

Arbitration Institutions in Africa Conference 2015

Thursday 23 July 2015

The Role of Arbitration Institutions in the Development of Arbitration in Africa

African Union Commission
New Building
Addis Ababa
Ethiopia



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The Role of Arbitration Institutions in the Development of Arbitration in Africa, African Union Commission, Addis Ababa, Thursday 23 July 2015

Programme

0900-0930: Registration and welcome

0930-0955: Formal welcome by Prof Vincent Nmehielle, General Counsel, AU Commission

1000-1025: Introduction by Dr Emilia Onyema (co-convenor of the conference)

1030-1300: Session 1: The Role and Function of Arbitration institutions in the continent.

1030-1145: Session 1a: Regional Arbitration Institutions/Centres (chair: Ms Alexandra Meise, Foley Hoag LLP)

- AFSA/Africa ADR (Ms Deline Beukes)
- Lagos Regional Centre (Hon. Wilfred Ikatari, Director-General)
- Kigali Centre (Mrs Bernadette Uwicyeza, Director-General)
- OHADA CCJA (Mr Narcisse Aka, Secretary, Arbitration Centre)

1145-1200: **Tea/Coffee Break**

1200-1320: Session 1b: National Arbitration institutions (chair: Chief Bayo Ojo, SAN; Founder, ICAMA)

- Ghana Arbitration Centre (Emmanuel Amofa, Director)
- Lagos Court of Arbitration Centre (Ms Megha Joshi, Director-General)
- LCIA-MIAC (Mr Duncan Bagshaw, Registrar)
- Addis Ababa Chamber of Commerce & Sectoral Associations (Mr Yohannes Woldegebriel, Director)
- Zambia Centre for Dispute Resolution Limited (Justice Charles Kajimanga)

1320-1430: **Lunch**

1430-1600: Session 2: Expectations of users from the institutions (chair: Prof Paul Idornigie, NIALS)

- Mr Jimmy Muyanja, Muyanja & Associates, Kampala
- Ms Leyou Tameru, Ethiopia
- Mr Kamal Shah, Partner, Stephenson Harwood, LLP London
- Dr Stuart Dutson, Partner, Eversheds LLP, London
- Dr Jimmy Kodo, CCJA, Abidjan
- Dr Kariuki Muigua, Nairobi

1600-1615: **Tea/Coffee Break**

1615-1730: Session 3: Projecting arbitration in Africa (chair: Prof Fidelis Oditah, QC, SAN)

- Judge Edward Torgbor, Nairobi
- Dr Emilia Onyema, SOAS, London
- Mr Tunde Fagbohunlu, SAN, Partner, Aluko & Oyebode, Lagos
- Mr Brett Hattaway, GC, DHL (Africa/ME)

1730-1745: Remarks by Rapporteur: Dr Jean Alain Penda, PwC LLP, London

1745-1800: Closing Remarks by Judge Edward Torgbor (co-convenor of the conference)

1930: **Dinner at Hilton Hotel Addis Ababa. After dinner speech by Chief Bayo Ojo, SAN (ICAMA)**

Principal Organisers and Funders of the Conference

SOAS University of London Team

Organiser/convenor: Dr Emilia Onyema, *PhD, FCIArb*, School of Law, SOAS, University of London.

Co-convenor: Judge Edward Torgbor (Kenya).

Rapporteur: Dr Jean Alain Penda, Consultant, PricewaterhouseCoopers LLP, London.

Administration: Ms Christine Djumpah and Mrs Juliet Ssentongo, School of Law, SOAS, University of London.

Ambassador Catherine Muigai Mwangi, Kenyan Ambassador to Ethiopia

African Union Commission Team

Prof Vincent O. Nmehielle, General Counsel.

Ms Chinonyelum E. Uwazie, Legal Office.

Ms Fikerte Bekele, Administrative Assistant.

Ms Lami Omale, Legal Intern.

Mr Abiy Assefa, Administrative Assistant.

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**Group Photograph of Delegates at the African Union Commission
23 July 2015**

3. Speakers Profiles

Mr. Narcisse Aka



MR. NARCISSE AKA is the Secretary General of the Arbitration Centre of the Common Court of Justice and Arbitration (CCJA) of OHADA and a trainer in arbitration law at the Higher Regional School of Magistracy of OHADA (ERSUMA) in Porto Novo, Benin, and expert for various institutions including the Office International Labour Organisation (ILO) and the International Development Law Organisation (IDLO). Former Magistrate, former trainee at the International Court of Arbitration of the ICC, he was also Secretary General of the Court of Arbitration of Ivory Coast near the Chamber of Commerce and Industry of Côte d'Ivoire (CACI). Narcisse is also referee in several institutional arbitrations and ad hoc. Narcisse Aka is author of several publications on arbitration, including the commentary to OHADA Uniform Act on arbitration law, practice and institutions in Africa.

Mr. Emmanuel Amofa



MR. EMMANUEL AMOFA is a Partner of Hagan Law Company and Administrator of the Ghana Arbitration Centre since its incorporation in 1996. His expertise and interest include Corporate Law, Investment Law and Negotiation, Civil Litigation, Land Law, International Commercial Law, International Business Transactions, Negotiation of Commercial Transactions, Arbitration and Mediation, Petroleum and Energy Law, Legal Sector Reform, Privatisation and Banking Law. He graduated as a Barrister-at-law from the Ghana School of Law, where he was awarded the B.J. da Rocha prize for the Best Student in Advocacy and Legal Ethics. In 1996 and 1997, he was awarded Certificates by the Ghana Stock Exchange and the International Legal & Investment Consultants Limited after successfully attending seminars on Foreign Investment Negotiations and Negotiating, Contractual Arrangements Relating to Foreign Investments respectively and in 2003, awarded a certificate in International Commercial Arbitration by the International Law Institute, Washington, DC and Georgetown University, Washington, DC. He is a lecturer in Alternative Dispute Resolution at the Ghana School of Law. He is the country contributor for Ghana on contemporary law on arbitration in Ghana published in *Arbitration in Africa: A Practitioner's Guide*, Kluwer Law International, 2013.

Mr. Duncan Bagshaw



MR. DUNCAN BAGSHAW is a barrister, called to the Bar in England and Wales in 2003. He is a Member of the Chartered Institute of Arbitrators. Duncan practised at the Bar in the fields of commercial and property litigation and arbitration for eight years until 2012 when he was appointed as the first Registrar of the LCIA-MIAC Arbitration Centre. LCIA-MIAC is an independent arbitral institution based in Mauritius. It receives support from the London Court of International Arbitration, including administrative support and knowledge of arbitrators. As Registrar of LCIA-MIAC, Duncan is responsible for the administration of cases and for developing and promoting LCIA-MIAC. Duncan has travelled extensively in Africa to meet governments, lawyers and companies, and has spoken and written extensively on arbitration in Mauritius, Africa, Europe and Asia. Duncan has lectured at the Universities of Cape Town, Tsinghua (Beijing) and Wolverhampton (UK).

