THE LIKELY IMPACT OF THE CHOICE OF INTERNATIONAL COMMERCIAL ARBITRATION RULES ON COMMERCIAL ACITIVITY IN MALAWI

LLM (COMMERCIAL LAW) THESIS

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DECLARATION

I the undersigned hereby declare that this dissertation is my own original work which has not been submitted to any other institution for similar purposes. Where other people's work has been used acknowledgements have been made.

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CERTIFICATE OF APPROVAL

The undersigned certify that this thesis represents the student's own work and effort and has been submitted with our approval.

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ABSTRACT

International Commercial Arbitration has become the preferred method of resolving international commercial disputes. Due to this preference, investment and trade have increased. Over the years institutional rules have been preferred over ad hoc arbitration rules. This is despite the fact that most institutional rules are based on the model UNCITRAL Law, which is ad hoc by design. The nature of arbitration is that it allows parties to decide how disputes will be governed with expectations of certainty in the process and desired outcome of disputes. With the support of the proposed arbitration law and centre in Malawi, commercial activity is likely to be bolstered. This is due to the ability of arbitration to effectively determine cross-border disputes which has generated trust from commercial parties. Although there has been a shift from litigation to international commercial arbitration, supported by strengthening of legal frameworks, commercial parties are still in the quest for certainty.

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LIST OF ABBREVIATIONS AND ACRONYMS

ADR: Alternative Dispute Resolution

AFSA: Arbitration Foundation for Southern Africa

IBA: The International Bar Association

ICA: International Commercial Arbitration

GOM: Government of Malawi

OHADA: Organization pour l'Harmonisation du Droit des Affaires en Afrique

SIAC: Singapore International Arbitration Centre

SSA: Sub-Sahara Africa

UNCITRAL: The United Nations Commission on International Trade Law.

Chapter 1

International Commercial Arbitration in Malawi

1.0. Background

In order to create a conducive environment for business and enhancement of international trade, the Malawi Government aims to enact laws and structures with a view to the quick settlement of disputes. The establishment of the High Court Commercial Division was in line with Government's Private Sector Development Strategy and Reform Programme.[1] However this has had its challenges in that those claims of not less than MK1000, 000 cannot be adjudicated on. Besides the Commercial Division, another form of dispute resolution that is compulsory is mediation which involves the assistance of a third party.[2]Another challenge is that the Arbitration Act recognises the Geneva Convention of 1929, the Washington Convention of 1965 and not the New York Convention of 1958(the Convention). The latter is widely accepted in many jurisdictions in as far as the recognition and enforcement of foreign arbitral awardsis concerned. The Convention is one of the tools with which commercial parties base their decisions on when it comes to investing in developing countries.

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[1] World Bank Group. Malawi Overview http://www.worldbank.org/en/country/malawi/overview accessed 3-3-14.

[2] Government of Malawi Concept Paper. Increasing Access to Commercial Justice Through Alternative Dispute Resolution: The Establishment of a Centre for Alternative Dispute Resolution.(2010) 5.

Besides Malawi developing a Draft Arbitration and Mediation Bill 2011 (the bill) which contains provisions for Malawi to become a contracting state to the Convention, a proposal to establish an Arbitration Centre was tabled by the Government. However it will now be incumbent on the Government to adopt an Arbitration Regime that can complement this centre. The benefits of Institutional Arbitration lie in the nature of the administration of the arbitral process, the certainty and also commercial security available to the parties.[3] Parties can refer to an Arbitration regime of their choice, but the Arbitration Centre can also prescribe rules that apply to Arbitration falling under its jurisdiction.

There are various Arbitration Institutions in the world, with each having its own rules. However over the years these institutions have changed or upgraded their rules in order to foster an international arbitration friendly environment.[4] Accordingly parties prefer to deal with the older reputable institutions because they are sustainable and the chances of them ever closing are slim. The fear is that using new arbitration institutions can increase the costs and deplete the certainty of arbitration because of the likelihood of their closure.[5]Coupled with the proposed Arbitration Centre,[6]there is a proposal to refer to the Singapore International Arbitration Centre and the Arbitration Centre for Southern Africa rules.[7]

[3]Margaret L Moses, *Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge Press 2012) 9 see Frank-Bernd Weigand, Practitioner's Handbook on International Commercial Arbitration (2nd edn. Oxford 2010) 173
[4] ibid
[5] ibid
[6] ibid (n2)12
[7] ibid

1.1 Justification of the study

To begin with commercial activities can be defined as:

> the performance of one or many trading acts by business people or organizations, including goods purchase and sale, service provision; distribution; trade representation and agency; consignment; renting and lease; hire purchase; construction; consultancy; technology; licensing; investment; financing; banking; insurance; exploration and exploitation; transport of goods and passengers by air, sea, rail, land, and other commercial acts as prescribed by law.[8]

Where disputes arise under any of these, commercial parties seek certainty with regards to their rights and obligations. Support for the bill and the establishment of the Centre by the Ministry of Industry and Trade therefore leaves room for an investigation into the rules that will provide such certainty.[9] Available literature contains comparative analyses of ad hoc UNCITRAL (model law) and institutional rules, however such analyses are not country specific.[10]

> A key premise of Doing Business is that economic activity requires good rules. These include rules that establish and clarify property rights, reduce the cost of resolving disputes, increase the predictability of economic interactions and provide contractual partners with core protections against abuse.[11]

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[8]Vietnam Ordinance on Commercial Arbitration (No. 08/2003/PL-UBTVQH of February 25, 2003) Article 2 (3)
[9] ibid (n2) 5.
[10]ibid 9.
[11] ibid (n2)21.

Certainty in ICA is a tenet of legal certainty and the elements include[12]

> (1) Laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected[13]

Due to the confidentiality of arbitral awards, ICA leans more to the criteria from (2) to (5). One way in which these elements can be achieved is through establishing institutions that provide stable legal structures.[14] It has also been agreed by other authors that legislation alone cannot achieve legal certainty and consideration must be had to other characteristics of sectors that the 'statute is grappling with.'[15] In spite of all this, achieving legal certainty has not been a success. The international institutions and actors have failed to achieve this principle.[16] This has resulted in the birth of other cultures as envisaged in codes and rules in banking and insurance which have been religiously applied and followed. Actually in certain instances these rules are born out of negotiations between Governments and these actors. Albeit they are complied with.

Tied to the concept of certainty, in institutional arbitration arbitrators are appointed in a timely manner, the process has a set period and fees are scheduled and not decided by the

[12]Beccerra, Ronald Ralf, Revista The constitutional review of international commercial arbitral awards in Latin America and the challenges for legal certainty. Insights from Colombian jurisdiction, 2014 Volume 3 No.6 Tribuna Internacional pp. 11-34 18
[13] ibid
[14] ibid 18
[15] ibid
[16] ibid 19

parties. Secondly whilst there are no fixed fees for arbitrators in the model law, institutional rules have a fixed schedule. The bill makes reference to both sets of rules, however an investigation into which set provides certainty is wanting. This the gap that this study aims to address.[17]

It is unclear whether the bill or rules of the SIAC or AFSA provide the desired certainty for commercial parties. There is a gap in that no investigation has been conducted as to the effect of these rules on the parties' expectation of certainty in ICA. The choice of rules likely to positively impact commercial activity is dependent on compatibility with the local order. Research has established that major corporations do find international arbitration effective.[18] Amongst the advantages are the enforceability of arbitral awards, the flexibility of the procedure and the depth of expertise of arbitrators. [19]It is the trust in these rules that promotes expectations of certainty making commercial parties to resort to arbitration.

The model law provides for arbitration on an ad hoc basis whilst the SIAC and AFSA rules are institutional.[20] However since the bill is based on the model law, there is a strong suggestion that ad hoc arbitration will remain dominant. The proposition that the final outcome of ad hoc arbitration is litigation has led to parties seeking more institutional arbitration.[21] Under this proposition uncertainty is conjured because national courts apply

[17] ibid
[18] ibid 6.
[19] Charles and Russel, David J Savage 'Ad Hoc v Institutional Arbitration' (2010), 4
[20] UNCITRAL Arbitration Rules: Survey and Comparison. 3 Md. J. Int'l L. 421 (1978) 7
[21]ibid (n12) 20

domestic law and there is also the possibility to be influenced by local economic, cultural and political conditions.[22] For example due to public policy which is a common ground for refusal of recognition of an award, the same case might be treated differently in different jurisdictions.[23]

In achieving legal certainty firstly the local legislation must distinguish between domestic and international arbitration, secondly national courts in inferring from national economic, political and societal norms must be accommodative of international standards such as those in the Convention and the model law.[24]

1.2. Objectives of the study

The main objective of this study is to establish which rules can provide certainty for commercial parties in International Commercial Arbitration (ICA) in Malawi.

1.3. Specific Objectives

Specifically, this study sets out to:

- Establish the meaning of certainty in ICA
- Identify the different legal regimes that regulate ICA
- Compare the different regimes with respect to their effect on certainty in ICA
- Identify the rules that provide commercial parties with the most certainty in ICA

[22] ibid
[23] ibid
[24] ibid (n12) 21

1.4. Scope of the study

The study focuses on certainty which is a tenet of legal certainty under the ad hoc and institutional regimes in ICA. Commentators have suggested that legal certainty requires the non-positivist theory in order to achieve predictability.[25] In other words the social and cultural norms together with legal frameworks can provide a better level of legal certainty.[26] For commercial parties the concept of legal certainty further entails two aspects namely shared normative expectations and the trust in compliance.[27] In support of this, one of the elements of legal certainty is that legitimate expectations must be protected.

The Arbitration Act[28] only addresses domestic arbitration. ICA is not defined neither is it regulated. In contrast the bill contains provisions related to ICA from the process right through to the award. Furthermore the proposed institutional rules contain such provisions. In focusing on the ad hoc and institutional ICA regimes, the study will analyse the model law, the bill and the proposed SIAC and AFSA rules.

1.5. Main research

The main question that this study seeks to answer iswhich arbitration rules are likely to provide commercial parties with the certainty in ICA in Malawi?

[25] ibid (n12)
[26] ibid
[27] ibid
[28] Cap 6:03

1.6. Specific questions

The study seeks to answer the following specific questions:

- What is certainty in ICA?
- What are the different regimes that regulate ICA?
- What is the effect of certainty in the different regimes in ICA?
- Which regime provides the most certainty in ICA?

