



***GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES***

Arbitration of International Commercial Disputes

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Introduction

- (1) Is it appropriate to impose restrictions on the choice of counsel(legal representation) in international arbitration**
- (2) In doing so ensure involvement of local counsel? Yes or No**
- (3) What possible changes would ensure the involvement of local counsel and Arbitrators in international disputes(What statistical data tell us?)**
- (4) Who are the captain of the changes for the “Cake from arbitration” to be shared Properly in this globalized world.**

International Arbitration & Legal Representation

- ❑ Limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system.
- ❑ freedom of legal representation is recognized in most national arbitration laws, and by most institutional arbitration rules across the globe
- ❑ Article 9 of CAM rules(Costa Rica) states that *“The parties must be represented or advised by lawyers, who may be granted a special power, under the same terms and conditions that apply for a special judicial power”*

International Arbitration & Legal Representation(Cont...)

The law on international arbitration in Costa Rica is silent on the matter regarding the nationality of legal counsel, however art 2(a) of said law states that regard is to be had to the international origin of this law, so it is arguable that foreign attorneys may represent clients in international commercial cases seated in Costa Rica. (Source:

<http://djarbitraje.com/pdf/908CostaRicaIBAArbitrationGuide.pdf>)

- Article 21 Paragraph 3 of the Brazilian Arbitration Act states that *“The parties may be represented by legal counsel, and the right to appoint someone to represent them in the arbitration proceeding will always be respected.”*

International Arbitration & Legal Representation(Difficulties)

- ❑ Despite what have been said: laws in a few jurisdictions require that counsel in locally-seated to be locally-qualified to represent in arbitration
- ✓ **difficulties also in India.** There, the law appears to allow foreign lawyers to appear in arbitration but this is have been challenged to the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position of the SC of March 18, 2018 appear to be that foreign lawyers not allowed to appear in arbitration.
<http://www.advocatekhoj.com/library/judgments/announcement.php?WID=9848>
- ✓ **In Nigeria(Africa):** Nigeria Legal Practitioners Act define a legal Practitioner as only lawyer registered to practice law in Nigeria(**Does a foregn Lawyer can represent his client in Nigeria ? Or there is a room to challenge this representation?**)

International Arbitration & Legal Representation(Precision)

- **Philippine(Asia):** Article 13 of the Philippine Dispute Resolution Center *rules of 2015* : “*the parties may be represented by persons of their choice, irrespective of, in particular, nationality or professional qualification*” .
- **Mauritius(Africa):** In the Mauritius Arbitration Act (section 31) " Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, **who need not to be qualified to practice law in Mauritius or in any other jurisdiction.**“
- **Tested Best Practice without Precision:** case of Rwanda with 40% KIAC International arbitration cases out 200 total cases(Parties have been represented by foreign counsels but preferred to work with local counsels **since the Seat of arbitration and applicable law to the contract were mainly Rwanda seated in the 200 cases**)
- ✓ **Allowing anybody is important for defining a “safe arbitration seat”**
- ✓ **Focus much on your Seat in contract (Applicable law) for ended share the “CAKE” Later.**
- ✓ **Example of two central American’s parties applying law of contract and the seat of one of the country of North America(USA) or Europ(UK) or China? **Is this lead to share the cake? The answer in No.****

WHAT STATISTICAL DATA IN ARBITRATION TELL US

Statistical data in international arbitration and discussion on what Lawyers and policy makers have done or should be doing to get **the “CAKE SHARED PROPERLY”**

ICSID STATISTICS 1966-2021

Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in ICSID Cases

- Western Europe (46%)
- North America (Canada, Mexico & U.S.): 20%
- South America (12%)
- South & East Asia & the Pacific (11%)
- Middle East & North Africa (4%)
- Eastern Europe & Central Asia (3%)
- Central America & the Caribbean (2%)
- Sub-Saharan Africa (2%)
- Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in ICSID Cases

Geographic Distribution of All ICSID Cases, by State Party Involved

- Eastern Europe & Central Asia (26%)
- South America (22%)
- Sub-Saharan Africa (15%)
- Middle East & North Africa (11%)
- Western Europe (8%)
- South & East Asia & the Pacific (7%)
- Central America & the Caribbean (6%)
- North America (Canada, Mexico & U.S.): 5%



Choice of Law in ICC arbitration 2017

In 87% of the disputes referred to ICC Arbitration in 2017, parties included a choice-of-law clause in their contracts. The laws of **England** and **USA** States remained the most frequent choices, followed by **French and Swiss law**.