Mrs. Deline Beukes



MRS. DELINE BEUKES, a Senior Executive based in Johannesburg, acquired extensive experience in the planning and execution of marketing and advertising campaigns for leading national and international companies. From 1992 to 2006 she held the position of Chief Executive Officer of the Advertising Standards Authority of South Africa. Deline served on various industry committees as well as legislative advisory groups within South Africa and represented South Africa at the European Advertising Standards Alliance in Europe from 1995 to 2006. Under her leadership South Africa was awarded the Best Practice Award for Advertising Self-Regulation in Paris in 2003. She served on the International Steering Committee for Global Self-Regulation. In 2003 she received the Rapport/City Press Award in recognition of being one of South Africa's inspirational women achievers. She served as a judge in the Woman of the Year Awards for a period of five years. From 2007 to date she has acted as the liquor industry's Independent Arbitrator for the resolution of disputes in terms of the Code of Commercial Communication for the Industry Association for Responsible Alcohol Use (ARA). In 2009 she was appointed by the Arbitration Foundation of Southern Africa (AFSA) as Executive Director of Africa ADR. She also

Dr. Stuart Dutson



DR. STUART DUTSON specialises in international arbitration, international litigation and international law. Stuart lived and worked in Lilongwe 2000 – 2001 as Malawi’s State Advocate. He spent 2013 living in Addis Ababa focusing on international arbitrations in relation to emerging markets and he leads Eversheds’ Africa Disputes Practice. Eversheds has 37 offices and affiliates in over 39 countries across Africa. He has conducted arbitrations under all major arbitration institutions’ rules in London, Europe, the Middle East and Africa; and Stuart has litigated international disputes in London, Australia, Europe, New York, Africa and the Middle East. Stuart has written numerous articles on international arbitration and private or public international law including in the Law Quarterly Review, Nigeria Law Digest, Modern Law Review, International Comparative Law Quarterly, and International Arbitration. He is regarded by Chambers & Partners and Legal 500 as a leading individual in both international arbitration and international law. Stuart has a PhD from Cambridge University in private international law and is a former member of the ICC Court of International Arbitration.

Mr. Babatunde Fagbohunlu SAN



MR. BABATUNDE FAGBOHUNLU is a partner and head of the Litigation, Arbitration and ADR Practice Group in Aluko & Oyebode. In December 2008, Tunde was conferred with the rank of Senior Advocate of Nigeria (SAN) by the Nigerian Legal Practitioners Privileges Committee. He regularly represents Nigerian as well as foreign and multinational clients in *Ad Hoc* arbitrations and arbitrations administered by arbitral institutions. Tunde has also served on the Federal Government of Nigeria’s Committee on the Reform and Harmonization of Arbitration/ADR Laws. He is a member of the Nigerian Bar Association, International Bar Association, The Body of Senior Advocates of Nigeria, the London Court of International Arbitration (African Users Council), a Fellow of the Chartered Institute of Arbitrators UK and a member of the International Arbitration Institute (IAI) in Paris. His writings on arbitration include: “Are Maritime Arbitration Clauses Valid?” – “The Arbitrator”, Vol 2, No 1, at pages 2 – 5.

Mr. Brett Hattaway



MR. BRETT HATTAWAY is a vice President & Head of Legal for East Europe, Middle East and Africa, supervising a team of attorneys with responsibility for all legal matters arising in relation to DHL Express' Eastern Europe Middle East and Africa business division, which generates approximately US\$1.5 billion in annual turnover and employs over 10,000 people in 89 countries in Africa, the Middle East/GCC, South East Europe, CIS and Russia. Responsibilities include leading negotiations, making acquisitions and resulting integrations, maintaining or terminating relations with joint venture partners and agents, liaising with European Union and WTO officials in the preparation of trade complaints, representing DHL at various industry association meetings, forming new companies, licensing and protection of intellectual property, providing general corporate advice to the CEO, board and country management, handling executive level HR matters, advising and leading industry wide lobbying efforts with regard to proposals for national laws relating to the aviation, postal and transport sectors, advising with regard to trade unions, strike activity and negotiations with unions, liaising with outside counsel on various issues, and overseeing more than US\$40 million in unsettled tax and claims litigation.

Professor Paul Idornigie NIALS



PROFESSOR PAUL OBO IDORNIGIE, a University Scholar, holds a doctorate degree in International Commercial Arbitration; is a Fellow of the Institute of Chartered Secretaries and Administrators (London); Member of the Chartered Institute of Arbitrators (UK); member, London Court of International Arbitration; member, Nigerian Bar Association; member, Nigerian Association of Law Teachers; member, International Bar Association and Commonwealth Lawyers Association. He is on the Panel of Neutrals at the Abuja and Lagos Multi Door Courthouses, Nigeria and the Panel of Arbitrators at the Lagos Regional Centre for International Commercial Arbitration, Lagos, Nigeria and Nigerian Communications Commission, Abuja, Nigeria. He is a Notary Public for Nigeria; Chairman, Chartered Institute of Arbitrators (UK), Abuja Chapter and a Member of the Inter-Ministerial Committee on the Review of Nigeria's Model Draft Investment Promotion and Protection Agreement (IPPA). He was Lecturer, University of Jos, Jos, Nigeria, Plateau School of Accountancy and Management Studies, Jos, and ANAN College of Accountancy, Jos; Senior Lecturer, Nigerian Law School, Abuja; World Bank Consultant/General Counsel, Bureau of Public Enterprises (BPE), Abuja. He is now occupying the SMA Belgore Distinguished Chair as a Professor of Law and Head, Department of Commercial Law at the Nigerian Institute of Advanced Legal Studies, Abuja. He is a Legal Consultant, Arbitrator and Regulatory/ADR/Public-Private-Partnership [PPP] Specialist; External Examiner to some Universities. He consults for various government agencies

Hon. Wilfred Dan Ikatari



HON. WILFRED DAN IKATARI is the substantive Director of The Regional Centre for International Commercial Arbitration, Lagos. He was formerly Honourable Member & Judge of the Investments & Securities Tribunal Nigeria, Abuja. He is an Applied Economist and a legal practitioner. He is a member of Nigeria Bar Association (NBA), Member International Bar Association (IBA), Member Institute of Directors (MIoD). He was between 1994–1998 appointed a special member and legal adviser Board of Governing council of the Rivers State Polytechnic, Bori. Hon. Ikatari was in 1998 appointed a full-time Honourable Commissioner, Bayelsa State Local Government Service Commission and served as Public Service Administrator of the Unified Local Government System. He returned to legal practice in 2000 as Senior Counsel and Managing Solicitor in the law firm of Chief Francis F. Egele & Co. In 2007, Hon. Ikatari was appointed a Senior Legislative Aide (Directorate Appointment) to the Senate of the National Assembly of Nigeria, Abuja wherein he was involved in administration and legislative draftsmanship. He was appointed Full-time Honourable Member and Judge of the Investments & Securities Tribunal of Nigeria where he performed adjudicatory and other judicial duties in the Capital Market Tribunal from 2008 to 2014. Hon. Ikatari has attended several International Training in different parts of the world and earned certificates in Adjudication, Judgment Writing, Advanced Management of Complex Litigation, Legislative and Legal Draftsmanship, Development Economics, Capital Markets and Financial Derivatives, Development and Regulation of Securities Market, Judicial Ethics & Administration, Court Management, Case Administration, Court Leadership and Governance, Advanced Administrative Law, Case-flow Management etc.