1.7. Methodology

It is important to introduce two important, but frequently confused terms. These are *methodology* and *methods*. The term method refers to tools or techniques of data collection such as questionnaires, interviews, literature reviews, etc. Methodology, on the other hand, has a more philosophical meaning and refers to the approach or paradigm that underpins research.[29]As an example there is heavy competition for application for grants and non-lawyers have been touted to have justified their research methodology.[30] Therefore the need to justify methodology amongst academic lawyers who engage in doctrinal research has become a necessity. According to Hutchinson 'Lawyers need to explicate their methodology in terminology similar to that used by other disciplines.'[31]

"Doctrinal research is research into the law and legal concepts.""'Doctrine' has been

[29]Loraine Blaxter, *How to Research*, (Open University Press, Buckingham 2001), 59 See also Martin Hammersley (eds)*Social research, philosophy, politics and Practice* (London Sage)

[30] Terry Hutchinson Nigel Duncan Defining And Describing What We Do: Doctrinal Legal Research (2012) Vol 17 No1 Deakin Law Review pp83-119 84

[31]ibid

defined as '[a] synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law.'[32] It deals with legal rules and norms which are meant to apply consistently and are thought to have "evolved organically and slowly."[33] It is further asserted that this methodology has been the dominant research methodology. In light of law research existing in the broader spectrum of other disciplines there is one challenge that legal researchers will face. 'Operate within the intuitive and arcane doctrinal paradigm and you are being vague according to funding providers, operate outside it and you are not being a lawyer according to the profession.'[34]

At the heart of the issue of methods and methodologies is the concept of *paradigms* which are conceptual frameworks within which social and scientific theories are constructed.[35]They are ways of breaking down the complexity of the real world that tell their adherents what to do. Legal research must be cognizant of this. The research method employed in this study was doctrinal qualitative research. According to McConville and Chui,

> The researcher seeks to collect and then analyse a body of case law, together with any relevant legislation (so-called primary sources). This collective analysis is often done from a historical perspective and may also include secondary sources such as journal articles or other written commentaries on the case law and legislation. The

[32]ibid
[33]ibid 85
[34]ibid
[35] Ann Oakley, P*eople's ways of knowing: Gender and methodology*, in Susan Hood Berry Mayall and Sandy Oliver (eds) *Critical issues in social research: power and prejudice*. (Buckingham: Open University Press 1999), 155

> researcher's principal or even sole aim is to describe a body of law and how it applies. In doing so, the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment. In this regard, the research can be seen as normative or purely theoretical. [36]

The challenge herein is that the researcher may know the law, but cannot predict its impact. Two approaches are used[37]in this regard namely that (i) the researcher has the task of ascertaining the precise state of the law on a particular point while (ii) where the researcher intends to explore at greater length the implications of the state of the law. The organisation of the data mentioned earlier can be associated to social science literature review. In arriving at the research questions, much emphasis has been placed on these sources and their applicability to the proposed state of the law in Malawi. The analysis of the data in this method will be conducted through a systematic and justifiable means that are aimed at being reproducible.[38]

Quantitative paradigms are concerned with the collection and analysis of data in numerical form. They tend to emphasize relatively large-scale and representative sets of data, and are common in the natural sciences.[39]In the doctrinal sense, quantitative paradigms supplement the traditional qualitative approach by identifying complexities of the law, legal actors and legal activities, and it has been widely applied in the field of corporate

[36] ibid 19
[37] ibid 46
[38] ibid 47
[39] Kieth F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (London: Sage 1998) 4

law.[40] The main reason for their supplementary use in this research is to 'test or verify existing theories, to explain the behaviour or phenomenon one is interested in as opposed to developing new insights in order to understand the social phenomenon or behaviour.[41]

Qualitative paradigms, on the other hand, are concerned with the collection and analysis of information in its many forms, chiefly non-numeric as possible[42]. They tend to focus on exploring in as much detail as possible, smaller numbers of instances seen as illuminating and aims to achieve depth rather than breadth. While quantitative research may be mostly used for testing theory, it can also be used for exploring the idea and generating hypotheses and theories. Similarly, qualitative research can be used for testing hypotheses and theories even though it is mostly used for theory generation[43]

In the present study, a qualitative approach was preferred. First, as in social science research, a great deal of the phenomena concerned was available as either raw or processed information in non-numerical form e.g. Legislation, policy documents, conventions, rules etc. In most cases this was used to provide a basis for comparative analyses of the various instruments. It enabled a comparative view of the problem, solutions and potential dilemmas to be taken.

[40] ibid (n35) 7
[41] ibid 48
[42] ibid
[43] ibid

1.8. Research Technique

'Comparative studies have been largely justified in terms of the benefit they bring to the national legal system'.[44]These 'studies have been largely justified in terms of the benefit they bring to the national legal system'.[45] Therefore the research technique that was used in the study was a literature review of sources, applying a comparative analysis. The organisation of the materials was aimed at analysing the impact on socio and economic activity. The primary sources of information were selected from the following Arbitration Regimes; the proposed Arbitration and Mediation Bill, the Singapore Arbitration Centre and the Southern Africa Arbitration Centre as well from case law. In as far as the bill being based on the model law and in 'countries that have adopted codes or constitutions which originated in another system, it has been natural for legal scholars to look at the way that system has developed and has been developed in its original habitat'.[46]

The purpose of comparative legal analysis is to give practical contribution to the local national legal system.[47]The facilitation of international trade has been a major stimulus for this kind of comparison. Coupled with that has been the desire to reduce problems of jurisdiction and choice of law which result from transactions or events that have features which link them to more than one legal system. These are the problems of conflict of laws.[48] The nature of international trade gives this technique its international character in

[44] Mike McConville and Wing Hong Chui, *Research Methods for law*, (Edinburgh Press 2007) 88
[45]ibid
[46] ibid
[47] ibid
[48] ibid 89

that international commercial arbitration is used by corporations from different states characterized by choices of laws, choices of arbitrators and choices of procedural law.[49]

The rules were reviewed to enhance understanding of whether they would provide certaintyfor commercial parties in Malawi. Furthermore this assisted in asserting the ones that would provide the most certainty. Secondary data was collected from publications such as books, law journals, articles, histories, commentaries, conference papers and reports.

1.9 Quality Control

To ensure that the data was reliable, the data was garnered from reputable sources. Ethics were observed to the following extent.

- **Plagiarism**. The works of others were duly cited
- **Privacy and Confidentiality**. Unpublished documents were not shown or shared with unauthorised persons
- **Integrity of data**. Data used was kept and the research did not infer any data, but use of actual data that was kept in the event that it needs to be replicated.[50]

1.10. Hypothesis

Institutional rules in ICA are likely to provide certainty in resolving commercial disputes in Malawi.

[49] ibid

[50]Office of Research Integrity, 'Guidelines for Responsible Conduct of Research' [2011]. 132 Cathedral of Learning 512-624-3007

Chapter 2

Literature Review

2.1. Introduction Doing Business and ICA

A dispute settlement system that encompasses predictability, security and legal certainty is the backbone of functional economic system. Many studies have been done in the area of arbitration the most notable being the United Nations on harmonisation of international trade law through the United Nations Commission on International Trade law UNCITRAL (model law).[51] However, the type of the research is generic designed to deal with issues of universal application whose lessons can be adapted.

There are also ongoing works such as the Hague Convention on Private International law, UNIDROIT which is a European effort in this area. However, the utility of such studies is limited in context, relevance and application. Closer to Malawi there has been an effort at sub-regional level such as the Treaty on the Organisation of Business Law in Africa (Organisation pour l'Harmonisation du Droit des Affaires en Afrique) ("OHADA") which was signed on 17 October 1993 by 14 African States. OHADA presents an opportunity for African States to strengthen their legal frameworks. It has considered and resulted in uniform law of arbitration for member states. However, the ODAHA is a civil

[51]United Nations Commission on International Trade Law Yearbooks (n.d.)http://library.williams.edu/resources/454accessed 25 MAY 2014.

law effort and it's applicability to a common law tradition like Malawi though feasible, has its limitations.

The Arbitration Act[52] does not distinguish between domestic and international arbitration. Section 2 of the Act only defines the arbitration agreement. As regards awards there is express limitation in part III of the Arbitration Act where reference is made to "Enforcement of Certain Foreign Awards". ICA is widely applied by countries that have adopted the New York Convention. The obvious limitation there in as far as an investor friendly climate is that commercial parties are unlikely to invest in Malawi because she is not a contracting party to the Convention. Another limitation is in the cumbersome procedures that parties must exhaust before having an award recognised and later enforced under the Act.[53] In the third schedule which contains provisions of the Geneva Convention, even after an award has been recognised, a Court may refuse enforcement if

> (a) That the award has been annulled in the country in which it was made;
>
> (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or that, being under a legal incapacity, he was not properly represented;
>
> (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to

[52] Cap 6:03
[53] ibid Third Sch

> arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.
>
> If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide[54]

This is in contrast to the Convention where the award is recognised and enforced in local circumstances that are no less stringent than those provided for with respect to domestic awards. As is between international commercial parties specific mention is only made to ICSID under the Washington Convention. Here again ICSID only deals with investment disputes between States and nationals of other States. The absence of the definition of what international arbitration in the Act is a limiting factor. This suggests that there is no distinction between domestic and international arbitration. Under section 2 of the Act[55] only an arbitration agreement and what a Court is are defined. Because of the dominant features of domestic Arbitration in Malawi's current law, commercial parties having their place of business elsewhere are unlikely to deem Malawi as a jurisdiction where recognition and enforcement of awards would be possible. The scope of this study encompasses ad hoc and institutional arbitration. However the Arbitration Act does not contain provisions to this effect. It is therefore worth noting that the bill mirrors the

[54] ibid
[55] ibid n52

Convention in defining an arbitration as one by an "international institution" "to which the parties have submitted."[56]

The challenge in Africa for investors is the weak legal framework.[57] A strong and certain legal, regulatory framework in the region is a prerequisite for attracting foreign direct investment and enhancing commercial activity in Africa. The principle of harmonisation is discussed as the efforts of governments in creating legal frameworks that provide certainty and predictability to parties to trade. [58]Arbitration rules are, therefore, crucial in fostering such an enabling environment for the conduct of business. OHADA provides for quick and less costly mechanism for settlement of disputes in the event that awards need to be enforced in a member state, procedures of which remove the perception of risk amongst investors.[59] It is well known that recourse to arbitration has been poor in Africa as such the harmonisation of arbitration laws under OHADA is also a bid to achieve confidence on the part of investors.[60]At the International Level, the United Nations has engaged in a process of harmonisation, unification and modernisation of trade law due to changes in 'commercial practices towards the promotion of international trade'.[61] The challenge remains that while uniformity has been proposed and promulgated, the rules that provide certainty still need to be investigated.

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[56] s 6

[57] http://www.trinityllp.com/the-harmonisation-of-business-law-in-africa-its-impact-on-investors/accessed 4-5-14

[58] Richard Garnett, 'Progress Towards Harmonisation International Arbitration Law' (2002)Melbourne Journal of International Law Vol 3 10

[59] ibid 25

[60] ibid

[61] Susan Block-Lieb and Terence Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2007) Vol 42:3 1

One challenge under OHADA is that Judges continue to favour national laws over the OHADA rules.[62]This leads to uncertainty amongst parties. After all, the intention is to make arbitration attractive to parties engaged in commercial activity by ensuring their expectations of certainty. Unexpected and undesired restrictions are further known to be procedural barriers under national laws, thus the need to identify which rules avoid these obstacles.[63]Unexpected and undesired restrictions found in national laws relate for example; to the parties' ability to effectively submit future disputes to arbitration; to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate.[64]Furthermore an effective arbitration regime is one that pivots on "speed, economy, informality, technical expertise, and avoidance of national for a".[65] In order to achieve certainty these must be prevalent.

