The PCA & other international arbitral institutions: developments in Mauritius

PCA-Young ICCA Practitioner Training Day
Labourdonnais Hotel, Port Louis, Mauritius, 2 May 2012

Judith Levine
Permanent Court of Arbitration
Legal Counsel and PCA Representative in Mauritius

Overview

1. Ad hoc v. Administered Arbitration
   - Advantages and disadvantages
   - What do parties want?

2. Snapshot of International Arbitral Institutions
   - Some key players: ICC, LCIA, regional bodies
   - Factors to consider and how to opt for an institution

3. Permanent Court of Arbitration
   - Background
   - Activities and types of cases

4. International Arbitration in Mauritius
   - Mauritius as a centre for international arbitration in the region?
   - What has Mauritius done? 2008 Act, PCAHost Country Agreement, establishment of LCIA-MIAC joint venture, what next?

www.pca-cpa.org
I. Ad hoc v. Administered Arbitration

- **Ad hoc**
  - Arbitration conducted by the parties and the arbitrators without the assistance of an institution, in accordance with a mechanism specifically crafted for their dispute.

- **Administered**
  - Arbitration administered by a specialist arbitral institution in accordance with a set of rules.
  - Parties pay the institution to assist in the initiation of the arbitration and constitution of the tribunal, to intervene as appropriate before the arbitrators are selected, to assist throughout the process with matters such as payments, notice, mailings & hearing facilities

---

www.pca-cpa.org

---

I. Ad hoc v. Administered Arbitration

- What do parties want?

  **Finding: Institutional arbitration is generally preferred to ad hoc arbitration**

  86% of awards that were rendered over the last ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations. These results are consistent with our 2006 study. The corporations indicated that the main reason for using institutional arbitration was the reputation of the institutions and the convenience of having the case administrated by a third party.

---

www.pca-cpa.org  www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf
1. **Ad hoc v. Administered Arbitration**

1. **A comprehensive set of rules**
   - **Administered**: parties incorporate into their agreement a complete set of tested, established institutional arbitration rules. Including those dealing with defaulting respondents.
   - **Ad hoc**: purely ad hoc agreements risk omitting key elements, encountering procedural stalemate and forcing a claimant to resort to court.
   - Solution: even in ad hoc cases, parties may adopt a set of Rules, e.g. UNCITRAL Rules
   - Less of a risk if tribunal and parties sophisticated or have constructive ongoing relationship

2. **Support Services**
   - **Administered**: many institutions provide trained, legally qualified, experienced staff to administer the case.
   - Available to assist arbitrators and parties on procedural matters, can serve as tribunal secretary
   - Share institutional knowledge and familiarity with rules
   - Act as depository or conduit for submissions
   - Establish and manage deposits
   - Handle billings and payments
   - Arrange hearing rooms, interpreters, court reporters etc.
   - Ensure arbitration runs smoothly
   - **Ad hoc**: no staff, institutional knowledge or support.
   - Solution: can still seek administrative support for some aspects of dispute
   - Less of an issue if sophisticated parties, counsel, tribunal
1. **Ad hoc v. Administered Arbitration**

3. **Expense**
   - **Administered:** parties need to pay administrative fees
   - Fee structure depends on institution *(ad valorem fixed fee, hourly rates, case-by-case approach)*
   - **Ad hoc:** no administrative fees
   - But can end up less cost effective if paying high hourly rate for performance of administrative tasks by arbitrators – could be resolved by appointment of a secretary
   - Administrative fees and arbitrator costs are insignificant compared with legal fees in most commercial cases
   - Could be more expensive if uncertainties or lack of time limits lead to prolonged proceedings or court