Ms. Megha Joshi



MS. MEGHA JOSHI was appointed the first Executive Secretary/Chief Executive Officer of the Lagos Court of Arbitration (LCA) International Centre for Arbitration & ADR (ICAA) in November 2012. She has been responsible for implementing the institutional framework of the business, administration and engagement of all the stakeholders of dispute resolution services at the LCA. As a native of Great Britain, Megha brings a depth of project management experience in the Nigerian private sector, in addition to her knowledge of working in numerous other international markets developing national economic branding campaigns in Malaysia, Indonesia, Scandinavia, Switzerland, Italy, Austria and the United Arab Emirates. Prior to joining the LCA, Megha was the Managing Director and co-founder of OMJ Strategies Limited, a public relations and government affairs agency based in Lagos. In this capacity, she worked closely with companies from the financial, downstream oil and gas, media, transportation and public sectors providing business development solutions.

Justice Charles Kajimanga



JUSTICE CHARLES KAJIMANGA obtained his LLB degree from the University of Zambia in 1983 and he was admitted to the Bar in 1984. In 1993 he obtained an LLM degree from Cornell University in the United States of America. Justice Kajimanga is a Judge of the High Court of Zambia and currently the Judge in charge of the Commercial Court. Justice Kajimanga began his career in 1985 as Corporation Counsel at Legal Services Corporation, a statutory body established by an Act of Parliament to provide legal services to parastatal companies. In 1987, he joined Zambia Cooperative Federation as Board Secretary and Legal Counsel until 1995 when he went into private practice. He was appointed Judge of the High Court in August 2002. Justice Kajimanga is the Chairman of the Zambia Branch of the Chartered Institute of Arbitrators.

Dr. Jimmy Kodo



DR. JIMMY KODO is Technical advisor to the President of the Common Court of Justice and Arbitration of the organization for Harmonization of Business Law in Africa (OHADA), in Abidjan, Côte d'Ivoire. Before joining the Court, he has practiced law in Paris and Nanterre (France) and served as Adjunct Professor at the University of Paris-Est Creteil, France. In 2008, Mr Kodo co-authored the Annotated OHADA Code, published by the Institut International de Droit d'Expression et d'Inspirations Françaises (IDEF). He also published the first comprehensive case law study of the application of OHADA law since the establishment of that legislation (*L'Application des Actes Uniformes de l'OHADA*, Publications de l'Institut Universitaire André Ryckmans 5 (Louvain-la-Neuve: Academia-Bruylant, 2010). As a research assistant at the University of Hertfordshire, Hatfield, United Kingdom, he helped on a comparative study of the legislation of 32 European countries to assess legal preparedness for the influenza pandemic across Europe (PHLaw Flu Project), funded by the European Union.

Ms. Alexandra Kerr Meise



MS. ALEXANDRA (XANDER) KERR MEISE is an attorney with both the International Litigation and Arbitration Practice (ILAP) and the Corporate Social Responsibility (CSR) Groups at Foley Hoag LLP. She has significant experience in international investment and human rights disputes, particularly those related to economic and natural resource development, and transitional justice in post-conflict regions. At Foley, her ILAP practice focuses on international arbitration (including investor-State dispute resolution and prevention), maritime boundary disputes, sovereign representation, and international commercial arbitration. Her CSR practice focuses on advising governments, non-governmental organizations, and multinational corporations on human rights compliance and conflict prevention, and alternative dispute resolution of human rights disputes. Xander has taught international arbitration at Vermont Law School and lectures frequently in academic and international fora on arbitration and international dispute matters. Most recently, she served as a trainer on investment law/investment disputes at Columbia University's Center for Sustainable Investment. She is also active in pro bono activities, including representing asylum seekers in immigration proceedings and recently advising the Supreme Court of the Republic of Zambia as it developed its new clerkship program.

Dr. Kariuki Muigua



DR. KARIUKI MUIGUA is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He is the immediate former Branch Chairman of Chartered Institute of Arbitrators (CIArb)-Kenya chapter, having served from 2012 to 2015. He is an Advocate of the High Court of Kenya of over 20 years standing and practising at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP) and the School of Law, University of Nairobi.

Mr. Jimmy Muyanja



MR. JIMMY MUYANJA, LL.M (Commercial Law), is the Executive Director, Center for Arbitration and Dispute Resolution (CARDER), Uganda. He is a Board Member of Nairobi Centre for International Arbitration, and a registered Arbitrator and Mediator, Centre for Arbitration and Dispute Resolution, Kampala, Uganda. He has authored several papers on Arbitration in Uganda. He developed reporting scheme for Uganda Arbitration cases on the UNCITRAL Case Law on Uncitral Text; developed jurisprudence on compulsory appointment of Arbitrators; and also developed and oversaw implementation of case division scheme for court-connected mediation at the Commercial Court of Uganda. He is a Member, NCI legislation Committee and has arbitrated and mediated cases within Uganda.

Professor Vincent Nmeielle



PROFESSOR VINCENT O. NMEIELLE is currently the general Legal Counsel and Director for Legal Affairs of the African Union Commission in Addis Ababa, Ethiopia. He is also Professor of Law and Head of the Wits Programme on Law, Justice and Development in Africa at the University of the Witwatersrand (Wits) School of Law in Johannesburg, South Africa, where he has taught since February 2002 and where he held the Bram Fischer Chair in Human Rights Law from 2002 to 2004. Nmeielle was a Professorial Lecturer in law at the Oxford University and George Washington University Human Rights Program in 2003 and 2004. From 2005 to 2008, Professor Nmeielle went on a leave of absence from Wits to serve as the Principal Defender of the United Nations-backed Special Court for Sierra Leone in Freetown, Sierra Leone, returning to Wits in June 2008. Professor Nmeielle holds a Bachelor of Laws (LLB) degree with Honors from the Rivers State University of Science and Technology, Port Harcourt, Nigeria, 1989; a Master of Laws (LL.M) degree with distinction in international law from the University of Notre Dame, USA, 1996; and a Doctor of Juridical Science (SJD) in international and comparative law from The George Washington University, Washington, D.C, USA, 2000. He is a Barrister and Solicitor of the Supreme Court of Nigeria and was admitted as such in 1990. Professor Nmeielle specializes in international and comparative law, and his professional, academic, and research interests lie within the areas of law, governance, justice and development in Africa. He has written extensively and consulted on constitutional issues, human rights, international justice, and governance in Africa. His recent works include *Africa and the Future of International Criminal Justice* (The Hague, Eleven International, 2012). *The World Bank Legal Review, Volume 5: Fostering Development through Opportunity, Inclusion and Equity* (The World Bank, 2014) of which he is one of the four editors and a contributor to two chapters.

Professor Fidelis Oditah QC SAN



PROFESSOR FIDELIS ODITAH QC 2003, called to the Bar 1992, practices at the English and Nigerian Bars in a broad range of areas. In England, he specialises in chancery and commercial work, with emphasis on insolvency and restructuring work. He has acted and/or advised on virtually all major corporate insolvencies in the UK in the last two decades. In Nigeria, his practice encompasses energy, projects, corporate and general commercial law. He has advised and acted for the Federal Government of Nigeria in a number of the most significant energy and power matters, and for many large and medium sized companies. He has extensive commercial arbitration practice as counsel and also sits frequently as an arbitrator in a broad range of commercial disputes.