A closer look at Singapore informs us that there has been an increase in use of the SIAC rules. However this is also owing to the increase in trade in the Asian region. The Sub-Sahara region in Africa has also been experiencing this surge in increased trade.[66] The preference of arbitration as opposed to transnational litigation therefore suggests that more

[62] ibid 27
[63] ibid (n58)
[64] UNCITRAL Secretariat 'Explanation of Model Law' <http://faculty.smu.edu/pwinship/arb-24.htm> accessed 4th June 2014
[65] George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) The Yale Journal Of International Law Vol.37 1.
[66] Paul Teo, 'Singapore Hub for Construction and Infrastructure Arbitrations' 1. <https://www.international-arbitration-attorney.com/wp-content/uploads/singapore-hub-for-construction-and-infrastructurearbitrationswith-the-worst-of-the-global-down.pdf> accessed 14th May 2014

arbitration centre's are required.[67]Malawi requires hefty restructuring in transport mechanisms and inadequate power.[68]It is not surprising therefore that in the opinion of Jaffe and McHugh preference of arbitration is a result of 'the contentious nature of construction projects; the desire to preserve and maintain relationships; and the fundamental business desire to get projects built sooner and at less cost than if projects went into lengthy litigation in the end'.[69]

Paul Teo cites four reasons that could lead to Singapore becoming an established hub for ICA they include; volume and scales of projects, regional construction law and disputes expertise, investment treaty protection and fast track arbitral procedures.[70] Law reform should take cognizance of these reasons as Malawi 'continues to attempt to refine its private sector strategy and action plan for the manufacturing sector that aims to focus on competitiveness, productivity and appropriate infrastructure development'.[71]Based on this the potential to become a hub exists especially since International corporations have formulated internal policies that prefer arbitration (choice of law, choice of arbitration and the seat) as a dispute resolution mechanism.[72]

[67]James G Zack 2012 'Trends in International Construction Arbitration' 2.<http://www.navigant.com/insights/library/construction/construction-forum/trends-in-international-construction-arbitration/> accessed 22nd May 2014

[68]http://www.ifc.org/wps/wcm/connect/REGION__EXT_Content/Regions/Sub-Saharan+Africa/Investments/Infrastructure/ accessed 3-13-14

[69] ibid

[70] ibid (n66) 3

[71]United Nations, 'Malawi And The Multilateral Trading System The Impact Of WTO Agreements, Negotiations And Implementation' [2006]14

[72] ibid (n67) 2

Chapter 3

Conceptual Framework

3.1 Introduction

Arbitration is a process that "seeks cooperation of the very public authorities from which it wants to free itself.[73]As mentioned earlier, parties seek for certainty in this process which is comprised of various steps that inform their choice of rules. Technicalities concerning the validity of an arbitration agreement, the nature in which arbitrators are chosen, and their impartiality, the recognition and enforcement of awards, the costs of arbitration have been widely discussed either in whole or in isolation.[74] However, arbitration does not exist in its vacuum but a broader context raising different conundrums.[75]

To understand these issues in ICA, it is necessary to place oneself in this broader context understanding. This can only be done from a backdrop of legal theory or philosophy of ICA.[76]The technicalities mentioned above can be explained through legal theory of arbitration thatexplains these phenomena and the conundrums they raise in their entirety.[77] In the opinion of Gaillardthere are three philosophies in international arbitration.[78]

3.2. Monolocalised theory.

Here an arbitrator being likened to a judge, will apply the law of the seat of the arbitration according to the legal order of the seat. As an example an arbitrator sitting in Malawi will act like a Malawian Judge. In the same example the legal order of Malawi as the seat of arbitration becomes the source of the arbitrator's power.[79] The arbitrator is likened to a Judge in Malawi either because of the mandatory provisions of the law of the seat, or because of the parties' intention based on their arbitration agreement.[80] The former and latter have been argued by F.A Mann and Roy Goode respectively. In establishing the applicable law under this theory, the arbitrator will apply the procedural law of the seat and the choice of law rules of the seat.[81]Proponents of this theory will abide by an arbitrators decision. Under this theory an award rendered in the country of origin can be challenged by anti-arbitration injunctions rendered by the courts of the seat.[82]

It is worth noting that the "relationship between arbitration and national courts" is somewhat complicated when it comes to enforcement of an award that has been set aside in the country of the seat.[83] Amongst the differing views of the New York Convention contracting states, is whether an award that has been set aside in the country of the seat can be enforced in another jurisdiction. The monolocalised emphasizes on what the local

[73]Jan Paulsson, 'Arbitration in Three Dimensions' (2010) London School of Economics and Political Science Law Department LSE Law, Society and Economy Working Papers 2/2010 2
[74] Emmanuel Gaillard, 'Three Philosophies ofInternational Arbitration' (2010) Martinus NiHoff Publishers Leiden Boston 305
[75] ibid
[76] ibid
[77] ibid
[78] ibid
[79]ibid
[80]ibid
[81]ibid 308
[82]ibid
[83]http://kluwerarbitrationblog.com/blog/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe/ date accessed 22-7-15

order where the enforcement is being sought determines. So setting aside in the "country of origin is non-existent".[84]

3.3 West Phalian theory.

This theory looks at the whole arbitration process itself; from the commencement of arbitration right through to the recognition and enforcement of the award in different states and how those jurisdictions will readily do so, provided it meets that legal orders conditions. Gaillard purports that in this theory the law of the seat is not the dominant legal order and that the state that enforces the award by doing so "legitimizes the arbitral process" conducted at the seat of arbitration.[85] He refers to this theory as being "West phalian" because the autonomy of the state is what the determinant factor is, in that each state prescribes conditions under which an award is enforced.[86] In fact according to him[87] Arthur von Mehren has argued that "unlike a judge an arbitrator has no *lex fori*.

3.4. The Transnational theory.

This theory suggests that states collectively legitimize the arbitration process.[88] In this theory, the award must meet certain criteria before it is deemed valid under each legal order.[89] Contemporary arbitration raises this aspect of it being transnational in that the process itself must meet the standards of national legal orders notwithstanding its independence.[90]

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[84] ibid n74 308
[85] ibid 307
[86] ibid
[87] ibid
[88] ibid (n73) 7
[89] ibid
[90] ibid

Three consequences of each theory follow for the purposes of this research in that as Gaillard suggests,

i. In applying the mono localized[91] theory, an arbitrator will act as a judge by applying the law of the seat and its procedural law.[92] In view of harmonization of business laws, the theory is an impediment to ICA. It propagates challenges under the OHADA uniform laws where the local law is preferred by Judges.

ii. Secondly in applying the Westphalian approach, the legal order of one state may be disregarded by arbitrators because of the weight that other legal systems accord the arbitration in terms of its validity. Here the autonomy of arbitrators to select the applicable law is cemented in them having the freedom to apply other procedural laws, but that of the seat of the arbitration.[93] Autonomy under the Westphalian approach also extends to the state itself.[94]

iii. Thirdly, applying the transnational approach might arise from the conundrums brought about by arbitration technicalities. In this theory, a harmonized approach is appropriate to solve the arbitration because of these technicalities. It is most likely that the most appropriate procedural rules, transnational procedural rules, transnational choice of law rules, or even transnational substantive rules will be applied.[95].

[91] ibid (n73) 4
[92] ibid (n74) 305
[93] ibid
[94] ibid (n74) 308
[95] ibid

Gaillard's view is that the transnational approach in ICA is appropriate. Party autonomy supports this theory. This approach perhaps brings to light the operation of arbitration in the contemporary business environment that has the guise of a global village with more and more harmonized boundaries. In this vein, procedural rules, transnational procedural rules, transnational choice of law rules, or even transnational substantive rules must be taken into account. As parties seek certainty, an application of this theory is appropriate. As Paulson[96] puts it in ICA 'Others contend that the forces of internationalization have now given birth to awards which do not owe their life to the law of the place of arbitration.'[97]The theory has its place in Sub Sahara Africa (SSA) since the absence of certain freedoms in arbitration has led to Africa not being an attractive destination for ICA. Paulsson at a London Court of International Arbitration Pan-African Council Conference provided these 7 seven freedoms. The freedom;

i. to choose arbitration as a method of dispute resolution; because leaving a discretion in the hands of the courts whether to enforce an international agreement to arbitrate is not acceptable;
ii. to be represented at the arbitration proceedings by counsel of one's choice;
iii. to stipulate the language or languages to be used in the arbitration proceedings;
iv. to have the dispute decided by arbitrators selected by the parties;
v. to have the arbitration proceedings conducted in the manner agreed between the parties;
vi. to have the dispute determined according to whichever law or another basis is chosen by the parties;

[96] ibid n73
[97] ibid

vii. to secure an award which is final and binding and not subject to review or amendment by another body.[98]

3.4. Conclusion

In view of this party autonomy is crucial because parties want to resort to dispute resolution mechanisms that they are certain of in ICA. What is apparent is that Paulsson's characteristics support the transnational theory. Therefore the test for certainty in ICA under ad hoc or institutional rules is whether these characteristics have been achieved.

[98] Austin Amissah. 'Choice of Arbitration Rules. The Dilemma of an African Adviser' [1997] 9

Chapter 4

Party autonomy in Ad hoc rules and the quest for certainty

4.1. Introduction

In order to discuss the effect of ad hoc rules in ICA, this chapter seeks to ascertain if ad hoc rules under the model law and the bill provide parties with certainty in ICA. Under Ad Hoc Arbitration the parties agree on the "form of arbitration" be it before or after the dispute.[99]The model law gives the parties the autonomy to decide on the **appointment of arbitrators**, **seat of arbitration**, as well as **the choice of law of the arbitration**. Usually at the point where they resort to arbitration trust is lost, thereby making it difficult to agree on these choices.[100] The leading principle is that of autonomy in commercial arbitration. Article 19(1) of the model law provides:

Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[101]

In ICA, the parties seek certainty of these three aspects about their rights and obligations.

[99]ibid (n19)
[100] ibid 3
[101] ibid (n20) 422.Revised Article is now Art 12

4.2. Impartiality of arbitrators

To ensure impartiality of arbitrators the IBA have developed guidelines even though they are not binding. Under general standard one.

> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the award has been rendered, or the proceeding has otherwise finally terminated.[102]

Secondly the circumstances under which arbitrators should refuse or accept appointment are provided as follows;

> (a) An arbitrator shall decline to accept an appointment or, if an arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or ability to be impartial and independent.
> (b) The same principle applies if facts for circumstances exist, or have arisen since the appointment that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties (have validly waived their objections to the arbitrator's service in accordance with General Standard 4).
> (c)doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.[103]

[102]IBA Guidelines 2014 Conflict of Interest.
[103]ibid General Standard Two

The neutrality of the arbitrators is key to the success of the arbitration procedure.[104]Under the model law arbitrators should be independent of the parties. However, there is no express provision about their relationship to the parties. Correlated to this is that they can belong to the countries of the parties' themselves.[105] This canbe advantageous to the parties since having an arbitrator from your country can have a positive influence on the proceedings.[106]This advantage is echoed in the bill.[107] It provides that

18 (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

Although the relationship to the parties is not expressly provided for, under the model law, case law suggests that an arbitrator is thus 'obligated to conduct a conflicts check to see if he must disclose any circumstances that might cause his impartiality to be questioned'.[108] The importance of impartiality and independence of the arbitrator are further highlighted in the decision of the Court of Appeal in Quebec in *Desbois v. Industries A.C. Davie Inc.*, Court of Appeal of Quebec, Canada, 26 April [1990]. The clause referred to in the case provided that

[104] Igor M Borba, 'International Arbitration: A comparative study of the AAA and ICC rules' (2009) Masters Thesis, Marquette University 52 56.
[105]ibid
[106] ibid
[106]*HSMV. Corp. v. ADI Ltd.*, Central District Court for California, 72 F. Supp. 2d 1122(C.D. Cal. 1999).

