/2/2020. See also Hague Rules on Business and Human Rights Arbitration, 2019 Article 28. Note also the provision of New York Convention on grounds for refusing recognition of arbitral award, 1958 (Article V(ii)).

2. The Amicus Curiae

The submission of amicus briefs has become wide spread in various jurisdictions including at the lower and appellate national Court systems.⁶ Generally speaking, an amicus in its brief helps the Court by supplementing or providing detailed analysis on points of law/assisting to put in perspective or clarify salient issues that the parties and the Court might not have averred or considered. The amicus curiae presents arguments that parties may have failed to address, either because of political pressures, tactical considerations or for any other reason. The precise role of an amicus curiae and its ambit will depend on the rules applicable in the particular jurisdiction/the Court or tribunal in which the filing of an amicus brief has been allowed. Originally the amicus curiae appears to have been a “bystander who without any direct interest in the litigation intervened on his own initiative to make a suggestion to the Court on matters of fact and law within his own knowledge”.⁷ As times passed, amici curiae were no longer passersby intervening in a process on their own initiative but by invitation of the Court.⁸ For instance, in the United Kingdom, the intervention of amicus curiae has, in most cases required an invitation from the Court. Different National Courts have drawn up rules governing the filing of amicus briefs.⁹ Whilst some jurisdictions recognize the power of the Court to appoint amicus curiae,¹⁰ the rules in some jurisdictions permits the intervention of amicus curiae only if certain requirements are met.¹¹

3. Amicus Curiae Before Nigerian Courts

There are no express provisions generally dealing with filing of amicus briefs in the Rules of Court in Nigeria. It will appear that Nigerian Courts have taken judicial notice of the filing of amicus briefs.

In *Atake v. Afejuku (supra)* the Court stated thus:

Every Court has an inherent power to invite barristers and/or solicitors of considerable experience to appear before it to assist in the proper administration of justice when important issues of law or fact are being considered. A legal practitioner so invited, gives his views of the law in a dispassionate manner. He does not act for any of the parties but is in Court to assist the Bench in

⁶ See generally Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38L. & SOC'Y REV. 807, 828 (2004) (“It is possible that the recent and dramatic increases in amicus filings in the Supreme Court have resulted in a ‘routinization’ of how amicus briefs are considered by the Court.”).

⁷ See Angell, *supra* note 12, at 1017 (“The amicus appears to have been originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make a suggestion to the Court on matters of fact and law within his own knowledge: the death of a party, manifest error, collusion . . .”).

⁸ Katia Fach Gómez; *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest* _Fordham International Law Journal Volume 35, Issue 2 2012 Article 3, Pg. 8.

⁹ See footnote 4 above. See also US Federal Rule of Appellate Procedure, Rule 29 which regulates the amicus brief process in U Circuit Courts. Other common Law countries which allow the submission of amicus briefs to the high Court of the land include the Supreme Court of Canada, Supreme Court of Appeal of South Africa and the Supreme Court of the United Kingdom. See also High Court Amendment Rules 2010 (No. 1) (Cth), sch 1, Rule 44.04 (Austl.); Rules of the Supreme Court of Canada, Rule 92, SOR/2002-156 (Can.); Supreme Court of Appeal of South Africa, (GN) R979/1998, Rule 16 (S. Afr.); Supreme Court of United Kingdom: The Supreme Court Rules, 2009, S.I. 1603 (L. 17), Rule 35 (U.K.) (enumerating the requisites in order to submit an amicus brief to each of these Tribunals).

¹⁰ Australia and Canada

¹¹ South Africa and the United Kingdom

unravelling intricate questions of law it is faced with. The invitation to legal practitioners is understandable for after all, they are equally officers of the Court and owe a duty not to mislead the Court but to assist it in ensuring that justice is done. (P. 410, paras. F-G)

The Rules of the Supreme Court of Nigeria provides for the filing of amicus briefs in matters relating to the validity or constitutionality of laws within the competence of the Federal Government or States of the Federation.¹² In such matters as provided by *Order 5 Rule 4 (1) (b) (c) and sub-rules (2) of the Supreme Court of Nigeria Rules* where the Attorney General of the Federation or Attorney-General of the State is not entitled to appear as of right under sub-rule (1) of this rule which provides that the Attorney-General of the Federation and that of a State can appear as of right in cases involving the validity of a Federal or State law, the Court may of its own motion or otherwise, grant leave to either of them to appear personally or by a legal practitioner for the purpose of presenting argument to the Court on the case”.

