

# The Jurisdictional Tensions Between Domestic Courts and Arbitral Tribunals

*Emilia Onyema\**

TABLE OF CONTENTS	Page
I. Introduction	481
II. Jurisdiction of National Courts and Arbitral Tribunals in Arbitration	482
III. Linkage Between Supportive Arbitration Jurisdiction and Choice of Seat	492
IV. Conclusion	500

## I. INTRODUCTION

This paper interrogates the relationship between national courts and arbitral tribunals to understand the jurisdictional tensions therein present. It examines the arbitral process to determine the separate spheres of influence of courts and arbitral tribunals and where these influences intersect. It also examines whether these two clearly defined systems of adjudication can symbiotically co-exist and cooperatively interact in the same space. The analysis leads to the conclusion that such co-existence is possible and is in the best interest of both systems if they wish to thrive. This paper then notes that jurisdictions whose laws and courts pursue a cooperative interaction between both systems are generally perceived as being supportive of arbitration. It argues that such perception attracts international arbitration disputes to those jurisdictions as seat; while the story is very different in jurisdictions that are not so perceived; they do not attract many international arbitration references as seat.

This paper therefore draws two major conclusions: first, for arbitration and litigation to thrive, both must accept the symbiotic nature of their relationship and strategically share space with confidence and trust and with the clear purpose of supporting each other in their own clearly defined spheres of influence; and second, for those jurisdictions wishing to attract more international arbitration references (as seat), not only do they need to modernize their arbitration related laws, but their courts must become supportive of the arbitral process. The analysis of these issues will draw from both qualitative and quantitative research that is already in the public domain including examination of the provisions of relevant legislation and conventions, judicial decisions, the views of legal commentators, and various statistics relevant to arbitration. The main arbitration law referenced in this paper is the UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended in 2006) (Model Law). The Model Law has been adopted or adapted by 103 jurisdictions in 73 countries, 10 of which are in Africa.<sup>1</sup>

---

\* Senior Lecturer in International Commercial Law, SOAS University of London.

1. The African states are: Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe. For the text and status of the Model Law, see the UNCITRAL website at: [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)

This paper first examines the issues over which national courts and arbitral tribunals have sole jurisdictions, those issues over which their jurisdictions overlap and how these are regulated under various laws (II). It then examines the link between the perception of arbitration friendliness or support of a jurisdiction and the attractiveness of the same jurisdiction as a seat for international arbitration (III).

## II. JURISDICTION OF NATIONAL COURTS AND ARBITRAL TRIBUNALS IN ARBITRATION

As is well known, arbitration is an alternative adjudicative mechanism to litigation for the resolution of disputes.<sup>2</sup> Arbitration as a private process entails that the decision makers in the process are private individuals, not officers of a state such as national judges.<sup>3</sup> These private individuals constitute the arbitral tribunal and they make final and binding decisions (duly recognized under the laws of most nations) over a particular dispute submitted to them by particular disputants.<sup>4</sup> National court judges perform the same judicial, decision-making function. Thus, as recognized by Mustill and Boyd, arbitrators are private judges.<sup>5</sup> It is this status accorded arbitrators and the decisions they make over the substantive dispute under various national laws that raises the tension between arbitral tribunals and national courts.<sup>6</sup> This tension is on the basis that both judges and arbitrators make binding decisions over disputes submitted by parties to them, albeit in different fora.<sup>7</sup> In addition, arbitrators now resolve major high-value

---

(last accessed 30 January 2017).

2. The semi-formalized nature of modern arbitration makes it therefore plausible to perceive of arbitration as “private litigation” as against the court process of public litigation. The Queen Mary International Arbitration surveys have consistently shown that commercial parties prefer arbitration. In their 2006 survey, 76 per cent of the respondents preferred arbitration. In 2008, 88 per cent of the respondents have used arbitration. In 2013, most respondents (52 per cent) still prefer arbitration while in 2015, 90 per cent of respondents still prefer to use arbitration. The Queen Mary University of London International Arbitration Surveys are all available online at: <[www.arbitration.qmul.ac.uk/research/index.html](http://www.arbitration.qmul.ac.uk/research/index.html)> (last accessed 8 April 2016).
3. Interestingly Art. 37(1) of the Arbitration Rules of the East African Court of Justice (EACJ) provides that arbitrators shall be appointed from among the judges of the EACJ. This is not the norm even for supranational courts that also provide arbitral services. An example is the OHADA Common Court of Justice and Arbitration (CCJA), the Rules of which clearly state that the CCJA does not itself resolve disputes but appoints arbitrators. See Art. 2(2) CCJA Arbitration Rules.
4. UNCITRAL Model Law (2006) defines arbitral tribunal in Art. 2(b) as “a sole arbitrator or a panel of arbitrators”, and in Art. 2(c) defines court as “a body or organ of the judicial system of a State”.
5. Michael J. MUSTILL and Stewart C. BOYD, *Commercial Arbitration*, 2nd ed. (Butterworths 2001) p. 220.
6. Such tension does not exist in non-adjudicative alternative dispute resolution processes, such as mediation. This is because mediators do not make, but assist the parties in making (binding) decisions over their dispute. So in effect the powers of the mediator are not comparable in status to those of a judge of a national court. Thus there is no cause for rivalry.
7. An example of this tension was evident in the call for a rebalancing of the two systems (arbitration and litigation) in England by the Lord Chief Justice, Lord Thomas of Cwmgiedd in 2016. The Lord Chief Justice’s views also stimulated some lively debates beyond the shores of England. At the

disputes and this exercise of power over such large disputes may evoke some degree of disfavour (or at best a sense of competition) with the judiciary.<sup>8</sup>

Arbitration laws in various jurisdictions usually set out the powers of arbitral tribunals and in some jurisdictions the same law also sets out some of the (supervisory) powers courts can exercise over arbitration within their jurisdiction.<sup>9</sup> Generally, a clear demarcation marked by the formation of the arbitral tribunal can be said to exist. For example, national courts exercise jurisdiction over all matters pertaining to the dispute, short of determining the substantive issues, before the formation of the tribunal. For all matters arising following the constitution of the arbitral tribunal, including determining the substantive dispute, the arbitral tribunal has jurisdiction. Following the publication of the arbitral award and the arbitral tribunal becoming *functus officio*, national courts decide all matters arising from the reference, such as enforcement of the final award. These divisions can also be conceived of as power “movements” or “shifts”.<sup>10</sup> This is a very broad description and there are matters that do not neatly fall within one or another of the zones.<sup>11</sup> This section will examine the tasks solely performed by national courts in arbitration (1); and the tasks performed solely by arbitral tribunals (2) to identify their separate spheres of influence; and finally identify the tasks over which they both share jurisdiction (3).

#### 1. *Sphere of Influence of National Courts in Arbitration*

The courts of a particular country become relevant to an arbitration reference connected to it. Such connection may be as tenuous as one party approaching the court for some

---

Chartered Institute of Arbitrators (CI Arb) London branch AGM on 28 April 2016, The Hon Sir Bernard Eder in his keynote address titled, “Does Arbitration Stifle the Development of the Law: Should Sect. 69 be Revitalised?” argued against the view that arbitration was stifling the development of common law.