8.01 The contractor and the owner shall accept and agree that the lender act as sole judge or arbitrator in the achievement of these conditions or requirements, in cases of dispute or litigation between them.[109]

Briefly stated the case involved a dispute relating to a shipbuilding contract. As the Quebec government had subsidized the shipbuilder, a minister of the Quebec government signed a contract to guarantee the performance of the shipbuilder's obligation. The contract also contained a clause providing that disputes would be resolved by arbitration and that the minister would act as arbitrator. After having stated that the impartiality and independence of the tribunal were fundamental features of arbitration, the court held that a clause providing that disputes relating to the contract will be arbitrated by a party to that contract is inconsistent with the requirements of impartiality and independence and is, therefore, null as contrary to public policy.[110]The decision brings to light "reference by both parties to a dispute to a third party, which is alien to their conflict"[111]

In the present state, although arbitration jurisprudence has not evolved in Malawi with only a few cases applying the current Arbitration Act,[112] the current practice has provided this much sought after impartiality. Most arbitral cases have been resolved by sitting or retired Judges, who are accustomed to procedural law of the Courts rather than the tenets of ADR.[113]However it must be pointed that where matters have come before the Courts,

[109]UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 65 see http://www.canlii.org/ . accessed 6-20-14
[110]ibid
[111]ibid
[112]Kandoke Mhone, 'Arbitration Law in MalawiArbitration law In Malawi and its implications for the PT A/SADCC' (2009) Sabinet Gateway 246
[113]ibid 232

there is strong suggestion that Malawian Courts have leaned towards arbitration.[114] The Supreme Court of Appeal has exercised supervisory functions by staying the proceedings in Court to have them referred back to arbitration where the parties had agreed so in a contract.[115]In such cases Judicial officers have been involved in an arbitration

- Before the commencement of the arbitration.
- During the arbitration.
- After the award has been published by the arbitrators.[116]

Still on the issue of judicial officers as arbitrators and the issue of impartiality parties are at liberty to opt for a Judge under the bill. It provides that

76.- (1) A judge of the Court may if in all the circumstances he thinks fit, accept appointment as sole arbitrator or as umpire by or by virtue of an arbitration agreement.

Of course the limitation is the potential of Court interference and promoting the mono localized theory by encouraging parties to resort to litigation. Such interference is reflected in section 76 (4) under the Second schedule which provides that

(1) Where the arbitral tribunal consists of or includes a judge-arbitrator the powers of the Court under sections 41 to 43 shall be exercisable by the Court and also by the judge-arbitrator himself.

[114]*Industrias Metalurgicas Pescamona Sociedad Animana (IMPSA) v Heavy Engineering Limited* MSCA Civil Appeal No. 14 of 2000 (unreported)
[115]ibid
[116]Emelia Onyema, 'Enforcement of Arbitral Awards in Sub-Sahara Africa' (2010) Arbitration International Vol 26 issue119.

(2) Anything done by a judge-arbitrator in the exercise of powers under subsection (1) shall be regarded as done by him in his capacity as judge of the High Court and have effect as if done by that Court.

Notwithstanding this limitation, whether arbitration and litigation being placed under the same forum is potentially favourable or not is subject to further debate. According to the bill the Judge is the arbitrator, can hear applications based on the arbitral proceedings and make determinations thereof. In line with the IBA standards this raises the possibility of conflict of interest. The bill further provides for an appellate step in that under section

(2) Any appeal from a decision of a judge-arbitrator under section 48 shall lie to the Supreme Court of Appeal with the permission of that Court.

These provisions are prima facie aimed at ensuring impartiality and independence. The appellate steps are meant to afford parties with a guarantee that their rights and obligations will be observed, maybe at a cost in terms of time.[117] What is apparent though is that the impartiality and independence of the judge in whose forum he is an arbitrator and judicial authority might raise challenges to the rights and obligations of the parties. The provision can lead to contrary expectations of general standard two of the IBA guidelines. To this end it can be inferred that ad hoc arbitration poses challenges to parties' expectations of certainty in ICA. Even if the Burgh House principles that apply to tribunals and judges[118] are applied,conflict might not be averted. They are not as explicit as the IBA guidelines. For instance Principle 11 'prohibits judges from sitting in a case if either they, or any

[117] ibid (n3) 133

[118] These principles were drafted to "apply primarily to standing international courts and tribunals (hereafter "courts") and to full-time judges." The Principles state, however, that they "should also be applied as appropriate to […] international arbitral proceedings and to other exercises of international judicial power" (Burgh House Principles, 2004, Preamble).

persons or entities closely related to them, have a material personal, professional or financial interest in the outcome of the matter'. This is not as extensive as the IBA guidelines.

4.3. Arbitrators and Applicable law

'As a matter of transnational Ordre public and lex mercatori, arbitrators must respect the parties' choice of law'.[119] This argument is echoed in the parties' autonomy under the bill on the premise of the model law. In terms of the choice, the parties can decide and in the absence of this express intention it is up to the arbitral tribunal to decide. The parties' choice is most likely to grant them certainty and predictability in that they know what to expect and what law the tribunal will be apply.[120]This choice is crucial because whatever substantive law governs the arbitration proceedings, there are mandatory rules from which the parties cannot derogate from the seat of arbitration. There are two tests that are applied in the absence of party choice, the subjective and objective approaches. In the former, the tribunal will attempt to interpret the parties' choice and in the latter it will infer from connecting factors.[121] However, it is argued that the objective test is more commonly used by arbitral tribunals.[122] The parties' choice of applicable law places them in a legal framework which they have elected. Therefore in the absence of this choice, it is likely that the tribunal will do this for them, of course based on the connecting factors.[123] This has the potential of placing their relationship in a legal framework they never intended

[119] Helena Carlquist, 'Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration' (2006) Masters Thesis Göteborg University 14
[120] ibid
[121] ibid 15
[122] ibid
[123] ibid

despite the tribunal's attempt to objectively resolve the dispute. Their rights and obligations are, therefore, likely to be affected in this regard, probably to an extent they never envisaged.

Under the bill[124]

For purposes of subsection (5), applicable law determined in accordance with the agreement of the parties, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

It further provides that[125]

(1) The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.

(2) The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties as directly referring to the substantive law of the state and not to its conflict of laws rules.

(3) If there is no choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the dispute.

(4) The arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, except if the parties have expressly authorised it to do so.

[124] Draft Arbitration and Mediation Bill 2011, s.7
[125]ibid s.44

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction.

This part confirms the objective approach. While the tribunal is afforded the freedom if agreed by the parties either to interpret using usages of trade, *ex aequo et bono* or *amiable et compositeur* all reference must be made to the contract. Case law supports the use of *ex aequo et bono* in instances where the parties have expressly stated so in the arbitration agreement that any determination using these methods is based on their mutual understanding.[126]Situations may arise where usages of trade accurately apply to the arbitration where there's no express choice of law clause agreed to by the parties.[127] Application of usages of trade can be linked to the transnational theory through delocalization, which refers to "stateless, floating, or a-national arbitration. It is based on the theory that international arbitration should not be fettered by the local of the place where the arbitration occurs."[128]In that case it was held that the tribunal's use of usages of trade only related to the substance of the dispute that is the intention of the parties when agreeing on such reference towards their disputes.[129] In another case before the Supreme Court of Switzerland,

> Although the parties' choice of law referred to the laws of Switzerland, the arbitral tribunal drew from the practice prevailing under the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and the 2004 UNIDROIT Principles of International Commercial Contracts.

[126] CLOUT case No. 507 [*Liberty Reinsurance Canada v. QBE Insurance and Reinsurance (Europe) Ltd*, Ontario Superior Court of Justice, Canada, 20 September 2002], [2002] CanLII 6636 (ON SC),
[127] ibid (n3) 59
[128] ibid (n3) 60
[129]ibid

> The Supreme Court rejected the challenge against the award, ruling that such references to transnational rules were reasonable especially when the parties have a longstanding international commercial relationship.[130]

It might be argued from the above case that a condition precedent is that there has to be a long international commercial relationship. However this decision still suggests the objectivity with which tribunals must proceed on and that where the parties have expressly stated their intention of usages of trade, their expectations are likely to be met. The provisions in the bill therefore support the objective test. As the law of the seat there are provisions that ultimately lead to certainty.

4.4. The effect of the choice of Seat of Arbitration

It has been argued that the law of the seat should have minimal supervision of the arbitration.[131]Of course the intention of such supervision effectively ensures that there are no elements of fraud or corruption where recognition, enforcement or setting aside of the award are concerned.[132] These supervisory functions have been reflected in two important decisions.[133]Both Singapore and India's laws on arbitration are modelled on the model law which both courts in those cases based their decision on. In Astro the opinion of the High Court was that an application for recognition and enforcement of an award made in Singapore meant that was a domestic award. It upheld two awards after recognition and enforcement were sought by the award creditors despite a jurisdictional challenge by the

[130] Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A_240/2009.
[131] ibid (n3) 61 see Frank-Bernd Weigand, Practitioner's Handbook on International Commercial Arbitration (2nd edn. Oxford 2010) 174
[132] ibid.
[133]Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV & Others* 31 October 2013, Supreme Court of India in *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc*, 6 September 2012.

debtors after the period for setting aside had expired. This was reversed by the Supreme Court which held that the model law was built on emphasis on according the law of the seat powers to give a party the right to set aside an award or enforce an award. Chapter VIII of the model law is not given effect in Singapore, to avoid confusion with the application of that part with the New York Convention. As a point of departure the Court turned to the double exaquateur rule in the Geneva Convention[134] 'which required leave of the court to be obtained both from the court of the seat and the court of enforcement,' further adding that this had been given a go-bye in the New York Convention.' Since

> Singapore had adopted the New York Convention, the court noted that [t]he seat of arbitration that was influential because of the double exequatur rule, therefore, became less significant under the New York Convention. The Court then went on to hold that [t]he drafters of the Model Law, in aligning the Model Law with the New York Convention, were plainly desirous of continuing this trend of de-emphasizing the importance of the seat of arbitration.[135]

The Court in recognizing that the New York Convention applied to Singapore 'took the view that choosing Singapore as the seat of arbitration would not deprive a party of its choice of remedies against an arbitral award.[136]The importance of the seat under ad hoc arbitration therefore lies in its law being aligned to the New York Convention where remedies are concerned.

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[134]Convention on the Execution of Foreign Arbitral Awards 1927 (the "Geneva Convention.")

