AFRICA MEDIATION ASSOCIATION

BRIEFINGPAPER 4:

TWINNING: CHARTING NEW COURSES IN DISPUTE RESOLUTION

This briefing paper results from a webinar series aimed to explore innovative approaches to dispute resolution by twinning mediation and arbitration processes, offering more efficient and flexible alternatives for resolving disputes. The series was organized by the Africa Mediation Association (AMA) in collaboration with the German Foundation for International Legal Cooperation (IRZ) for legal and judiciary reform projects and the Zambia Branch of the Chartered Institute of Arbitrators (CIArb).

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SPEAKERS:

JUSTICE ABHA PATEL S.C.

Justice Abha Patel S.C. was admitted to the Zambian Bar on 18 August 1989 and obtained her Masters in Law (LLM) from the University of Cambridge, England in 1988. In her legal career spanning over 34 years, she has achieved and been recognized for her many outstanding achievements as a prominent member of the Zambian Bar, including being part of the first members of the Bar to be trained in ADR. She enjoys dual qualification and was admitted as a Solicitor to the Roll of Solicitors of the Supreme Court of England & Wales in April 2008. She is a Mediator, a trainer of Mediators, an Arbitrator, Adjudicator, and Fellow of the Chartered Institute of Arbitrators UK CIArb.

KADIDJA SIDIBE

Kadidja Sidibe has over 10 years of experience in the legal profession, now practicing under the style of Nana Mudenda and Co. Kadidja's commitment to alternative dispute resolution is evident in her qualification as a Member of the CIArb (MCIArb). She is currently pursuing the prestigious designation of Fellow of the Chartered Institute (FCIArb), demonstrating her ongoing dedication to the field. Kadidja actively contributes to the Alternate Dispute Resolution community in Zambia by serving on the Executive Committee of the CIArb - Zambia Branch. Furthermore, she played a pivotal role in the recent establishment of the Lusaka
International Arbitration Centre.

DR. JOHN SOKFA

Dr. John Sokfa is a researcher and mediator. He is the deputy president of the Africa Mediation Association (AMA), and deputy director of the Centre for Mediation in Africa (CMA), University of Pretoria. Sokfa is also colead of the MBBI's (Mediators Beyond Borders International) African community mediation project (ARCoM).

THOMAS JOHN

Thomas John practices globally as an international commercial mediator, arbitrator, negotiator, and legal consultant. Accredited by, and a panel member of, leading mediation and arbitration institutions, Thomas is based in the Netherlands. Common and civil law trained and fully bilingual (English/German), he has a keen interest in resolving commercial, corporate, and Investor-State disputes, but also disputes relating to MSMEs, travel and tourism, business and human rights, as well as to international organizations, their staff, contractors, and consultants. Thomas specializes in disputes relating to art and cultural objects and he is a panel arbitrator of the Court of Arbitration of Art in The Hague, Netherlands.

OVERVIEW

The webinar series on twinning mediation and arbitration processes gained momentum following a conference in Zambia, highlighting the growing recognition of **mediation as a valuable tool** for enhancing the **efficiency** and **cost-effectiveness** of dispute resolution.

By the mid-2020s, there was renewed interest in this combination, spurred by courts integrating mediation to expedite resolutions. Countries like Germany have amended their arbitration rules to require consideration of settlement opportunities throughout the arbitration process, aligning with the twinning concept and emphasizing **the importance of effective process design**.

This webinar series aims to introduce participants to the concept of twinning, highlighting the **strengths** and **challenges** of both mediation and arbitration and the **pitfalls** associated with combining both processes.

ARBITRATION PROCESS

The arbitration process, as an Alternative Dispute Resolution method, typically begins when parties agree to submit their dispute to an arbitral tribunal. Sources explain that the process is initiated through a pre-established agreement or guided by specific regulatory rules. A preliminary conference is usually conducted to establish the procedural framework and timelines. Parties then exchange pleadings and evidence, which form the foundation of the arbitration proceedings. The hearings can be either documentary-based or traditional in-person sessions, demonstrating **the process's adaptable nature**. Ultimately, the arbitral tribunal reviews the submitted evidence and issues a final award that resolves the dispute.