8. See for example Susan FRANCK, “The Role of International Arbitrators” (2006) p. 1 available at: <<https://international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf>> (last accessed 8 April 2016).
9. An example is the 1996 English Arbitration Act (EAA) Sects. 42-45. The text of the English Arbitration Act 1996 is available at: <[www.legislation.gov.uk/ukpga/1996/23/data.pdf](http://www.legislation.gov.uk/ukpga/1996/23/data.pdf)> (last accessed on 7 April 2016).
10. I used the word “shift” to describe these power movements in Emilia ONYEMA, “Power Shift in International Commercial Arbitration Proceedings”, 14 *Caribbean Law Review* (2004, nos. 1 and 2) pp. 62-77. An electronic copy of this article is available at: <<http://eprints.soas.ac.uk/4425/>> (last accessed 7 April 2016).
11. For example, emergency arbitrator mechanisms and post award actions (correction, interpretation and making additional awards) by arbitrators.

assistance;<sup>12</sup> it being the court of the seat of arbitration;<sup>13</sup> or of the place where recognition and enforcement or annulment of the award is sought.<sup>14</sup> It is of course debatable whether the courts of other countries may have jurisdiction over an arbitration reference not otherwise connected to them as described. Examples include the courts of the country of the substantive law of the transaction or where assets are located for purposes of interim measures.<sup>15</sup> This debate does not affect the discussion in this paper so that national courts refer to courts in any jurisdiction connected to an arbitration reference.

The UNCITRAL Model Law expressly provides in Art. 5:

“In matters governed by this Law, no court shall intervene except where so provided in this Law.”

Art. 5 of the Model Law therefore makes it quite plain that for Model Law jurisdictions, precedence is given to the arbitral tribunal to decide those matters contained in it except where expressly stated. The Model Law also expressly provides in Art. 6 those matters over which designated national courts (or other authority) shall have jurisdiction.<sup>16</sup> Such intervention is also expressly stated to be for the purpose of “assistance and supervision”. Again evidencing the intention of the drafters of the Model Law as it relates to the role of courts in international arbitration: to support and not hinder the arbitral process. The matters over which national courts can intervene are: to give effect to the arbitration agreement; appoint arbitrators; decide arbitrator challenge applications; enforce or refuse to enforce orders for interim measures granted by the arbitral tribunal; grant interim measures; terminate the arbitrator’s mandate; finally determine the arbitrator’s jurisdiction; take evidence; enforce arbitral awards; and set aside arbitral awards. This list further evidences the desire of the drafters of the Model Law to give to the arbitral tribunal full control over the arbitral process and to

---

12. An example is in the *National Iranian Oil Company v. State of Israel* dispute where the French courts assisted the Iranian party by appointing the arbitrator despite the dispute or arbitration agreement not having any connection to France. For the English text of the decision see 11(2) Mealey’s International Arbitration Review B5 (1996).

13. See for example Arts. 34(2), 35 and 36 Model Law; Sects. 2 and 3, EAA. See also for example Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KROLL, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) (henceforth Lew, Mistelis and Kroll) p. 107.

14. See for example Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). Text and status of the New York Convention is available at: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)> (last accessed 30 January 2017).

15. See for example Sect. 22B of the Hong Kong Arbitration Ordinance, Chapter 609, E.R. 2 of 2014 (HK Ordinance) on the enforcement by the courts of Hong Kong of a relief granted by an emergency arbitrator. See also Art. 17H Model Law on the recognition and enforcement of interim measures issued by an arbitral tribunal.

16. The matters are covered by Arts. 8, 11(3), 11(4), 13(3), 14, 16(3), 17H, 17I, 17J, 27 and 34(2) of the Model Law. For more details see the travaux préparatoire available on the UNCITRAL website already mentioned above.

ensure minimal interference by national courts.<sup>17</sup> Thus court intervention is limited to the early stages of the arbitral reference (prior to and in aid of the proper constitution of the arbitral tribunal) and following the conclusion of the reference when the award is rendered, with possible interference during the arbitral proceedings (when the arbitrator is challenged, assist with taking evidence and granting interim measures to preserve the subject matter of the arbitration).

The Model Law therefore envisages a national court assisting with the constitution of the arbitral tribunal, following which the tribunal will be left in peace to determine the dispute and make an award which the court can assist with enforcing or setting aside. These clear provisions ensure that the spheres of influence of these decision-makers are reasonably clear cut and well defined.

Under English law, the 1996 Arbitration Act (EAA) goes a couple of steps further than the Model Law.<sup>18</sup> The EAA makes detailed provisions on the powers English courts can exercise over arbitration references. The Act commences by stating as one of its general principles that “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”.<sup>19</sup>

It then borrows from the Model Law the general caveat limiting court intervention except as provided in the law.<sup>20</sup> The EAA notes that even where a court may intervene, the court can exercise its discretion and decide against such intervention. An example is under Sect. 2(3) for forum non conveniens purposes. The EAA grants English courts powers or jurisdiction to stay legal proceedings in favour of arbitration; extend time to commence arbitration; appoint and remove arbitrators; determine the arbitrator’s jurisdiction; make supportive orders; extend time to make awards; among others.<sup>21</sup>

Under the Arbitration Law of France, there are even fewer opportunities (in comparison with the Model Law) for courts to intervene. For example Art. 1448 provides:

“Where a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”<sup>22</sup>

This provision makes it clear that a court can act before the constitution of the arbitral tribunal and also in cases where the arbitration agreement is manifestly void. It therefore

---

17. See the preparatory documents for the Model Law available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html)> (last accessed 30 January 2017).

18. See for example Sects. 42-45 of the EAA.

19. Sect. 1(b) of the EAA.

20. Sect. 1(c) of the EAA.

21. These are provided for in Sects. 9-11; Sect. 12; Sect. 17(3) and (5); Sect. 18; Sect. 23(5), Sect. 24; Sect. 32; Sects. 42-45; Sect. 50 of the EAA.

22. Art. 1448(2) provides that French courts cannot decline jurisdiction *suo moto*. A party must make a request to the court which follows the provisions of Art. II(3) of the New York Convention.

settles any ambiguity in favour of arbitration. It also avoids the New York Convention confusion of whether it is for national courts to examine whether the arbitration agreement is “null and void, inoperative or incapable of being performed”, before referring the parties to arbitration.<sup>23</sup> Section 6 of the Singapore International Arbitration Act 2012 also clearly empowers the court to determine whether the arbitration agreement is valid before referring the parties to arbitration.<sup>24</sup>

Art. 1446 of the French Arbitration Law gives parties the freedom to submit a dispute pending before the courts to arbitration.<sup>25</sup> There is similar provision in the Ghana ADR Act of 2010.<sup>26</sup> These provisions imply that the well-known principle of parties losing the right to take advantage of their arbitration agreement where they have “taken steps in the proceedings”, may not be applied. Under French law, the courts can assist disputants to appoint and remove arbitrators, take evidence, grant certain interim orders, recognize and enforce the award, or annul the award.<sup>27</sup> It is instructive that the caveat, “the judge acting in support of the arbitration” is included against the powers granted to courts in most of these provisions under the French law. Such caveat is a helpful reminder to French courts and judges of the purpose of their role in arbitration.

National courts have the sole jurisdiction to recognize and enforce or set aside/annul arbitral awards. National laws clearly provide the standards and grounds parties need to

---

23. For the position under Indian Law whose courts have been known to enquire into the validity of the arbitration agreement under this article, see: Avatar SINGH, *Law of Arbitration and Conciliation*, 8th ed. (Eastern Book Company 2007) pp. 414-416. Art II(3) of the New York Convention provides:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

24. Sect. 6(2) Singapore International Arbitration Act, Chapter 143A of 2012. The text of this Act is available at: <<http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?Compld:dd9f0294-66ec-4d80-ac95-b40c1be85915>> (last accessed 11 April 2016).