Chief Bayo Ojo SAN



CHIEF BAYO OJO, a Senior Advocate of Nigeria (SAN) was called to the Nigerian Bar in 1978. He later got admitted as a Solicitor of the Supreme Court of England and Wales. Since then he has been in active Commercial law, Arbitration, Alternative Dispute Resolution, Oil and Gas, Litigation and International Law practice. He has acted as sole Arbitrator, member of arbitration panels and as Counsel in numerous domestic and international arbitrations both at the ICC and the LCIA. As Attorney General of the Federation and Minister of Justice, he initiated key reforms in the justice sector. Mr Ojo also acted as Chairman of the review panel for licensing round of oil blocks issued in 2005 in Nigeria, was an advisor on the exit of Nigeria from the London and Paris Clubs, advised and participated in the negotiation of a loan of \$2.5 billion US Dollars for the Mambilla Hydro, Railways and Rural Telephony from the China Exim Bank in Beijing, advised on the new regime for borrowing put in place by the Debt Management Office for the States and Federal Government, advised on the putting together of the Fiscal Responsibility Act, the current Central Bank Act, Tax Acts and review of Nigerian Investment Laws and a new Nigerian Arbitration Act to mention a few. As a former member of the National Council on Privatization, Ojo advised on the privatization of key Government entities that have been successfully privatized.

Dr. Emilia Onyema



DR. EMILIA ONYEMA is a senior lecturer in International Commercial Law, and Associate Dean (Learning and Teaching) of the Faculty of Law and Social Sciences, at SOAS, University of London; a Fellow of the Chartered Institute of Arbitrators and Committee Member of the London branch; and a Fellow of the Higher Education Academy. Dr Onyema's teaching and research covers international sales law, law and development in Africa and international commercial arbitration. She was formerly a Research Fellow at the School of International Arbitration, Queen Mary University of London, and the Alternate Tribunal Secretary of the Commonwealth Secretariat Arbitral Tribunal in London. Dr Onyema is qualified to practice law in Nigeria and is (np) solicitor in England & Wales. She advises companies in these fields. She holds a PhD in international commercial arbitration and is widely published in this area. Her most recent publication, "Regional arbitration institution for ECOWAS: lessons from OHADA Common Court of Justice and Arbitration" was published in (2014) Issue 5 of the Int'l Arb Law Rev.

Dr. Jean Alain Penda



DR. JEAN ALAIN PENDA, Independent Consultant at Price Waterhouse Coopers LLP, London, United Kingdom and OHADAC Project Manager, headquarters in the French West Indies. Jean Alain Penda holds an LLB from the University of Buéa (Cameroon), an LLM in International Corporate and Financial Law from the University of Wolverhampton (United Kingdom), and a Ph.D. from the University of Basel (Switzerland) specialising in sales and commercial law. Penda has been a Research Assistant for the Head of Private Law at the Faculty of Law, University of Basel and a Researcher for Global Sales Law, a project supported by UNCITRAL. He is a Director at the Foundation for a Unified System of Business Law (FUBLA) and a regular consultant for the Association for the Unification of Business Law in Africa (UNIDA) and ACP Legal, both which are non-governmental organisations promoting legal integration in Africa and the Caribbean. Author of several articles on OHADA law, Jean Alain Penda is regularly invited to speak at conferences and represents its association in most events worldwide

Mr. Kamal Shah



MR. KAMAL SHAH is a partner based in our London office and is the head of Stephenson Harwood's Africa and India Groups. He specialises in complex, cross-border international arbitration, litigation and fraud and asset tracing. He has acted for Governments, Government entities, banks, private corporations and high net worth individuals in a range of matters including those relating to projects and infrastructure, joint ventures, banking products, shareholder disputes, energy disputes, and a range of schemes commonly used to defraud individuals and corporations. Kamal is the Vice President of the LCIA African Users Council and a board director for the Business Council for Africa. Born in Kenya, he is fluent in Kiswahili, Gujarati, Hindi and French. He has advised on numerous high profile matters and is currently advising the Arab Republic of Egypt in relation to the tracing of US billions of dollars misappropriated by the Hosni Mubarak Regime and the Nigerian National Petroleum Corporation in relation to the enforcement of a US\$330 million arbitration award.

Ms. Leyou Tameru



LEYOU TAMERU is a legal consultant from Ethiopia. Educated in Addis Ababa University and Georgetown Law, her work focuses on International Arbitration. She has consulted on international arbitration cases while working with international and Ethiopian firms including WilmerHale and Emahizee Global Consulting. Her interest in the development of International Arbitration in Africa has led her to organize a number of fora on the topic such as the annual East African International Arbitration Conference. Leyou has also taught law at Addis Ababa University and has a broad experience ranging from investment policy to legal research while consulting with the World Bank and the International Finance Corporation (IFC). Leyou has a passion for technology and media and how it can be used to educate about legal matters.

Hon. Justice Torgbor



HON. JUSTICE EDWARD TORGBOR CA, FCI Arb, LLD, Professor of Law and Legal Consultant He is currently a Chartered Arbitrator (England) and Fellow of the Chartered Institute of Arbitrators (England), Court Member of the LCIA and Vice-President of the LCIA African Users' Council. Justice Torgbor is a specialist practicing arbitrator and mediator based in Nairobi with cases in Kenya, France and England. Formerly barrister in England, Judge of the High Court of Kenya, Advocate of the Supreme Court of Zambia, Attorney at Law, Ghana, Lecturer and Tutor in arbitration law and practice. He has published professional articles and is a Contributor to LCIA and Chartered Institute of Arbitrators' journals, Chairman, Participant and Presenter at numerous arbitration conferences, seminars and workshops in Kenya, Ghana, Nigeria, Uganda, Lesotho, South Africa, and England.

Mrs. Bernadette Uwicyeza



MRS. BERNADETTE UWICYEZA is the Secretary General of Kigali International Arbitration Centre (KIAC) since the starting of the Centre in 2012. She Holds a French Law degree and a Postgraduate Diploma in European Union Law (with Honors) from the University of Rennes I in France. The special field for Bernadette is business law, Regional Integration, management and policy formulation. She is also an Accredited Mediator CEDR. Prior to joining KIAC, Mrs. UWICYEZA was a Legal Advisor to the Ministry of East African Affairs under Trade Mark East Africa Project (2011) assisting the Ministry in legal and judicial matters of the EAC integration. She serves also as Legal consultant to the Ministry of Justice under the Competitiveness and Enterprise Development Project/World Bank (2006- 2011), coordinating the business law reform program engaged by the government for easy doing business in Rwanda. She worked earlier to that as Managing Director in different companies in Rwanda and served as lecturer in different Schools of law in Rwanda. She speaks English, French & Kinyarwanda. Her recent publication include: Bernadette UWICYEZA (Ed.)-New Law Governing contracts in Rwanda-Rozenberg Publishers-Amsterdam 2013-ISBN 978 90 361 0362 6

Director Yohannes Woldegebriel



DIRECTOR YOHANNES WOLDEGEBRIEL was born in Addis Ababa, Ethiopia in 1967. After he underwent his elementary and high schools, he joined the Addis Ababa University in 1985. Following a one year freshman course, he was admitted to the Faculty of Law of the Addis Ababa University and obtained his LL.B degree in July 1990. From June 2008 up to now, he is serving as Director of the only and pioneer arbitration body in the Chamber system and indeed, the entire country: the Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute. Since he was appointed as the Director of the Arbitration Institute, together with his colleagues, he exerted much effort to promote and popularize the resolutions of Commercial disputes through Arbitrations and Alternative Dispute Resolutions.

