

RECENT TRENDS AND OPPORTUNITIES IN INTERNATIONAL COMMERCIAL ARBITRATION

BY

ADEDOYIN RHODES-VIVOURE SAN, C.Arb*

1.0. INTRODUCTION

The origins of international commercial arbitration can be traced to “the methods used by the guilds and the merchants in the dispatch of their affairs.”¹ Maritime arbitration preceded international commercial arbitration and its origins can be traced as far back as voyages of ships owned by ancient Phoenicians carrying the cargoes of Greek traders.² Professor Tetley observed that arbitration may have existed in pre-historic times and was definitely practiced by about 1200 A.D. on the Atlantic and Northern coasts of Europe and in certain Mediterranean ports, where the customary *lex maritime* prevailed in its two great medieval codifications, *the Roles of Leron* and the *Consolato del Mare*. He observed that recorded arbitral decisions have been traced back to those rendered in Latin and preserved in the *greffe* of Giraud Amalric, a notary in Marseilles, dating from as early as 1248 A.D.³ Though the specialized and cross-border nature of maritime transactions quickly engendered arbitration to the maritime and shipping community, its popularity has moved to different other sectors and industries due to the perceived advantages of international arbitration more so in cross-border disputes between parties from different legal backgrounds.

International commercial arbitration has continued to evolve and develop as the preferred dispute resolution mechanism for cross-border commercial disputes.⁴ The perception of a neutral forum for cross-border disputes, the avoidance of national courts and the perceived advantages of its peculiar features including party autonomy, flexibility, confidentiality and

* LLB, LLM, MA [London], SAN, C.Arb, CEDR [UK] Accredited Mediator, Mrs. Rhodes-Vivour is the Managing Partner of Doyin Rhodes-Vivour & Co, Solicitors Advocates & Arbitrators. Email: doyin@drvlawplace.com.

¹ The Historical Background of Commercial Arbitration by Earl S. Wolaver.

² See Ibid. See also Professor Tetley, *Marine Cargo Claims*, 4th Edition Vol. 1 chapter 28.

³ See Tetley, *Marine Cargo Claims*, 4th Edition, Vol. 1 p. 1417, fn. 2.

⁴ Adedoyin Rhodes-Vivour. *Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform*. Retrieved from <https://drvlawplace.com/publications/>

privacy,⁵ expediency,⁶ parties' choice of dispute resolver,⁷ finality and enforceability of the resultant award⁸ have contributed to its popularity in the international plane as the preferred dispute resolution mechanism.

In order to retain its status as the preferred dispute resolution mechanism in cross-border disputes and ensure it continues to meet the needs of its users in a changing world, the practice of international commercial arbitration continues to be updated through the review of arbitral institutional rules, guidelines and protocols, amendment to national laws and evolving of case law jurisprudence.

This paper recognizes the importance of the historical perspectives of international commercial arbitration and seeks to identify recent trends in the field whilst highlighting current and anticipated opportunities.

2.0. HISTORICAL PERSPECTIVES OF INTERNATIONAL COMMERCIAL ARBITRATION

The detailed origins of commercial arbitration including its historical simplicity ought not to be lost in obscurity despite its growing popularity and complexity over the years.⁹ According to Mikaël Schinazi,¹⁰ the evolution of modern international commercial arbitration can be divided into three broad periods: *the Age of Aspirations* (approximately from the 1780s to the 1920s), the *Age of Institutionalization* (from the 1920s to the 1950s) and *the Age of Autonomy* (from the 1950s to the present). Modern international commercial arbitration and its development have been credited to several historical periods and incidents. To Mikaël

⁵ The two terms are not one and the same. Confidentiality deals with the obligation of the arbitrators and the parties not to divulge information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award while privacy relates to the right of persons other than the arbitrators, parties and their necessary representatives and witnesses, to attend the arbitration hearing and to be aware of the arbitration, i.e., arbitral proceedings are closed to third parties save for the express consent of the parties to arbitration. On the confidentiality or otherwise of arbitration proceedings see; How confidential is Arbitration? Russia 16.04.2004 https://www.cms-lawnow.com/ealerts/2004/04/how-confidential-is-arbitration?sc_lang=en#:~:text=One%20of%20the%20potential%20attractions,and%20witness%20evidence%20are%20confidential. Richard Semllie. *Is arbitration confidential?* Fenwick Elliot LLP.

⁶ There has been recent concerns that arbitration proceedings have become too-long and expensive. One of the identified reasons for this delay is the scrupulous practices and delay tactics used by counsel in arbitration proceedings. See *Delaying Tactics in Arbitration*. Chapter 37, AAA Handbook on Arbitration Practice. 2nd Edition; See also ICC Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives. 2017.

⁷ This choice enables the resolution by specialists who are skilled and experienced in the particular trade and industry.

⁸ Adedoyin Rhodes-Vivour. *The Agreement to Arbitrate – A Primary Tool for the Resolution of Maritime Disputes*. Paper Delivered at the Practical Maritime Arbitration Conference organized by the Emirates International Law Centre and held in Dubai April 5th-7th 2008.

⁹ E.g. M. Mustil, "Arbitration: History and Background." 1989 6 *Journal of International Arbitration* 43; V.V. Veeder, "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas." (1998) 47 *International & Comparative Law Quarterly* 747; A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017); E. Jolivet, F. Grisel and E. Silva Romero, 'Aux origines de l'arbitrage commercial contemporain: L'émergence de l'arbitrage CCI (1920–1958)' (2016) *Revue de l'arbitrage* 403.

¹⁰ Mikaël Schinazi. 2020. The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System. ICC Dispute Resolution Bulletin 2020. Issue 2.

Schinazi, the “*mercato*cracy” group can be recognized to have played a key role throughout the modern history of international commercial arbitration. The mercato

cracy has been described as a group of ‘*global corporate elite*’ including transnational merchants, private international lawyers, representatives of international organizations, which ‘*operates globally and locally to develop new merchant laws governing international commerce and the settlement of international commercial disputes and to universalize the laws through the unification and harmonization of national commercial legal orders*’.¹¹

Mikael Schinazi recalls that during the Age of Aspiration also called the ‘*long nineteenth century*’¹² arbitration was frequently used to settle commercial disputes at the regional levels. England had become the dominant world economic power during the industrial revolution and also eventually became the preferred seat of commercial arbitration. England’s dominant position is attributed to the sporadic increase recorded during the period in trade disputes between buyers and sellers. Consequently, arbitration committees were set up in diverse merchant guilds and trade associations including the London Corn Trade Association (LCTA) established in 1878 and London Oil and Tallow Trades Association established in 1910. By the adoption of standard contracts of the trade associations, Alternative Dispute Resolution/Arbitration clauses were introduced and became prevalent.¹³ The historical strength of London as a preferred place of arbitration and a major provider of arbitration services is recognized as rooted in this era with the standard form contracts drawn up to include arbitration clauses specifying London as the place of arbitration coupled with the support of the English Judicial system providing impetus for London developing into a favoured seat.¹⁴

At the international level, arbitration also began to gain momentum as a desired and preferred mechanism for the settlement of inter-state disputes. An arbitration clause was incorporated into the famous Jay Treaty of 1794 between the United States and England.¹⁵ The period witnessed the famous Alabama Arbitration of 1871 consequent upon the United States allegation that the British Government had violated its legal duty to respect neutrality during the American Civil War. The dispute between the two states was resolved through the 1871

¹¹ C. Cutler. 2003. *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Cambridge University Press.