25. On the law of arbitration in France, see generally: Jean ROUCHE, Gerald H. POINTON and Jean-Louis DELVOLLE, *French Arbitration Law & Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed. (Kluwer Law International 2009) and Emmanuel GAILLARD and John SAVAGE, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999)

26. Sect. 7(1) Ghana ADR Act 2010 goes further by empowering the court to refer parties to arbitration even where there is no arbitration agreement in existence. The section provides:

“Where a court before which an action is pending is of the view that the action or a part of the action can be resolved through arbitration, that court may, with the consent of the parties in writing, despite that there is no arbitration agreement in respect of the matter in dispute, refer the action or any part of the action for arbitration.”

See for a critique of this provision, Emilia ONYEMA, “The New Ghana ADR Act 2010: A Critical Overview”, 28 *Arbitration International*, (2012, no. 1) p. 101 at pp. 113-115.

27. See Arts. 1452, 1453, 1454, 1456(3), 1463(3), 1468, 1469, 1516 of the French Arbitration Law.

satisfy for their courts to recognize, enforce, set aside, annul or remit an arbitral award.<sup>28</sup> The New York Convention which has 156 parties, 35 of which are African States, specifically empowers national courts to recognize and give effect to arbitration agreements and recognize and enforce or set aside/annul arbitral awards.<sup>29</sup> Art. II(3) of the New York Convention expressly refers to the “court of a Contracting State” while the obligations under Arts. III and V both refer to the “competent authority” with the primary obligations contained in those articles reposed in the Convention State. These obligations are performed by national courts in the vast majority of the Member States of the Convention.<sup>30</sup>

So for the Model Law (and its jurisdictions) the relevance of the state playing a supportive role is to enable the parties to actualize their promises as contained in their arbitration agreement. Such promises include effectively commencing arbitration when a covered dispute eventuates. Most national laws through their provisions, clearly envisage the arbitral tribunal taking charge of the arbitral proceedings when it is constituted. Therefore national laws empower the arbitral tribunal to determine the substantive disputes between the parties and all consequential matters towards making such decisions. Such matters include, managing the proceedings; taking evidence; determining what weight to attach to the evidence; deciding the issues in dispute between the parties; deciding liability of the parties and the remedies to award; allocating costs and interest. These matters therefore fall outside the domain of national courts.

## 2. *Sphere of Influence of Arbitral Tribunals*

Arbitral tribunals on their part become relevant when they have been constituted in a particular reference. By constitution is meant the appointment and acceptance of appointment of all arbitrators forming the arbitral tribunal.<sup>31</sup> The powers of the arbitral tribunal are also, by virtue of the choice of a seat, connected to a particular jurisdiction.<sup>32</sup> It is generally accepted that the powers and jurisdiction of arbitral tribunals are subject

---

28. See for example Arts. 34, 35 and 36 of the Model Law; Sects. 66, 67, 68 and 69 EAA; Arts. 1516 and 1519 French Arbitration Law.

29. These powers are contained in Arts. II(1), III and V of the New York Convention.

30. Art. III of the New York Convention provides for the recognition of arbitral awards while Art. V provides grounds on which such awards may be refused enforcement.

31. See Emilia ONYEMA, *International Commercial Arbitration and the Arbitrator's Contract*, (Routledge 2010) pp. 84-102.

32. Such connection counters the idea of “floating” or totally delocalized arbitrations. For some commentaries on the delocalization and transnational theories, see, Jan PAULSSON, “Arbitration Unbound: Award Detached from the Law of the Country of its Origin”, ICLQ (1981) pp. 358-387; Hong-Lin YU, “Explore the Void: An Evaluation of Arbitration Theories, Part 2”, 8 Intl ALR (2005, no. 1) pp. 14-22; Julian LEW, “Achieving the Dream: Autonomous Arbitration”, 22 *Arbitration International* (2006, no. 2) pp. 178-203; Ahmed MASSOUD, “The Influence of the Delocalisation and Seat Theories Upon Judicial Attitudes Towards International Commercial Arbitration”, 77 *Arbitration* (2011, no. 4) pp. 406-422; Jonathan MANCE, “Arbitration: A Law unto Itself?”, 32 *Arbitration International* (2016, no. 2) pp. 223-241; and Emmanuel GAILLARD, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010).

to the mandatory requirements of the law of the seat of arbitration.<sup>33</sup> The law of the seat also acts as a gap-filler for matters not provided by the parties or which they have not agreed upon. It therefore guides the arbitral tribunal on what powers it can exercise over the dispute within that particular jurisdiction. Needless to say, such power differs from jurisdiction to jurisdiction. However, some degree of convergence is beginning to emerge in international arbitration laws.<sup>34</sup> The powers of any arbitral tribunal can therefore be found in the arbitration agreement between the parties, any set of arbitration rules adopted by the parties and the provisions of the law of the seat of arbitration.

Most international arbitration disputes are subject to a set of arbitration rules which may be for administered or non-administered references. In this section, examples will be drawn from the UNCITRAL (2010 revision),<sup>35</sup> ICC (2012),<sup>36</sup> LCIA (2014),<sup>37</sup> SIAC (2013)<sup>38</sup> and KIAC (2012)<sup>39</sup> Arbitration Rules to give a flavour of the powers exercisable by arbitrators.<sup>40</sup> The arbitral tribunal has general autonomy over the arbitral proceedings. This includes determining the conduct of the proceedings, including case management, taking of evidence, granting interim measures of protection, hearing the parties, deciding the issues in dispute and making the award.<sup>41</sup>

---

33. See Gary B. BORN, *International Commercial Arbitration*, volume 1 (Kluwer Law International 2009) at p. 306 and p. 1765; LEW, MISTELIS and KROLL, *supra*, at p. 120. But see Emmanuel GAILLARD and John SAVAGE, eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) pp. 633-636.

34. It is arguable that this convergence is strongly driven by institutional rules which themselves “codify” arbitral practice, especially international arbitral practice.

35. For the text of UNCITRAL Arbitration Rules 1976 with revisions in 2010, see: <[www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf)> (last accessed 15 April 2016).

36. International Chamber of Commerce (ICC) available at: <[www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/](http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/)> (last accessed 15 April 2016).

37. London Court of International Arbitration available at: <[www.lcia.org/](http://www.lcia.org/)> (last accessed 15 April 2016).

38. Singapore International Arbitration Centre available at: <[www.siac.org.sg/](http://www.siac.org.sg/)> (last accessed 15 April 2016). A new set of SIAC Arbitration Rules was launched in May 2016 at the SIAC 2016 Congress and Golden Jubilee celebration, with details on the SIAC website.

39. Kigali International Arbitration Centre, available at: <[www.kiac.org.rw/](http://www.kiac.org.rw/)> (last accessed 15 April 2016).

40. The 2015 Queen Mary International Arbitration survey lists the ICC, LCIA, HKIAC, SIAC and SCC as the five most preferred arbitration institutions. KIAC is representative of arbitration institutions in Africa. It is recognized that most arbitration rules are modelled after the UNCITRAL Arbitration Rules in addition to it being used for ad hoc or non-administered references.