4. Discussion Paper

Discussion Paper

Dr Emilia Onyema

Introduction

It is well acknowledged that the level of participation by African states in the global arbitral discourse is much less than the numbers of arbitration references it generates. Such participation is measured on the numbers of arbitration references that hold in the continent (as seat of arbitration); the numbers of arbitrators of African origin that are appointed as members of such arbitral tribunals; the numbers of African law firms/practices or lawyers that represent clients/disputants in such references; the numbers and caseload of arbitration institutions that administer arbitral references. This project therefore empirically and systematically examines the reasons for this weak showing by each of these stakeholders and suggests remedial actions over an agreed period of time. Such remedial actions will be monitored for a shift (or not) in the desired direction. The shift will be for an increase in the numbers of arbitrations held within the continent; increase in the numbers of arbitrators of African origin appointed; increase in the numbers of African lawyers representing disputants in such references; increase in the caseload of arbitration institutions; and increase in the numbers of published arbitration related court decisions.

In a 2014 article (reproduced in this *Discussion Paper*), I noted that there are adequate numbers of arbitration institutions in the West Africa sub-region so that developing a new institution will only further congest an already crowded market space and noted that the presence of these many institutions has not realised the AALCO vision of “greater inflow of arbitral hearings with seats in the continent”.¹ This is particularly so with those disputes with at least one African party (defined as a party registered or domiciled in an African country). In similar vein, in his article, *Opening up International Arbitration in Africa*, Judge Edward Torgbor examined old prejudices against the appointment of qualified Africans as arbitrators in international dispute resolution (article is reproduced in this *Discussion Paper*).² In that connection Lise Bosman also noted in a recent article the efforts of the PCA in supporting African countries in arbitration related matters especially in its role of appointing authority as designated under the arbitration laws of several African countries.³

Data available show that there are arbitration institutions that administer arbitral references in various countries of the continent (see Table 3 below), however most disputants (even Africans and African registered companies) nominate arbitration institutions in other parts of the world as administrators of their disputes (see Table 4 below). This conference will examine the reasons for this phenomenon especially where one party to the reference is African. Research also shows that most African countries have modernised their national arbitration laws and signed up to relevant arbitration conventions (see Table 2 below), but these actions have not attracted the much needed arbitration references to the continent. There is also data to show that a growing number of African lawyers (and other professionals) are actively undertaking various trainings in arbitration and general ADR and again these have not translated into more arbitration references. So there is a clear need to interrogate the reasons behind this dearth of arbitral references with seats in the continent. It is also important to engage with the question whether it is now time for Africa to look within her borders to generate these much needed

¹ Onyema E, ‘Regional Arbitration Institution for ECOWAS: lessons from OHADA Common Court of Justice and Arbitration’ (2014) IALR page 99-111 [a pdf copy of the article can be downloaded at soas.ac.uk/eprints while IALR is available on Westlaw]

² Torgbor E, ‘Opening up International Arbitration in Africa’ (2014) LCA Dispute Resolution Journal, vol 1 no 1, page 1-20.

³ Bosman L, ‘The PCA’s Contribution to International Dispute Resolution in Africa’ (2014) Stellenbosch Law Review, vol 25 no 2, page 308-328.

arbitration references and look less outwardly for these (so effectively grow our domestic arbitration market).

This conference is the first in a series of four planned to examine the same question but as it relates to different stakeholders. So this conference in Addis Ababa will examine the role of arbitration institutions in the continent and is aptly hosted by the African Union Commission, as the umbrella organisation of African states. The second conference planned for 2016 will examine the role of courts and judges. This conference will be hosted by the Lagos Court of Arbitration in their new headquarters complex in Lagos and will hold on 6-7 July 2016 (please note this date in your diaries) on the theme, "Rethinking the role of courts and judges in supporting arbitration in Africa". The third in the series will examine the role of the state in supporting arbitration in 2017; and the last conference will examine the role of legal services providers in 2018. These four themes are the bedrock of any effective arbitral jurisdiction and must all align to make any jurisdiction attractive to be adopted as seat of arbitration. The proceedings at each conference will be published.

It is my view that the 'benefits' of arbitration follow the jurisdictions chosen as seats of arbitration. Such benefits impact on the four stakeholders focused on at each of the four conferences:

The State: will have modernised legal framework (conventions, laws and rules); benefit from higher taxable income from legal services and other businesses such as hospitality, tourism, transportation and communication; open up its legal services market particularly to international law firms; reputational advantage, among others.

Courts and Judges: will have the opportunity to make judicial pronouncements on the arbitration laws which it will adjudicate upon and contribute to the development of global arbitral jurisprudence; what I call the 'African voices' will participate in the shaping of emanating global arbitral jurisprudence. The scholarship of their decisions and judicial reasoning will also begin to restore respect for and confidence in the judiciary in these countries.

Arbitration institutions: will increase their caseload; render services that will be of globally recognisable standards; transparency of their services and strategic space sharing.

Arbitration users: will engage primarily commercial entities (primary users) and the lawyers that advise and represent disputants; and arbitrators: to continue to share best practices and support for the process of arbitration in purely domestic disputes and those arising from intra-African and international transactions.

So the goal of these series of conferences is to contribute to the transformation of the arbitral landscape of the jurisdictions in Africa so that they can attract more arbitration references with seats in their jurisdictions and develop their domestic arbitration. This goal is also the objective of the main research project to which this conference will contribute. These therefore are the desired impact measurements: change in numbers of references; modernised legal frameworks; increase in numbers of arbitration references with seats in cities in the continent, increase in the numbers of domestic arbitration and increase in the numbers of well-reasoned court judgments on arbitration from the continent.

The main research project titled "Creating a sustainable culture of arbitration as a mechanism for dispute resolution in African states"

It is not necessary for me to rehash the importance of empirical research in the operation of arbitration as a form of dispute resolution mechanism in Africa. There is no viable empirical research in this field in the continent to inform decisions, revision of laws and knowledge and practice sharing across the continent. This is one vision of this research project of which this conference is a part.

This project will pull together stakeholders in the sector of dispute resolution, articulate and monitor their practices and impact of the outcome of our conferences and research output, to find a measurable change in all aspects of arbitration in the continent. The various aspects are arbitration specific laws and rules and their reviews; courts and judges; arbitration institutions; arbitration users and practitioners; and the state. The second goal of this research project is knowledge sharing between researchers and academics, arbitration users and practitioners, and arbitration institutions, outside and within the continent.

The primary goal/purpose of the research project is to increase the visibility and viability of arbitration in the domestic, intra-Africa and international dispute resolution market.

Funding

Research requires money. My vision is that stakeholders should bear the burden of funding this and similar research because they will reap the benefit of the research. This translates into relevant stakeholders in the continent funding this research. It must be noted that it is crucial that African institutions support research and initiatives such as these on Africa. We had invited and asked several African institutions to attend and fund this conference but they did not and particular mention is made of the African Development Bank that funded a report on three out of the many arbitration institutions (we have listed 64 in Table 3 below) in the continent in 2014 (so at least evidencing their interest in arbitration in Africa). It is hoped that the AfDB and African Import Export Bank will be more supportive in funding such projects. The call for funding is not limited to these banks but to all institutions, agencies, and law and other professional firms who have an interest in the development of arbitration (and other ADR) on the continent.