¹² The expression ‘long nineteenth century’ was most famously used by British Marxist historian E. Hobsbawm to describe the 125 years from 1789 (the beginning of the French Revolution) to 1914 (the outbreak of World War I).

¹³ G. Schwob, *Les contrats de la London Corn Trade Association (Vente CAF)* (Arthur Rousseau, 1928).

¹⁴ Subsequently other jurisdictions; Paris, Singapore, Hong Kong and Geneva have developed into favoured arbitration seats. The development of Paris has been traced to the amendment of the French Code of Civil Procedure on arbitration made on January 11, 2013. The top five African countries that act as seats of arbitration are: South Africa, Nigeria, Egypt, Rwanda, and Coted’Ivoire. <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>

¹⁵ ‘Treaty of Amity Commerce and Navigation, between His Britannic Majesty and the United States of America, by Their President, with the advice and consent of Their Senate’ in H. Miller, *Treaties and Other International Acts of the United States of America*, vol. 2 (Government Printing Office, 1931), 245–274. The Jay Treaty sought to settle matters that had been left unresolved after the War of Independence, such as the British occupation of military forts, British seizure of American ships and impressment of American sailors into the Royal Navy to fight against revolutionary France, British interference in American trade and exports, the northwestern boundary between the United States and Canada and compensation for prerevolutionary debts.

Arbitral Commission proceedings at the Geneva's town hall (in what is still known as the Salle de l'Alabama).¹⁶

The second phase of the evolution of international commercial arbitration i.e., the age of institutionalism is regarded as the beginning of the 20th century. By this time, the prevalent use of arbitration as a mechanism for commercial dispute resolution had gained a reasonable level of momentum. Despite the impact of World War I, urgent steps were taken to establish institutions to resolve commercial disputes and maintain peaceful trade relationship between commercial parties from diverse nations. The International Chamber of Commerce was established in 1920 during this period sequel to the Atlantic City Conference of 1919 whilst its Court of Arbitration opened in 1923.¹⁷ Subsequently, in 1926 the American Arbitration Association (AAA) was established through the merger of the Arbitration Society of America and the Arbitration Foundation. These institutions are regarded as the forbearers of international commercial arbitration as a specialist practice. However, there were concerns in respect of the adequacy of the rules, procedures, techniques and the need for more efficiency and effectiveness. The United Nations Commission on International Trade Law (UNCITRAL) spurred a series of inter-state debates which birthed instruments including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).¹⁸ The Age of Institutionalization is reported to have lasted until the 1950s when the New York 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into force and birthed a new era of international commercial arbitration.¹⁹

The third age in the history of international commercial arbitration i.e., the age of autonomy began in the late 1950s and extends till date. In the evolution of commercial arbitration, the third age is dedicated to laying the foundational principles and theories governing international commercial arbitration. The period witnessed the emergence of different experts in commercial arbitration from the *mercato* group. The field of commercial arbitration began to develop its distinct features as a full-fledged field of practice and research rather than a sub-specialization in international law. Law firms, attorneys, arbitrators, arbitral institutions and centers, and even international arbitration journals started exploring international commercial arbitration as an area of practice and research.

Thus, commercial arbitration began to develop its own laws. Experts developed theories and intellectual constructs on international commercial transactions. For instance, the theory of *lex*

¹⁶ Although the Alabama Arbitration may be considered an imperfect model for modern international commercial arbitration, however, the Alabama Arbitration remains a key event in the history of international arbitration. V.V. Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator: From Miami to Geneva' in D. Caron, S. Schill, A. Smutny and E. Triantafyllou, *Practicing Virtue: Inside International Arbitration* (Oxford University Press, 2015), 127 at 133; R. Jenkins, *Gladstone: A Biography* (Pan Books, 2002) at 359; B. Loynes de Fumichon and W. Park, 'Retour sur l'affaire de l'Alabama: de l'utilité de l'histoire pour l'arbitrage international' (2019) *Revue de l'arbitrage* 743 at 747.

¹⁷ L. Magnier, *La Chambre de commerce Internationale* (Arthur Rousseau, 1928); G. Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce-1938* (Columbia University Press, 1938).

¹⁸ The New York Convention has been described as 'the single most important pillar on which the edifice of international arbitration rests' and a Convention which 'perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.'

¹⁹ See Mikaël Schinazi. 2020. The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System. *ICC Dispute Resolution Bulletin* 2020 Issue 2.

mercatoria was propounded as a set of rules created by private operators in cross-border commercial transactions to govern their trades in a general or specialized commercial area.²⁰ Thus, instead of applying national laws to such commercial transactions, agreed set of rules globally observed came into being.²¹ The age witnessed the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law on International Commercial Arbitration (1985) designed to assist States reform, modernize and harmonize their arbitration laws taking into account the particular features and needs of international commercial arbitration.²²

States, arbitral institutions, and experts in the field have continued to build on the foundational theories to enable the further development of international commercial arbitration into its current status of prevalence in the commercial world and improve its efficiency and efficacy in the modern world.²³

3.0. RECENT TRENDS AND OPPORTUNITIES

The age of autonomy is characterized by an enlarged arbitration community, newer forms of disputes, more sensitivity to diversity and inclusion concerns, proliferation of arbitration institutions, more modern practices/evolution of enhanced standards, specialization and procedural innovations for the continued effectiveness and efficiency of international commercial arbitration and enhanced standards for all practitioners in the field.

The age has also opened up more opportunities enabling a widened entrance into the arbitration world subject to the capability to abide by the tenets and fundamental principles including Independence, Impartiality and Integrity.

3.1.1. ENLARGED ARBITRATION COMMUNITY

The field of international commercial arbitration was once perceived as the exclusive preserve of arbitrators from the western world and predominantly “*male and aging*” with most arbitrations being conducted in the traditional centres in the west.²⁴ Dissatisfaction with the uneven balance led to the establishment of various regional initiatives particularly on the African and Asian Continents including the Asian-African Legal Consultative Organization

²⁰ The history of this innovative theory can be traced to Clive Schmitthoff and Berthold Goldman’s inspiring insights in the 1960s which were then applied by scholars in a wide range of contexts in the 1970s and thereafter. This period also witnessed the emergence of the French school of international arbitration and the second generation of the school in the 1980s.