4. **Flexibility**
   - **Administered:**
     - Typically considered less flexible
     - But while parties must abide by some institutional requirements (such as regulation of initiation of the case and issuance of award), the parties retain latitude to tailor the proceedings to fit their case. Nearly all sets of rules provide for this (e.g. LCIA Rules, art. 14(1)).
     - E.g. *Abyei Arbitration* (PCA): institutional rules used, but adapted by parties to suit case in terms of deadline, languages, publicity, finance, method of appointing arbitrators
   - **Ad hoc:** completely flexible and can be tailored
I. Ad hoc v. Administered Arbitration

5. Arbitrator appointments, challenges & fees
   - **Administered:**
     - Institution can assist with: appointing arbitrators, resolving challenges to arbitrators, setting arbitrator fees and managing payments
   - **Ad hoc:** if not pre-existing agreement:
     - may be stalemate if one side fails to appoint arbitrator,
     - Awkward fee negotiations between parties & arbitrators
     - If UNCITRAL Rules, provision for appointing authority (if none agree, PCA secretary-general has default role)

---

6. Enforceability: perceived “cachet” or “comfort”?

  “there is something more majestic, more dignified and more comforting” about institutional arbitral awards.

- **Friedland, Arbitration Clauses for International Contracts, p. 40:**
  “an enforcing court can be assured that an award rendered under the aegis of an established arbitral institution has ensued from a proceeding under well-tested rules applied by accomplished arbitrators, one or more of whom may have been appointed by the institution itself”.

- **Lew, Mistelis, Kroll, Comparative Int’l Comm’l Arbitration (2003), p. 34:**
  “A strongly perceived advantage of institutional arbitration is the cachet behind the name of the institution. Accordingly, especially in countries where there is a political interference or where the courts and law are not always arbitration friendly, parties consider it beneficial when seeking to enforce an award which was issued by, or which carries the name of, an internationally respected institution”

---

www.pca-cpa.org
I. Ad hoc v. Administered Arbitration

- **Conclusions**
- Administered arbitration is generally preferred to *ad hoc*
- There can be a third way between purely *ad hoc* and full administration, e.g. semi-administered, “hybrid”, “institution lite” [varying degrees to which parties may choose to have an institution assist in one or more aspects of dispute – appointments, fees, etc]
- As will be seen, under the 2008 Mauritius International Arbitration Act, even *ad hoc* arbitrations, with place of arbitration in Mauritius, have some institutional safe guards and deadlock breakers.

---

2. Arbitral Institutions

- **How to Opt for Administered Arbitration?**
  - a) Include model clause from institution in contract, e.g.: LCIA

  "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

  The number of arbitrators shall be [one/three].
  The seat, or legal place, of arbitration shall be [City and/or Country].
  The language to be used in the arbitral proceedings shall be [ ].
  The governing law of the contract shall be the substantive law of [ ]."

---
2. Arbitral Institutions

How to Opt for Administered Arbitration?

b) Once dispute has arisen, can still provide for administration in first procedural order or terms of appointment.

Case Administration

The International Bureau of the PCA shall act as registry (the “Registry”) in the arbitration on the following terms:

(a) The Registry shall maintain an archive of filings and correspondence and handle Party deposits and disbursements. The Registry shall also make its hearing and meeting rooms in the Peace Palace available to the Parties and the Tribunal at no charge, costs of catering, court reporter, simultaneous interpretation, or other technical support associated with hearings or meetings at the Peace Palace shall be borne by the Parties.

(b) Registry expenses such as air courier costs and bank transfer fees shall be paid in the same manner as the Tribunal’s fees and expenses (paragraph 5).

(c) The Tribunal may appoint a member of the Registry to act as Administrative Secretary. The Administrative Secretary and other members of the International Bureau shall carry out administrative tasks on behalf of the Tribunal, and shall bill their time in accordance with the PCA Schedule of Fees.