This conference on the role of arbitration institutions

Various reasons have been proffered for the weak showing of Africa in arbitration as mentioned above in blogs, articles and conferences⁴; and as is the unfortunate norm with issues affecting the continent, there has been (and continues to be) a lot of talk on these concerns with no remedial action. It is this need for action that has prompted and motivated this project. To this end, this conference will focus on sharing experience for the creation of an enduring culture for the effective administration of arbitration by institutions that meet the requirements of its users as part of the process towards the greater participation of African arbitrators, institutions and cities in the global arbitration space. More particularly, this conference will examine the current role and functions of arbitration institutions within the continent; identify the key institutions and their commonalities and differences (for strategic space sharing); discuss and understand their users' perceptions of their services (scope and quality); suggest ways of improving their effectiveness towards placing the institutions at the forefront of dispute resolution in Africa. In 2008 I identified the following 5 tools which need to be in place for any arbitration institution to be viable in modern dispute resolution landscape:⁵

- Modern arbitration rules.
- Modern and efficient administrative and technological facilities.
- Security and safety of documents.
- Expertise within its staff.
- Some serious degree of permanence.

⁴ See for example the discussions by the various panels at the May 2014 ICAMA Second Arbitration Roundtable that held in Abuja, Nigeria: <http://www.icama.com/about.html>.

⁵ In a paper titled "Effective utilization of arbitrators and arbitration institutions in Africa by appointors" available at http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf

This list remains correct today and remains the minimal tools any arbitration institution in Africa should put in place.

This is the first conference on the four stakeholders, the focus of the main research project. It is designed as a one day intensive and interactive workshop that will examine the current role and functions of arbitration institutions within the continent; identify any gaps; understand their users' perception of their services; and suggest ways of improving their effectiveness. The conference proceedings have been divided into three main panels.

Panel 1 is further divided into those institutions/centres that promote themselves and their activities as 'regional' so beyond the territorial and jurisdictional borders of one particular state on panel 1a and those institutions/centres that promotes themselves as national or domestic on panel 1b. Such description does not preclude them administering cross-border disputes.

The speakers on these panels are the chief executive officers that operate or manage these institutions/centres, and so in a position to effect change. Primarily they are here today to tell us what they do and listen to the users to better understand what their users need from them that will make them more attractive so these users can nominate their institutions in the future.

The two panels are chaired by Ms Alexandra Meise of Foley Hoag LLP and Chief Bayo Ojo, SAN of ICAMA.

Panel two consists of users of these institutions drawn from various parts of the world and having listened to the institutions/centres on what it is they offer, these users will respond in view of their needs and experience from their use of other more established institutions with whose services they are also familiar, in the spirit of sharing experience and informing the institutions/centres in Africa what will make them opt to choose those on the continent. This panel is chaired by Prof Paul Idornigie of NIALS.

The third panel examines other issues which need to also be in place to make African cities/states attractive to being selected as seats for cross-border arbitration. These issues will be raised for general discussion and awareness at this conference. This is primarily for completeness since the remaining three conferences in the series which will hold over the next three years will each focus on one of the themes from the discussants. This panel is chaired by Prof Fidelis Oditah, QC, SAN.

Panel 1

1a Regional Arbitration Institutions

Regional arbitration institutions are those institutions whose services have a regional reach. The AALCO institutions fall within this category. There are three of these in Africa covering the North (Cairo RC); West (Lagos RC) and East (Nairobi RC which is yet to commence operation). The AFSA/Africa ADR also markets itself as a regional institution for the Southern Africa region; while the OHADA, CCJA covers the OHADA region (currently comprised of seventeen African countries from West and Central Africa). The Kigali Centre also sets out to serve the Eastern region of Africa. The ICC will share on its Africa experience and tips on sustainability of arbitration institutions.

1b National Arbitration Institutions/centres

This category comprises other arbitration institutions/centres in the continent that do not market themselves as having a regional reach but primarily administer disputes that are domestic or international in nature. This panel, comprised of such institutions from different regions of the continent, will discuss their functions and services.

The themes for panel discussion include:

- Facilities of the institution.
- Dissemination of relevant information about the institution.
- Appointment of arbitrators.
- Qualified personnel to facilitate references in the institution.
- Awareness campaign and other arbitration related services by the institution.
- Relationship between the institution, state, courts, and arbitration practitioners.

Panel 2

Users

Having listened to the centres/institutions on the services they offer (or perceive they offer), the users will respond to the presentations and feedback to the centres/institutions on the effectiveness or otherwise of their services; identify the shortcomings and gaps in comparison to the services of other well established arbitration institutions (such as the ICC, AAA, LCIA, SIAC, Swiss Chambers, SCC, etc.). In particular users will discuss the following issues:

- Services of the institutions that are considered fit for purpose.
- Services of the institutions that are not fit for purpose and suggest improvements.
- Gaps in the current ordering of these institutions.
- Gaps in the current provisions of these institutions.
- Services these institutions could (and should) also provide.

Panel 3

In concluding the conference, the last panel will focus on the different stakeholders and steps they can take in projecting Africa as a destination for arbitration. Each speaker will focus on one stakeholder comprising:

- Arbitrators of African origin.
- National courts and laws.
- Party advisors.
- Commercial parties/investors in Africa.
- African states and cities.

Tables

Five Tables with relevant data on African states and arbitration are included in the appendix below.

Concluding events

The rapporteur for the conference, Dr Jean-Alain Penda, will then pull together the issues that have been examined by the four panels; clarifying areas of commonality of practice; duplication in space sharing; weaknesses as stated by the users and suggestions on strengthening these areas.

The co-convenor of the conference, Judge Edward Torgbor, will conclude the day with some brief remarks thanking all attendees and our sponsors and inviting all to our next conference in Lagos on 6-7 July 2016, and to dinner at the Hilton Hotel Addis.

Language

Proceedings of the conference will be conducted in the English language.

Appreciation

The organisers of this conference are immensely grateful to Ambassador Catherine Muigai Mwangi, the Kenyan Ambassador to Ethiopia for facilitating the involvement of the African Union Commission in this conference and research project.

We also thank Prof Nmehielle and his team at the Legal Counsel's office in the AU Commission for accepting to host this conference in their premises and indicating their interest in the subject of arbitration and all the assistance they gave to our team.

We thank Chief Bayo Ojo and ICAMA for not just participating but also throwing their funds behind this project which clearly reflects the vision of the ICAMA biannual roundtables which they organise.

We thank SOAS University of London the foremost institution in Europe and the UK for the study of African studies and languages, for financially supporting this conference as a testament to our genuine interest in participating and dialoguing on African matters in Africa.

We thank Alexandra Meise and her Firm, Foley Hoag LLP for their financial support and interest in our project and this conference.

We thank Kamal Shah and Stephenson Harwood for their financial support and encouragement with this project.

We thank Tunde Fagbohunlu, SAN and LACIAC for their financial support as well.

We thank all our chairs, speakers and delegates who have all spent their own funds to attend this conference. This tells us this is a subject you are deeply interested in and therefore to which you were willing to also commit your personal resources.

Special thanks to the organising team who were coordinating this conference from different countries: Judge Torgbor, Dr Jean Alain Penda, Christine Djumrah and Juliet Ssentongo.

We thank you all for attending the pre-conference reception last night and also invite you to a formal dinner this evening at 1930 at the Hilton Hotel to close the conference.