[135] Nakul Dewan 'To "seat" or not to "seat": Art thou relevant' <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/326-to-seat-or-not-to-seat-art-thou-relevant>2 accessed 20th July 2014

[136] ibid

To expound on the importance of the seat regarding the parties' choice the Bhatia case has made it very clear that unless the parties expressly state that the law of India is excluded in its application to the arbitral proceedings then it will still be applicable. The appellant contended that the arbitration took place outside India i.e. France therefore Part I of the Arbitration and Conciliation Act, 1996 did not apply to the arbitral proceedings. The application was made under Section 9 under interim measures. At par 32 S.N Variava. J states that

> To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I are compulsory. However, parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

The supervisory significance of the seat is consistent with the decision in the Astro case, as well as the Bhatia case. This express inclusion of the New York Convention in terms of the parties rights to "having the choice of either taking the active step of setting aside an award or the passive step of resisting enforcement"[137] even where the law of the seat is where the award was rendered and sought to be enforced provides that certainty. It can also be deduced from the Astro case that awards rendered and enforced in the same seat

[137] ibid

are international, domestic awards.[138] A contrary decision in Bhatia would leave parties with no remedies where the arbitration was conducted outside India. The findings in Bhatia are applicable to Malawi because the parties also have to make this express choice, otherwise Malawian Courts will assume jurisdiction. The bill provides that

5. - (1) The provisions of this Part shall apply where the seat of the arbitration is in Malawi. (2) The following sections shall apply even if the seat of the arbitration is outside Malawi, or no seat has been designated or determined- (a) sections 12 and 13; and (b) section 65.

(3) The powers conferred by the following sections shall apply even if the seat of the arbitration is outside Malawi or no seat has been designated or determined-

(a) section 42; and

(a) section 43:

Provided that the Court may refuse to exercise any such power if, in the opinion of the Court, the fact that the seat of the arbitration is outside Malawi, or that when designated or determined the seat is likely to be outside Malawi, makes it inappropriate to do so.

4.5. Conclusion

The importance of the linkages of appointment of arbitrators, applicable law and the seat are evident. The flow of the arbitral process where arbitrators appointed by the parties are not impartial, can be affected because of compromises in their application of the law. It is also evident that the parties must be prudent in their choice of seat. The choice of

[138] http://www.clydeco.com/insight/articles/the-seat-of-arbitration-why-is-it-so-important date accessed 24th June 2014

arbitrators and the choice of seat are, therefore, the determinant factors of the expectations of certainty in ad hoc arbitration. The law of the seat as the framework that the parties subject their arbitration to must be supportive of the arbitration, extending to the rights of the parties. Astro and Bhatia have set the standard. Ad hoc arbitration has, therefore, been enhanced through the development of the model law especially since many jurisdictions have based their national laws on it. Therefore ad hoc arbitration does provide a commercial parties with certainty in ICA.

Chapter 5

Institutional rules and the quest for certainty

5.1. Introduction

With specific focus on the AFSA and SIAC rules this section seeks to ascertain if institutional rules provide parties with certainty in ICA. As mentioned in the background section of this study, it is the administration that is the major difference between ad hoc and institutional arbitration. The administrative functions of the institution are the reason institutional arbitration is known to satisfy the expectations of certainty between parties to arbitration.

The bill makes reference to institutional arbitration. In fact throughout the bill reference is made to an institution.[139] As a point of departure

6. - (1) In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated-

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

Reference is made to an institution that would administer the arbitration process if its rules were so elected by parties. The bill further provides that

[139]ibid n124 s 6

(3) Parties may make arrangements under subsection (2) by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

Institutional arbitration is preferred to over ad hoc arbitration. By 2008, 86% of awards that had been rendered in the preceding ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations.[140] One of the main reasons why companies have opted for institutional arbitration is the "reputation of the institutions and the convenience of having the case administrated by a third party.[141] With the proposal by the Malawi Government of an arbitral institution, the bill is conducive to the development of this type of arbitration.

At the launch of the London Court of International Arbitration in 1892 the following was stated 'This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer up of strife'.[142]Many more institutions have been established since then, and more recent is the Singapore International Arbitration Centre. The technicalities mentioned above that deal with the arbitral process can provide parties with the highest degree of certainty. Reputable rules are crucial to the levels of trust that can be established between parties to international trade in particular, but not limited thereof. It has further been postulated by Dr Robert Briner that

> There is an increased awareness that the growth of their economies also depends on the confidence of the foreign

[140]Price Water House Coopers, 'International Arbitration Corporate Attitudes And Practices' (2008) School of International Arbitration Queen Mary University of London 19

[141] ibid

[142]Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration* (4 edn London, Sweet and Maxwell, 2004) 4-5.

> partner—the investor, the licensor, the trading or the joint venture partner. The rule of law is the basis on which all commercial interchange has to be able to rely. The confidence of all parties in a reasonable, foreseeable method for resolving disputes in a fair fashion, based on rules of law, constitutes an essential cornerstone for the development of international trade and investment.[143]

For international trade between developing countries like Malawi, confidence in the rules is a necessary condition before trade can ensue.[144] The basis of creating rules in which parties can have trust emanates from instances in which investors in developed countries might view legal systems in developing countries as being risky. In *Amco v Indonesia* [2007] 1 Lloyds Rep 391 (HL) the observation made was to the effect that 'to protect investment is to protect the general interest of development and of developing countries'.[145]This is the basis on which the establishment of the arbitration institution in Malawi should be founded.

5.2. Impartiality of Arbitrators

The rule in institutional rules is that there should be:

> One or three arbitrators;
>
> If one and the parties cannot agree on who it should be, the arbitrator is chosen by the relevant arbitration institution;
> If three, each party nominates an arbitrator subject to confirmation by the relevant arbitration institution. The third is

[143]Michael Tselentis, 'International commercial arbitration and the Southern African Development Community' (2009) 31
[144]ibid
[145]ibid

> chosen by the institution or the two party-nominated arbitrators, unless the parties agree otherwise.[146]

As a standard, the IBA guidelines are significant even in institutional arbitration. Rule 6.1 of the SIAC rules provides the parties with the freedom to choose arbitrators and to further choose the chairman of that arbitration. This is deemed to be an agreement under the rules, and the tribunal shall treat it as such. In all cases of choosing arbitrators, the chairman of the institution has the final authority of appointing the arbitrators.[147] This is, of course, after performing the administrative function of scrutinizing each one to avoid compromising their impartiality. Rule 10.1 confirms this scrutinizing function in that the President of the institution has to ensure that the arbitrator has the necessary qualifications in relation to his nomination by the parties. Rule 10.3 then moves to provide that the President further has to assert whether the arbitrator nominated by the parties or appointed by the institution has the time to dispense with the case. In relation to general standard three on disclosure of the IBA guidelines, rule 10.4 creates an obligation for an arbitrator to disclose to the registrar before his appointment by the President of any justifiable doubts regarding his impartiality or independence. 'The Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view'.[148] According to them, disclosure shows the capability of the arbitrator and further echoes his impartiality and independence.[149] To add to the

[146]Appointing an Tribunal [2011] http://www.out-law.com/en/topics/projects--construction/international-arbitration/arbitrators/ accessed 1st June 2014
[147]SIAC Rule 6.3
[148]ibid (n102) 10
[149]ibid

significance of the guidelines, it is the perspective of the parties that arbitral institutions have promoted to be important in determining the test for disclosure.[150]

Allowing parties to only nominate arbitrators and not appoint ensures that the panel is made up of experts from various regions of the world with different abilities.[151]Institutional appointment allows parties to select an arbitrator possessing the necessary skill, experience and expertise to provide a quick and effective dispute resolution process. However parties should avoid scenarios where they specify so many characteristics that arbitrators should possess that it becomes almost impossible to find them, thereby invalidating an arbitration agreement.[152] Based on the above the standards on impartiality and independence are more likely to be achieved under institutional rules. The scrutinizing aspect can cultivate a culture of trust in the rules because an appointing authority will align the selection of arbitrators to the guidelines such as those of the IBA.

The administration function in institutional arbitration does not suggest that the institution makes the decision for the parties, appointment of the arbitrators is based on what the parties have agreed. Rule 6.6 provides that

The terms of appointment of each arbitrator shall be fixed by the Registrar in accordance with these Rules and Practice Notes for the time being in force, or in accordance with the agreement of the parties

[150]ibid
[151]ibid (n143)
[152]ibid (n3) 47 see Frank-Bernd Weigand, Practitioner's Handbook on International Commercial Arbitration (2nd edn. Oxford 2010) 174-175

Therefore, the institution ensures that while arbitrators are appointed in accordance with the parties' intention, those intentions are upheld without compromising the arbitrator's impartiality. In appointing arbitrators, the discretion of the President of the institution would obviously be in line with the merits of the dispute and the expertise required expediting with the dispute.[153] The SIAC rules[154] provide for 21 days within which the parties must have agreed on an arbitrator where they have agreed to have a sole arbitrator making the procedure predictable. Where the parties have agreed on three arbitrator's rule 8.2 provides that

If a party fails to make a nomination within 14 days after receipt of a party's nomination of an arbitrator, or in a manner otherwise agreed by the parties, the President shall proceed to appoint an arbitrator on its behalf.

Under ad hoc rules it is difficult to come to an agreement on who the sole arbitrator should be because each party nominates. Thus, the discretion of the institution plays an important role in addressing such challenges under the SIAC rules.[155] If they agree on a sole arbitrator and agree before the 21 days elapse, the arbitration can actually prove to be costly.[156] The cost related to being unable to choose an arbitrator is foregoing their choice through an agreement of a sole arbitrator. Parties that are cost conscious in this regard are likely to be assisted by this discretion where they cannot intentionally agree on a sole arbitrator.

[153]SIAC Rule 10
[154]ibid Rule 7.2
[155]Latham & Watkins, 'Guide to International Arbitration' (2014) 7
[156]ibid

The SIAC rules further provide for instances where there is more than one party to the dispute. In such cases rule 9 provides that the claimants shall jointly nominate one arbitrator and the respondents shall do the same where three arbitrators are to be nominated. This has to be done within 28 days of the commencement of the arbitration. Once again the time stipulated is crucial to the arbitration for the purposes of certainty. On the other hand where one arbitrator is to be appointed all the parties must agree on this sole arbitrator within the stipulated period mentioned above.[157]

The rules governing how arbitrators are appointed under SIAC are exhaustive and structured. They also provide a means by which parties can avoid situations like that in the case of *Indian Oil Corp. Ltd. & Ors. v. M/S Raja Transport(P) Ltd*[158]where the Supreme Court found that where the arbitration agreement names the person who shall act as arbitrator, that choice may be disregarded if justifiable doubts as to that person's impartiality or independence exist, or if other circumstances warrant the appointment of a different arbitrator. However, the Court ruled for the Employee arbitrator to be appointed as an arbitrator after the High Court had dismissed him on the ground of being biased. The decision can be traced to the waivable list in the IBA guidelines which provide for situations that are "serious but not severe"

> 2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the

[157]SIAC Rule 9.2

[158]Supreme Court, India, 24 August 2009, available on the Internet at http://www.indiankanoon.org/doc/2073/

> parties if the affiliate is directly involved in the matters in dispute in the arbitration.[159]

A prerequisite is that the parties must be aware of the conflict and must consent to proceed with having the arbitrator. It is the parties' choice and one that they trust in. The challenge this has raised with reference to India is discussed at para 17 in the Indian Oil Corp case. The Supreme Court went on to state

> Before parting from this issue, we may however refer to the ground reality. Contractors in their anxiety to secure contracts from government/ statutory bodies/public sector undertakings agree to arbitration clauses providing for employee-arbitrators. But when subsequent disputes arise, they balk at the idea of arbitration by such employee-arbitrators and tend to litigate to secure an "independent" arbitrator. The number of litigations seeking appointment of independent Arbitrator bears testimony to this vexed problem. It will be appropriate if governments/statutory authorities/public sector undertaking reconsider their policy providing for arbitration by employee-arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in Arbitrators. A general shift may in future be necessary for understanding the word "independent" as referring to someone not connected with either party. That may improve the credibility of Arbitration as an alternative dispute resolution process.