²¹ A modern example of such *lex mercatoria* is the ICC’s INCOTERMS and Uniform Customs and Practice for Documentary Credit (UCP).

²² The UNCITRAL Arbitration Rules and Model law have subsequently being reviewed with the latest versions being the UNCITRAL Arbitration Rules 2010, UNCITRAL Model Law with 2006 amendments. In 2021 the UNCITRAL Expedited Arbitration Rules also came into being.

²³ Thus Arbitral institutions are continuously reviewing their rules and practices to ensure their competitiveness/the efficiency and efficacy of their systems e.g. ICC Arbitration Rules are constantly reviewed (1975, 1988, 1998, 2012, and 2017) with the latest revision in 2021. The 2021 Rules took account of various developments in the field including those occurring in the wake of COVID’ 19 with the need for social distancing.

²⁴ E.g. Paris, London, New York; See also Gary Born. International Commercial Arbitration, Vol. 1. Kluwer Law International, 2009. Pp. 174-199.

(AALCO).²⁵ During the age of autonomy the need for diversity and inclusion has become a central theme with the acknowledgement that these core issues challenged the very legitimacy of the international arbitral system which led to efforts to address the imbalance. In 2018 the UNCITRAL working Group 3 confirmed that the current lack of diversity in decision making in the field of ISDS undermines the legitimacy of the ISDS regime and needs to be addressed.²⁶ Similarly according to the ICC President, Claudia Salomon, in an interview granted at the ICC's annual Africa conference held in Nigeria in June 2022, *"diversity is a key strength of the ICC Court and essential to the legitimacy of international arbitration."*²⁷ In recent times, diversity in all its ramifications including geographical, gender and generational has assumed centre stage with active commitments by both arbitral institutions and other organizations to address the imbalance.

Indeed, the ICC International Court of Arbitration started as a westernized organization. The first ICC body called 'Court of Arbitration' inaugurated on 19th January 1923 was a regrouping of 120 members from 15 different European countries and the United States. Today, the ICC Court is comprised of 195 members from 121 countries.²⁸ In 2018, the ICC International Court of Arbitration achieved gender parity of the court with the appointment of 88 female and 88 male members of the court. The ICC African commission was also launched in 2018 with the mandate to build capacity in Africa, improve the number of African Arbitrators and enhance awareness of, and access to ICC's dispute settlement know-how and globally reputed services.²⁹ To bridge the generational gap the ICC Hold the Door initiative was launched in 2022 with the aim of enhancing the capacity of young arbitration practitioners by affording them a rare opportunity to observe arbitration hearings, either held virtually or in person.³⁰ In its 100 year history, for the first time, a woman, Claudia Solomon was made the president of the ICC Court.

The age of autonomy also witnessed the establishment of related campaigns for diversity and inclusion e.g. the Equal Representation in Arbitration (ERA) Pledge and the African Promise campaign. The ERA Pledge is a global initiative and a call to action³¹ for the arbitral

²⁵ Originally known as the Asian Legal Consultative Committee (ALCC). See <https://aalco.int/>

²⁶ International Chamber of Commerce (ICC). Leadership, Legitimacy, Legacy: A tribute to Alexis Moure. Edited by Mohammed S. Abdel Wahab et al. 2022. Page 32.

²⁷ Onyinye Ukegbu, Jun 27, 2022. Business Day Newspaper. *"Diversity is a key strength of the ICC Court and essential to the legitimacy of international arbitration"* – Claudia Salomon. Retrieved from <https://businessday.ng/news/legal-business/article/diversity-is-a-key-strength-of-the-icc-court-and-essential-to-the-legitimacy-of-international-arbitration-claudia-salomon/>

²⁸ <https://iccwbo.org/media-wall/news-speeches/icc-dispute-resolution-in-2021-our-year-in-review/>

²⁹ <https://iccwbo.org/dispute-resolution-services/africa-commission/>

³⁰ <https://iccwbo.org/media-wall/news-speeches/new-initiative-to-hold-the-door-open-for-young-arbitration-practitioners/>

³¹ The Pledge began with a suggestion made at ICCA 2014 by Jacomijn van Haersolte-van Hof, director general of LCIA that concrete action should be taken in order to see more women appointed as arbitrators. Sylvia Noury of Freshfields picked up on the idea and took it forward. Noury gathered a group of stakeholders at a dinner in London in April 2015 to discuss the under-representation of women arbitrators and potential solutions to cure this situation. Several dinners followed in various cities around the globe to discuss this issue and hear the views of the business and legal communities. Participants agreed that taking a pledge was the way forward. By signing a pledge and encouraging practitioners in dispute resolution to do the same, they would feel more committed to redressing the gender balance in arbitration. It was felt that without a joint commitment to change behaviours and to assess progress regularly, despite everyone's good will, gender equality would not be sufficiently prioritized.

community, with the simple objective of improving the profile of women in arbitration with the view to secure appointments of more women as arbitrators on an equal opportunity basis. The Pledge was formally launched in London in May 2016 and has attracted 5000 signatories from many arbitral institutions, law firms, arbitrators and clients.³² The “*African Promise*” campaign aims at improving the profile and representation of African arbitrators and appointing Africans as arbitrators especially in arbitrations connected with Africa. The drafters of the African Promise consider that African arbitrators should be appointed as arbitrators on an equal opportunity basis.³³ Arbitration institutions are now specifically incorporating diversity and inclusion provisions in their rules on appointment of arbitrators. Most recently, the new Rules of the Belgian Centre for Arbitration and Mediation (CEPANI) came into force on the 1st day of January, 2023 and clearly provides for consideration of diversity and inclusion in the appointment of arbitrators. The amended Article 15.1 of the Rules provides thus:

“The Appointments Committee or the President shall appoint or confirm the Arbitral Tribunal in accordance with the following rules. It shall take into account, inter alia, the availability, the qualifications and the ability of the arbitrator(s) to conduct the arbitration in accordance with the Rules, and considerations of diversity and inclusion.”