The provision cited above was applied in the case of *Attorney-General of Ogun State v. Alhaja Aberuagba*¹³, Bello J.S.C., (as he then was) observed:

“As the appeal raised very important constitutional issues concerning the Federal and State’s taxing powers, we invited all the Attorneys-General in the Federation as amici curiae to file briefs of argument on the issues and to appear for oral argument at the hearing. The Attorney-General of the Federation and the Attorneys- General of ten States responded to the invitation ... In parenthesis, I should like to express my appreciation for the assistance given to the Court by learned counsel for the parties and learned amici curiae.”

Apart from specific invitations from the Court for briefs amicus curiae, parties can invite amicus curiae to address certain issues but this has to be done with the leave of the Court. In *Dominic Onuorah Ifezue v. Mbadugba & Anor*¹⁴, Chief F.R.A. Williams S.A.N. appeared by leave of Court as amicus curiae on the issue of the interpretation of *Section 258 (1) of the Constitution*. The recent call for Amici curiae intervention through an application brought under *Section 1 of the Administration of Criminal Justice Act 2015* to the Court by Counsel in the case of Retired Col. Sambo Dasuki in relation to his continued detention by the State Security Service (SSS) was refused. To the Hon. Justice Hussein Baba Yusuf of the Federal Capital Territory High Court, the second defendant had not met the conditions for the appointment of an amicus, which is discretionary.

Indeed, filing briefs as amicus curiae can be a veritable tool for determining questions brought before our Courts as was acknowledged by the Honourable Justice Bello JSC as he then was in the case of *Ogugu v. State*¹⁵ wherein he stated thus:

“I should like to reiterate our gratitude to the learned amici curiae for the research, industry and learning in their submissions on the constitutional question. Although it has turned out that the Court cannot in this appeal determine the question, nevertheless their effort has not been in vain. They have alerted the Court to appreciate the

¹² See the Supreme Court of Nigeria Rules (as amended in 2009) Order 5.

¹³ (1985) 2 NWLR (pt. 3) at p. 409 para. C – D

¹⁴ S.C. 68/1982

¹⁵ (1994) 9 NWLR (Pt. 366) 1

gravity and constitutional importance of the question. It is anticipated that the occasion for its determination is likely to be presented soon. In spite of the importance of the constitutional question, it is surprising that Dr. Onagoruwa, the then Attorney- General of the Federation and Minister of Justice did not respond to the Court's invitation to him to file a brief on it and to appear as an amicus curiae."

4. Amicus Curiae in Arbitration

4.1 Investment Arbitration

The question may arise as to what role an amici has in either arbitration proceedings before an arbitral tribunal or in instances where an arbitral matter is before the law Court. The filing of amicus curiae briefs before an arbitral tribunal itself raises questions as regards the propriety of a non-party being able to file a brief in relation to an arbitration proceeding which is considered as a private and confidential proceeding. **Redfern and Hunter** on the age long principle of arbitration being regarded as a private process stated thus:

"...a private process, an advantage in the eyes of those who do not want details of their quarrels (accompanied almost inevitably by attacks on their competence or good faith) to be disclosed in open Court, with the possibility of further publication elsewhere."¹⁶

The learned authors however accepted that "developments in the law and practice of arbitration over recent years have been such that the old certainties no longer exist and a fresh look has to be taken."¹⁷ It would appear that the practice of filing amicus briefs before arbitral tribunals constitutes a fresh look of the age long principle of confidentiality and privacy of arbitral proceedings and premised on greater transparency considerations in the sphere of investment/trade arbitration¹⁸. The World Trade Organisation (WTO) dispute resolution system and Investment arbitration under the auspices of International Center for Investment Disputes (ICSID) accept the filing of amicus briefs from third parties.

Article 13 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes in the WTO ("DSU") regulates the arbitration panel's right to seek information.¹⁹ The treatment to be accorded to unsolicited amicus letters is a controversial issue.²⁰ In the WTO appellate procedure, the appellate body has considered that its right to

¹⁶A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* (1986)

¹⁷A. Redfern & M. Hunter with N. Blackaby & C. Partasides, *Law and Practice of International Commercial Arbitration*, para. "1-44" (4th edn. 2004).

¹⁸ See . Redfern & M. Hunter *Law and Practice of International Commercial Arbitration*, "on Confidentiality in investor-state arbitration"; 6th edn, pg. 130, para 2.183.