Arbitration is an Alternative Dispute Resolution (ADR) method that resolves disputes **outside of court**, requiring parties to submit their disagreements to a neutral third party. Arbitration mediation involves a third-party, assisting parties to negotiate and reach an acceptable resolution through discussion and exploring options.

It offers **flexibility**, **privacy**, and **confidentiality**, making it particularly suitable for commercial disputes, especially those crossing international borders. Arbitration can also be applied in various disputes, including construction, employment disputes, family law issues etc.

Arbitral awards are enforceable **under national and international laws**, typically binding with limited rights of appeal, promoting timely resolutions.

The benefits of arbitration include **faster resolutions** compared to traditional litigation, the ability to select **specialized arbitrators**, and the flexibility to **customize processes** to meet the parties' needs.

Arbitration also offers a higher level of **confidentiality and privacy**, safeguarding sensitive information, while being more **cost-effective and time-efficient**, making it an attractive option for dispute resolution.

HISTORY OF ARBITRATION AS A DISPUTE RESOLUTION PROCESS

Arbitration has roots dating back to 3000 BC, with early uses including dispute resolution between states and cities. The practice evolved through Roman times and medieval Europe, where it was used in commercial contexts. A significant development occurred after the 30-year war in Europe, when the 1648 Treaty of Westphalia introduced arbitration mechanisms between states to prevent future conflicts.

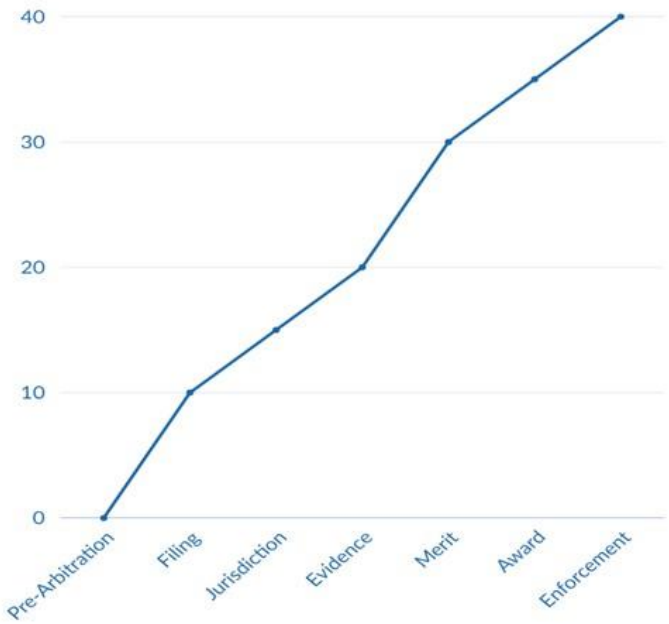
The establishment of the Permanent Court of Arbitration in 1899 marked a crucial milestone, initially focusing on state-to-state disputes before expanding its scope. The 1958 New York Convention was a game-changer for private sector arbitration, creating an efficient cross-border enforcement mechanism for arbitral awards and providing legal certainty with limited exceptions for enforcement. Arbitration has seen **continuous growth and refinement** both nationally and internationally, **adapting to meet the evolving needs** of parties involved in disputes.

HISTORICAL CONTEXT OF MEDIATION AND KEY TRENDS IN ITS DEVELOPMENT

Mediation practices in Africa have experienced **notable growth**, though they still **lack widespread normalization and acceptance**. Historically, mediation has deep roots in various cultures, particularly in Africa, where it often involves community elders facilitating conflict resolution. Many **traditional practices** emphasize reconciliation and community harmony, guided by principles like Ubuntu, which prioritize interconnectedness.