(d) The contact details of the Registry are as follows:

2. Arbitral Institutions

Some factors to consider in choosing an institution:

- Whether the institutional rules specify a place of arbitration
- Where the rules provide for confidentiality
- Whether rules allow joinder of third parties
- Whether institution only appoints from panel of arbitrators
- Quality of case administrators and extent of administrative support
- Reputation and enforceability
- Does institution offer expedited processes? Other forms of ADR?
- Does institution have experience with specialized type of dispute?
- How institution calculates arbitrator fees and arbitration costs

www.pca-cpa.org
2. Arbitral Institutions

Some key international institutions

- **ICC** (International Chamber of Commerce Court of International Arbitration)
  - Headquartered in Paris but can administer cases all over the world
  - Experienced with international commercial disputes
  - Has a network of “national committees” that assist with appointments
  - Has a “Court” of experts tasked with making certain decisions in the arbitral process, including scrutiny of awards
  - Calculates administrative and arbitrator fees according to amount at stake in dispute
  - [www.iccwbo.org/court/arbitration](http://www.iccwbo.org/court/arbitration)

- **LCIA** (London Court of International Arbitration)
  - Headquartered in London, with London as default seat of arbitration in Rules
  - Contains confidentiality provisions in rules
  - Has established presence in India, cooperation with a centre in Dubai and now has a joint venture in Mauritius (more later)
  - Has a “Court” and a set of “User Councils”
  - Calculates arbitrator fees according to hourly rate
  - Publishes reasons for arbitrator challenges
  - [www.lcia.org](http://www.lcia.org)

  [Has established joint venture in Mauritius with Mauritius International Arbitration Centre]
2. Arbitral Institutions

- Other international institutions
  - International Centre for Dispute Resolution (ICDR, connected with AAA and other regional associations)
  - Singapore International Arbitration Centre
  - Hong Kong International Arbitration Centre
  - Stockholm Chamber of Commerce Arbitration Institute
  - Kuala Lumpur Regional Arbitration Centre (member APRAG)
  - CIETAC
  - Permanent Court of Arbitration...

3. Permanent Court of Arbitration

- created in 1899 at 1st Hague Peace Conference, initiative of Tsar Nicholas II, “seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace”

- 1899 Convention for the Pacific Settlement of International Disputes recognizes arbitration as “most effective” and “equitable” means of settling disputes where diplomacy has failed

- With object of “facilitating an immediate recourse to arbitration for international differences” 1899 Convention establishes a Permanent Court of Arbitration to be “accessible at all times.”
3. Permanent Court of Arbitration

Three part structure

i. the Administrative Council (115 member states)

- 22 member states from Africa (including DRC, Uganda, Kenya, Sudan, Ethiopia, South Africa, Swaziland, Rwanda, Mauritius, Madagascar, Zambia)

www.pca-cpa.org

ii. Members of the Court

"each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators" (Art. 23)

- Sir Christopher Greenwood, CMG QC
- Sir Franklin Berman, KCMG, QC
- Sir Elihu Lauterpacht, CBE, QC
- Lady Justice Arden

Mauritius has not nominated four Members of the Court, despite being a Member State since 1970. The government has recently been alerted to this oversight and encouraged to nominate up to four people.

www.pca-cpa.org
3. Permanent Court of Arbitration

iii. International Bureau
Secretariat based in the Peace Palace
The Hague, The Netherlands
(purpose built for PCA, also hosts ICJ)

Experienced, multinational, legal and administrative staff provide support to parties and tribunals:
• full registry services and support to tribunals
• official channel of communications and archive of documents
• financial administration, logistical and technical support
• organization of meetings/hearings (in Peace Palace or elsewhere)
• Secretary-General, Deputy Secretary-General, 8 legal counsel (serve as “Registrar” in state-state cases, or “Secretary” in private-public cases), supported by assistant legal counsel and secretaries

www.pca-cpa.org

3. Permanent Court of Arbitration

Original staff of International Bureau

Current staff (circa 2010)

www.pca-cpa.org
3. Permanent Court of Arbitration

Activities of the PCA

Growth in PCA’s Caseload Since 1900

Current Docket
- 60 pending cases
- 4 state-to-state
- 33 investor-state under BITs or MITs
- 21 contract disputes with states/IGOs
- 1 environmental