Enjoy the deliberations and Thank you!

Key Article by Dr Emilia Onyema

SOAS, University of London

Regional Arbitration Institution for ECOWAS: Lessons from OHADA Common Court of Justice and Arbitration

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Dr Emilia Onyema, *FCIArb**

Introduction

The States of the West African sub-region currently do not host many international arbitration references and various reasons are proffered for this situation. Arbitration practitioners within these States will prefer to see more arbitrations hosted in the sub-region. This article examines whether the establishment of a new regional arbitration institution similar to the OHADA Common Court of Justice and Arbitration (CCJA) within ECOWAS will be a solution. The CCJA in addition to its juridical role within OHADA also administers arbitration references under its own set of arbitration rules. It is this latter role of the CCJA that is primarily examined in this article in answering the question, whether the ECOWAS Common Court of Justice (CCJ) should in addition to its role as a supranational regional court, also transform into a regional arbitration institution to render within ECOWAS member States, comparative services as the CCJA does in OHADA member States. To answer this question, this article examines OHADA and her harmonisation strategy in section one; section two briefly highlights certain provisions of the arbitration rules of the CCJA as a regional arbitration institution within OHADA; section three examines the remit of ECOWAS and the role of the CCJ; section four examines the arguments in favour and against setting up a new regional arbitration institution within the ECOWAS sub-region, and the role of the Asian-African Consultative Organisation (AALCO) regional centres; section five argues for the strengthening of national courts in the sub-region and proposes the expansion of the jurisdiction of the CCJ to include applications for the recognition and enforcement, and challenge of foreign or international (transnational) awards connected to ECOWAS member States, but not for the CCJ to transform into a regional arbitration institution.

1. OHADA and her Harmonisation Strategy

OHADA was created by Treaty, signed in 1993 and entered into force in 1995 and the revised treaty was ratified in 2008 and entered into force in 2010, and is a grouping of seventeen African countries⁶ with a particular focus on the harmonisation (through the instrument of unification of laws) of their business laws for the purpose of attracting greater foreign direct investment (FDI) as they seek to create more conducive and predictable legal environment for foreign investors within their States.⁷ The OHADA countries are geographically located in Western and Central Africa which explains why nine OHADA member States are also members of ECOWAS.⁸ The member States of OHADA have some relevant and

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⁶ The seventeen African countries are: *Benin, Burkina Faso, Cameroon, Central Africa Republic, Cote D'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Democratic Republic of Congo, Senegal, Chad, and Togo*. The nine countries in asterisks are also members of ECOWAS. This list of OHADA member states is available at: <http://ohada.org/etats-parties.html> accessed on 7 July 2014.

⁷ OHADA Treaty, art 1.

⁸ The West African Economic and Monetary Union (UEMOA under its French acronym) is another regional organisation within West Africa to which the following Francophone ECOWAS and OHADA member States also belong: Benin, Burkina Faso, Cote D'Ivoire, Guinea Bissau, Senegal and Togo.

deep commonalities such as French as the official language of most of the member States;⁹ membership of the franc zone as it relates to their currencies;¹⁰ French law as their received laws along with the civil law tradition.¹¹ One major impact of the strong connection to France is that the nature of the substantive laws under the OHADA regime is not strange or unfamiliar to the citizens, judiciary or legal practitioners within OHADA member States. Ntongho has argued that OHADA laws are based on French law which does not reflect “African culture and practice”.¹² Such an assertion, correct in itself, does not take account of the role of received laws generally in the continent. She contends that this is one of the reasons why other African countries are not joining OHADA. The reasons she says are because France is a major donor to these (OHADA) African countries and has strong colonial ties with them.¹³ In addition to this however, the continued effect of and strong connection between all colonised African countries with their former colonialist country must not be overlooked. This is encapsulated in the concept of received laws (reflecting those body of laws not indigenous to the relevant African country) evident in legal transplantations and the legal systems adopted in various African countries. It can therefore be asserted that the substance of OHADA laws are not ‘foreign’ in her member States because they are predominantly Francophone countries conversant with the civil law legal system on which OHADA laws are based and in which their lawyers are trained.

The impact of received laws therefore cannot be left out of the discussion on harmonisation of laws in Africa. This is particularly relevant for laws regulating business transactions.¹⁴ It is interesting that Ntongho gives, as one of the reasons why Anglophone African countries will not join OHADA, the fact that their laws are based on the common law legal tradition which in itself is received and not indigenous. African lawyers are familiar working with received laws (whether French or English based) and these can form the basis of any discussion for a harmonised regime of laws.¹⁵ This does not remove the perception in Anglophone countries that if they joined OHADA, they will be disadvantaged because OHADA uniform laws are primarily based on French law and the civil law system.¹⁶ The late Professor Yakubu summarised the obstacles to the expansion of OHADA as follows:

⁹ Spanish is the official language in Equatorial Guinea, Portuguese is the official language in Guinea Bissau, and Cameroon has both French and English as official languages. Though the 2008 revised Treaty (art. 42) adopted English, Spanish and Portuguese as OHADA additional working languages, in practice French remains the sole OHADA working language and the controlling language of all its documents and not much official translation of OHADA documents to the additional languages has been done.

¹⁰ This is reflected in preamble no 3 of the 1993 Treaty which states in part: “Convinced of the fact that their membership in the franc zone is an economic and monetary stability factor and constitutes a major asset for the progressive realisation of their economic integration ...”

¹¹ Cameroon operates both the common law and civil law traditions for its legal system. On how the OHADA regime operates in Cameroon and the impact of the different legal systems on its practice see Tunde M, “OHADA as Experienced in Cameroon: addressing areas of particular concern to Common law Jurists” in Dickerson CM (ed), *Unified Business Laws for Africa*, GMB Publishing, 2009, (Unified Business Laws for Africa) at page 69-82.

¹² Ntongho R.A, “Political Economy of the Harmonisation of Business Law in Africa” (2012), *Journal of Politics and Law*, vol 5, no 2, page 58 (Ntongho) at page 59.

¹³ It is noted that France may no longer be the major donor to OHADA as the World Bank has also become a major donor with the UK Department for International Development also contributing to fund various programmes in some OHADA States such as the DRC.

¹⁴ In most African countries, indigenous (and religious) laws regulate personal matters such as family and inheritance which may not necessarily implicate business transactions and those matters with a foreign element, though the rise in large mechanised farming may implicate customary land law.

¹⁵ It must also be acknowledged that even after most African countries became independent, the laws enacted by their legislatures were still heavily influenced by those in operation in their former colonialist States.