The African Mediation Association (AMA) is **actively promoting mediation** across the continent, and several key trends have emerged - countries like Nigeria, Kenya, and South Africa have enacted **mediation laws** and established **court-annexed mediation programs**, integrating mediation into their judicial systems; various organizations, including governmental bodies and regional entities like ECOWAS, have set up **mediation units** to promote peaceful conflict resolution, alongside support from NGOs like the AMA; **programs** are revitalizing traditional conflict resolution methods, aligning with international peacebuilding trends that emphasize local ownership and agency; there is a growing emphasis on **training** to ensure mediators are professionally qualified, raising concerns about the effectiveness of experienced mediators lacking formal training; **online dispute resolution platforms** are being employed for conflict analysis and to include voices typically excluded from formal processes; mediation is increasingly recognized as a central strategy in addressing social and political conflicts.

Settlement windows are designated moments during the dispute resolution process for parties to negotiate amicable settlements, strategically timed at various points, such as pre-arbitration or after initial hearings. Neutrals must consider timing, incentives, and client preferences during these windows to facilitate effective negotiations.



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TWINNING

The concept of "twinning" in dispute resolution refers to **the strategic integration of mediation and arbitration**, leveraging the strengths of both to achieve optimal outcomes. Key features of twinning include flexibility and decisiveness, allowing parties to tailor the process while ensuring a binding decision if mediation fails.

Three distinct models of twinning are:

Concurrent Twinning
Mediation and arbitration occur simultaneously, allowing complex disputes to be simplified through parallel processes managed by different practitioners.

Sequential Twinning
Mediation occurs first, followed by arbitration if needed, with variations like tiered dispute resolution and intermittent sequential processes. Each phase being managed by different practitioners.

Braided Twining
A single process led by one neutral practitioner who oscillates between the roles of mediator and arbitrator as needed.

Unlike the concurrent and sequential models, this approach allows for a **fluid transition** between mediation and arbitration within a single dispute resolution process, enhancing **adaptability** based on the evolving needs of the dispute.

The single neutral practitioner manages the entire process, assessing the situation and shifting roles in response to the dynamics of the dispute, thereby maintaining continuity and potentially improving outcomes.

Twinning faces **challenges** such as differing mindsets of neutrals, issues of neutrality, coordination difficulties, and the need for thorough documentation. Addressing these challenges is crucial for successful outcomes. The **benefits** of twinning include reduced stress and anxiety, streamlined resolutions, lower legal costs, enhanced creativity in solutions, preservation of relationships, emotional healing, and added enforceability through arbitration.

PROCESS DESIGN

Process design refers to the strategic integration of mediation and arbitration, two distinct yet complementary dispute resolution processes. This integration aims **to leverage the strengths** of both dispute resolution processes to provide a more **effective** and **efficient** resolution to disputes.

According to Mary Walker, process design for effective twinning, requires significant consideration and is not for the faint-hearted.

Key factors include:

Model Selection: Deciding between a sequential model with two neutrals or a single neutral braided model.

Neutral Selection: The complexity of choosing an appropriate neutral, especially for three-member arbitration panels and their qualifications.

Timing: Identifying the right timing for each phase of the process is crucial, as it impacts the flow and effectiveness of dispute resolution.

Human Behavioral Dynamics: Challenges may arise from confidentiality issues influenced by private meetings, which should not be underestimated.

Communication and Agreement: Establishing clear rules and procedures across all twinning models is essential to mitigate risks and enhance the enforceability of awards.

Setting aside of awards is largely governed by the law of the arbitration seat, which necessitates careful consideration of local legal factors when selecting the arbitration seat and drafting clauses. The arbitration environments in Zambia, the United Kingdom, and the United States were described as generally favorable, with positive, arbitration-friendly decisions from the Supreme Court reinforcing the notion of arbitration as a party-driven process. It was mentioned that courts typically refrain from interfering with arbitration clauses, except in matters of public policy. While challenges to arbitration in the UK are relatively low, they often concern breaches of "Due Process," which can sometimes be used strategically by lawyers in adversarial contexts.