The above development is in furtherance to CEPANI’s Diversity and Inclusion Policy and Commitment and the status of the institution as a signatory to the ERA pledge as made on the 10th day of November, 2016.³⁴

The use of statistics as a veritable tool for measuring indicators and performance has become more widespread in the arbitral community. Various arbitral institutions including the International Chamber of Commerce, International Centre for Settlement of Investment Disputes, London Court of International Arbitration, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre now publish statistics on their caseload, claim amounts and nature of disputes. Some of the publications, for instance the ICC Dispute Resolution Statistics and the ICSID Caseload Statistics Report publish data showing the number of African Arbitrators appointed. African arbitral institutions are not left out. The Annual Caseload Report of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) shows the number of cases for the year, nature and sector of the disputes, number of Non-Egyptian parties, of Non-Egyptian arbitrators and female arbitrators appointed.³⁵ Hopefully, other arbitral institutions are expected to follow similar trend including publishing the number of African Arbitrators appointed to non-African disputes like their counterparts from other hemispheres who are regularly appointed to disputes pertaining to Africa.

³² Signatories as at 28th November, 2022 <http://www.arbitrationpledge.com/>

³³ <https://www.arbitralwomen.org/the-african-promise-aims-at-improving-the-representation-of-africans-in-international-arbitration/>. See also the Alliance for Equality in Dispute Resolution. <https://www.allianceequality.com/>

³⁴ <https://www.cepani.be/about-us/>; Evelien Van Espen. *CEPANI Revises its Arbitration Rules – Diversity and Inclusion a Key Focus*. Crowell & Moring LLP. December 21, 2022. https://www.crowell.com/newsevents/alertsnewsletters/all/cepani-revises-its-arbitration-rules-diversity-and-inclusion-a-key-focus?utm_source=mondaq&utm_medium=syndication&utm_term=CorporateCommercial-Law&utm_content=articleoriginal&utm_campaign=article

³⁵ See the 2021 Cairo Regional Centre for International Commercial Arbitration publish an Annual Caseload Report. <https://cricica.org/annual-caseload-reports/>

Organizations are showing sensitivity to the composition of speaking panels at conferences with a view to ensuring speakers are diverse and inclusive of those from jurisdictions previously regarded as geographically disadvantaged areas. Hopefully, such sensitivity will not be limited to choosing speakers from those in the diaspora. The International Law Association has published the 2021 Diversity, Equality & Inclusion Policy and the 2020 Guidelines for Diversity of Conference and Panel Speakers which provide that ILA representatives should aim for diverse representation in the selection of speakers on every panel and keynote speakers at ILA affiliated events, including 50/50 balance of men and women.

There are various scholarship opportunities for young arbitrators aspiring for further training in international arbitration. These opportunities include the African Arbitration Academy Flagship Training Programme Scholarship and the International Council for Commercial Arbitration (ICCA) scholarship for young members at the Miami School of Law, MIDS and the Tsinghua Law School. The ICC Africa Commission under the leadership of Diamana Diawara has also contributed to capacity building in various jurisdictions.

Similarly, the opportunities to participate in arbitration/ADR moot competitions are more varied. Foreign arbitration moot competitions include the ICC Vis Pre-Moot, the ICC International Commercial Mediation Moot Competition, the London School of Economics (LSE) and London Court of International Arbitration (LCIA) annual London Vis Pre-Moot and the AIAC Pre-Moot in preparation for the Annual Willem C. Vis International Commercial Arbitration Moot and the Shenzhen FDI Moot competition. There are also geographical specific ones. The *Africa in the Moot* established in 2020 consists of Willem C. Vis International Commercial Arbitration Moot Alumni who aim to support students from African universities in the field of arbitration. The organization provides coaching and support services, academic resources and financial support for African students participating in international moot competitions. There are African based Arbitration Moot competitions e.g., International Commercial Arbitration Moot Competition organized by the Lagos Court of Arbitration Young Arbitrators Network (LCA-YAN), the Sports Law Arbitration Moot Competition (SLAM) organized by PARMARS for the Eastern African Region and the National Investor-State Arbitration Moot Competition organized by the Nairobi Centre for International Arbitration (NCIA).

The aspiration in various continents to develop their countries as preferred arbitration seats and ensure the development of able practitioners in the field has certainly led to an increase in the number of arbitration institutions. According to the 2020 SOAS Arbitration in Africa Survey Report³⁶, there are 91 arbitration centres scattered in 42 African countries. The issue is whether these newer organizations stand to achieve their objectives independently or whether there should be collaboration amongst them in the achievement of their goals.

In the writers view the arbitration institutions particularly in countries striving for recognition particularly within limited resources ought to consider collaboration between themselves as well as possible collaboration with the more established institutions. For instance, in 2009, the Permanent Court of Arbitration (PCA) signed the Host Country Agreement with Mauritius with

³⁶ <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>

the view to promoting Mauritius as a venue for international arbitration and PCA services.³⁷ The International Chamber of Commerce has offices in different parts of the world, including Hong Kong (2008), New York (2014), Sao Paolo (2017), Singapore (2018), and Abu Dhabi (2021).

3.1.2. NEW STREAMS OF DISPUTES

The arbitration world has recorded influx of new streams of disputes due to developments in the ever changing world. Some of the new trends of disputes are those relating to climate change concerns and the need to guarantee environmental safety, Merger and Acquisition, Covid-19 related and renewable energy disputes.³⁸

Environmental, Social and Governance (ESG) issues have gradually become one of the top issues considered by investors and companies with respect to their operations.³⁹ The initiative is consequent upon the global trend of the implementation of ambitious global energy transition and climate change programs.⁴⁰ The awareness of climate change issues engendered the adoption of the Paris Agreement by 196 Parties at the 21st Conference of Parties (COP 21) on the 12th day of December, 2015. The Agreement is considered a legally binding international treaty aimed at limiting global warming to well below 2 or preferably 1.5 degrees Celsius and reach global peaking of greenhouse gas emissions as soon as possible in order to achieve a climate neutral world by mid-century.⁴¹ Similarly, the European Union Fit For 55% program adopted by the European Council on the 14th day of July, 2021 is targeted at achieving a 55% reduction in carbon emissions by 2030 and net zero in 2050.⁴²

The recent decision of the Hague District Court in *Milieudéfensie et al. v Royal Dutch Shell Plc (RSD)*. *NL:RBDHA:2021:5339* is recognized as groundbreaking in the light of the emphasis of climate change programs, its effect on the operations of companies and need to comply with climate change obligations. In the case, the court held that the Royal Dutch Shell Plc must reduce its Scope 1, 2, and 3 emissions, across its entire energy portfolio, by 45% by 2030, relative to 2019 emission levels on the ground that the company owes the general community a duty of care and human rights obligation.