¹⁹ See Katia Fach Gómez "*Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*" *Fordham International Law Journal* Volume 35, Issue 2 2012 Article 3; Understanding on Rules and Procedures Governing the Settlement of Disputes art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; see Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals under the Hot-Rolled Lead / Asbestos Doctrine*, 44 HARV.INT'L L.J. 317, 319 (2003) (discussing Understanding on Rules and Procedures Governing the Settlement of Disputes in the WTO ("DSU") provisions, including Article 13 that relate to amicus submissions in panel-level proceedings).

²⁰ One of the most recent examples in this regard is the unsolicited letter from an Australian private entity (Apple and Pear Australia Ltd.) received by the panel in the case *Australia-Apples*. See Simon Lester, *Unsolicited Letter from an Australian Private Entity*, INTL ECON.L. & POL'Y Blog. http://worldtradelaw.typepad.com/ielpblog/wto_disputes/.

accept amicus submissions arises from the broad provisions of Article 17(9) of the DSU.²¹ The 2010 Working Procedures for Appellate Review contain additional rules regarding third-party participants.²² In practice, many of these submissions are rejected, which has generated controversy.²³ Likewise, whether panels are required to give reasoned explanation of their decisions is still being debated.²⁴ Thus it will appear that various questions with regard to the filing of amicus briefs in WTO proceedings are still not settled, though the power is derived from Article 13 and 17(9) of the WTO Dispute Settlement Understanding (DSU).

Issues of transparency have necessitated a “fresh look” in Investment arbitration by allowing briefs from non-parties. International investment arbitration involves host States and investors. Citizens of developing country states and non-governmental organizations demand that their voices be heard in disputes pertaining to the investments located in their locale with host investors. No doubt, due to the effect of properly managed investment arrangement on livelihood, poverty levels and rapidly deteriorating infrastructure of host nations. Thus, transparency has assumed a major issue in investment arbitration and in recent times, provisions in both bi-lateral/multi-lateral treaties and tribunal rules have incorporated the principle of transparency manifesting in the admission of amicus briefs/submissions from interested parties though not parties to the proceedings.²⁵

UNCITRAL has adopted new rules governing transparency in UNCITRAL arbitrations which is applicable to future international investment treaties²⁶ subject to the parties’ right to opt out of the new rules.²⁷ The 1976 UNCITRAL Arbitration Rules as revised in 2006 and further revised in 2010 incorporates the new transparency rules.²⁸ Both sets of rules came into force on 1 April 2014.

The UNCITRAL Transparency Rules, apart from witting down the confidentiality and privacy of the arbitration process²⁹ permits third parties to file submissions with the tribunal regarding disputes in issue before the tribunal.

²¹ See WTO (DSU), Art. 17(9).

²² See World Trade Organization, *Working Procedures for Appellate Review*, Rule 24, WT/AB/WP/6 (Aug. 16, 2010).

²³ See WORLD TRADE ORGANIZATION, *AHANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM* 98–100 (2004).

²⁴ The Appellate Body has stated that “[t]he grant of leave to file a brief . . . does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.” Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 52(5), WT/DS135/AB/R (Mar. 12, 2001). In another case, the Appellate Body referred to amicus letters, but concluded that they were not going to be taken into account, stating:

²⁵ See UNCITRAL Transparency Rules, Art 4(3)(a), which may allow experts and *amicus curiae* without a strong link to the proceedings per se, but who nonetheless have important expertise to bring to bear on the understanding or resolution of the dispute, to meaningfully participate in the proceedings. See also Article 39 of the 2004 Canadian model Bi-lateral Investment Treaties (BIT).

²⁶ The Rules will only apply to disputes under existing treaties (*i.e.*, treaties concluded prior to 1 April 2014) if all parties to the arbitration consent, or if the home state of the claimant and the respondent state consent. UNCITRAL Transparency Rules, Art. 1(2)

²⁷ See the UNCITRAL Rules on Transparency in Treaty-based Investor-State, Article I (2)(a).

²⁸ See UNCITRAL Arbitration Rules 2010 (as revised in 2013) Article I para. 4 which provides thus: For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), subject to article 1 of the Rules on Transparency.

²⁹ See UNCITRAL Transparency Rule, Art. 6.(Open oral hearings), UNCITRAL Transparency Rule, Art. 3. See also Gary B. Born *“International Commercial Arbitration”* confidentiality provisions in investment arbitration regimes Second edition Vol. II Pg. 2824-2831.

The need for privacy in international investment arbitration as desired by the parties is being balanced against the interest of the public to protect its interests in its nations assets and resources particularly of developing countries. Increase in foreign investments has thus widened the filing of amicus briefs basically on the premise that investment in a nation's resources cannot be regarded as a purely commercial transaction but a transaction that has important bearings of matters of public policy of a nation³⁰.