Consideration: The choice of law (Lex Arbitri) determine the appointment and the counsel to involve(Dispute resolution clause)



MEETING THE CHALLENGES

Some barriers to Arbitrate in developing countries cited in literature (Action Need)

- Interference of Courts
- Corruption
- Limited trained professionals(issue of capacity building)
- Poor legal/regulatory frameworks
- Lack of data on Enforcement in many developing countries?
- What else? Political instability, **visa(case of Rwanda opening entry to the entire world)?**
Airline?

There is always excuses of not arbitrating in some of the countries.

We need to admit some of the weaknesses and work hard to improve but players need to fight the negative perceptions.

CHANGE IS HAPPENING IN NEW SEAT(ENFORCEMENT)

- **Singapore (Enforce in 6 months, Herbert Smith Freehills Survey on Enforcement 2018),**
- among the ASEAN countries, 91.02% of the participants consider **the Singapore** courts to be highly or very effective in enforcing international arbitral awards, This is followed by **Malaysia** where close to 69% of the participants consider the courts to be effective generally in enforcing international arbitral awards.
- The courts' approach to enforcement of arbitral awards in the other South East Asian countries is still not as developed as in Singapore, but they have steadily improved over the years, especially in **Thailand**, and **Philippines** where courts have been increasingly effective in recognising arbitral award
- **Rwanda in Central Africa (6 months, users perception survey 2015)**

This duration have an impact on the Seat determination by parties and Sharing the cake in the future may require making your seat "Safe"(a clear enforcement regime)



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Recent Experience of Rwanda(as Safe seat)

- Kigali International Arbitration Centre(KIAC) registered 200 cases in 10 years of its existence years(40% being Int'l cases)
- 3-6 months (enforcement of award vary between 3 to 6 months)
- Only One KIAC award out of 130 awards was only set aside by the Rwandan court.
- Chief Justice rules of 2012 giving priority of arbitration case over other matter. It doesn't follow the normal role/Registry
- The New civil code procedure of April 2018 limiting court intervention
- **Art: 21: Grounds for refusal of registration of a claim by the court Registrar(Not the Judge) when the contract provide for Arbitration**
- Can't file a claim in Rwandan court without demonstrating that he/she has used amicable settlement provided by the contract;

What lawyers and their jurisdictions can do to appear on the map of Int'l arbitration(share the cake).

- Driving/Positioning your respective countries as an Arbitration safe Seat(**legal representation, 1958 New York Convention, Model law, Supportive Courts, Clear Enforcement Regime, visa policy, safety etc..**).
- Testing Arbitral Institutions in your jurisdiction (some of them have been tested positively)
- Start with Contract Negotiation & drafting (Push for your seat and Applicable Law, Avoid Pathological Clauses). For purpose of sharing the cake when Dispute arises.**
- Learn more than one International languages (for young people)

Ended: Be aware that: Arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as **tourism, Hotels facilities, zero tolerance to corruption, Entry facilities(visa), safety, internet facility, transport etc....**

Example: **PRADA Report in France (2011).**

Contribution of arbitration to the economic growth

Eg2: 2012 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda) with model arbitration clause compulsory to Government contract.



Conclusion

- The Economic expansion especially in developing Countries need to think and rethink the Arbitration dispute resolution mechanisms especially for **future equitable share of the Cake in this globalized world.**
- Finally, the lesson from some countries which tested their arbitrators, their counsels and arbitral centers is encouraging. What we also learned is that change is possible, it is happening, and the mission of the legal practitioners gathered here is **to IDENTIFY WHAT IS THE PROBLEM CAUSING UNDER REPRESENTATION IN ARBTRATION AND CONTRIBUTE TO THE SOLUTION FOR THE CHANGE TO HAPPEN MORE QUICKLY THAN IN THE PAST.**
- We believe that there are two Main captains for these Changes (**The lawyers and the Attorney General Office** in our Respective Countries)



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THANK YOU