Consequently, many companies (particularly in the energy and construction sector) have incorporated ESG-clauses into their commercial contracts. It is predicted that ESG-related disputes will arise from the interpretation and application of the ESG-clauses which are

³⁷ <https://pca-cpa.org/en/about/structure/pca-mauritius-office/>

³⁸ Tolu Aderemi. Emerging Trends in Internal Arbitration: Post-Pandemic Consequences. 11th October, 2022. This Day Newspaper. Retrieved from <https://www.thisdaylive.com/index.php/2022/10/11/emerging-trends-in-international-arbitration-post-pandemic-consequences/>;

³⁹ ESG is a set of standards deployed to assess a company's governance mechanisms and its ability to effectively manage its environmental and social impacts.

⁴⁰ <https://www.diligent.com/insights/esg/>

⁴¹ <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>

⁴² See <https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/#:~:text=The%20European%20climate%20law%20makes,EU%20climate%20neutral%20by%202050.>

regarded as unique, complex and largely untested.⁴³ These anticipated disputes are expected to be referred to arbitration as the most suitable dispute resolution mechanism for such disputes.

The recently launched Greener Arbitration campaign centrally advocates for sustainable arbitration practice, promotes awareness of the environmental impact of arbitrations and issues best practice guidelines on the ways in which carbon emissions can be minimized in arbitration practice.⁴⁴ The campaign has launched six Green Protocols including the Green Protocol for Arbitral Proceedings and Model Green Procedural Order, Green Protocol for Arbitral Hearing Venues, Green Protocol for Arbitration Conferences, Green Protocol for Arbitrators and the Green Protocol for Arbitral Institutions etc. The Green Protocol for Arbitral Proceedings specifically encourages the use of less paper,⁴⁵ virtual/remote hearing for the whole or part of the proceedings,⁴⁶ avoidance of unnecessary travel in international arbitration⁴⁷ and use of electronic versions of documents⁴⁸ etc. The campaign is considered to have ushered in a new era of environmental consciousness in the practice of international commercial arbitration. Consequently, arbitral institutions, law firms, arbitrators, counsel and arbitration users are expected to incorporate the recommended best practices and guidelines as a new trend to be seen in arbitration agreements, arbitration orders and arbitral institutional rules.

The impact of the Covid-19 pandemic in almost all areas of life, including international commercial arbitration cannot be overemphasized. Consequent upon the economic contraction engendered by the pandemic and the inability of parties to perform their duties under several commercial contracts, new stream of disputes arising under the principles of *force majeure*, *frustration*, and *impossibility* are being referred to arbitration while more of these disputes from companies still recovering from the economic contraction are anticipated.⁴⁹

Due to the economic uncertainty pervading the world in recent times, parties under Merger and Acquisition (M&A) transactions appreciate the inclusion of earn-out clauses as an arrangement to bridge the gap between the diverging valuations of the target company by the buyer and the seller at the closing. The arrangement entails the promise that in addition to the upfront payment, the seller of a business will receive additional amounts if the company attains the agreed performance targets over an agreed period after the closing. However, this agreement frequently results in disputes over valuation issues and the seller's vague causes for a shortfall in the agreed performance target. These disputes are frequently resolved through international commercial arbitration.

In 2021, there were more than a record-breaking 63,000 M&A transactions announced or completed worldwide.⁵⁰ The Global M&A volumes in 2021 were reported to top \$5 trillion for

⁴³ Freshfields Bruckhaus Deringer LLP. Illuminating the top trends: International Arbitration 2022. See page 8.

⁴⁴ <https://www.greenerarbitrations.com/about>

⁴⁵ See Section II(G).

⁴⁶ See Section IV(A).

⁴⁷ See Section VIII(A)(A1).

⁴⁸ See Section III.

⁴⁹ Freshfields Bruckhaus Deringer LLP. Illuminating the top trends: International Arbitration 2022. Page 7.

⁵⁰ <https://www.empowersuite.com/en/blog/mergers-acquisitions-2021-record-year>

the first time, comfortably eclipsing the previous record of \$4.55 trillion set in 2007.⁵¹ However, going by the lingering economic effects of the Covid-19 pandemic in diverse climes, more M&A disputes arising from the shortfalls in targeted performance are anticipated to be referred to arbitration.

The African Continental Free Trade Agreement (AfCFTA) came into force on the 30th day of May, 2019 and is predicted to generate new streams of investment disputes due to the anticipated influx of foreign direct investment (FDI) into the continent. It is expected that the implementation of the AfCFTA will attract foreign direct investments through its laudable provisions for the reduction and/or elimination of tariffs, zero and/or limited barriers to trade, market and economic integration, favourable trade and investment policies.⁵² According to the World Bank 2022 report, foreign direct investment in Africa is estimated to sporadically increase between 111% and 159% upon the full implementation of the Agreement in the continent.⁵³ Consequently, the anticipated increase in trade and investment in Africa is expected to generate a corresponding increase in investment and trade disputes which will be referred to arbitration and other ADR mechanisms as the preferred mode of dispute resolution for such disputes. The AfCFTA established specialized bodies for the resolution of disputes arising under the treaty including the Dispute Settlement Body (DSB), the Adjudicating Panels and the Appellate Body for second-tier review.⁵⁴

3.1.3. MODERN PROCEDURAL PRACTICES

The current age of autonomy has witnessed the introduction of modern procedural practices aimed at ensuring the continuous efficiency and effectiveness of international commercial arbitration. Some of these practices as reflected in various procedural rules include third party funding, increase in virtual/remote hearings, promulgation of expedited arbitration rules and reviewed provisions on joinder and consolidation.

The increased practice of third-party funding in arbitration has been attributed to the increasing costs of arbitration proceedings and lack of user liquidity which may dissuade users from pursuing their claims due to the lack of requisite financial capacity to pay for such costs.⁵⁵

⁵¹ <https://www.reuters.com/markets/us/global-ma-volumes-hit-record-high-2021-breach-5-trillion-first-time-2021-12-31/>

⁵² This Day. How the AfCFTA will Boost Investment and Development in Africa. <https://www.thisdaylive.com/index.php/2021/05/25/how-the-afcfta-will-boost-investment-and-development-in-africa/amp/>

⁵³ The World Bank. Free Trade Deal Boosts Africa's Economic Development. June 30, 2022. <https://www.worldbank.org/en/topic/trade/publication/free-trade-deal-boosts--africa-economic-development>

⁵⁴ See Article 20, Agreement Establishing the African Continental Free Trade Area and Article 5, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

⁵⁵ See Freshfields Bruckhaus Deringer LLP. Illuminating the top trends: International Arbitration 2022, Page 8; Tolu Aderemi. Emerging Trends in Internal Arbitration: Post-Pandemic Consequences. 11th October, 2022. This Day Newspaper. Retrieved from <https://www.thisdaylive.com/index.php/2022/10/11/emerging-trends-in-international-arbitration-post-pandemic-consequences/>; Tanya Landon and Dorothee Schramm. Trends in International Arbitration: The Fallout from COVID-19. Published on July 2, 2022, in Pharmaceutical Technology, Volume 46. Issue 7. Retrieved from <https://www.pharmtech.com/view/trends-in-international-arbitration-the-fallout-from-covid-19>. See Also AAA Report on Survey of Costs and Disputes funding in Africa – The first African wide survey focusing on costs of resolving disputes, the financing of claims and the impact of Covid-19 pandemic on litigation and arbitration costs and measures to drive costs efficiency in African disputes.