In *Methanex v. USA*³¹ (“*Methanex*” case), the issue of allowing amicus briefs was brought under Chapter Eleven (11) of the North American Free Trade Agreement (herein referred to as NAFTA). The tribunal admitted an amicus brief in January 2001 and though the tribunal stated that there was nothing in the UNCITRAL Arbitration Rules expressly conferring upon an arbitral tribunal the power to refuse or accept amicus submissions, it inferred the power so to do from Article 15(1) of the UNCITRAL Arbitration Rules³² which provides that the tribunal may conduct the arbitral proceedings as it considers appropriate. The view of the tribunal was later confirmed by the tribunal in *UPS v. Canada*³³. Considering the scrutiny of the media and non-governmental organizations (NGO) on this decision, the NAFTA Parties thereafter addressed the issue of amici submissions or non-disputing party submissions by releasing an interpretative statement on non-disputing party participation.³⁴

The first case in which the issue was raised under the International Centre for Settlement of Investment Disputes (ICSID) Convention was *Aguasdel Tunari v. Bolivia*³⁵ which was brought under a 1992 bilateral investment treaty (BIT) between the Netherlands and Bolivia. In the case, the tribunal did not admit the amici submissions as it (the tribunal) was of the opinion that it could not do so without the permission of the parties. However, in the subsequent case of *Aguas Argentinas, Suez & others v. Argentina* case³⁶, the tribunal exploring the procedural powers granted to the Tribunal by Article 44 of the ICSID Convention ruled that it had power to admit amicus curiae submissions in appropriate cases. The Court examined Article 44 of the ICSID Convention which states that if a question comes up, which is not covered by the Convention or the Arbitral Rules, the tribunal shall decide the question. The tribunal found the acceptance of amici submissions a procedural matter and rejected the argument that accepting the amici submissions is a procedural measure that would have substantive consequences³⁷. The reasoning of the

³⁰ Ibid.

³¹ (2005) 44 ILM 1345

³² The UNCITRAL Arbitration Rules Article 15(1) provides that “[s]ubject to these Rules, the 12 arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

³³ ICSID Case No. UNCT/02/1

³⁴ See Katia Fach Gómez “*Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*” Fordham International Law Journal Volume 35, pg. 22 Issue 2 2012 Article 3; In October 2003, the NAFTA Free Trade Commission (FTC) issued a statement on non-disputing party participation (hereinafter called “FTC statement” or “statement”). The FTC statement confirmed that no provision in the NAFTA limited a tribunal’s discretion to accept non-disputing party submissions. The statement also set out the procedures for amicus applications and the filing of such submissions. It is worth noting that the statement drew a clear distinction between the participation of “non-disputing parties,” defined as persons or entities that are not a disputing party, and the participation of NAFTA Parties (i.e. Canada, Mexico and the U.S.) as non-disputing Parties.

³⁵ 2002 ICSID Case No. ARB/02/3. This case concerned a water supply and treatment concession awarded to Aguas del Tunari for the city of Cochabamba, Bolivia (hereinafter Aguas del Tunari).

³⁶ ICSID Case No. ARB/03/19. This case concerns water distribution and sewage treatment in the Buenos Aires region.

³⁷ The same decision was reached in *Aguas Provinciales de Santa Fe, Suez, & Ors v. Argentine Republic*, ICSID Case No. ARB/03/17

tribunal was that “the admission of an amicus curiae submission would fall within this definition of procedural question since it can be viewed as a step in assisting the tribunal to achieve its fundamental task of arriving at a correct decision in this case.”

A subsequent amendment³⁸ to the ICSID rules appears to have put some clarity on the matter. The third amendment came into effect on April 10, 2006.³⁹ This 2006 amendment included provision to ensure transparency in Investment Arbitral proceedings. This statement also set out procedures for amicus applications and filing of such submissions. Article 37(2) of the amendment to the ICSID Rules provides thus:

“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
- (b) the non-disputing party submission would address a matter within the scope of the dispute;*
- (c) the non-disputing party has a significant interest in the proceeding.*

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

However, certain limits have been established to address certain concerns that parties have had in proceedings. The non-disputing parties are not parties and the term “non-disputing parties” can be misleading. Amici curiae or non-disputing parties in some instances have filled petitions to be joined as parties but these petitions have been rejected. Amici curiae only have the opportunity to file submissions and not be joined as parties.⁴⁰ Also, there are conditions set out by the various rules when amici submissions are requested. Under the ICSID rules quoted above, particularly Rule 37 (2), conditions for accepting submissions have been stated. Lastly, amici have no access to hearings or pleadings of the parties without the consent of the parties. The proceedings still remain confidential and private.

