“The Invention of Arbitration and ADR Infrastructure by Emerging Economies as a means of attracting Foreign Investment- LESSONS FOR LAGOS”

Introduction

The Lagos State Government Administration of Governor Babatunde Raji Fashola, as part of its commitment to position Lagos as a regional hub for international commercial arbitration in the West African sub-region and beyond, enacted the Lagos State Arbitration Law (Law No. 10 of 2009) and the Lagos Court of Arbitration Law (Law No. 8 of 2009 (LCAL)). The functions of the Lagos Court of Arbitration (LCA), as stated in Section 9 of the LCAL are to promote the resolution of disputes in the territory of Lagos by arbitration and other Alternative Disputes Resolution (ADR) mechanisms. Being composed of a board of directors, a secretariat and the LCA itself, its organisational structure is similar to that of the London Court of International Arbitration.

The LCA’s location in Lagos, the commercial and economic nerve centre of Africa’s largest market, creates the potential for the improvement of Nigeria’s investment climate and the promotion of economic development in Nigeria. In order to achieve this however, much will depend on its ability to establish a regime of dispute resolution which will reliably, efficiently and effectively protect and enforce the rights of foreign investors and their investments, thus inspiring them to take advantage of the immense business opportunities in Nigeria and the wider West African Sub-region. The strategy to be adopted in realising this goal should be one which blends local practices with international best practice to achieve the most efficient solutions.

The incorporation of local practices is important because culture affects every facet of the daily life of a people from the food they eat to their system of education, religious practices and social interactions. It reasonably follows from this that culture also influences the way people in a specific region engage in business relationships and by extension, the way associated disputes are generally resolved. The application of internationally accepted best practices is relevant because it serves as a
reference point for foreign investors who are not familiar with the practices of the host country. It also aids in conferring legitimacy on international dispute resolution outcomes. Legitimacy, being a normative status conferred upon a system by those subject to it, requires that the particular regime in question act in accordance with generally accepted standards which ensures its acceptance and continued usage. A truly effective dispute resolution process therefore must be able to understand and engage all factors related to the dispute and, in so doing, must be able to withstand strict scrutiny on a global level.

The above suggests that the credibility of ADR in individual countries depends substantially on the availability of certain Arbitration and ADR infrastructure. This paper examines the role that unique Arbitration and ADR infrastructure plays in contributing to “foreign investment attractiveness” especially for emerging economies which are becoming increasingly competitive about attracting foreign investment, and looks at structures in Dubai and China as examples in this regard. In so doing, Part I addresses the need for invention, Part II deals with Dubai’s dispute resolution history and the IICRA, Part III deals with China’s dispute resolution history and the CIETAC and Part IV looks at the impact these institutions have had in their regions and the challenges they face. The paper concludes with a look at the potential of these economies to attain the prominence of arbitration hubs as New York, London and Paris.

Part I

Arbitration and ADR Infrastructure and the Need for Invention

Arbitration and ADR infrastructure is a general term used to describe all the physical and non-physical arrangements necessary for arbitration to exist and succeed, from initiation of arbitral proceedings through to the enforcement of the award. It includes well equipped arbitration venues,
modern telecommunication and transportation facilities, accommodation, modern and robust arbitration laws, experienced arbitrators and ADR experts and an independent, efficient and reliable judiciary to support the arbitral tribunal in the discharge of its duties and to enforce valid arbitral awards.

Even though arbitration and ADR has been practised in different forms since ancient times\(^1\), the prevailing form of arbitration today is that which evolved in the hegemonic western economies necessarily because they dominate the global business and economic landscape. The United Nations Commission on International Trade (UNCITRAL), in recognising the capacity of a unified dispute resolution framework to enhance global trade and investment, produced a Model Law on International Commercial Arbitration in 1985 with amendments in 2006 (the UNCITRAL Model Law)\(^2\) based on international best practice. The Model law has been adopted by many countries with amendments as necessary. Its adoption signifies progressiveness and its familiarity boosts investor confidence.