Consequently, provisions recognizing the practice of third-party funding has been introduced into arbitration rules. The International Chamber of Commerce International Court of Arbitration expressly referred to the practice of third-party funding under Rule 11(7) of the 2021 Arbitration Rules. Other recent arbitral institution Rules with provisions on third-party funding include the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules 2022,⁵⁶ Hong Kong International Arbitration Centre Arbitration Rules, 2018,⁵⁷ and the Asian International Arbitration Centre Rules 2021.⁵⁸ Emerging jurisdictions are not left out; one of the additions to the revised arbitration rules of the Arbitration Foundation of Southern Africa (AFSA) which came into effect on 1 June 2021 is Article 27 which governs third party funding arrangements for international arbitrations administered by AFSA.

Thus, in many jurisdictions third-party funding has graduated from being a tort and crime under the doctrine of champerty into a welcomed development in the field of international commercial arbitration practice. There are now elaborate and clear provisions in national laws and arbitral institutional rules with respect to third-party funding. For instance, the recent Nigerian Arbitration and Mediation Bill, 2022 awaiting the ascent of the President clearly provides for third-party funding under Section 61 of the Bill.⁵⁹

The modern practice of third-party funding has received judicial approval as evinced in *Excalibur v Texas Keystone* [2017] 1 WLR 2221 where the English Court of Appeal observed in the opening sentence of its decision that “*third-party funding is a feature of modern litigation*”. Indeed, it is expected that third-party funding practices will increase due to the lingering economic impact of the Covid-19 pandemic on several companies thereby initiating the reassessment of the companies’ capital allocation and liquidity management.⁶⁰

Third-party funding has also raised issues pertaining to the disclosure of such funding. There is currently no consensus as to the mandatory disclosure of third-party funding. Consequently, some recently amended arbitration rules demands a mandatory disclosure of third-party funding while similar provisions are not provided in other arbitration rules. The ICC 2021 Arbitration Rules expressly provides for a mandatory disclosure of third party under Article 11(7) which states thus:

“In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3) [duty to confirm their independence], each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration”

⁵⁶ See Rule 14, ICSID Arbitration Rules 2022.

⁵⁷ See Rule 44, Hong Kong International Arbitration Centre Arbitration Rules 2018.

⁵⁸ See Rule 13(13.5)(e), Asian International Arbitration Centre Rules 2021.

⁵⁹ Section 61 of the Nigerian Arbitration and Mediation Bill, 2022 provides that: “*The torts of Maintenance and Champerty (including being a common barrator) do not apply in relation to third-party funding of arbitration. This section applies to arbitrations seated in Nigeria and to arbitration related proceedings in any court within Nigeria*”

⁶⁰ Freshfields Bruckhaus Deringer LLP. Illuminating the top trends: International Arbitration 2022. See page 9.

Similar provisions which require mandatory disclosure of third-party funding is provided under Rule 14 of the 2022 International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, Article 22 of the 2022 Dubai International Arbitration Centre (DIAC) Arbitration Rules and Article 44 of the 2018 Hong Kong International Arbitration Centre (HKIAC) Arbitration Rules.

However, the London Court of International Arbitration Rules 2020 and the 2021 UNCITRAL Arbitration Rules remain silent with respect to the disclosure of third-party funding. It appears that the practice of third-party funding will generate both legislative reforms and case law in diverse jurisdictions.

In ***Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6)*** the Respondent made an application praying the Tribunal to order the Claimants to disclose, *inter alia*, whether they had entered into third-party funding arrangements to finance their claims in the arbitration, and if so, the terms of such arrangements. However, the application of the Respondent was refused on the ground that the Tribunal was not persuaded that there were reasons to make such order. Subsequently, the Respondent again urged the Tribunal to order the Claimants to disclose “*the identity and nature of the involvement of third-party funders for the Claimants in this proceeding*”. In this instance, the Respondent argued that the disclosure was necessary for various reasons including to ensure that there are no conflicts with those involved in the arbitration, particularly, the arbitrators. The Respondent relied on the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. Consequently, the Tribunal considered the Respondent’s application in light of the new argument and accordingly ordered the Claimant to disclose whether their claims in the arbitration are being funded by a third-party/parties, and if so, the names and details of the third-party funder(s) and the terms of the funding, including whether and to what extent it/they will share in any success the Claimants may achieve in the arbitration. The Tribunal further clarified that the ground for its decision is to ensure the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder. Accordingly, the Tribunal held that transparency as to the existence of a third-party funder is crucial in the matter.

The present age has experienced a sporadic increase in the use and reliance of technology in international arbitration. Due to the Covid-19 pandemic lockdowns, travel restrictions and social distancing rules, the international arbitration community had to invent innovative procedures for the conduct of arbitral proceedings. Consequently, some arbitral institutional rules were reviewed to incorporate new procedures and several protocols and guidelines were issued with respect to virtual arbitration proceedings. Examples of these protocols and guidelines include the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (19 April 2020), the Seoul Protocol on Video Conference in International Arbitration (18 March, 2020), the African Arbitration Academy Protocol on Virtual hearing 2020, Hong Kong International Arbitration Centre Guidelines for Virtual Hearings (14 May, 2020), Lagos Chamber of Commerce International Arbitration Centre Protocol for the Management of Virtual Proceedings 2020. Several video conferencing technologies were introduced during the pandemic with the tribunal given more power with respect to the conduct of the arbitration proceedings. For instance, the ICC Arbitration Rules 2021 mandatorily obliges the arbitral tribunal to adopt such procedural measures it considers

appropriate (including the measures referred to in Appendix IV) in order to ensure effective case management provided they are not contrary to any agreement of the parties. Thus the hitherto discretionary “may” was replaced with “shall”.⁶¹ ICC Article 22(2) provides thus:

“In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV”

The Appendix retained the use of telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.⁶²

Article 19.2 of the London Court of International Arbitration (LCIA) Rules 2020 further broadened and clarified the mode of hearing to include express reference to virtual hearing and other forms of hearing including conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). Article 19.2 provides thus:

“The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, specifying that as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)”

Despite the declining number of reported cases of the pandemic, its impacts on arbitration are still in effect till date. According to the ICC Commission on Arbitration and ADR 2021 Survey, 93% of respondents agreed that technology has improved the efficiency and cost-effectiveness of the arbitration process while 88% of the respondents agreed that it should be the norm post-pandemic to conduct case management and other procedural conferences as virtual meetings.⁶³

The arbitration world continues to innovatively deploy these technologies and issue relevant guidelines to address possible challenges surrounding their usage e.g. time zone differences, power supply, access to technology, etc. in any event the advantages of remote and distant hearing has mitigated the of time travel inconvenience and associated costs on arbitral expenses.