41. See for examples: Arts. 17-39 UNCITRAL Rules; Arts. 17-28, 31-32 and 35 ICC Rules; Arts. 14-23, 25-28 LCIA Rules; Rules 16-19, 21-29 and 31 SIAC Rules; and Arts. 26-33, 35-38 KIAC Rules.



Some issues on which arbitration rules are beginning to converge are the competence of the arbitral tribunal to determine its jurisdiction in the first instance;<sup>42</sup> grant interim orders of protection to preserve the *res* of the arbitration;<sup>43</sup> join third or non-parties to the arbitration agreement;<sup>44</sup> consolidate arbitral proceedings;<sup>45</sup> manage the arbitral reference;<sup>46</sup> take and allocate weight to the evidence of the parties;<sup>47</sup> decide the dispute between the parties;<sup>48</sup> and make an arbitral award binding on the parties.<sup>49</sup> So arbitral tribunals effectively have full control over the proceedings, subject only to the agreement of the disputing parties and to a lesser degree the decisions of the particular arbitration institution (if any) whose arbitration rules apply to the dispute.<sup>50</sup>

### 3. *Shared Jurisdiction Between National Courts and Arbitral Tribunals*

There are however some issues in arbitration over which national courts and arbitral tribunals share jurisdiction. States in their national arbitration laws grant powers over these issues to both the arbitral tribunal (through the disputing parties) and national courts. It will be interesting to interrogate whether over these issues, national courts and arbitral tribunals have concurrent or coordinate jurisdiction. Put a different way, does this mean that once the arbitral tribunal has made a decision on the issue, national courts must respect the decision and cannot therefore override the decision made by the tribunal? It is arguable that this will be the position on those issues mentioned above (under II.2), over which the arbitral tribunal is granted sole authority to decide. Thus, national courts lack jurisdiction to entertain applications over such matters. For example, Sect. 34 of the EAA expressly states “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.” It follows that for such matters, there is no concurrent or coordinate jurisdiction between national

---

42. See for example Art. 23 UNCITRAL Rules; Art. 23 LCIA Rules; Rule 25.2 SIAC Rules; and Art. 31 KIAC Rules.

43. See for example Art. 26 UNCITRAL Rules; Art. 28 ICC Rules; Art. 25 LCIA Rules; Rule 26 SIAC Rules; and Art. 33 KIAC Rules.

44. See for example Art. 17(5) UNCITRAL Rules; Art. 22.1(viii) LCIA Rules; Rule 24.1(b) SIAC Rules; and Art. 32.3 KIAC Rules. Under Art. 8 KIAC Rules, the KIAC Secretariat can also make this decision. Under the ICC Rules, the ICC Court makes this decision pursuant to Art. 7 of the ICC Rules.

45. See for example Art. 22.1(ix) LCIA Rules. Under Art. 11 KIAC Rules, the KIAC Centre makes this decision. Under the ICC Rules, the ICC Court makes this decision pursuant to Art. 10 of the ICC Rules.

46. See for example Art. 17(1) UNCITRAL Rules; Art. 22 ICC Rules; Art. 14 LCIA Rules; Rule 16 SIAC Rules; and Art. 28 KIAC Rules.

47. See for example Art. 27 UNCITRAL Rules; Art. 25 ICC Rules; Art. 22.1(vi) LCIA Rules; Rule 28.3 SIAC Rules; and Art. 28 KIAC Rules.

48. See for example Art. 33 UNCITRAL Rules; Art. 31 ICC Rules; Art. 22.3 LCIA Rules; Rule 24 SIAC Rules; and Art. 38 KIAC Rules.

49. See for example Art. 34 UNCITRAL Rules; Art. 31 ICC Rules; Art. 26 LCIA Rules; Rule 28.2 SIAC Rules; and Art. 39 KIAC Rules.

50. For example, arbitration institutions may decide the seat of the arbitration and the fees of the arbitrators.

courts and the arbitral tribunal. If there is any such jurisdiction, it will be between the disputing parties and the arbitral tribunal. This is because arbitration laws generally empower disputing parties to agree some of these issues, for example, agreeing the seat and language of the arbitration. For some other matters, practicality of performance requires agreement between the parties and arbitral tribunal, for example, fixing the timetable for the hearings; while other matters, such as the weight to be attached to the evidence adduced by the parties, fall within the sole jurisdiction of the arbitral tribunal to decide. National courts do not have powers to entertain (least of all overturn) arguments on the decision of the arbitral tribunal over such matters.

To some degree, that is the same position with the arbitral tribunal's finding of facts in the substantive dispute. This explains why generally there is no appeal mechanism in arbitration,<sup>51</sup> similar to that in litigation; but a challenge mechanism on limited or circumscribed grounds. However, where for example, an arbitrator is challenged and the arbitral tribunal<sup>52</sup> determines the challenge in the first instance, with a national court making a final determination on the challenge, such a situation is clearly not one of coordinate jurisdiction.<sup>53</sup> The national court enjoys a superior jurisdiction to that of the arbitral tribunal, and its decision overrides that of the initial decision-maker, be it the arbitral tribunal, appointing authority or arbitration institution. The same can be said for the award which can be confirmed, set aside or remitted back to the arbitral tribunal by a national court.

There are other issues over which both the arbitral tribunal and the court can make a decision, for example, the grant of interim measures of protection. It should be quickly noted that even over interim measures, the powers of the arbitral tribunal may be limited primarily by the very nature of arbitration and the practicalities of the dispute. The consensual nature of arbitration necessitates that the arbitral tribunal lacks powers over non-parties to the arbitration agreement who have not submitted to its jurisdiction. Therefore if the interim measure affects the rights or interests of a non-party, this may limit the authority of the arbitral tribunal.<sup>54</sup> The powers of national courts generally do not have such limitations, subject to the question of territoriality.<sup>55</sup> Another issue of practical consideration is the urgency of the order sought. Where such an order is sought quickly, it may not be practicable for the party to convene the arbitral tribunal for a

---

51. This does not refer to appeal processes within the arbitral mechanism for example under trade arbitrations such as the Grain and Feed Trade Association (GAFTA) which operates a two-tier arbitration system, for which see: <[www.gafta.com/arbitration](http://www.gafta.com/arbitration)> (last accessed 23 February 2017).

52. Or the arbitration institution or appointing authority, as the case may be.

53. Under most arbitration laws the national courts finally determine challenges to arbitrators regardless of who initially made the decision. Such decision-maker may be the tribunal itself, appointing authority or arbitration institution.

54. The word "may" is used here because the arbitral tribunal may achieve the same result through personal orders made directly against the party before them over whom they have jurisdiction. Arbitrators generally use such personal orders.

55. See however, Campbell MCLACHLAN, "Transnational Applications of Mareva Injunctions and Anton Piller Orders", 36 *The International and Comparative Law Quarterly* (1987, no. 3) pp. 669-679.

hearing before the order is made. The same consideration will also affect the requesting party's need to surprise the other party with the order. An example is where the requesting party wishes to stop the other party moving funds out of the jurisdiction. Such an order clearly needs an element of surprise. But the need to observe due process prevents the arbitral tribunal from conducting an *ex parte* hearing with one party to the dispute in the absence of the other party. This effectively frustrates the urgency and surprise elements of the order. The impact of these issues, which is exemplified in the discourse on the ability of the tribunal to hear *ex parte* applications, is evident in the UNCITRAL Working Group papers.<sup>56</sup> The deliberations of this Working Group led to the additional provisions in Art. 17 of the Model Law which provides for the arbitral tribunal or national court to grant such measures: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures."