Despite the clear benefits of global uniformity, cultural diversity must necessarily influence the approaches of individual countries to the practise of this general framework that has been adopted. This is important for the accommodation of culture-specific, idiosyncratic commercial forms and arrangements which investors will encounter in various states. The very evolution of what is regarded as “modern arbitration” is based on the adaptation of non-court, neutral third party dispute resolution methods, to the various circumstances and peculiarities of Anglo-American commerce and which evolved over time into the formal arrangements we have today. Countries outside this evolution process have their own peculiar commercial arrangements, the nuances of

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which may not necessarily be adequately addressed by the Anglo-American model. This is where invention is important.

To invent means to, “… originate something that has never been in existence before”. Invention recognises that all countries are different, discourages the “one size fits all” approach and promotes self-realisation. There is therefore a need to create a balance between the adoption of general global ideals and the affirmation of individual local particularities.

There is a wave of emerging economies which are gradually positioning themselves as possible arbitration hubs for the near future by re-defining arbitration and ADR options within their borders and proving that global ideas and local practices are not necessarily mutually-exclusive but can be blended quite harmoniously towards inventing something new, unique and yet effective. Notable examples can be found in Singapore, China, Malaysia and Dubai but this essay will focus on the efforts of Dubai and China.

Part II

Dubai’s Dispute Resolution History

An emirate of the United Arab Emirates (UAE), Dubai’s ancient history can be traced back to the “Bedouin tribes of the desert and Islamic crusades”. The practise of Islam is based upon the Islamic

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5 The UAE, founded on December 2, 1971 is a federation made up of seven emirates, including Dubai. The other emirates include Abu Dhabi (the capital city), Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al Khaimah.
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Sharia Law which is derived from the Quran (the holy book of the Muslims), the Sunna (the practices of the Prophet Mohammed) and the Consensus (the agreement of the companions of the Prophet). Sharia Law teaches harmony amongst brethren and promotes non-contentious modes of dispute resolution with a neutral arbiter.\(^7\) Sharia arbitration and conciliation has always been a feature of Arabian dispute resolution. It has seen a recent rise in global relevance due to increased prominence of and trade flows with middle-eastern countries.\(^8\) The psychology of an Arab with regard to dispute resolution is very well captured by the words of H.E. Shaikh Abdullah Bin Khalid Al Khalifa, Minister of Justice and Islamic Affairs:

“The Arab is conscious of the fact that a case in a court is actually a dispute between two adversaries whereas in the case of arbitration it is a dispute between brothers. This clear distinction makes arbitration harmonize with an Arab’s psychological make-up which is imbued with sentimentalism and which is more at home with a spirit of peace, goodwill and conciliatory brotherhood. This makes arbitration as a method of settling disputes more effective on an Arab soil which provides an appropriate environ for the acceptance, strengthening and popularizing of this mode and infusing a spirit of respect for it.”\(^9\)

This cultural background is the context for inventing an ADR framework and regime for Dubai.

\(^7\) See the Holy Quran, *Surah An-Nisa: Verse: 65* for exhortation in respect of arbitration and *Surah An-Nisa: 114* in respect of conciliation.


Dubai’s arbitration and ADR legal framework consists of two regimes. The Federal UAE Arbitration Law contained in the Federal Code of Civil Procedure covering most of Dubai\(^\text{10}\) and the DIFC Arbitration Law 2008 (based on the UNICITRAL Model Law) which covers the Dubai International Finance Centre, a 110-acre financial free zone, located within the heart of Dubai.

Dubai has historically been regarded as arbitration-unfriendly but recent improvements have occurred with the much celebrated recognition and registration by the DIFC Judicial Authority of the DIFC/LCIA award issued in *Property Concepts FZE v Lootah Network Real Estate & Commercial Brokerage*\(^\text{11}\) and its subsequent approval for enforcement by the Dubai courts\(^\text{12}\) under the provisions of the New York Convention.

**Sharia Arbitration and Conciliation at the Islamic International Centre for Reconciliation and Arbitration (IICRA)**

It is clear that Islamic banking has become very prominent in the world today. It is operated in many different jurisdictions, including the UK, the US. Its growing popularity is facilitated by the varied financial products which are alternatives to traditional banking in terms of the absence of interest charges and its ethical investment opportunities. Also the emergence of Muslim countries in world finance, notably, the middle-eastern states, has resulted in a proliferation of such transactions. The

\(^{10}\) A new federal arbitration law is soon to be passed, drafts of which have made available for public comment. It relies heavily on the Egyptian Arbitration Law which takes guidance from the Uncitaral Model Law. For an exhaustive analysis of the most recent draft see A. H. El Ahdab et al, *op. cit.*, (note 14). See also Craig C. Shepherd, “**Commentary on the draft UAE Arbitration Law**”, A contribution by the ITA Board of Reporters, Kluwer Law International.