This credibility can be afforded through an institution. A solution to such a problem probably lies in the IBA guidelines. Under the non-waivable red list arbitrators must recuse themselves from arbitral proceedings because the conflict of interest cannot be cured by disclosure if, for instance

[159]ibid (n102) 17

1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.[160]

Similar to the SIAC rules the AFSA rules under article 9 provide that

the Secretariat shall appoint an arbitrator or arbitrators in accordance with any agreement between the parties, and, to the extent that there is no such agreement on the number of arbitrators or the choice of arbitrator or arbitrators, the Secretariat shall appoint a single arbitrator; and provided further that, where three arbitrators are appointed, the Secretariat shall appoint one of them as chairman.

Furthermore the provisions of Article 14 of the AFSA rules mirror the SIAC rules regarding conflict of interest and state that

14.1. A prospective arbitrator shall, before his appointment by the Secretariat, in writing disclose to the Secretariat any facts and circumstances of which he is aware and which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties.

An arbitrator already appointed shall, if any facts or circumstances of which he is aware thereafter arise, which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties, in writing disclose the same to the Secretariat.

Having regard to this article, the concept of justifiable doubt is well founded in these institutional rules. Expectations of certainty particularly with reference to the arbitrator's

[160]ibid (n102)

independence and impartiality can be satisfied by submitting arbitration to both SIAC and AFSA.

5.3. Determination of Applicable law

There are three fundamental issues calling for decisions on what law applies: (i) what law governs the substance or merits of the dispute?; (ii) what law governs the validity of the arbitration agreement (treated as a separate agreement even when occurring in a clause of a larger agreement)?; and (iii) what law governs the arbitration proceeding (this law is also commonly known as the "curial law" or the "*lex arbitri*")?[161] Under the SIAC[162] rules the applicable law to the arbitration, the parties are free to designate the law applicable to the dispute, failing such the arbitral tribunal decides which law is closely connected with the substance of the dispute

The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law which it determines to be appropriate.

Just as in ad hoc arbitration, arbitrators are also entitled to apply the law of equity ex aequo et bono. However this is only where the parties have expressly stated.[163] This propagates the flexibility that arbitrators possess in that they can apply rules of law that will not act harshly against one of the parties.[164] There exists a belief that arbitrators are not under an obligation to apply the law, but to simply render justice. However, this is belief is viewed

[161]Tietie Zhang, 'Enforceability of Ad Hoc Arbitration Agreements in China, Ad Hoc Arbitration System' (2013) Cornell International Law Journal Vol.46 369
[162]Rule 27.1
[163]Rule 27.2
[164]ibid (n3) 82

as being old while contemporary developments suggest that arbitrators must apply the law. Despite this under the law of equity, arbitrators still "soften the impact of the law".[165]This is particularly so in cases where the standard of justice being used is that which the arbitrator aligns himself to. This debate while relevant might be swaying in favour of a strict application of the law. Most counsel will not draft arbitration clauses that grant an arbitrator the powers to decide *ex aequo et bono*.[166]

According to Professor Pierre Mayer, 'companies that use arbitration are seeking certainty, which they believe will result only from the application of law.'[167] This approach by companies challenges rule 27.2 and perhaps is contrary to the principles of predictability and certainty in institutional arbitration as it grants arbitrator's flexibility. However, the advantage is that it is left to the parties to decide whether to grant such powers or not. The rules[168] allow the tribunal to apply rules of trade to the dispute such as the *lex mercatoria.* The challenge here is similar and is probably against certainty. While the rules of trade are standard that can be used by parties, parties prefer to "use governing law with a developed jurisprudence that they know will be enforceable"[169] The current practice of preferring a specific governing law by most companies is probably the reason this clause is left to the parties to decide whether or not to empower arbitrators to do so. This preference however would not preclude parties from applying the *lex mercatoria* to assist in the interpretation or to complement the law governing the contract.[170] Rule 27.3

[165]ibid
[166]ibid
[167]ibid 83
[168]SIAC Rules 27.2
[169]ibid (n3) 83
[170]ibid

however would still be applicable and would allow the tribunal to take into account the *lex mercatoria* or *ex aequo et bono* in determining the applicable law. Rule 27.3 provides that

In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

As the rule expressly states, parties can be guaranteed with certainty that the tribunal would not only apply the law chosen or in the absence, the law it determines closest to the contract, but that other pertinent factors would be considered such as rules of law. The provisions of applicable law may be deemed to be aligned to party autonomy under the transnational theory. The parties can choose a national law that is unrelated, and that is of a neutral country that both of them have no relationship to.[171] Of course, the only limitation is the mandatory[172] law of the seat of the arbitration and the public policy of that country. Currently, the bill sets out a list of mandatory provisions from which the parties cannot derogate from contract.[173] These mandatory provisions support this limitation but serve to guarantee a specific governing legal order. If Malawi is the seat, then its procedural law[174] will decide on the involvement of courts on matters such as disclosure, witness evidence and limitation periods, formalities as well exclusion of court jurisdiction and enforceability of the award.[175]The bill provides[176] that

[171]ibid
[172]Law that cannot be excluded by the contract term
[173]ibid (n124) First Schedule
[174]ibid
[175]http://www.out-law.com/en/topics/projects--construction/international-rbitration/international-arbitration-substantive-procedural-and-mandatory-rules/ date accessed 9th June 2014
[176] ibid n(124)

(4) It shall be immaterial whether or not the law applicable to the parties' agreement is the law of Malawi.

(5) The choice of a law, other than the law of Malawi, as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part, shall be equivalent to an agreement making provision about that matter.

(6) For purposes of subsection (5), an applicable law determined in accordance with the agreement of the parties, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

Of course it's noteworthy that positive impact on arbitration of the *lex arbitri* depends on how efficient the Court system is in that particular country.[177] Since arbitration is a much quicker alternative from litigation, the only other way in which this challenge can be addressed is for the parties to refer to institutional rules which are more predictable.[178] Institutional arbitration itself submits to the mandatory provisions, pointing once again back to the efficiency of the Court System. In rule 1.1 of the SIAC rules

Where parties have agreed to refer their disputes to SIAC for arbitration, the parties shall be deemed to have agreed that the arbitration shall be conducted and administered in accordance with these Rules. If any of these Rules is in conflict with a mandatory provision of the applicable law of the arbitration from which the parties cannot derogate, that provision shall prevail.

[177]ibid (n124)
[178]ibid

An example of a mandatory provision which points to the Courts efficiency is a stay of legal proceedings. A party to an arbitration agreement does have a remedy in that a stay of court proceedings in favour of arbitration can be obtained where any party to an arbitration agreement institutes proceedings in court against another party to the arbitration agreement, in respect of a matter which falls within the scope of the arbitration agreement.[179]Under the bill, granting of a stay is mandatory, and the court to which an application has been made "shall" make an order to stay proceedings so far as the proceedings relate to the matter that is the subject of the arbitration agreement.

Arbitrators and Courts will usually adopt different approaches when determining the applicable law. While some resort to the traditional approaches of conflict of laws, others will apply the transnational approach applying different rules.[180] From the wording of section 7 of the bill, the transnational approach has been adopted and arbitrators would be expected to follow that approach. SIAC and AFSA institutional rules encompass this transitional approach. Under the AFSA applicable law rules both approaches have been adopted. However, compared to the SIAC rules they have been extended to explicitly uphold the law of the seat as well as the public policy of South Africa. Article 15.3 of AFSA rules provides that

Where the law to be applied is not South African law (hereinafter referred to as "foreign law"), the arbitrator shall apply such foreign law only if it can be ascertained by him readily and with sufficient certainty and only to the extent that such foreign law is not opposed to South African principles of public policy or natural justice. Where the

[179]ibid (n124) s12
[180]ibid (n161) 369

arbitrator informs the parties that he is unable to ascertain such foreign law readily and with sufficient certainty, it shall be the duty of the party relying on such foreign law to prove the relevant foreign law by means of evidence. In the absence of such evidence, or where the arbitrator, despite such evidence, is unable to determine such foreign law, he shall apply South African law.

Here the party relying on the foreign law must prove that that law is applicable. However, South African law as the law of the forum will be applied where this can't be done, and usually Courts will rely on the forum law.[181] According to the conflict of laws approach

> The absence of an express choice will lead to an inference of the proper law being that of the seat of the arbitration, i.e., the place (country / law district) where the arbitration is centred. Failing both an express choice and an agreement providing for the seat of arbitration, the appropriate choice of law is that of the law of the country with which the arbitration process is most closely connected.[182]

However, it has been accepted in the House of Lord's decision in *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd*[183]that the proper law and the procedural law may be different. So under AFSA rules the procedure to determine the choice of law is extensive and takes the two approaches of determining the applicable law as stated above. What this seems to achieve is certainty, in the sense that if the principles of trade, the choice of parties cannot be determined then South African Law shall apply. One

[181]ibid 370
[182]Gwyn Tovey, Lecture 8 Jurisdiction and enforcement (1992-2001) <http://www.nadr.co.uk/articles/articles.php?category=61> 1 date accessed 18th December 2013
[183][1970] AC 583.

mandatory provision under this section is that the arbitrator has to apply South African law of evidence to the arbitration.[184]

Party autonomy with respect to applicable law is well founded under institutional rules and supported by law of the seat. Due to the scrutiny function of the institution the process to arrive at the applicable law especially absent a choice by the parties is predictable. They can be certain that their intention will be arrived at.

5.4. The effect of the choice of Seat of arbitration

The seat of arbitration is not to be confused with the place where the proceedings take place as discussed in Bhatia and Astro earlier. By opting for Malawi to be the seat of arbitration the parties are electing Malawian procedural law the *lex arbitri* to be applied to arbitration. Before parties select the seat, they must consider what effect this has on the conduct of the arbitration as well as the enforceability of the award.[185]Mandatory provisions that cannot be derogated from give the seat its significance. Hefty criticism has led to reversal of earlier practice by the Court in Australia and Singapore, which gave effect to the parties opting out of the law of the seat by adopting institutional rules. The reversals in *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt Gmbh v. Australian Granites Limited,* Queensland Court of Appeal, Australia, [2001] 1 Qd R 461 and *John Holland Pty. Ltd. v. Toyo Engineering Corp. (Japan)* [2001] SGHC 14 March 2001 by the

[184]AFSA Article 15.3
[185]ibid (n3) 17

Australian and Singapore courts respectively now make it clear that adoption of the institutional rules does not mean a rejection of the law of the seat.[186]

The benefits of ICA can be seen where a country is a contracting party to the Convention. Contracting states are obliged to recognise arbitral awards as binding and enforce them. To date, 149 states are parties to the New York Convention, but Malawi is not. This means that the award issued by a tribunal seated in Malawi if she becomes a party can be enforced in any of those other 148 states. The comfort this provides parties is perhaps one of the most important features of ICA.[187] The bill makes provision for Malawi becoming a member state to the convention in Sections 82 (1) and 82 (2) (b). Enforceability under the convention can be considered in light of the transnational approach, and it is also a major component of the certainty feature in arbitration. Institutional arbitration also affords parties the autonomy to select the seat having regard to the impact of that law on the arbitration. Section 6 of the bill allows the parties to choose the seat of arbitration and this extends to an institution being the seat. What this suggests is that parties will seek a jurisdiction that is a contracting state. To complement this under institutional rules, this party autonomy is provided under SIAC rule 18 (1) and (2) that

The parties may agree on the seat of arbitration. Failing such an agreement, the seat of arbitration shall be Singapore unless the Tribunal determines, having regard to all the circumstances of the case that another seat is more appropriate.