Art. 17 J on the other hand provides:

"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."<sup>57</sup>

Therefore, expressly as it relates to those interim measures which an arbitral tribunal by its nature can order, it can be said to have concurrent jurisdiction with national courts. The effect of this concurrent jurisdiction is that a supportive court will assist the parties by enforcing the order of the arbitral tribunal.<sup>58</sup> An unsupportive court on the other hand, will either not enforce the order or deny the arbitral tribunal of such jurisdiction.

The same analysis applies to situations where the arbitral tribunal orders the appearance of a witness or production of documents. Under the laws of some jurisdictions, the arbitral tribunal can directly make such orders which their courts will enforce.<sup>59</sup> In some other jurisdictions, parties need to seek such assistance for witness production before national courts. Such access to the courts is very important especially over witnesses that the arbitral tribunal does not have powers to summon. It is important that since the onus lies with the presenting party to produce their evidence (and witnesses) that they can access the courts to assist them with that task. Closely allied to witness production is document production. The IBA Rules on the Taking of Evidence

---

56. For Working Group II Papers on Interim Measures see the 32nd to the 44th available at: <[www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html)> (last accessed 15 April 2016).

57. Sect. 45 of the Hong Kong Ordinance dis-applies this Art. 17J of the Model Law while under Sect. 61 of the Ordinance; such orders granted by the arbitral tribunal will be enforced with leave of the court.

58. The English High Court in *Gerald Metals SA v. Timis* [2016] EWHC 2327 (Ch) considered that in appropriate cases, it would defer to the LCIA emergency arbitrator procedure as provided for in the LCIA 2014 Arbitration Rules.

59. See for example Sect. 56 Hong Kong Ordinance.

in International Arbitration has greatly assisted with harmonizing practice on this subject.<sup>60</sup>

States therefore anticipate that arbitral tribunals will decide the substantive issues in dispute and the procedural matters connected to such decisions as consented to by the disputing parties. In addition states generally allow their courts to intervene to varying degrees with any arbitration connected to their territory. Such intervention may be prior to the constitution of the arbitral tribunal, during the arbitration proceedings and after the issuance of the arbitral award. These interventions by national courts may be necessary and supportive of the arbitration process. Supportive interventions by national courts will facilitate the commencement of the arbitration process, its smooth continuation and enforcement of the decisions made by the arbitral tribunal. Therefore the tools provided for national courts to intervene in arbitration may be construed positively as evidence of state support for the process of arbitration. Such tools may also be construed negatively. As shown above, the same tools are generally available for court support or negative intervention in arbitration in various jurisdictions. However, the difference in categorizing the attitude of national courts lies in how these courts use these tools.

There is no singular jurisdiction in the world that does not provide opportunities for its courts to intervene in arbitration proceedings within its territory. However, the states that are referred to as being “arbitration friendly” are those whose courts respect and support the jurisdiction of the arbitral tribunal and the arbitral process. States whose courts appear to not fully appreciate the role of, and sphere of influence of arbitration within their legal system, are described as being unfriendly towards arbitration. Such courts appear to compete for jurisdictional power and space with the arbitral tribunal, thereby negatively intervening in the arbitral process. Such negative intervention frustrates the right of choice of dispute resolution mechanism given to the disputants by the same state, since both the executive, legislative and judiciary are different arms of the same state or government. Such negative intervention by national courts in arbitration references causes additional expense of time and money, frustrates the parties’ choice of dispute resolution mechanism and greatly erodes users’ confidence in arbitration generally and more particularly in such jurisdictions.

### III. LINKAGE BETWEEN SUPPORTIVE ARBITRATION JURISDICTION AND CHOICE OF SEAT

This section briefly examines the link between the perception by users of arbitration of a jurisdiction as being supportive of arbitration, and the ability of such jurisdiction to attract arbitration references as seat. It is generally recognized that a modern arbitration regime includes: content of the arbitration law (whether it accepts and codifies party autonomy and limited court interference, so generally meets the UNICTRAL Model law

---

60. For the IBA Rules on the Taking of Evidence in International Arbitration 2010 and Commentary, see: <[www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)> (last accessed 15 April 2016).

minimum threshold); whether the jurisdiction is party to the New York Convention;<sup>61</sup> whether the jurisdiction is home to viable and sustainable arbitration institutions; whether the jurisdiction is home to qualified arbitration practitioners; and whether the attitude of the courts is supportive of arbitration.<sup>62</sup> This last factor shall be examined in more detail under this section.

### 1. *Popular Seats for International Arbitration*

The traditional seats for arbitration as noted by several arbitration surveys (in different orders) are, Geneva, London, New York and Paris. Examples from the Queen Mary Surveys consistently list these cities. The 2006 Queen Mary Survey notes that, “the four most popular venues were England, Switzerland, France and the United States of America”.<sup>63</sup> Data from the Queen Mary International Arbitration surveys show that in 2010, London, Paris, New York and Geneva were the seats most preferred by their respondents with Singapore beginning to emerge as a “regional leader in Asia”.<sup>64</sup> In their 2015 survey, London, Paris, Hong Kong, Singapore and Geneva were listed as the “five most preferred and widely used seats”.<sup>65</sup> Interestingly, on number of caseload, China can be regarded as a major player with CIETAC recording a total of 18,078 cases between 2000 and 2015 of which 7,280 were foreign related and 10,798 were domestic cases.<sup>66</sup> However from the Queen Mary survey, China was not mentioned as one of the top destinations for international arbitration.<sup>67</sup> The Queen Mary 2015 survey found that parties chose seats primarily on the “reputation and recognition” of the seat and as a link to the substantive law of the transaction. When asked the reasons for their preferences, respondents to the Queen Mary survey chose, “neutrality and impartiality of the local legal system, the national arbitration law, and track record of enforcing agreements to arbitrate and arbitral awards” as their top three factors.<sup>68</sup> This is all very useful data which states wishing to attract more arbitration cases can use in formulating relevant policies.

Singapore was noted in the Queen Mary 2015 Survey as one of the popular (non-traditional) seats for arbitration. This finding by the Queen Mary Survey is supported by

---

61. As listed by Sundaresh MENON, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence”, *Singapore Journal of Legal Studies* (2013) pp 231 at 238-240.

62. The 2015 Queen Mary International Arbitration Survey at pp. 5, 11-17, found that their respondents preferred certain seats because of their “appraisal of the seats established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards”.

63. See “International Arbitration: Corporate Attitudes and Practices 2006” at pp. 3, 14-15.

64. See “Choice in Arbitration” 2010 Survey, pp. 2, 17-20.

65. See “2015 International Arbitration Survey: Improvements and Innovations in International Arbitration”, pp. 2, 11-17.

66. For details of CIETAC caseload, see: <[www.cietac.org/index.php?m=Page&a=index&id=40&l=en](http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en)> (last accessed 6 February 2017).

67. This anomaly raises various qualitative issues on the use of surveys for example the results being very dependent on the location of the respondents. It also raises the question of what are the best forms of measureable indicators for these types of enquiry.