4.2 Commercial Arbitration

Arbitration is the preferred mechanism for commercial parties who mostly hinge their preference for arbitration on the privacy of arbitral proceedings and the confidentiality surrounding the process. Parties are persuaded to go for arbitration in a bid to avoid the public scrutiny of the Court process. Some national arbitration laws and various institutional arbitration rules protect the privacy of the parties and confidentiality of the

³⁸ The third amendment

³⁹ The amendment was preceded by a discussion paper released on October 22, 2004 titled ‘Possible Improvements of the Framework for ICSID Arbitration and a working paper released on May 12, 2005 on Suggested Changes to the ICSID Rules and Regulations’.

⁴⁰ Biwater, Procedural Order No. 5, (February 2, 2007), para. 54, available at <http://www.worldbank.org/icsid> (under “Cases”).

process.⁴¹ Third party intervention is therefore generally anathema in commercial arbitration proceedings. The submission of amicus brief is not the norm in arbitration between private parties. However, once the arbitration proceedings is concluded and should the award or any related application come before the Courts, the filing of amicus briefs has grown to be an acceptable practice in International Commercial Arbitration.

4.3 The Role of Arbitral Institutions

Leading arbitration institutions have recognized the need to assist national Courts as amicus curiae in matters relating to arbitration. The International Chamber of Commerce (ICC) Court of Arbitration Paris in its interest of safeguarding and protecting the integrity of the arbitral process would intervene as amicus curiae on matters that affect the ICC Rules or are of broad legitimate interest in the work of Arbitral Institutions.

In *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd) (Respondent)*⁴² before the supreme Court of England, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and Chartered Institute Of Arbitrator (CIArb) were granted permission “to intervene as institutions representing the broadest possible concerns of users with the same and similar concerns about the Court of Appeal’s decision”. The issues for determination related to the appellant’s application to the High Court for the removal of the Chair of the arbitral tribunal under section 24 of the English Arbitration Act 1996, arguing that the relevant circumstances (the chair having accepted appointments in two other related references as respondent’s party arbitrator, without the knowledge of the appellant), had given rise to doubts as to the impartiality of the chair. The challenge brought by the appellant had been rejected at the lower Court i.e. the English High Court and the Court of Appeal. However, permission to appeal to the UK Supreme Court on the following two issues was granted:

1. Whether and to what extent an arbitrator may accept appointments in multiple reference concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and
2. Whether and to what extent he/she may do so without disclosure.

Judgment is yet to be delivered in the matter.⁴³

In *Uber Technologies v. David Heller*⁴⁴ pursuant to Rule 92 of the Supreme Court of Canada⁴⁵, the International Chamber of Commerce (ICC) and other arbitration institutions acted as interveners pursuant to the Rules of the Supreme Court of Canada allowing amicus curiae.⁴⁶ The interveners included the Chartered Institute of Arbitrators, (Canada)

⁴¹ E.g. LCIA Rules Article 30. See also Swiss Rules, Article 44, SCC Rules; Article 46, HKIAC Rules, Article 42, Article 35 of the SIAC Rules. See also Gary B. Born, Chapter 20, Pg 2779-2831 2nd Edition, 2014; Confidentiality in International Arbitration.

⁴² UKSC 2018/0100

⁴³ For details of the submissions made by the interveners on the 12th and 13th day of November 2019, see <https://www.supremecourt.uk/cases/uksc-2018-0100.html>

⁴⁴ Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. and David Heller SCC File No. 38534

⁴⁵ Rules of the Supreme Court of Canada SOR/2002-156

⁴⁶ Attorney-General of Ontario, Young Canadian Arbitration Practitioners, Arbitration Place, United Food and Commercial Workers Canada, Worker’s Health and Safety Legal Clinic, Don Valley Community Legal Services, Canadian Federation of Independent Businesses, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Chamber of Commerce, the Chartered Institute of Arbitrators (Canada) Inc. And Toronto Commercial Arbitrators (jointly), Canadian American Bar, Association, Montreal Economic Institute,