[186]In the Eissenherk and John Holland decisions

[187]Oommen Mathew and Charis Tan Eversheds LLP, 1 September 2013 Arbitration procedures and practice in Singapore: overview Thomson Reuters p.1.

The Tribunal may hold hearings and meetings by any means it considers expedient or appropriate and at any location it considers convenient or appropriate.

In deciding on arbitration the parties seek control of the process and the degree of such control needs to be assessed in light of the law of the seat. The bill in section 43 accords the parties the right to agree on the taking of evidence of witnesses, the preservation of evidence, preservation of property, sale of goods and the granting of injunctions. If the parties don't agree then the Court assumes such powers in support of the arbitral proceedings. Even in matters where the seat is outside Malawi the bill provides for the Court to intervene in assisting the arbitration with regards to those aspects. The Courts intervention is a standard set by the Bhatia case, and it is encouraging to note that back home the bill provides this kind of certainty for parties. Other laws might not be so friendly and might allow Courts to intervene more often than is necessary for supervising the arbitration.[188] A possible solution to ensuring that the supervisory functions are dealt with in accordance with their wishes, the parties can opt for resorting to institutional rules to govern the arbitration process. Reference to choosing an arbitration institution as the seat carries with it the advantage that parties subscribe to supervisory functions of their choice. Under rule 22 of the SIAC rules, the tribunal is granted powers to decide on witnesses and in rule 22.4 to determine the taking of evidence of witnesses.

The SIAC and AFSA rules in as far as the seat of arbitration is concerned are no different if not the same. Decisions as to the seat of arbitration are based on

[188]ibid (n3) 18

- The formal requirements (the national arbitration law, former arbitration enforcements, neutrality and impartiality)
- The law governing the substance of the dispute
- Convenience (location, prior use by the organization, industry specific use, language)
- General infrastructure (costs, access, physical infrastructure)
- Location of the arbitration institution
- Choice of the seat made by the other party
- Recommendation by counsel[189]

From a survey conducted by White&Case in 2012 International Commercial Arbitration Survey: Current Practices and Preferred Practices in Arbitral Process as per the list above 62% of the respondents of that survey cite the most important factor for their choice of seat as a "formal legal infrastructure" at the seat.[190]Due to the fact that arbitration laws are based on the model law, the bill is a precursor to the choice parties can make.[191] The mandatory provisions that supervise the arbitration under the bill are therefore, crucial in determining whether Malawi can attract parties to select her as the seat. Under the AFSA rules a procedural example that parties might consider is article 15.4 which makes its mandatory for South African law to apply when taking evidence. It would, therefore, be of significant importance for the parties to ascertain what South African Law provides. Article 15.3 provides that

The arbitrator shall apply the South African law of evidence; provided that he may allow a party to present evidence in written form, either as signed statements or in affidavit form, in which event any other party may require the deponent to attend the proceedings

[189]http://arbitrationpractices.whitecase.com/news/newsdetail.aspx?news=3787 accessed 7th June 2014
[190]ibid
[191]ibid

for oral examination and cross-examination, and, if the deponent fails to attend and submit to be examined and cross-examined, the arbitrator may exclude such evidence in written form altogether or may attach such weight to it as he thinks fit.

According to *Noble China Inc. v. Lei Kat Cheong*, Ontario Court of Justice, Canada,[192] the parties' choice must not be in conflict with the mandatory provisions of the law of the seat. In support of this, the bill grants the tribunal the powers to decide on the procedure of evidence to be taken. This might suggest flexibility of the arbitral process, even though flexibility is not the only determinant for the choice of seat.[193] Flexibility based on party autonomy can influence the choice of parties. The bill provides that

33. - (1) The arbitral tribunal shall decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include-

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

[192] 4 November, [1998] CanLII 14708 (ON SC)

[193] ibid n(3) see also Ar. Gör. S DursunA Critical Examination Of The Role Of Party Autonomy In International Commercial ArbitrationAnd An Assessment Of Its Role And Extent (2012) Yalova Üniversitesi Hukuk Fakültesi Dergisi(2012/1).162 172

Leaving the choice of the law of evidence or rules as right for the parties is an acceptable practice. The IBA[194]rules of evidence are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirm that they find the IBA Rules useful.[195] On the other hand, institutional rules such as article 15.3 of the AFSA rules might prove restrictive and deter parties from such rules depending on what the law of evidence of South Africa stipulates.

5.5. Conclusion

From the preceding paragraphs institutional rules are effective because of the procedures they provide for, be it appointment of arbitrators, applicable law or the seat of arbitration. What is very clear is that the support of the national law is also required particularly where mandatory provisions are concerned since these cannot be derogated from. The SIAC and AFSA rules contain provisions that are sequentially arranged to sieve out any discrepancies that may arise, notwithstanding the remedies that parties have, for instance, to challenge the appointment of arbitrators. This perhaps is one of the destinations of the parties' quest for certainty in ICA.

Under these rules arbitral tribunals are granted the discretion to apply rules of law or the governing law as well as the discretion to be aided by rules of law to interpret the substantive parts of the dispute. This scope does suggest a discretion that allows tribunals to be exhaustive and look at the dispute from a bird's eye view, thereby satisfying the

[194]International Bar Association Rules of Evidence
[195]ibid n(193)

parties' expectations of certainty. Based on this, both institutional rules do provide parties with certainty in ICA.

5.6 Expedited procedures rules and the quest for certainty

5.6.1. Introduction

Beyond choice of law, choice of seat and choice of arbitrators expedited procedures provide parties with certainty in ICA. As concluded in chapter 4 and earlier sections of this chapter, there's a strong suggestion that both regimes satisfy the quest for certainty. This section seeks to further compare ad hoc and institutional arbitration. To a certain extent there are growing concerns about arbitration becoming more and more like litigation. The time it takes for awards to be rendered, the administrative fees and the costs of attorneys as well as arbitrators have become costly for parties. This is more the reason institutions have had to revise their rules to accommodate expedited procedures.[196]

5.6.2 Expedited Procedures under Institutional rules

It is now well established that there are costs and delays in arbitration, calling for quicker disposal mechanisms of arbitration referred to as the "fast track" basis.[197] Under the SIAC rules, the Registrar can reduce the time limits such as granting the award within six months; resort to only one arbitrator; leave it to the parties to agree on which evidence will be taken and in absence hold hearings for witnesses; experts and hear all arguments

[196]Sutherland Asbill & Brennan LLP, 'Expedited Arbitration Rules'(2012) 2
[197]Ashurst international arbitration group, 'Expedited Procedure In International Arbitration' (2014) 1

and give an award in summary unless otherwise requested by the parties.[198] The fast track procedures serve to ensure;

- Optimal efficiency and time-saving
- Significant reduction in arbitration and legal costs
- Potential mitigation of loss for both parties
- Simplicity and a less complex process
- Arbitration in accordance with the expedited procedure regardless of the amount in dispute subject only to the SIAC Chairman's discretion where such procedure is not appropriate.[199]

This serves to explain why 20 applications for the expedited procedures were made out of 88 cases with SIAC after the expedited procedure rules had been incorporated.[200] Of course one potential challenge noted by Hogan Lovell's is that the agreement of the parties is at risk with fast track arbitrations.[201] This is because the Registrar can resort to appointing one arbitrator instead of an agreed three, at which point the defendant must always be prepared and weary of such applications.[202] On the other hand though, it can be argued that by subjecting to the SIAC rules, both parties have anticipated applications of such a nature. Still more, the practice of fast track arbitration requires arbitrators that are well experienced and parties that have the resources to resort to it.[203] One feat of the AFSA rules is that supplementary rules of the expedited procedure have been incorporated. Various commentators are of the view that institutionalized arbitration rules should have

[198]SIAC Rule 5

[199]http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-31-29/archive-2012/240-the-siac-expedited-procedure accessed 6-22-14

[200]https://www.international-arbitration-attorney.com/wp-content/uploads/the-expedited-and-emergency-arbitrator-procedures-under-the-siac-rules--ef-80-adsix-months-on-how-have-th.pdf 2 accessed 6-22-14.

[201]ibid 3

[202]ibid

[203]Mireze Phillipe, 'Are Fast-Track Arbitration Rules Necessary'?https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlaw0105202718125.pdf 254 accessed 22nd June 2014

supplementary expedited procedures.[204] They argue that these would be beneficial for parties that don't have the capacity to draft tailor made rules or those that do not want to draft them at all.[205] The support of administrative functions highlights the importance of institutional arbitration.

5.6.3 Expedited Procedure under Ad Hoc rules

Ad hoc rules do provide expedited mechanisms. Under the bill, parties may agree on the powers of the arbitral tribunal in case of failure by a party to do something necessary for the proper and expeditious conduct of the arbitration.[206] However, this is mostly in relation to commission or omission on the part of either the claimant or the respondent and not with a view to fast tracking the arbitration. For example, the tribunal may continue proceedings in the absence of a party or without any written evidence or submissions on his behalf, as the case may be, and may make an award on the basis of the evidence before it if without showing sufficient cause the party fails to attend or be represented at an oral hearing of which due notice was given.[207] This discretion granted to the tribunal requires arbitrators that can execute their duties very well. In contrast to expedited procedures under institutional rules, this does not provide certainty for parties to arbitration opting to employ the procedures. Correlated to resorting back to litigation, parties will apply to national courts for such relief just as it was prior to their development.[208]

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[204] ibid 257
[205] ibid
[206] s40 (1)
[207] s40 (1) (b) (ii).
[208] Raja Bose and Ian Meredith, 'Emergency Arbitration Procedures: A Comparative Analysis' (2012) Int.A.L.R., Issue 5 Thomson Reuters Professional UK Limited and Contributors 186 see also Fletcher J Sutherland Asbill & Brennan LLP *Expedited Arbitration Rules* (2012) 2

Expedited procedures require a vast amount of resources to enable the institution to make a decision at any time within limited periods of time. Besides the infrastructure and support staff of the institution, the expertise of the arbitrators is crucial for the effective application thereof.[209] Mirezze Phillipe concludes by begging the question whether fast track is indeed necessary when the institutional rules have already provided a faster mechanism.[210] He cites five questions that a practitioner must address before a fast track arbitration is considered. These are questions that depending on their answer do further test the question of certainty in arbitration.

i. Do I want to go faster?
ii. Do I have a good reason for doing this?
iii. Will I be able to cope with such an expeditious procedure?
iv. Will the opposing party also be capable of this?[211]

An answer in the affirmative advances Malawi's ambitions of becoming an international commercial arbitration hub. As previously mentioned counsel in international corporations in the infrastructure sector, hire from a pool of highly skilled professionals globally who are at par with the requirements of fast track procedures. Phillipe concludes that fast track arbitration is not for everyone due to the issues such as unrealistic deadlines.[212]However in jurisdictions without resources of that level they can still be utilized where;

i. the dispute is low-value and/or has little impact on the ongoing business of the parties;

[209]ibid
[210]Special Counsel, Secretariat of the International Court of Arbitration, International Chamber of Commerce, Paris, France
[211]ibid (n203) 284
[212]ibid

ii. the case is straightforward and can be dealt with on a documents-only basis and in a summary award; and
iii. the other side is agreeable to using the expedited procedure and unlikely to employ delaying tactics[213]

Based on these scenarios reference to straightforward cases probably explains why the SIAC rules have capped the amounts that can be referred to disputes to S$ 5,000,000.[214] Under the AFSA rules there is no threshold, which supports the idea that fast track rules are not for everyone.[215] In comparison the SIAC rules would be more suitable to the Malawian context.