68. 2015 International Arbitration Survey at p. 13.

recent data from the Singapore International Arbitration Centre (SIAC) which shows a year-on-year increase in its caseload of new cases, from 78 in 2004 to 222 in 2014.<sup>69</sup> SIAC continues to review its arbitration rules with the latest revision of its 2013 Rules in 2016.<sup>70</sup> These reviews keep abreast with developments in arbitral practice so the Rules meet the needs of its users. A very brief examination of the arbitration regime in Singapore may help with understanding its rise to becoming a popular seat for arbitration. Singapore (in addition to other policy changes) revised its International Arbitration law in 2012 and though based on the Model Law, reflects greater court support for arbitration.<sup>71</sup> However, an explanation of the popularity of Singapore as a seat for arbitration must go beyond these factors. This is because some other jurisdictions that have also reviewed their national arbitration laws (and some have more than one major arbitration institution with equally modern arbitration rules) have not garnered such popularity or seen such increases in their arbitration caseload. I will suggest that the role of the government and courts of Singapore in supporting arbitration, along with its geographical location (serving the Australian-Asian markets) have also greatly impacted on its emergence as a popular seat for arbitration. The government of Singapore and the courts of Singapore have adopted clear policies to support the growth and development of Singapore as an international centre for arbitration.<sup>72</sup> This has led to greater marketing of arbitration in Singapore and of Singapore to the international arbitration community. In addition to the availability of first-class non-legal support services for arbitration, Singapore has also put in place first-class legal services to support international arbitration.<sup>73</sup>

It must be noted that even for the traditional seats, their courts have not always made “supportive” decisions over arbitration disputes. Two examples from England will suffice: In the *Jivraj v Hashwani* litigation of 2009 where the English Court of Appeal decided that arbitrators were employees of the appointing parties in interpreting EU law<sup>74</sup>; the international arbitration community raised alarm over the decision of the Court of Appeal (to the effect that arbitrators were employees) and made strenuous “protests” in the media; with some institutions filing amicus briefs at the hearing of the

---

69. See the 2015 SIAC Annual Report at: <[www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2015.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf)> (last accessed 15 April 2016).

70. SIAC also recently launched its Investment Arbitration Rules with effect from 1 January 2017. The text of these Rules is available at <[www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf](http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf)> (last accessed 30 January 2017).

71. One example of such support is in Sect. 12. In 2016 further revisions came into effect; for example Sect. 16 on the appointment of a conciliator.

72. See for an example of an article on this: <<http://simc.com.sg/singapore-became-arbitration-hub/>> (last accessed 15 April 2016).

73. Such legal services include the increase in the numbers of international law firms with offices in Singapore providing access to legal and other expertise for complex disputes.

74. The Employment Equality (Religion and Belief) Regulation, 2003. This Regulation prohibits employers from discriminating against a prospective employee on grounds of religion.

appeal at the Supreme Court.<sup>75</sup> The decision of the Court of Appeal was reversed by the Supreme Court to safeguard arbitration and the London arbitration market.<sup>76</sup> The intervention of the arbitration institutions (ICC and LCIA) must be commended. Such intervention is necessary to protect arbitration and must be made (wherever possible) in courts all over the world and not just in selective jurisdictions.

Again, in 2010, the English Supreme Court upheld the decision of the Court of Appeal in *Dallah v. Pakistan* by refusing to enforce in England the arbitral award made by an ICC arbitral tribunal sitting in Paris, though the same award was enforced by the French courts.<sup>77</sup> This was viewed as a decision that is not supportive of arbitration. However these decisions did not negatively affect the continued choice of London as seat of arbitration.<sup>78</sup> This may point to factors other than just having a supportive judiciary to attract arbitration as seat; or does this relate to the effect of arbitration users' perception of a jurisdiction; so that when a jurisdiction is perceived as supportive, its national courts can afford to occasionally give anomalous decisions on arbitration? This clearly calls for some interrogation for a clearer understanding of why such decisions do not adversely affect the reputation or choice of a traditional seat such as London as a top destination for arbitration references.<sup>79</sup>

## 2. Some African Jurisdictions

It will be remiss not to explore some African jurisdictions since the 23rd ICCA Congress was held in Africa (Mauritius). This section briefly examines four African jurisdictions whose national laws are based on the UNCITRAL Model Law; are parties to both the New York and ICSID Conventions; and home to known arbitration institutions with

---

75. For a good summary of the issues and decisions in *Jivraj v. Hashawani*, see commentary by Olswang LLP at: <[www.lexology.com/library/detail.aspx?g=d9baca5b-a5fd-4692-b7e8-a8243fd1c323](http://www.lexology.com/library/detail.aspx?g=d9baca5b-a5fd-4692-b7e8-a8243fd1c323)> (last accessed 15 April 2016).

76. See *Jivraj v. Hashwani* [2011] UKSC for the decision of the Supreme Court overturning the decision of the Court of Appeal which is reported in [2010] EWCA Civ. 712.

77. The refusal was on the ground that the Government of Pakistan was not a party to the arbitration agreement between Dallah and the Trust. See *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs and Government of Pakistan* [2010] UKSC 46 for the Supreme Court decision. See a summary from White & Case LLP at: <[www.whitecase.com/publications/newsletter/insight-dallah-paris-court-appeal-and-uk-supreme-court-reach-contrary](http://www.whitecase.com/publications/newsletter/insight-dallah-paris-court-appeal-and-uk-supreme-court-reach-contrary)> (last accessed 15 April 2016).

78. For example in 2014 the second most frequently chosen place for ICC arbitrations was London; chosen in eighty-six cases. See ICC Bulletin (2015, issue 1) at page 14.

79. Such interrogation will help dispel the view expressed in some emerging jurisdictions that regardless of how "friendly" their arbitration regime becomes, international arbitration users will still choose the traditional seats.

modern arbitration rules:<sup>80</sup> Nigeria, Rwanda, Mauritius, and Egypt. A brief mention will also be made of the OHADA arbitration regime.<sup>81</sup>

Nigeria hosts one of the African-Asian Legal Consultative Organization (AALCO) Regional Centres, the Lagos Regional Centre and at least one other major arbitration centre, the Lagos Court of Arbitration Centre.<sup>82</sup> Nigeria generates huge numbers of both domestic and international commercial disputes. The Nigerian Arbitration and Conciliation Act 1988 is based on the Model Law (1985 version) and its arbitration institutions have modern arbitration rules.<sup>83</sup> However Nigeria is not attracting international arbitrations as seat. It is obvious that apart from a weak non-legal environment, the systemic failures of Nigerian courts create a very weak judicial environment which is not perceived by arbitration users as supportive of arbitration.<sup>84</sup> There have been some very positive judicial decisions such as the Nigerian Supreme Court decision in *The Owners of the MV Lupex v. Nigeria Overseas Chartering and Shipping Ltd* upholding the arbitration agreement.<sup>85</sup> However, it is frustrating for parties to have to appeal all the way to the Supreme Court of Nigeria for their arbitration agreement to be recognized and given effect.

Rwanda has fared much better than Nigeria especially as a post-conflict state. Rwanda has a modern arbitration law also based on the Model Law (2006 version) and a very active and vibrant Kigali International Arbitration Centre (KIAC) supported by the government of Rwanda. From statistics made available by KIAC, it has a growing caseload and between 2012 and 2015 has administered twenty-eight cases with parties from the United States of America, Italy, South Africa, Kenya, Pakistan, Rwanda, and Senegal.<sup>86</sup>

Mauritius on its part has first class non-legal facilities, a developed tourism industry and a thriving global business industry. It is a Model Law (2006 version) jurisdiction and home to the LCIA-MIAC centre which is described by a report on three arbitration institutions in Africa commissioned by the African Development Bank, as having,

---

80. For a list of seventy-two arbitration institutions in various African countries see: <[www.arbitration-icca.org/media/7/14403606533411/list\\_of\\_arbitration\\_institutions\\_in\\_africa\\_-\\_emilia.pdf](http://www.arbitration-icca.org/media/7/14403606533411/list_of_arbitration_institutions_in_africa_-_emilia.pdf)> (last accessed 30 January 2017).