INC., jointly with the Toronto Commercial Arbitration Society, Young Canadian Arbitration Practitioners and Arbitration Place. The issues for determination before the apex Court related to questions with respect to the competence-competence principle. ICC's submissions were directed to whether the competence-competence principle applies where a challenge to the jurisdiction of the arbitrator is based on the alleged invalidity of the arbitration agreement and the proper approach for determining the suitability of arbitration including arbitration for resolving certain categories of disputes. The written submissions of ICC emphasized that it takes no position on the disposition of the appeal, and that its submissions are informed by the ICC's Court experience and expertise in international arbitration. Relying on the apex's Court's judgments in *Dell*⁴⁷ and *Seidel*⁴⁸, as well as the strong emerging international consensus, the ICC submitted that, "in commercial cases, allegations of invalidity ought to be addressed in the same manner as other jurisdictional challenges pursuant to the competence-competence principle".⁴⁹ On the issue of the proper approach for determining the suitability of arbitration, including ICC arbitration for resolving certain categories of dispute, ICC submitted that "such determination ought to be made having regard to clearly expressed policy structures applying the *competence-competence* principle and the allocation of judicial and arbitral responsibilities".⁵⁰

Judgment is yet to be delivered in the matter.

Indeed arbitral organisations recognise the important role they can play in safeguarding the integrity of the arbitration process as independent and impartial amici. In the *Uber Tech V David Heller* supra, the ICC brief emphasized thus:

"The ICC takes no position on the disposition of this appeal. Its submissions are informed by the ICC Court's experience and expertise in international arbitration..."

5. Distinction between a "Friend of Court" and "Friend of Party"

The friend of Court (*amicus curiae*) is someone/organisation who is not a party to a case but assists the Court by offering information, expertise, or insight that has a bearing on the issues in the case; and is typically presented in the form of a brief. The decision on whether to consider an amicus brief lies within the discretion of the Court.

On the other hand, friends of parties in common law, refers to a person who represents another person who is under disability or otherwise unable to maintain a suit on his or her own behalf and who does not have a legal guardian. They are also known as next friend.⁵¹ The role of a litigation friend must never be confused with that of an amicus. A litigation friend represents the interests of a party and can therefore be partial.

An amicus should be impartial and the brief aimed at assisting the Court at arriving at the just and proper decision in an objective manner not simply pursuing its own partisan interests, legitimate or otherwise. It must be recognized that arbitral institutions do have an obligation to protect the integrity of the arbitral system and acting as amicus enables this important function to be carried out in the interest of maintaining the integrity of the system.

Parkdale Community Legal Services and Income Security Advocacy Centre (Jointly), International Chamber of Commerce, Consumers Council of Canada, Community Legal Assistance Society and ADR Chambers Inc (as interveners).

⁴⁷ *Dell Computer Corp v. Union des consommateurs*, 2007 SCC 34 [Dell]

⁴⁸ *Seidel v. TELUS Communications Inc*, 2011 SCC 15 [Seidel]

⁴⁹ [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38534/FM050 Intervener International-Chamber-of-Commerce.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38534/FM050%20Intervener%20International-Chamber-of-Commerce.pdf)

⁵⁰ *ibid*

⁵¹ *Sofolahan v. Fowler* (2002) NWLR (Pt. 788) 664.

6. Conclusion

Arbitral institutions have an important role to play in safeguarding the development and integrity of the arbitration process. They should regard themselves as the gate-keepers.

African arbitral institutions need to be watchful and vigilant for instances where their intervention as amicus is required to preserve the integrity of the arbitral system and the confidence of users. Indeed it should be part of their functions, they must be committed to providing unbiased and non-partisanship amicus briefs that preserve the legitimate interests of arbitration as an effective means of resolving disputes and the preservation of the integrity of the arbitral system.

In assisting the Courts as an amicus, care must be taken not to overburden the Court by lengthy briefs. The intervention of an amicus should be restricted to issues before the Tribunal/Court. Briefs should be kept to a reasonable length, precise and supported by the relevant authorities. The African Court system in the exercise of the discretionary power to accept or reject an amicus brief ought to encourage the filing of amici briefs in appropriate situations, either by invitation from the Court or by allowing the application of an amicus. The practice of allowing a non-party to a suit to apply to be amicus curiae rather than the common practice of always having to invite such submissions should be embraced in appropriate situations. Where rules of Court are lacking, appropriate rules should be put in place as to guide the filing of amicus briefs.

In conclusion, from the above it is evident that amici do play an important role in helping Courts and tribunals reach a just determination of matters they ordinarily might have no expertise in and thus the importance of the amicus curiae in arbitration, particularly Court related arbitration matters cannot be overemphasized.