5.6.4. Conclusion

The fast track rules provide a speedier mechanism to resolve disputes and where the three circumstances arise, they are appropriate.[216] It is the scrutiny function under the institution of whether there it is appropriate to have a fast track arbitration; the appointment of the arbitrator; the procedure in the arbitral proceedings; the fixed time for delivery of the award and the provision of a summary of the award that satisfies the quest for certainty. However institutional arbitration does support the complex nature of fast track procedures.

[213]ibid (n208)
[214]Rule 5.1 (a)
[215]Art 23
[216] ibid n(208)

Chapter 6

Certainty and the Transnational Approach

6.1. Introduction

The findings discussed below are not new, they have been examined by different authors.[217] What makes them different however is that they are competent of informing which rules are ideal for Malawi with particular reference to the freedoms that are necessary to promote ICA. Placed in the context of the transnational approach, the findings suggest institutional arbitration provides parties with certainty in their choice or arbitration rules.

To this point there are still challenges with regard to the impartiality of arbitrators for example in how the parties nominate arbitrators in ad hoc arbitration because of the parties' autonomy, while the contrary is evident in institutional arbitration due to the scrutiny function. Correlated to this is the potential of delaying the arbitral proceedings and the likelihood of resorting back to litigation. National laws such as the bill must deviate from the model law to take this into account. It is also not surprising that parties to arbitration feel the need for a law to be applied, thus the importance of the law of the seat has become pivotal despite arbitration attempting to minimize its supervisory role. However the transnational approach gives arbitrators the powers to use other principles of

[217]ibid (n2)

law such as equity and trade to apply to the arbitration absent a choice by the parties. In order to make arbitration more attractive, institutional rules have included provisions that are flexible for parties such as the multiparty arbitrations and expedited procedures, which all aim to expeditiously deal with complex disputes.

6.2. The Parties freedom to have the dispute decided by arbitrators selected by the parties

Party autonomy is well reflected under both sets of arbitration regimes.[218]The freedom is well provided for under institutional rules even though the parties only nominate and the institution appoints arbitrators.[219] However what seems apparent is the likelihood of Court interference in ad hoc arbitration. Firstly this interference may come in the form of challenges to the arbitrators based on the conflict of interest standards by the IBA due to the lack of procedures in the bill[220] ensuring their impartiality. Correlated to this is likelihood that the parties' choices will be influenced with a view to get a result in their favour, by nominating an arbitrator they're familiar with. It has been mentioned earlier that the intention in ICA is to deviate from litigation. The bill, supports this in that only supervisory functions are emphasized.[221]

Historically the OHADA uniform laws serve as an example of Court interference in arbitration.[222]However the judge arbitrator can also be a means of providing efficient ways

[218]Arbitration and Mediation Bill 2011, SIAC rules and AFSA rules
[219]SIAC rule 5, AFSA article 9
[220]Section 18
[221]Section 76
[222]Richard Garnett, 'Progress Towards Harmonisation International Arbitration Law' (2002) Melbourne Journal of International Law Vol 3 10

of arbitration in terms of speed. The parties' autonomy of selecting arbitrators they agree on is well supported by the bill. However exhaustive procedures dealing with impartiality and independence can only be inferred from other sources that are not binding, but accepted, such as the IBA guidelines. On the other hand under the AFSA and SIAC rules express provisions have been provided for with a view to ensure that party autonomy is respected and achieved through administrative functions of these institutions. In other words gaps in the bill are covered by the institutional rules.

Scrutinizing of arbitrators by the institution provides a more structural and absolute method that can avoid challenges of the arbitrators by parties, thereby ensuring that the time limits in conducting the proceedings are adhered to.[223]To this end the parties are certain. Furthermore the multiparty nature of international contracts, are covered by procedures related to having joint arbitrations which allows a predictable form of ICA.[224]Under this arrangement the various disputes are conducted by the same arbitrators without the parties having to initiate different arbitrations thereby selecting different arbitrators altogether.[225]

[223]SIAC Rule 6.4, AFSA Article 9.1.3
[224]SIAC Rule 9
[225]http://www.nortonrosefulbright.com/knowledge/publications/21953/international-arbitration-newsletter date accessed 9th June 2014

6.3. The parties freedom to have the dispute determined according to whichever law or other basis is chosen by the parties

Absent party autonomy to choose the applicable law to their arbitration, international commercial arbitration is not attractive to commercial parties.[226] The bill and the institutional rules support this concept by giving the parties the freedom to choose the applicable law to the arbitration.[227] It is crucial for the parties to carefully select their arbitrators because they in turn deal with questions of which law applies especially in cases where no law has been chosen. Usually parties do not choose the applicable law when they have subjected their arbitration to the model law and in so doing it is up to the arbitrators to decide the applicable law. The substantive law of the contract implies that it is also the law of the arbitration agreement.[228] Case law and various commentators suggest that this is why the law of the seat is important because when dealing with validity of the arbitration agreement, arbitrators will most likely apply it especially in cases where the parties have also not agreed as to whether the *lex mercatoria*[229] or the *ex aequo et bono*[230] principles will apply.[231] Alternatively the parties will agree that such principles be used to assist with the interpretation of the arbitration agreement. Interestingly *voie directe* allows the arbitrators to apply any law without recourse to conflicts of laws provision if the parties have agreed so.[232]

[226]ibid (n73) 7
[227]s6, SIAC r27 and AFSA a15
[228]ibid (n3) 70
[229]ibid 74
[230]ibid 77
[231]ibid
[232]ibid (n3) 81

Under both ad hoc and institutional rules the application of either the law governing the arbitral dispute or the rules of law is well founded. Such freedom correlates to party autonomy and certainty because the parties know under what conditions the arbitration proceedings will take place and under what conditions they can exercise their rights. The applicable law will then lead to the parties' choice of the seat of arbitration. There is a belief that certainty can only be derived from the application of the law[233] and as seen above, the law of the seat plays a crucial role. With reference to recognition and enforcement of arbitral awards, the impact of the law of the seat has now made the double exaquateur rule diminish according to the decision in Astro. [234] It is also accepted under institutional rules that hearings can take place anywhere in the world even if the seat is elsewhere.[235] If the seat is Malawi, Malawian procedural law applies to the 'involvement or intervention, as appropriate, by the courts exercising jurisdiction over the seat'.[236] Under the bill the same would apply if the institution chosen as the seat by the parties was either in South Africa or Singapore under the AFSA and SIAC rules respectively. Where applicable law is concerned ad hoc and institutional rules provide the parties with the much sought after certainty in ICA.

[233]ibid 83
[234]ibid Astro (n133)
[235]http://www.clydeco.com/insight/articles/the-seat-of-arbitration-why-is-it-so-importantaccessed 20-7-2014
[236]ibid

6.4. The Parties' freedom to have the arbitration proceedings conducted in the manner agreed between the parties

An arbitration centre is a prerequisite for parties when making investment decisions[237] and its reputation and rules are of paramount significance.[238] The nature of international contracts geared towards investment for example in the construction industry, is that they are multilayered and the corporations seek to complete projects on time.[239] This has given rise to the expedited procedures, which are left to the discretion of the tribunal in ad hoc arbitration, to assist such parties to quickly deal with their disputes. The necessity of agreeing to utilize these fast-track procedures however is heavily dependent the expertise of the support staff of the arbitration institution, the arbitrators and also counsel for the parties.[240] For commercial entities, the availability of such procedures is attractive given the colossal sizes of projects and the need to complete them on schedule. The speed and administrative supervision offer certainty for them.[241]Of course this is built on these parties' capability of resourcing the conduct of fast-track procedures before agreeing to submit disputes under them.[242]Correlated to administration, the challenge with such procedures in ad hoc arbitration is that they're difficult to administer absent the administrative functions. Even in the event that the parties agree in ad hoc arbitration to subject their arbitration to the expedited procedure, it is highly likely that the administrative function of an institution will be reverted to. Therefore fast track

[237]ibid
[238]ibid (n3) 9
[239]ibid (n66) 3
[240]SIAC Rule 5 and AFSA Article 23
[241]ibid (n200) 3
[242]ibid (n203) 284

procedures under institutional rules provide the parties with the highest degree of certainty.

6.5. Conclusion

From the discussion, it is concluded that in contrast to ad hoc arbitration rules, institutional arbitrations rules are palpably acceptable. There are similarities between the two sets of regimes, but what is readily apparent to the commercial party in institutional arbitration is that a certain mechanism governing the arbitral proceedings will be employed. Certainty amongst the parties' lies in the scrutinizing function of institutional rules aimed at securing the parties' rights and obligations. Of course the bill as an ad hoc arbitral regime attempts to make arbitration speedier, but attractive methods such as the expedited procedures are absent. Due to their demanding nature it would be difficult to expect them to be provided for in national law without any administrative authority over them. Certainty in ICA is more reflected in institutional rules, which explains why they are preferred by multi-national organisations.

Chapter 7

Conclusions

The institutional rules proposed for the arbitration centre are based on the model law, but they raise the threshold through administrative functions, exhaustive procedures and innovative features. By opting to use institutional rules commercial parties are likely to guarantee their rights and obligations. From the discussion of the findings it is evident that institutional rules are similar (*Disce omnes),* but it is how they raise the threshold to suit Malawi and the SSA that is relevant.

It is also evident that party autonomy in the appointment of arbitrators, choice of law and seat as well as other expeditious methods of dealing with disputes are prevalent in ICA. Under the current regime in Malawi, this is not the case. From the discussion above the bill as the*lex arbitri* can provide parties with certainty. Furthermore the freedom of parties to choose the institutional rules be it would be supported by a strong legal framework that is allows for the subjective and objective tests to be applied. The Astro and Bhatia cases affirm this position. A decision to establish an arbitration centre would align Malawi's aspirations of drawing more foreign direct investment with current practice in the world. Resulting from this is the likelihood of increased trade in Malawi.

The bill, AFSA and SIAC rules have all been analysed in as far as the extent to which they contain provisions that provide certainty for commercial parties. A closer examination of the bill in the preceding chapter does support the idea that the absence of an administering institution can pose a challenge to the rights and obligations of parties to ICA. Due to this absence the likelihood of seeking the assistance of a court is still rife. In light of the nature of contracts entered into by for example multinational companies, complex disputes are bound to arise. These disputes would be better administered by arbitration institutions as opposed to ad hoc. Constructed on this *while ad hoc arbitration is the accepted practice, the AFSA and SIAC rules are likely to provide commercial parties with the highest degree of certainty in Malawi.*

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APPENDICES

APPENDIX 1: LIST OF STATUTES

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