\(^{12}\) See [http://kbh.ae/media/Property%20Concepts%20FZE.pdf](http://kbh.ae/media/Property%20Concepts%20FZE.pdf) (Last accessed 6\(^\text{th}\) December 2011).
resolution of the increasing Islamic finance disputes requires a keen understanding of Islamic sharia, its jurisprudence, and the systems on which Islamic finance in particular is built.

The International Islamic Centre for Conciliation and Arbitration (IICRA) is an independent, non-profit international organisation established by Resolution No. (1) of its General Assembly\(^{13}\) in April 2005 for the resolution by conciliation and arbitration of financial and commercial disputes between Islamic financial institutions \textit{inter se}, their clients and other third parties in accordance with the principles of the Islamic Sharia law.\(^{14}\) It is composed of a General Assembly made up of over 70 member institutions and banks, a Board of Trustees, an Executive Committee and a General Secretariat that is responsible for the day to day running and administrative duties. Being a specialist institution, it draws from a wide range of arbitrators with specific experience in the Islamic finance industry including middle-eastern and international experts who possess specialist knowledge on legal and technical issues covering areas including insurance, investment, property leasing, etc. Its international nature confers party confidence and ensures enforcement of its awards across the world. It also possesses excellent facilities for the conduct of arbitration under its auspices and provides other services such as administrative and supervisory, specialised consultations, training courses and publications. Its seat is Dubai but being an international body, it is not bound by any particular national law. It has its own rules of procedure and in the absence of agreement of parties, applies the UAE procedural law.

\(^{13}\) The General Assembly is made up of Central Banks, Islamic Financial Institutions, Conventional Financial Institutions that provide Islamic financial services, sponsors and any other institution invited or any member accepted by The Board of Trustees. See \url{http://iicra.com/English/m4_1.htm}.

\(^{14}\) See Chapter 1, Article 2 of the Centre’s by-laws. This can be viewed on its website \url{www.iicra.com}.
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In the determination of arbitrations before it the IICRA applies the principles of Islamic Sharia, the applicable law as chosen by the parties\(^{15}\), its list of arbitration and conciliation procedures found in its by-laws\(^{16}\), international standards and guiding principles governing relevant matters, for example, capital adequacy and risk management, auditing, amongst others, issued by Sharia supervisory commissions/institutions\(^{17}\) and relevant Islamic *Fiqh* as rendered by the *Fiqh* Council located in India which issues guiding resolutions from time to time.\(^{18}\) The IICRA, like the ICC, pre-examines its arbitral awards before it is signed and published in order to avoid substantial procedural mistakes that may threaten the award.

Part III

**China’s Dispute Resolution History**\(^{19}\)

China’s dispute resolution framework is a product of an evolutionary process influenced by Confucianism, societal organisation and communist ideology.\(^{20}\)

Confucianism dominated philosophical thought from about 260 AD and propagated harmony in the community through voluntary self-governance and ethical behaviour which produced peace and ensured the continuance of relationships as opposed to external coercion and sanction which

\(^{15}\) This applicable law will be applied to the extent that it is consistent with the Islamic Sharia.

\(^{16}\) This can be viewed on the Centre’s website [http://iicra.com/English/m4_1.htm](http://iicra.com/English/m4_1.htm).

\(^{17}\) These include The Accounting and Auditing Commission for Islamic Financial Institutions based in Bahrain, Islamic Finance Services Board based in Malaysia, General Council for Banks and Islamic Financial Institutions based in Bahrain, Islamic International Rating Agency based in Bahrain, etc.


\(^{19}\) For commentary on the dispute resolution history of China and how it differs from that of the West see generally S.F Ali op. cit. (note 4).

produced disruption and broke down relationships. Disputes between parties were resolved privately with the help of familiar third parties and were aimed at the maintenance of unity and togetherness.