Regarding **strategic considerations for enforcement**, it was indicated that if a settlement agreement must be converted to an arbitral award, practitioners have options such as starting arbitration immediately before mediation and resuming later or employing concurrent mediation-arbitration twinning. Key factors highlighted included trust between parties, jurisdictional issues, and the enforceability of the settlement agreement.

Practically, it was emphasized that practitioners should strategically design their dispute resolution processes with enforcement concerns and the nature of the underlying disputes in mind. While consent awards are generally enforceable under the New York Convention, it was cautioned that any fraudulent intent in their creation could lead to **unenforceability**.

DUE PROCESS

Emphasizes the **neutral role** in processes, highlighting real challenges such as transitioning between mediation and arbitration, understanding process established rules and principles, and identifying bias or impartiality among neutrals (see Corporate State Entity vs. National Government). Due process is defined as the **fairness** of hearings and the **equal treatment** of all parties involved, underscoring the **right to proper legal representation**, while being closely linked to the concepts of rule of law and natural justice. The UNCITRAL Model Law Article 18 guarantees equality among parties and ensures they have a full opportunity to present their case, forming the basis of due process.

The **Concept of Bias** is **subjective** and difficult to define from various perspectives, raising questions about who determines what constitutes a "reasonable person" in assessing bias. The case of Glencot Development and Design Co. Limited v. Ben Barrett & Son (Contractors) Limited explores claims of compromised impartiality due to an adjudicator also acting as a mediator. Although the adjudicator claimed to be unbiased, the court found apparent bias due to his dual role, emphasizing that the test for bias should be viewed from an objective outsider's perspective rather than the adjudicator's subjective state of mind. While no actual bias was established, the court acknowledged that Barrett had a strong case. Sue Clayton advises against serving as both mediator and arbitrator in the same case to maintain high standards and avoid bias, and if parties insist on this arrangement, meticulous documentation of their understanding is crucial.

ENFORCEMENT ISSUES IN SETTING ASIDE AWARDS

Corruption and **money laundering** are significant concerns that can lead to challenges in enforcing awards. In jurisdictions like Zambia, there are legal obligations to report money laundering issues. Furthermore, when there is knowledge or suspicion of corruption, it must be reported to anti-corruption authorities, with severe penalties for failing to do so. Arbitrators generally face fewer consequences for corruption issues compared to mediators, who risk losing their licenses for negligence.

The ethical and legal responsibilities of arbitrators are not reflected in those of mediators, and Zambia lacks a binding code of conduct for mediators, despite having statutory provisions for mediation for two decades. Lawyer mediators act as neutral parties, raising concerns about the need for harmonization of ethical standards across arbitration and mediation processes. This disparity in ethical duties underscores the necessity for a unified approach to dispute resolution practices.

The focus on corruption primarily concerns secondary contracts arising from initial "bribery agreements," such as rigged tenders. Awards related to these secondary contracts, induced by corruption, can be set aside by supervising courts. Courts, particularly in jurisdictions like Zambia, are proactive and stringent in challenging and invalidating awards connected to corruption.

An illustrative case ***Sorelec vs. Libya*** *(ICC Case No. 19329/MCP/DDA)*, where a €450 million award was annulled due to a settlement agreement tainted by corruption. The Paris Court of Appeal employed a "red flag approach" to identify circumstantial evidence of corruption, concluding that Sorelec had bribed Libyan officials, which rendered the award corrupt and contrary to international public policy. The red flag approach involves examining indirect evidence and circumstances that indicate corrupt practices in the underlying contract, with potential red flags arising from private information shared during mediator caucuses. Mediators must clarify confidentiality norms with parties beforehand, being informed about their role and process.