81. OHADA refers to the “Organization for the Harmonization of Business Laws in Africa” created by Treaty in 1993 and revised in 2008. For more information on OHADA see: <[www.ohada.com/](http://www.ohada.com/)> (last accessed 15 April 2016).

82. Nigeria is home to at least two other arbitration institutions: International Centre for Arbitration and Mediation, Abuja; and Lagos Chamber of Commerce International Arbitration Centre.

83. One example is the 2015 Arbitration Rules of the Lagos Chamber of Commerce International Arbitration Centre (LACIAC) which is available at: <[www.laciac.org/](http://www.laciac.org/)> (last accessed 15 April 2016).

84. Such systemic failures include delays in the judicial process and allegations of judicial corruption. On delays see, Emilia ONYEMA, “IPCO v NNPC Saga and Liability of Nigerian Legal System”, published in *The Guardian Newspapers (Nigeria)* of 22 December 2015 and also available at: <<http://eprints.soas.ac.uk/21653/>> (last accessed 15 April 2016).

85. *The Owners of the MV Lupex v. Nigeria Overseas Chartering and Shipping Ltd* [2003] 15 NWLR (Part 844) 469.

86. For more details see: <[www.kiac.org.rw/IMG/pdf/-25.pdf](http://www.kiac.org.rw/IMG/pdf/-25.pdf)> (last accessed 15 April 2016).



“the potential to become a successful arbitration centre, as it is endowed with a very modern set of arbitration rules, the Centre’s Registrar has responded to all requests for information in a very professional and efficient manner, and the local arbitration law also seems to meet all international standards”.<sup>87</sup>

The government of Mauritius embarked on a clear policy initiative of making Mauritius a destination for international arbitration.<sup>88</sup> The Mauritian courts have adopted this policy and can be said to be supportive of international arbitration. This is evidenced from their decisions on arbitration and their specialist courts with final appeal to the Privy Council in London.<sup>89</sup> One recent example of a very supportive decision by the Mauritius Supreme Court is the *Cruz City 1 Mauritius Holdings v. Unitech Ltd* case.<sup>90</sup> In this case the Court enforced two LCIA arbitral awards in favour of Cruz City. The Supreme Court of Mauritius used the opportunity to declare the constitutionality of the New York Convention in Mauritius and its preference for a narrow public policy interpretation of Art. V(2) of the Convention. Mauritius therefore has in effect supportive arbitral, legal and non-legal environments for international arbitration to thrive. It is also suitably located to attract disputes from Indian parties. An assessment on the basis of caseload shows Mauritius is not yet thriving as a seat for international arbitration. This may be because LCIA-MIAC is still a relatively young arbitration institution.<sup>91</sup>

Egypt on its part is home to the oldest AALCO regional centre in Africa, the Cairo Regional Centre. Egypt’s national arbitration law is also based on the Model Law (1985 version) while the arbitration rules of the Cairo Regional Centre are based on the UNCITRAL Rules.<sup>92</sup> The caseload of the Cairo Regional Centre has grown year-on-year. In their 2015 Annual Report, 54 new cases were filed with the Centre, bringing the total of cases filed with the Centre to 1,070.<sup>93</sup> Of these new cases, two were purely international (between parties from Saudi Arabia, United States and UAE).<sup>94</sup>

---

87. See Werner JAHNEL, “Assessment Report of Arbitration Centres in Cote d’Ivoire, Egypt and Mauritius”, a report prepared for the African development Bank, dated 10 April 2014 at p. 69 and available at: <[www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment\\_Report\\_of\\_arbitration\\_centres\\_in\\_C%3%B4te\\_d%E2%80%99Ivoire\\_\\_Egypt\\_and\\_Mauritius.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%3%B4te_d%E2%80%99Ivoire__Egypt_and_Mauritius.pdf)> (last accessed 15 April 2016).

88. For more details, see Duncan BAGSHAW, “The Experience of LCIA-MIAC” in Emilia ONYEMA, ed., *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Kluwer Law International 2016) pp. 95-108.

89. This is clearly geared towards reassuring foreign parties who need final decisions on their disputes made by such a panel of decision makers.

90. *Cruz City 1 Mauritius Holdings v. Unitech Ltd and Others* [2014] SCJ 100.

91. According to the LCIA website, LCIA-MIAC was established in 2011.

92. For more information on the Cairo Regional Centre see, Mohamed ABDEL-RAOUF and Dalia HUSSEIN, “The Cairo Regional Arbitration Centre” in Emilia ONYEMA, ed., *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Kluwer Law International 2016) pp. 61-74.

93. See the CRCICA 2015 statistics at: <[http://crcica.org/FilesEnglish/Annual%20Report\\_2016-10-31\\_09-26-47\\_0.pdf](http://crcica.org/FilesEnglish/Annual%20Report_2016-10-31_09-26-47_0.pdf)> (last accessed 06 February 2017).

94. This figure contrasts with 2014 when the Centre administered nine purely international cases with parties from Kuwait, Lebanon, Panama, Saudi Arabia, Seychelles, Sudan, Switzerland, and United Arab Emirates. CRCICA 2014 Annual Report is available at: <[http://crcica.org/eg/pub\\_annual.html](http://crcica.org/eg/pub_annual.html)> (last accessed 15 April 2016).

Understandably, the disputes filed with the Cairo Regional Centre are predominantly from parties from the Middle East, North Africa (MENA) region.<sup>95</sup> However it is noted that the Centre has stepped up its engagement with countries of sub-Saharan Africa. For example it appointed a Nigerian arbitration expert to its Board of Trustees in 2014.<sup>96</sup> The Cairo Regional Centre remains a very active and engaged arbitration institution and will play a major leadership role for other arbitration institutions on the continent, as it shares its experience of administering arbitrations and participating in the global arbitral space.

As it relates to the OHADA arbitration regime, there are arbitration institutions in most of the seventeen OHADA member states and these have varying degrees of success and operate in similar fashion to other private arbitration institutions.<sup>97</sup> Within the OHADA region, the states apply the Uniform Arbitration Act of 1999 (UAA) which is currently under review. The UAA, though not modelled after the UNCITRAL Model Law, provides for a relatively modern arbitral regime as the law of arbitration for the member states.<sup>98</sup> Arbitration under the Common Court of Justice and Arbitration (CCJA) Arbitration Rules is unique.<sup>99</sup> This uniqueness is based on the dualist nature of the CCJA as the OHADA supranational court and final authority on OHADA uniform acts. As an arbitration institution, the CCJA performs the same tasks and functions as any other arbitration institution. However when the arbitral tribunal renders its award, the same can be enforced or annulled by the CCJA (with no appeal to any other court).<sup>100</sup> Over the years the CCJA has shown its support for arbitration through robust enforcement of arbitral awards. However very recently, the CCJA annulled an arbitral award (in keeping with its practice) where the arbitrators agreed higher fees with the parties than was agreed by the CCJA.<sup>101</sup> This action of the arbitral tribunal and the parties was contrary to the mandatory provision in the CCJA Arbitration Rules, which binds the

---

95. In 2015, CRCICA administered disputes involving parties from Egypt, Saudi Arabia, Lebanon, Libya, UAE, USA, Turkey, British Virgin Islands, Russia, Spain, Taiwan and the Cayman Islands. Correspondingly, the arbitrators came from Egypt, Lebanon, Saudi Arabia, Libya, Tunisia, USA, UK, Germany, France and Spain.