In the quest to maintain the effectiveness of international commercial arbitration as the preferred dispute resolution mechanism, many arbitral institutions have revised their rules to incorporate modern practices. Arbitration Rules have been revised in relation to expedited

⁶¹ See Article 22(2) ICC Arbitration Rules 2021.

⁶² See Appendix IV ICC Arbitration Rules 2021.

⁶³ ICC Commission Report. *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings*. February 2022.

arbitration proceedings,⁶⁴ appointment of emergency arbitrators,⁶⁵ summary dismissal procedure,⁶⁶ joinder and consolidation.⁶⁷ In September 2021, the UNCITRAL Expedited Arbitration Rules took effect with features such as the tribunal's power to decide to forgo the document production phase of the proceedings and an accelerated timeline for the conclusion of the arbitration, with the award to be issued within six months from the date the tribunal is constituted.⁶⁸ Similarly, Article 30 of the ICC 2021 Arbitration Rules and the Expedited Procedure Rules (Appendix VI) expressly provides for expedited arbitration procedure. Chapter XII of the recent 2022 ICSID Arbitration Rules and Article 5 of the 2016 Singapore International Arbitration Centre (SIAC) Arbitration Rules also have provisions on expedited proceedings.

Arbitral institutions updated their provisions on joinder and consolidation for a more liberal approach. The ICC 2021 Arbitration Rules made significant amendment to the previous provisions in Article 7(5) and 10 of the 2017 Arbitration Rules on joinder and consolidation. Under the 2017 Arbitration Rules no additional party can be joined after the confirmation or appointment of any arbitrator, unless the consent of all parties, including the additional party, is obtained. However, Article 7(5) of the 2021 Rules provides that even where there is no unanimous consent, the arbitral tribunal, once constituted and upon a party's request, may join a third party where all the conditions stated in the Article are met.⁶⁹ The new International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules 2022 made amendments to the 2006 Arbitration Rules by expressly providing for consolidation under Rule 46 of the new Rules. Though the 1976 UNCITRAL Arbitration Rules did not contain provisions on joinder, consolidation and multi-party arbitrations, the amendments made in the 2010 UNCITRAL Arbitration Rules expressly introduced joinder of parties under Article 17(5) of the Rules. The 2020 London Court of International Arbitration (LCIA) Arbitration Rules also makes provision for the appointment of arbitrators where there are three or more parties,⁷⁰ empowers the arbitral tribunal to join one or more third parties in an arbitration⁷¹ and consolidate one or more arbitration proceedings.⁷²

In 2017, the International Chamber of Commerce (ICC) introduced summary procedure for the expeditious dismissal of unmeritorious claims through an update to its Note to Parties and

⁶⁴ See Article 30, ICC Arbitration Rules 2021; Chapter XII: Expedited Arbitration Rule 75 – 86, ICSID Arbitration Rules 2022.

⁶⁵ See Appendix V: Emergency Arbitrator Rules, ICC Arbitration Rules 2021; Chapter III: Disqualification of Arbitrators and Vacancies Rule 26, ICSID Arbitration Rules 2022.

⁶⁶ See Article 22 ICC Arbitration Rules 2021 and Section VII(D) of the 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration; Chapter VIII: Suspension, Settlement and Discontinuance Rule 54, ICSID Arbitration Rules 2022.

⁶⁷ See Article 7 and 10, ICC Arbitration Rules 2021; Chapter VI: Special Procedures Rule 46, ICSID Arbitration Rules 2022.

⁶⁸ See UNCITRAL Expedited Arbitration Rules, Article 1-16.

⁶⁹ See also Article 8 and 9 of the International Centre for Dispute Resolution (ICDR) Rules 2021 which relaxed the rules on joinder and consolidation.

⁷⁰ Article 8, LCIA Arbitration Rules, 2020.

⁷¹ Article 22(x), LCIA Arbitration Rules, 2020.

⁷² Article 22A, LCIA Arbitration Rules, 2020.

Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.⁷³ Section VI(C) of the 2017 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration provided that any party may apply for the *expeditious determination* of manifestly unmeritorious claims or defenses within the broad scope of the arbitral tribunal's power under Article 22 of the 2017 ICC Arbitration Rules. Article 22 of the 2017 Arbitration Rules provides thus:

- “1. The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.*
- 2. In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.”*

The provisions are retained under Section VII(D) of the 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration and Article 22 of the 2021 ICC Arbitration Rules. The London Court of International Arbitration Rules, 2020 contains similar provision for summary dismissal under Article 22.1(viii) which provides that the arbitral tribunal shall have power to:

“determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an “Early Determination”)”

Arbitral tribunals are thus vested with the necessary tools aimed at saving time and costs thereby increasing the efficiency of proceedings.⁷⁴

Globalization has engendered complexity in international commercial transactions. Performance of a contract can now involve multiple parties from different jurisdictions. Multi-party and multi-contract disputes are now common in international arbitration practice especially in maritime, construction, energy and sale of goods cases where a dispute may affect more than one contract. According to the 2020 ICC Dispute Resolution Statistics, of the 2,507 parties involved in cases filed in 2020, 48% were claimants and 52% were respondents. Approximately a third of the cases (31%) involved multiple parties, of which there are several

⁷³ See also Article 39 of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, 2017; Article 29, Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules, 2016; Article 26, SIAC Investment Arbitration Rules, 2017.