11 pending cases involve African parties (19%)

Current Docket

State-to-State disputes

UN Convention on Law of the Sea cases
- Malaysia v. Singapore, Land reclamation, Settled 2005
- Barbados v. Trinidad & Tobago, Maritime delimitation Award 2006
- Guyana v. Suriname, Maritime delimitation, Award 2007
- Ireland v. UK (“Mox Plant”), Settled 2009
- India v. Bangladesh, Pending
- Mauritius v. UK (“Chagos Archipelago”) Pending

Eritrea-Ethiopia Claims Commission
- Created by 2000 agreement to resolve claims for loss, damage or injury by one gov’t against the other and by nationals against a gov’t relating to 1998 conflict
- 14 main claims and 14 partial awards (for prisoners of war, property damage, economic loss, diplomatic claims)

Pakistan v. India (Kishenganga)
- Pending dispute under Indus River Treaty 1960 re: diversion of waters from Kishenganga river for construction of a hydroelectric dam project in disputed Kashmir region. 7 member tribunal
Site visits and experts

Pakistan v. India

1935: First case between a State and private party
Radio Corporation of America v. Republic of China

Private-public disputes now form major part of PCA’s case activities

e.g. Eurotunnel v. England and France

Disputes between States & private parties

> 30 investor-State disputes
> 20 contract disputes w. State entities
Private investor may sue host State directly in an arbitration pursuant to a contract, or more commonly these days, a bilateral investment treaty (BITs). According to UNCTAD, Mauritius has signed at least 36 BITs (“IPPAs”) but only 20 have entered into force.

### Investor-State Arbitration (subject of later presentation)

<table>
<thead>
<tr>
<th>Partner</th>
<th>Date of signature</th>
<th>Date of entry into force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>26-Sep-04</td>
<td>28-Feb-05</td>
</tr>
<tr>
<td>Belgium and Luxembourg</td>
<td>30-Nov-06</td>
<td>10-Dec-09</td>
</tr>
<tr>
<td>Benin</td>
<td>18-May-01</td>
<td>---</td>
</tr>
<tr>
<td>Botswana</td>
<td>17-Aug-06</td>
<td>---</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>18-May-01</td>
<td>22-Nov-09</td>
</tr>
<tr>
<td>Cambodia</td>
<td>3-Aug-01</td>
<td>---</td>
</tr>
<tr>
<td>Chad</td>
<td>18-May-01</td>
<td>---</td>
</tr>
<tr>
<td>China</td>
<td>4-May-06</td>
<td>8-Jan-07</td>
</tr>
<tr>
<td>Comoros</td>
<td>18-May-01</td>
<td>---</td>
</tr>
<tr>
<td>Congo</td>
<td>20-Dec-10</td>
<td>---</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>3-Apr-09</td>
<td>27-Aug-09</td>
</tr>
<tr>
<td>Finland</td>
<td>12-Sep-07</td>
<td>17-Oct-08</td>
</tr>
<tr>
<td>France</td>
<td>8-Nov-06</td>
<td>---</td>
</tr>
<tr>
<td>Germany</td>
<td>29-May-04</td>
<td>27-Aug-08</td>
</tr>
<tr>
<td>Ghana</td>
<td>18-May-03</td>
<td>---</td>
</tr>
<tr>
<td>Guatemala</td>
<td>18-May-01</td>
<td>---</td>
</tr>
<tr>
<td>India</td>
<td>4-Jun-00</td>
<td>28-Jun-00</td>
</tr>
<tr>
<td>Indonesia</td>
<td>8-Mar-07</td>
<td>28-Mar-00</td>
</tr>
<tr>
<td>Korea, Republic of</td>
<td>18-Mar-07</td>
<td>9-May-08</td>
</tr>
<tr>
<td>Madagascar</td>
<td>6-Apr-04</td>
<td>1-Jun-05</td>
</tr>
<tr>
<td>Mauritania</td>
<td>18-May-01</td>
<td>---</td>
</tr>
<tr>
<td>Mauritius</td>
<td>18-Mar-07</td>
<td>26-May-03</td>
</tr>
<tr>
<td>Nepal</td>
<td>5-Aug-09</td>
<td>---</td>
</tr>
<tr>
<td>Pakistan</td>
<td>5-Apr-07</td>
<td>3-Apr-07</td>
</tr>
<tr>
<td>Portugal</td>
<td>12-Dec-07</td>
<td>3-Jun-09</td>
</tr>
<tr>
<td>Romania</td>
<td>26-Jun-00</td>
<td>26-Jun-00</td>
</tr>
<tr>
<td>Russia</td>
<td>30-Jul-01</td>
<td>---</td>
</tr>
<tr>
<td>Senegal</td>
<td>14-Mar-02</td>
<td>---</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>4-Mar-00</td>
<td>19-Apr-00</td>
</tr>
<tr>
<td>South Africa</td>
<td>17-Feb-04</td>
<td>9-Oct-08</td>
</tr>
<tr>
<td>Switzerland</td>
<td>15-May-00</td>
<td>---</td>
</tr>
<tr>
<td>Sweden</td>
<td>25-Feb-04</td>
<td>1-Jan-05</td>
</tr>
<tr>
<td>Switzerland</td>
<td>26-Feb-08</td>
<td>21-Apr-00</td>
</tr>
<tr>
<td>Tanzania, UR</td>
<td>4-May-09</td>
<td>---</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>20-May-06</td>
<td>13-Oct-06</td>
</tr>
<tr>
<td>Zimbabwe</td>
<td>17-May-00</td>
<td>---</td>
</tr>
</tbody>
</table>