Regarding **mediators' obligations**, there is an **ethical dilemma** concerning **confidentiality versus disclosure** when they encounter information that raises a red flag. If a mediator transitions from mediation to arbitration (in med-arb scenarios), the obligations regarding the handling of disclosed information may change. Questions arise about whether a mediator can continue as an arbitrator after receiving sensitive information. Mediators face **challenges** in balancing the need to maintain confidentiality with the obligation to disclose suspicions of wrongdoing, which may depend on the jurisdiction's code of conduct and ethical guidelines. The potential conflict of interest and the ethical duty to act on suspicions must also be considered.

BRAIDED PROCESSES

Questions arise regarding the standards applied when a mediator also serves as an arbitrator. The expectation for **vigilance** and **ethical standards** concerning corruption should apply equally to individuals in these dual roles. Failing to act on suspicions can lead to severe repercussions, as illustrated by the Sorelec case, which was annulled due to procurement through corruption.

ENFORCEMENT FRAMEWORK

The New York Convention (1958) governs the **enforcement** and **recognition** of arbitral awards and is regarded as a successful UN instrument. It provides a streamlined process for converting arbitral awards into domestic court judgments, with limited grounds for objection.

In twinning scenarios, which combine arbitration and mediation, awards are often **consent awards** resulting from either a sequential process (mediation followed by arbitration) or a braided process (intertwining mediation and arbitration). Historical questions about the status of consent awards under the New York Convention have largely been resolved. Notable American cases, such as Transocean Offshore Gulf of Guinea VII Limited v. Erin Energy Corporation and Alpetelecoms v. Unify, confirm that consent awards fall under the New York Convention. These cases indicate that it is **challenging** to distinguish between awards rendered on merits and those rendered by consent.

A case example highlighting potential issues with consent awards is Viva Chemical Company v. Allied Petrochemical Trading & Distribution Company, where a rapid mediation and conversion of a settlement into an arbitral award was deemed fraudulent, aimed at defrauding creditors. As a result, the award was held unenforceable under the New York Convention due to violations of public policy, specifically French policy.

Article 11 of the New York Convention applies to the recognition and enforcement of arbitral awards arising from **disputes between physical or legal persons**, raising questions about whether a live dispute exists at the time of entering a consent award. In scenarios involving pending arbitration, such as arb-med-arb situations, there is already a recognized dispute because arbitration has commenced, and awards rendered after mediation following pending arbitration are generally enforceable under the New York Convention.

In a sequential process involving a tiered clause (mediation followed by arbitration), questions arise about **whether a dispute exists when transitioning from mediation to arbitration**. One perspective suggests that no dispute exists if the parties have settled, as the settlement agreement signifies resolution. Conversely, another view argues that the New York Convention remains neutral on the timing of the dispute, allowing for the conversion of a settlement agreement into an arbitral award.

Ignoring red flags not only undermines public policy but can also have **crossjurisdictional implications**. Mediators must navigate the laws of the jurisdiction where arbitration is seated, as these laws dictate their obligations and potential disclosures. Arbitrators are expected to be **vigilant** and recognize any potential corruption influencing contracts, with an obligation to disclose any suspicions of corruption. Legal practitioners are encouraged to remain **alert** to corrupt conduct and red flags, particularly in high-value, cross-border disputes.

KEY TAKEAWAYS

Emphasizes the **necessity for checks and balances** within the braided process to prevent compromising the neutral's role. It urges **awareness and procedural safeguards** among neutrals, parties, and counsel involved in such processes. While Alternative Dispute Resolution (ADR) is marketed as a quicker method for dispute resolution, issues such as bias can lead parties back to court, undermining its advantages. The case of *Halliburton Company v. Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 was cited to highlight the importance of an objective assessment of bias in arbitration decisions.

Bias can significantly impact the enforcement of arbitration awards and may result in applications for the removal of arbitrators. Practitioners are advised to maintain a good reputation to avoid becoming embroiled in bias controversies, especially since state laws may provide grounds for removal based on bias.

To avoid bias issues, several **strategies** were recommended:

- Obtaining express agreements and consent from parties at every stage of the process design.
- Recording discussions and ensuring parties fully understand the proceedings to safeguard against future challenges to the process.