Society was organised into small cohesive municipal units that evolved norms followed by the entire group. When a member transgressed, societal pressure was applied to correct his behaviour and disputes were resolved by prominent group members with emphasis on collective harmony rather than the enforcement of individual rights. This incorporated elements of forgiveness, compromise and sacrifice.

Finally, in more modern times, communism, like Confucianism, sought to preserve societal order through self-criticism and voluntary ethical behaviour. This was embodied in the Maoist method of mobilising the masses through its “mass-line” approach. This employed the use of “persuasion and education” and discouraged coercion and force. The Chinese mentality with respect to dispute resolution can be summed up in an old proverb “It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit.”

China’s arbitration and ADR legal framework consists of a parallel two-fold regime contained in its PRC Arbitration Law 1994 which draws a distinction between domestic and international arbitration. The provisions on international arbitration, aspects of which are based on the UNCITRAL Model Law, are covered under Chapter 7. China has ratified the New York Convention and several BITs with arbitration provisions. Finally, the Supreme Peoples Court has provided valuable judicial directions on issues not covered in the 1994 arbitration act. There is no ad hoc arbitration in China as

21 Ibid at p. 482.
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the arbitration law under article 16 expressly restricts arbitrations to “arbitral institutions” only. There are over 180 arbitral and ADR institutions in China today25, however, the main international commercial arbitration institutions are the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission.

China is considered to be pro-enforcement in terms of foreign arbitral awards with its restrictive interpretation of public policy and broad interpretation of procedural requirements.26

**Conciliatory Arbitration in the China International Economic and Trade Arbitration Commission (CIETAC)**

The CIETAC, also known as the Arbitration Court of the China Chamber of International Commerce was established in 1956 under the China Council for the Promotion of International Trade in response to increased foreign economic and trade relations after the adoption of the “reform and opening up” policy. It was established for the resolution of economic and trade disputes by arbitration and conciliation under its 2005 arbitration rules which are regarded to be of international standard.27 Its organisation is similar to that of the ICC International Court of Arbitration which consists of a chairman, vice chairmen and members, a secretariat that handles its day to day affairs and three specialised committees for research on procedural and substantive arbitration issues, compilation of awards and review of qualification and performance of CIETAC arbitrators. They also, like the ICC, scrutinise awards before publication. Its headquarters is in Beijing with three sub-commissions in Shanghai, Shenzhen and Tianjin.28

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25 Ibid. at p. 309
26 Ibid.
The CIETAC administers arbitrations in a very unique way. Whilst pure arbitration in the western sense is readily available, a good number of the disputes brought to the CIETAC are resolved by conciliatory arbitration. This involves a unique blend of the merits of both modes. Subject to party agreement, the arbitrator can discontinue arbitral proceedings and act as a conciliator. If a resolution is reached, the parties sign a settlement agreement which forms the basis of an arbitral award. If no resolution is reached, the parties can return to arbitration. The rules grant a high level of influence to the arbitrator/conciliator who may conduct the arbitration or conciliation as he deems fit subject to party agreement. Unlike western arbitration, there is no anxiety about the arbitrator acting as conciliator in the same matter. Article 40 of the rules prevents the arbitrator from importing anything that transpired in the conciliation into the arbitration.

Part IV

Impact of IICRA and Challenges

The IICRA is described as one of the foundational structures of global Islamic finance, at par with the major Islamic Commissions mentioned above. It was created deliberately to fill the gap created by the inability of the courts in Islamic countries to effectively adjudicate on the technical issues involved in Islamic finance. Its wide and varied international membership, consisting of central banks, Islamic banks and other financial institutions, ensures global recognition and enforcement of its awards. It is the leading global institution for the resolution of international Islamic finance disputes.

29 Article 40 of its rules allows for conciliation on agreement of the parties. It also allows the arbitrator to suggest conciliation if he believes that it will help.
30 Articles 29 and 40 (3) of the CIETAC Arbitration Rules.
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In addition to dispute resolution, it generally assists the Islamic financial industry with the provision of many legal and sharia-related services such as legal consultations, publications and trainings.\(^{31}\)

IICRA’s main challenges are discussed by Khoweildy. These include a continued reference by the legal departments of some Islamic financial institutions to judicial remedies borne out of habit despite the superior Islamic finance know-how offered by the IICRA. A lot of Islamic financial agreements do not stipulate the mode of dispute resolution until the dispute has arisen, at which point, the parties are less likely to agree because of lack of confidence in each other. Thus they usually end up in the courts. Finally, the relative infancy of the centre, established in 2007, means that many of the currently existing Islamic financial agreements pre-date the IICRA.\(^{32}\) These challenges can be tackled by the creation of awareness of its services by the IICRA in its individual member countries either by setting up liaison offices or constant seminars, lectures, etc. The member institutions should also issue clear policies in-house as to the compulsory integration of resort to IICRA in its arbitration agreements.