---

**First Intra-State dispute: the Abyei Arbitration**

**July 2008:** Parties deposit Agreement with PCA  
**October 2008:** Tribunal constituted

**April 2009:** Public hearings in Peace Palace. Webcast. Testimony in Arabic, English & Dinka
3. Permanent Court of Arbitration

Appointing Authority matters under UNCITRAL Rules

Pursuant to Article 6, 7 and 12 of UNCITRAL Rules 1976 (and Art. 6, 8, 10, 14 of 2010 Rules), a party to any dispute under UNCITRAL Rules may request Secretary-General of PCA to designate an appointing authority to appoint tribunal or resolve challenges to arbitrators. PCA has dealt with over 450 such requests (>75 involving Africa). These include many instances where the parties agree PCA directly act as appointing authority.
4. International Arbitration in Mauritius

“The Government of Mauritius has embarked on an ambitious project: to establish Mauritius as an international arbitration centre, the first of its kind in the region. Our aim is to offer a modern and attractive jurisdiction for international arbitration.”

Prime Minister, Dr the Hon. Navinchandra Ramgoolam
Mauritius International Arbitration Conference, Dec. 2010

Why Mauritius?
10 reasons

- Politically stable, long tradition of democracy, good governance and respect for rule of law. (1st Mo Ibrahim Index of African Governance)
- Vibrant economy. Services account for 70% of GDP. (20th worldwide and 1st in Africa in Doing Business 2011 Report)
- Geographically at crossroads of Africa, Asia and Europe
- Multi-cultural and multi-lingual. English and French spoken
- Legal system is hybrid of common law and civil law
- Pool of skilled lawyers, accountants and experts in trade and finance. Foreign lawyers allowed to appear as arbitrators or counsel too.
- Independent judiciary, taking steps to strengthen domestic courts
- Party to New York Convention
- Network of DTAAs makes it a conduit for international investments
- Government observes rule of non-interference in arbitral proceedings

www.pca-cpa.org
What has Mauritius done?
Steps to create a favourable environment