96. The appointee is Mrs. Olufunke Adekoya. This is in addition to Judge Abdulqawi Yusuf from Somalia. See, Cairo Regional Centre 2015 Annual Report, at p. 14.

97. The seventeen OHADA member states are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Comoros, Democratic Republic of Congo, Guinea, Guinea Bissau, Equatorial Guinea, Chad, Côte d'Ivoire, Gabon, Mali, Niger, Republic of Congo, Senegal, and Togo. For arbitration institutions in these jurisdictions see the list at: <[www.researcharbitrationafrica.com/#!arbitration-institutions-in-africa/lvi7c](http://www.researcharbitrationafrica.com/#!arbitration-institutions-in-africa/lvi7c)> (last accessed 15 April 2016).

98. See Boris MARTOR, Nanette PILKINGTON, David S. SELLERS, and Sabastien THOUVENOT, *Business Law in Africa: OHADA and the Harmonization Process*, 2nd ed. (GMB Publishing Ltd 2007) pp. 259-284.

99. See Emilia ONYEMA, "Regional Arbitration Institution for ECOWAS: Lessons from OHADA Common Court of Justice and Arbitration", *Int'l ALR* (2014, issue 5) pp. 99-111.

100. See Mahutodji Jimmy Vital KODO and Narcisse AKA, "The CCJA as a Regional Arbitration Institution" in Emilia ONYEMA, ed., *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, (Kluwer Law International, 2016) pp. 47-59.

101. See *Republic of Guinea v. Getma International*, decision of the CCJA of 19 November 2015.

parties to the fees set by the CCJA.<sup>102</sup> This decision has drawn negative commentary from the media<sup>103</sup> and the wider arbitration community on its possible impact on the development of OHADA arbitration.<sup>104</sup>

An examination of the rankings of these African States in the World Bank Ease of Doing Business Reports shows a clear connection between governmental regulatory (in)efficiencies and growth of arbitration. Comparing the 2015 and 2016 Reports for the World Bank Ease of Doing Business Rankings, Singapore ranks first out of 189 jurisdictions in both Reports. For the four African countries explored above, Mauritius maintained its top ranking among African countries but fell from 28th in 2015 to 32nd in 2016 in the world. Rwanda fell from 46th in the world in 2015 to 62nd in 2016, but moved from 3rd to 2nd in Africa over the same period. Egypt fell from 112 in 2015 to 131 in 2016 globally and also lost ground within the continent from 12th in 2015 to 15th in 2016. Nigeria however, ranked 170 in 2015 and 169 in 2016 in the global rankings and among African countries moved from 42nd to 40th showing a very slight improvement. As compared with the traditional seats of arbitration mentioned above (London, Paris, Geneva), the United Kingdom was ranked 8th in 2015 and 6th in 2016 globally. France was ranked 31st in 2015 and 27th in 2016 while Switzerland was ranked 20th in 2015 and 26th in 2016.<sup>105</sup> These bare comparisons suggest a connection between the governmental regulatory environment of each country and its ability to attract international arbitration references as seat. It therefore appears the African States will need major improvements in their regulatory environments in addition to modernizing their laws and signing up to the relevant conventions, if they wish to attract international arbitration references as seats.

This paper has argued that if international arbitration users perceive a jurisdiction as being supportive, such jurisdiction will attract international arbitration references as seat. Published statistics on traditional seats for international arbitration primarily based in Europe and the United States of America support this thesis. As applied to emerging jurisdictions, there is evidence to show that the same is true. However, the question that needs to be examined is how a supportive jurisdiction is defined. As shown above, Singapore meets the classic definition of a supportive jurisdiction. Rwanda is a small (as is Singapore) post-conflict state with a lot of reconstruction on-going. The role played by the government with a clearly defined business-friendly policy appears to support and complement the work of the Kigali International Arbitration Centre. Mauritius is in the

---

102. It should be noted that the CCJA is empowered to fix a higher rate of fees for arbitrators under Art. 24(3) of its Arbitration Rules.

103. See for example, a Newspaper article at: <[www.jeuneafrique.com/285543/societe/affaire-getma-guinee-les-arbitres-repondent/](http://www.jeuneafrique.com/285543/societe/affaire-getma-guinee-les-arbitres-repondent/)> (last accessed 15 April 2016).

104. See commentary from Herbert Smith Freehills at: <<http://hsfnotes.com/arbitration/2016/01/19/ohada-ccja-court-annuls-e38-million-arbitral-award-against-guinea/>> (lst accessed 15 April 2016). Getma unsuccessfully applied to enforce the annulled award before the courts in the United States. See for example, the decision of the District Court of Columbia in *Getma International v. Republic of Guinea*, Civil Action No. 2014-1616 (D.C. 2016).

105. See the World Bank *Doing Business Reports*: 2016 “Measuring Regulatory Quality and Efficiency”; and 2015 “Going Beyond Efficiency” available at: <[www.doingbusiness.org/](http://www.doingbusiness.org/)> (last accessed 15 April 2016).

same position. However, these two African jurisdictions are not recording the same successes as Singapore, so there is a need to investigate this further.

It appears that in addition to providing a supportive legal environment (modern laws, ratification of relevant conventions, supportive courts, and availability of legal expertise); and non-legal services (first-class hotels, ancillary hearing facilities, easy access to and out of the seat, among others); the geographical location of a seat and the stage of economic development or growth of the state or region are equally important.<sup>106</sup> These factors are relevant for states wishing to attract international arbitration as seat to also consider. However, the strength or degree of the relationship between the existence of these services and the numbers of international arbitrations hosted by the seat needs further interrogation which goes beyond the remit of this paper. The Queen Mary 2015 Survey concludes that “reputation and recognition are decisive factors when selecting a seat”, as a result of which traditional seats will remain popular because of the perception that their legal systems are neutral and impartial, with effective national arbitration laws and courts with a track record of enforcing arbitration agreements and arbitral awards.<sup>107</sup> The key task before emerging arbitral seats in Africa is whether users of international arbitration will one day also perceive them in those terms.

#### IV. CONCLUSION

Arbitral tribunals act in a different sphere than national courts; however, they both are in the same business of resolving disputes. There appears to be a growing convergence in arbitration laws on matters over which the arbitral tribunal has greater decision-making powers, issues on which national courts have overriding powers, issues in which both national courts and arbitral tribunals enjoy truly concurrent jurisdictions, and finally those issues over which national courts have sole power and control. However the interpretation and implementation of these laws differ in various jurisdictions. This paper argued that there is a link between the perception of international arbitration users on how supportive a jurisdiction is of arbitration and the ability of that jurisdiction to attract international arbitration as seat. It raised other possible connecting factors showing that there is need for further research to clearly identify the factors that constitute the support of a jurisdiction for arbitration. The result of such research will set out principles which those states wishing to become destinations for international arbitration can adopt and implement to hopefully begin to change the perceptions of users of arbitration on the support for arbitration by those states and the attendant benefits of such perception.

---

106. Other factors that may be relevant to this question are the size of the country involved and location of international law firms.

107. Queen Mary 2015 International Arbitration Survey, pp. 11-15.