The text also noted that different jurisdictions have varying rules regarding private caucuses, with some not recognizing the concept at all. Therefore, it is essential for neutrals to discuss with parties the complexities surrounding information exchanged in private caucuses and the potential conflicts between mediative and arbitral roles.

Protecting the **integrity** of the process requires ensuring transparency and obtaining consent, which can help prevent parties from contesting agreements based on perceived lack of impartiality. Although caucuses are useful for gathering additional information and exploring settlement options, mediators must handle the information sensitively to avoid parties feeling manipulated into making concessions.

There is a notable **contrast** between the techniques used in mediation and arbitration; unlike mediators, arbitrators do not hold private caucuses, adhering to principles of fair hearing. Therefore, disclosures made in mediation could create perceptions of bias if the arbitrator is privy to this information.

An illustrative case, *Ku-ring-gai Council v. Ichor Constructions Pty Ltd.* [2018] NSWSC 610, demonstrated the importance of proper consent in procedural law. In this case, the court ruled that the arbitrator's appointment was terminated due to a lack of express written consent to return to arbitration after seeking consent for mediation, underscoring the procedural law requirements that must be adhered to.

DISCUSSION

Where does the use of AI in resolving disputes without human intervention leave the arbitration profession in the future?

AI systems currently designed will **still need human touch** with mediation as we deal with a lot of emotions which AIs cannot pick up e.g., appropriate amount of empathy. What we do see more is the **support** of AI in mediation and arbitration in the context of discovery, sifting through documents or transcript of evidence to find certain patterns and analysing text, or connecting issues. However, the system will only be as intelligent as the people programming it. AIs are **not self-educating but trained**.

From the case of *Martha vs Avianca* (AI generated case), it is important to remember that AI is as smart as the information feed. Yet, smart enough to try to fill in blanks, so exercise some level of caution. So, practice and training are still very needed as AI's can provide wrong answers and hallucination. Human element will not be completely obsolete. We will still need it to produce better results.

Mediation can falter when untrained mediators are involved, which may lead to unproductive sessions and frustration for the parties. A skilled mediator must recognize their **limitations** and know when to **seek help**.

Transitioning from a facilitative mediation role to an adversarial arbitration role poses **challenges**. Although arbitration is typically less facilitative, arbitrators can encourage participation and explore settlement options, utilizing open questioning techniques from mediation.

While some facilitative skills can be applied in arbitration, the nature of arbitration restricts the full facilitative process. Arbitrators must be cautious to **maintain enforceability**, as overly creative solutions may compromise the validity of outcomes.

Respondents generally concurred on the limitations of mediation and the careful use of facilitative skills in arbitration, with no significant disagreements raised.

It was noted that New Zealand has a stricter approach to procedural requirements in combined mediation and arbitration processes compared to other countries that may provide more flexibility.

Strong emphasis was placed on defining and documenting processes for transitioning between mediation and arbitration within dispute resolution agreements. **Clear documentation** helps prevent future procedural disputes.

Several institutions offer highly regarded mediation advocacy **training**, which is recommended for individuals involved in commercial mediation. Professionals trained in both arbitration and mediation must grasp the distinct procedural rules and ethical obligations of each process.

Double Consent requires parties to agree to enter mediation and then to transition from mediation to arbitration, ensuring transparency and accountability throughout the process.

Awareness of **potential red flags**, especially regarding corruption, is crucial. An unusually large award compared to the services rendered can be a significant red flag.

There is a **distinction** between registering an award (recognition) and enforcing it (execution). Non-parties cannot challenge the arbitration outcome unless they were adequately notified and allowed to participate in the proceedings.

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CONTACT US

The Africa Mediation Association (AMA) is a non-profit organization that is legally registered in Kenya. AMA works collaboratively with citizens, public and private institutions to promote mediation as a viable, responsive, and amicable dispute resolution model on the African continent.

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