**Impact of CIETAC and Challenges**

As indicated above, CIETAC was established in direct response to the upsurge of investment that occurred after adoption of the “open door policy”. It has had great success over the years having handled over 10,000 arbitrations since its inception. It now administers an average of 700 arbitrations a year, most of which are international arbitrations, and is reputed to be one of the world’s leading arbitration institutions in terms of volume of cases handled.\(^{33}\) In 2008 alone, it

\(^{31}\) See A. Khoweildy *op. cit.* (note 18) at p. 37.

\(^{32}\) Ibid. at pp. 51-53.

\(^{33}\) See S.F. Ali *op. cit.* (note 4) at p. 815.

handled 1,230 arbitrations, twice as many as the ICC in the same year.\(^{35}\) Its awards are also recognised and enforced internationally.\(^{36}\) CIETAC’s prominence and ascendancy has been helped in no small measure by the absence of international arbitral institutions in China. Under Chinese arbitration law, one of the requirements for a valid arbitration agreement is the specification of an arbitral institution which is defined as a “Chinese arbitral institution”\(^{37}\).

Despite CIETAC’s achievements, western parties may not be agreeable to its fusion of conciliation and arbitration. The dominant Anglo-American model makes a clear distinction between the two and does not envisage such interchangeable proceedings because one may influence the other. This difference in thought was apparent during the drafting of the UNCITRAL Conciliation Model Law where the Chinese representatives on the Working Group were in favour of merging the two and the US and Mexican representatives were not.\(^{38}\) This should however not deter foreign investment because party autonomy, which is affirmed throughout the CIETAC rules, allows the parties to choose their preferred ADR mechanisms, which include pure arbitration based on the western model.

Conclusion

It is well settled that certain conditions must be present in order to create a favourable investment climate\(^{39}\). This involves the provision of basic structures that support commerce like modern and dynamic legislation which recognises and preserves the rights of investors, a strong and independent


\(^{38}\) See S.F. Ali *op. cit.* (note 4) at p. 806.

judicial system which safeguards and enforces these rights, non-discriminatory regulation and the availability of modern general infrastructure such as good roads and modern transportation, telecommunications, hotels and airports with connections to every corner of the globe, amongst others.

Dubai and China are widely regarded amongst the leading emerging economies due to their rapid economic progress through steady investment flows facilitated by open door policies towards investment and supportive modern general and arbitration specific infrastructure. Their increasing success lies in the general creation of an enabling investment climate as enumerated above and the specific provision of dispute resolution mechanisms that are both global and domestic. In recognition of the globalisation of International Commercial Arbitration, they have adopted or are in the process of adopting the UNCITRAL Model Law and the most prominent international conventions on recognition and enforcement of arbitral awards. For the effective implementation of these modern arbitral laws, they have created internationally recognised and respected arbitral institutions which embody their own unique historical approaches to dispute resolution.

In context of the above, these economies have set the pace to become hubs for foreign investment and arbitration in their respective regions. This is a crucial first step in achieving the global dominance of such hubs as New York, Paris and London. Their eventual attainment of this prominence will be dependent upon continued adoption of dynamic governmental and economic policies that will sustain economic growth, regular progressive review of local legislation, contemporary infrastructural development and consistent adherence to international standards and best practice.
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The experiences of these economies show that invention is possible, desirable and is beneficial when done in the context of international best practice and supporting infrastructure like good legislation and necessary physical infrastructure. It is hoped that the LCA can draw lessons, from the study of these economies’ efforts, in charting its own path. Whilst these institutions and economies have not yet achieved the prominence of the main international arbitration institutions, they are well set on their way and it is time for Lagos to take its place among them.

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