CPD Course: Challenging International Arbitrators

Resource Person: Ms. Susan Kimani, MIAC Co-Registrar and PCA Legal Counsel

Attendees: Law Practitioners and Legal Officers

Date: 9th May 2019

Time: 14.00- 16.00

The Institute for Judicial and Legal Studies welcomed Ms. Susan Kimani to deliver a CPD lecture on "Challenging International Arbitrators". The course sought to unpack the dynamic field of ethics in international arbitration and the circumstances that may result in a challenge to an arbitrator using practical examples drawn from cases that have arisen in challenge proceedings. Additionally, reference was made to some niche vocabulary, such as 'double hatting' and 'issue conflict'. Overall, the session lasted for 2 hours and was very insightful.

Overview:

- Difference between arbitration and mediation
- Brief introduction to International Arbitration
- Advantages of arbitration
- Ethics in arbitration
- Ethics in arbitration- 'double-hatting' & 'conflicts'

The session began with the resource person highlighting the main difference between arbitration and mediation. She stipulated that arbitration is similar to the court process as parties still provide testimony and give evidence but it is usually less formal and that it is the arbitrator who hears evidence and makes a decision. On the other hand, in mediation, the process is a negotiation with the assistance of a neutral third party. Moreover, the parties do not reach a resolution unless all sides agree. Next, she went on to define arbitration as:

'Parties in dispute, agree to submit their dispute to one or more neutral third parties, who consider the dispute and make a decision, which is binding. That decision is binding because the parties have agreed that it should be, rather than because of the coercive power of any State'.

Reference was also made to the principal international arbitration institutions which are as follows:

- International Chamber of Commerce;
- London Court of International Arbitration;
- International Centre for Dispute Resolution;

- Stockholm Chamber of Commerce;
- Swiss Arbitration Association;
- American Arbitration Association;
- Dubai International Finance Centre;
- Hong-Kong International Arbitration Centre;
- Singapore International Arbitration Centre;
- China International Economic and Trade Arbitration Commission; and
- International Centre for Settlement of Investment Disputes.

Benefits of arbitration:

The ease of enforceability of an arbitral award across jurisdictions due to the popularity of the **New York Convention 1958** is a key advantage offered by arbitration. In addition, arbitration offers the benefits of expert decision-making in complex disputes, flexibility, neutrality, and a confidentiality regime which the parties can design according to their needs and preferences (ranging from the fullest confidentiality extending even to the mere existence of the proceedings, to a regime of full publicity). Another vital feature of arbitration is that it promotes the concept of party autonomy. Party autonomy in contracts appears as the freedom of contact doctrine which essentially means that parties are free to enter into contracts and can decide on the subject matter of the contract. The same mechanism is applied in arbitration agreements. Parties to the contract are free to choose the system they wish to settle their dispute. If they wish to adopt arbitration, then they have the authority to choose their desirable arbitrator (or arbitrators) to adjudicate their case. Additionally, they also retain the discretion to choose the *lex arbitri* (seat) and the applicable law.

Ethics in international arbitration:

As international arbitration is becoming more popular, there has been a dramatic expansion in the pool of arbitrators, and a commensurate diversification of the cultural and legal traditions among them and among the parties as well. As a result, the circumstances which may result in a challenge to an arbitrator are increasing. The body of rules and guidelines governing ethics in international arbitration are evolving, but remain largely uncodified. However, one cannot deny that considerations regarding the ethics of arbitrators are imperative in international commercial arbitration decisions. In an evaluation of such arbitrator bias, partiality, or misconduct, two influential decisions define the legal horizon: the decision issued by English Courts in AT&T v. Saudi Cable Company [2000][1] and the U.S. Supreme Court's decision in Commonwealth Coatings Corporation [1968][2]. When compared with the rationale of the AT&T case, the strict approach in Commonwealth Coatings Corporation reveals a list of clear advantages. Under this strict scrutiny approach, arbitrators must disclose all prior relations or dealings with any of the parties to the dispute

[1] [2000] 2 All ER (Comm.) 625
[2] Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)

as an effective method of preserving fairness, integrity, confidentiality, and neutrality during the arbitration proceedings.

Furthermore, she justified the need for a universal code of ethics in international arbitration so as to avoid the following situations:

1. '**Double hatting**'- This term can best be explained using a scenario which is as follows:

You are defending the respondent in an international arbitration administered by an institution headquartered overseas. The arbitrator is a lawyer at a prominent law firm there. Midway through the proceedings, the claimant gives notice that it has retained a new lawyer on its counsel team.

The new lawyer is from the same country as the arbitrator and the administering institution. You review her résumé and are shocked to discover that she is the vice-chair of the very institution where the case is pending. You read the institution's rules and learn that she sometimes has the unilateral power to select arbitrators for proceedings administered by the institution.

However, it was further explained that the issue of 'double-hatting' can be sorted with recourse to the following grounds:

- Due Process [Article V (1) (b) of the NYC 1958]
- Public Policy [Article V (2) (b) of the NYC 1958]
- Contract [Article V (1) (d) of the NYC 1958]

2. '**Issue conflict**'- Relates to bias in the context of arbitrators' relationships with parties and/or counsel [thus, hindering the critical features of International Arbitration which concerns the independence and impartiality on behalf of the arbitrator].

As a conclusion, reference was made to the benefits of international arbitration and how it has become critical for commercial as well as financial disputes. However, emphasis was placed on the need for a universal code of ethics for arbitrators so as to preserve the feature of independence and impartiality and as a result, to avoid the 'double-hatting' and 'issue conflict' complications.