⁷⁴ Charles Rae. *ICC Court Clarifies Summary Dismissal Procedure in Arbitration*. Latham & Watkins LLP. December 5, 2017. Retrieved from <https://www.latham.london/2017/12/icc-court-clarifies-summary-dismissal-procedure-in-arbitration/>; Koh Swee Yen & Willock Andrew. *Summary Procedure*. Jus Mundi. March 11, 2022. Retrieved from <https://jusmundi.com/en/document/publication/en-summary-procedure>; Gordon Bell & Christopher Richards. *What does the ICC'S Summary Procedure Mean for Arbitration?* Gowling WLG. December 4, 2017. Retrieved from <https://gowlingwlg.com/en/insights-resources/articles/2017/what-does-the-icc-s-summary-procedure-mean-for-arb/>; Kate Wilford. *Summary Procedure in Arbitration making a Long Story Short*. Hogan Lowell International LLP. December 1, 2016. Retrieved from <https://www.hoganlovells.com/en/publications/summary-procedures-in-arbitration-making-a-long-story-short>

respondents (51%), several claimants (31%), or several claimants and respondents (18%). As in previous years, the vast majority of multiparty cases (87%) involved three to five parties. Consequently, in recent times, many institutional arbitration rules have been revised to facilitate multiparty disputes by incorporating joinder of third parties and consolidation of arbitration proceedings as case management mechanisms for complex multi-party arbitration matters. Arbitration institutions appreciating the dichotomy between party autonomy and the flexibility required to enable efficiency in the conduct of arbitration involving multi-parties have amended their rules to enable the arbitral tribunal conduct the arbitration efficiently and still accord due respect to party autonomy. The Arbitral community in the interest of balancing expediency and efficiency with the principle of party autonomy has engaged in a careful crafting of the provisions relating to multi-party, joinder and consolidation in the light of not sacrificing expediency and efficiency on the altar of party autonomy.

The flexible modern practices introduced in diverse arbitral institutions rules appears to have attracted an increase in their usage by arbitration users. According to the ICC 2020 Dispute Resolution Statistics, 31% of the cases registered in 2020 were registered under the expedited rules.⁷⁵ By the same report, 32 Emergency Arbitrator (EA) applications were reportedly filed in 2020⁷⁶ and 31% of the cases registered in 2020 involved multiple parties.⁷⁷

Innovations by international arbitrators aimed at improving the efficiency and reliability of international arbitration tribunals are not left out. Former Vice-President of the ICC International Court of Arbitration and the President of the International Council for Commercial Arbitration (ICCA), Ms. Lucy Reed,⁷⁸ proposes a tribunal meeting- “*the Reed Retreat*” prior to the hearing to enhance the tribunal’s preparation and efficiency during the hearing.⁷⁹ The Reed Retreat is aimed at ensuring that members of the tribunal have individually read the files and are adequately prepared for the hearing. Mr. Neil Kaplan,⁸⁰ a past President of the Chartered Institute of Arbitrators, proposes that prior to the main hearing of the matter, counsel briefly introduce their respective positions to the tribunal and present skeletal arguments in advance. The *Kaplan Opening* is aimed at ensuring a better understanding of the matter by the tribunal and ultimately facilitate improved decision-making in the matter.⁸¹

3.1.3. MANY DOORS TO DISPUTE RESOLUTION AND VARIED CAREER STREAMS FOR DISPUTE RESOLVER

The age of autonomy witnessed the global community becoming more aware of the many doors to dispute resolution and the efficacy of choosing the appropriate door in a bid to resolution in the most effective manner through a range of alternative dispute resolution services including

⁷⁵ ICC Dispute Resolution 2020 Statistics, Page 18. See Rule 30 of the ICC Arbitration Rules, 2021.

⁷⁶ ICC Dispute Resolution 2020 Statistics, Page 20.

⁷⁷ ICC Dispute Resolution 2020 Statistics, Page 9.

⁷⁸ President of the Singapore International Arbitration Centre (SIAC).

⁷⁹ Lucy Reed. The Kaplan Lecture 2012 – ‘*Arbitral Decision-making: Art, Science or Sport?*’ 2012. Retrieved from www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed_tribunal_decision-making.pdf.

⁸⁰ Former member of the ICC International Court of Arbitration and Council member of the International Council of Commercial Arbitration.

⁸¹ Neil Kaplan. “*If it Ain’t Broke, Don’t Change It.*” 2014. 80 Arbitration 172. See also other innovations including the Redfern Schedule, Scott Schedule, Sachs Procol and the Debevoise Protocol.

mediation (or conciliation), expert determination and dispute boards. This age witnessed the evolution of multi-door court houses.⁸² In realization of the need to promote alternative dispute resolution in its wider terms, arbitration organizations rebranded. The ICC Arbitration commission became the ICC ADR Commission and the ICC Centre for ADR was established providing avenues including mediation expert appraisal, dispute board and overseeing documentary instruments dispute resolution expertise. The ICC Dispute Resolution Service (DRS) evolved from arbitration administered by the International Court of Arbitration to include ICC ADR services administered by the ICC International Centre for ADR. The young practitioners' organizations were not left out in the rebranding exercises. The ICC YAF rebranded to ICC Arbitrators and ADR Forum (YAAF).

The age of autonomy has truly witnessed an appreciation of the many tools in the “*dispute resolution tool box*”. As stated by Claudia Solomon, the ICC President, “*international arbitration may be the best tool for the job, but if we stay conscious of our tool bias, we must dig deep in our toolbox, and consider what other tools may be required.*”⁸³ The importance of Alternative Dispute Resolution (ADR) as an effective tool has been further institutionalized in the ICC 2021 arbitration Rules with the obligation of the arbitral tribunal going beyond mere informing the parties (of their freedom to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules) to encouraging them to pursue alternative dispute resolution.⁸⁴

In the current era, conventional arbitration clauses are being replaced by multi-tiered dispute resolution clauses and various opportunities abound for diverse careers in the dispute resolution field for ADR practitioners.

4.0. CONCLUSION

Indeed international commercial arbitration is an evolving changing landscape with its actors, particularly the institutions keen to keep abreast with its evolving nature with a view to ensuring international commercial arbitration remains a viable instrument for the resolution of international disputes. The task to ensure that international arbitration becomes even more global and truly international in all its ramifications is key to its evolvement in the age of autonomy.

The widened range of disputes, increase in disputes, proliferation of institutions, diversity and inclusion, more effective rule making are all positive indices for the opportunities that avails in this area for states, institutions and individuals wishing to capture a share of the arbitration market.

⁸² Propounded by Professor Frank E. A. Sander in his paper titled “Varieties of Dispute Processing Subsequently” delivered during the 1976 Roscoe Pound Conference where he stated thus: “...the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”

⁸³ <https://iccwbo.org/publication/maslows-hammer-an-over-reliance-on-familiar-tools/>

⁸⁴ See Appendix IV: Case Management Techniques, ICC Arbitration Rules 2021 in comparison to Appendix IV of the 2017 Arbitration Rules.

However, the task of tapping into the opportunities is not to the faint hearted but to the nations, institutions and individuals who are strategic, focused on core objectives and determined to ensure the continuing efficacy of Alternative Dispute Resolution (ADR) through rule making, evolving practice, continuous development and collaboration.

Equal opportunity for all is a key component of this age –the very absence of which threatens the legitimacy of the system thus diversity and inclusion has assumed global awareness. Indeed, the arbitral institutions have embraced their roles as “*gatekeepers*” of the arbitral system with a view to ensuring the continuing growth, development and popularity of international arbitration in the ever changing world.

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