- 2008: Introduction of state-of-the-art legislation based on UNCITRAL model law, with innovative features, including role of PCA
- April 2009: Host Country Agreement with Permanent Court of Arbitration and establishment of PCA office here in 2010
- December 2010: Major international conference on international arbitration (book published)
- July 2011: Joint venture with London Court of International Arbitration to create Mauritius International Arbitration Centre (MIAC) – watch this space – recruiting a registrar soon, will be up and running later this year.

www.pca-cpa.org

A bit more about PCA in Mauritius
PCA Host Country Agreement 2009

- HCAs make PCA dispute resolution services more widely accessible, provide legal framework for PCA cases to be held in territory of host country.
- Host country secures provision of facilities and services, and offer same privileges and immunities as in HQ agreement with Netherlands.
- PCA has HCAs with Argentina, Costa Rica, India, Singapore, South Africa, but Mauritius is only one with physical presence, provides office space.
- PCA posts a legal officer to assist “to assist with discharge of Secretary-General’s duties under the Act, and with the promotion of PCA services in the region and promotion of Mauritius as an arbitral venue”

www.pca-cpa.org
The PCA role under IIA

- Act adopts a “particularly innovative solution” entrusting certain functions to PCA that would traditionally necessitate court assistance.
- PCA solution was chosen to “strengthen the international standing of the new Act, and ... to assure international users that all decisions on these matters would be taken by a neutral, highly reputed and experienced international body.”
- PCA S-G will only act if provisionally satisfied that Act applies (s.3)
- PCA S-G’s decisions are final (s.19(5))

The PCA role under IIA

Composition of Arbitral Tribunal

- Subject to party agreement, PCA S-G can be requested to act when others (other side, arbitrators, an institution) have failed to take steps to constitute arbitral tribunal (s.12)
- PCA S-G may make necessary appointments or take “any” measures necessary to remedy a failure in appointment process, e.g. confirm, repeat or revoke pre-existing appointments, designate presiding arbitrator (s.12), give other directions.
- Arbitral tribunal decides challenges in first instance, but as a second step, party may request PCA S-G to decide the challenge (s. 14).
- S-G may also play role in replacing arbitrator or proceed with truncated tribunal

Other functions

- S-G may play role in scrutinizing fees and expenses (s. 18)
- S-G is general statutory default authority empowered , upon application of a party or tribunal, to extend time limits (s. 30)
The PCA role under IIA

It won’t happen overnight…

PCA S-G also has a special function under the UNCITRAL Rules, first introduced in 1976. Little activity for first decade, but now over 450 requests …

<table>
<thead>
<tr>
<th>Growth in PCA Appointing Authority Cases Since 1976</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
</tr>
<tr>
<td>1976-1980</td>
</tr>
<tr>
<td>1981-1985</td>
</tr>
<tr>
<td>1986-1990</td>
</tr>
<tr>
<td>1991-1995</td>
</tr>
<tr>
<td>1996-2000</td>
</tr>
<tr>
<td>2001-2005</td>
</tr>
<tr>
<td>2006-2010</td>
</tr>
</tbody>
</table>

www.pca-cpa.org

What is PCA doing next?

- Education, capacity building and training
  - Teaching at University of Mauritius
  - Judicial workshop on New York Convention – 3-4 May 2012
  - Practitioner training session May 2012
  - Another “MIAC” conference December 2012
  - Started internship program

- Spreading the word in the region and world
  - Trips to African and Asian states to address government officials, legal professionals and academics
  - Bid to host ICCA 2016 Congress (first time in Africa)
  - Build state-of-the-art hearing facility (host MIAC/PCA)
What else can be done?

- Key to success of the project…
  - May not see results of efforts for several years, but lawyers and clients need to start thinking now about including Mauritius as the seat in arbitration agreements at the time of negotiating and drafting contracts…

www.pca-cpa.org