¹⁶ Ntongho, at page 61. See also, Akin-Olugbade A, who in a paper titled, “The Harmonization of Investment Laws in Africa and Prospects for Future Harmonization of such Laws” presented as the ADB contribution to the

“They include lack of political will resulting in the judicial and commercial infrastructures’ instability and continued lack of sophistication and strength. Other impediments include the divergence of legal, cultural and social traditions, differing economic philosophies on specific topics such as priorities in bankruptcy, and very generally, the continuing influence of the nations’ colonial past”.¹⁷

It is of course important to keep the goals and limitations of OHADA in view. As a creation of Treaty, OHADA is binding only on its member States. It may be that its description and title (harmonisation of business laws in Africa) causes confusion as to its sphere of influence. It is not an African Union institution neither is it a regional economic community or a customs union or regional trade organisation. It is an organisation of a number of States that cut across two main geographical regions of Africa, Western and Central Africa, with strong common interests and colonial histories that share similar legal system which happens to be the civil law system. So the idea behind OHADA is not one of States desiring to pool their sovereignties together,¹⁸ and agree common policies for the economic development of their member States (as in ECOWAS). This being the context in which OHADA exists, it is therefore impractical to seek to translate its mechanisms to the whole continent. Bamodu and Ndulo, have separately argued that the harmonisation of business laws in Africa should be undertaken on a continental level under the auspices of the African Economic Community (AEC). However in this author’s view, harmonisation of business laws on a continental level is a huge project which may not be realisable within a reasonable time (if ever) primarily because of the very diverse nature and competing legal systems of the countries within the continent.¹⁹ Moreover, such harmonisation process can in the interim be undertaken on a regional basis, a view supported by Article 4(d) of the Treaty establishing the AEC which provides as one of the objectives of the AEC, the coordination and harmonisation of “policies among existing and future economic communities in order to foster the gradual establishment of the Community”.²⁰ Therefore the key analysis should be whether, either on a continent wide level or in the various geographical regions, the mechanism of harmonisation of business or commercial laws adopted by OHADA can be replicated towards the attainment of uniformity and certainty (and in some cases modernisation) of their business laws.

Back to OHADA and the harmonisation method it adopts. Article 1 of the OHADA Treaty states:

panel on ‘Investment Law, Dispute Resolution and the Development Promise: Back to the Future’ at the 2007 Annual Meeting of the American Society of International Law, *ASIL Proceedings*, vol 101, page 452, stated, “one of the major challenges that OHADA faces is the extension of its membership to African countries of the common law tradition”.

¹⁷ Yakubu JA, “Community Laws in International Business Transactions” in Dickerson CM (ed), *Unified Business Laws for Africa*, at page 6.

¹⁸ Though, loss of some sovereignty to the supranational agencies in such an organisation is inevitable.

¹⁹ See Bamodu G, “Transnational Law, Unification and Harmonization of International Commercial Law in Africa (1994), *Journal of African Law*, vol 38, no 2, page 125 at page 169, where he argues for African countries to harmonise their private international law rules which affect trade on a continental basis. See also Ndulo M, “Harmonisation of Trade Laws in the African Economic Community” (1993), *Int’l Comparative Law Quarterly*, vol 42, page 101.

²⁰ The treaty was concluded in Abuja on 3 June 1991 with text available at http://www.au.int/en/sites/default/files/TREATY_ESTABLISHING_THE_AFRICAN_ECONOMIC_COMMUNITY.pdf accessed on 8 July 2014. It is important to note that the ECOWAS Treaty declares ECOWAS as the only regional economic community within the West Africa sub-region for purposes of participation in the AEC, and OHADA is not a regional economic community.

“The objective of the present Treaty is the harmonisation of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, ...”²¹

And Article 5 provides that these common rules “are to be known as Uniform Acts”. The effect of the uniform acts is stipulated in Article 10:

“Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.”

Beauchard and Kodo have argued that the implementation of this Article 10 remains uncertain even with the CCJA publishing an interpretation of the Article in an Advisory Opinion to the effect that Article 10 is limited to those provisions in domestic laws that are identical to or conflict with a provision of a uniform act.²² The authors argue that the uncertainty arises with domestic courts making decisions upholding domestic laws that conflict with a uniform act, and that these tensions arise from a lack of the use of express abrogation language in the Treaty.²³ They conclude that the conflicting positions adopted within the member states “would have to start with an exhaustive identification, state by state, of all language abrogated by the uniform acts”.²⁴ This is on the basis of the rules of abrogation adopted in these jurisdictions. As an example the CCJA in *Delpech v SOTACI* ruled that national legislation can be applied to understand the provisions of the Uniform Act on Arbitration (UAA).²⁵ This decision of the CCJA supports the assertion that both regimes (domestic laws and uniform acts) continue to exist side by side. So where a domestic law on the same subject matter contains identical or contradictory words (or words to that effect), the uniform act will supersede and take precedence over the domestic law, though the domestic law may help clarify the uniform act.

As mentioned above, the focus or interest of OHADA is limited to business laws which are defined under Article 2 as:

“regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect of credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration, are also included the following laws: Employment law, Accounting law, Transportation and Sales laws, and any such other matter that the Council of Ministers would decide, unanimously, to so include as falling within of Business Law, in conformity with the objective of the present Treaty and of the provisions of Article 8.”²⁶

²¹ The wording of art 1 remains the same in both the 1993 original and 2008 revised Treaties.

²² See Beauchard R and Kodo MG, “Can OHADA Increase Legal Certainty in Africa?” (2011), The World Bank Justice and Development Working Paper Series, (Beauchard & Kodo) pages 25-26. A pdf copy of the paper is available online at <http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/17-2011CanOHADAIincrease.pdf?resourceurlname=17-2011CanOHADAIincrease.pdf> accessed 7 July 2014. See also The CCJA Advisory Opinion of 30 April 2001 to which the authors refer.

²³ Beauchard and Kodo, pages 26-28, referring specifically to decisions from the Court of Appeal Niamey (Niger) and Court of First instance Ouagadougou (Burkina Faso) as examples.

²⁴ *Ibid.*, pages 24-25.

²⁵ *DELPECH v SOTACI*, CCJA decision No 010/2003 of 9 June 2003, where the CCJA referred to art 44 of the Ivorian Arbitration Law in interpreting the reference to “competent judge” in art 25 UAA. The CCJA decided this article referred to the Court of Appeal of Cote d’Ivoire, as having jurisdiction over the action to nullify an award.

²⁶ The wording of art 2 remains the same as in the 1993 original Treaty.

To this end, OHADA has adopted the following nine uniform acts: (1) Law of Cooperative Societies of 15 December 2010; (2) General Commercial Law revised 15 December 2010; (3) Law of Commercial Companies and Economic Interest Groups, latest revision of 30 January 2014²⁷; (4) Secured Transactions and Guarantees Law revised 15 December 2010; (5) Simplified Recovery Procedures and Measures of Execution of 01 January 1998; (6) Collective Proceedings for Clearing of Debts, 01 January 1999; (7) Arbitration Law, 11 June 1999; (8) Organisation & Harmonisation of Accounting Firms, 01 January 2001 and 01 January 2002; and (9) Contract of Carriage of Goods by Road of 22 March 2002. OHADA is also currently consulting on a Uniform Contract law,²⁸ and has its sights on laws regulating labour law, consumer sales law, competition law, intellectual property law, banking law, evidence law and a law to regulate unincorporated forms of business.²⁹ So it is evident that there is no limit to this list of ‘business laws’, a description which in itself is problematic.

The necessity to define and limit what matters fall within business laws is aptly raised by Beauchard and Kodo in the context of overlap of subject matters and conflicts in the sphere of influence and regulation by the various regional organisations to which OHADA member States also belong.³⁰ Such overlaps, the authors conclude, create legal uncertainty, “which can be resolved only if each of these organizations were to ensure that the rules it adopts do not address the same topics as other such organizations, or at the very least, that their rules do not internally conflict”.³¹ This state of affairs reveals a lack of collaboration between the regional organisations within the sub-region to which these States belong. It may therefore be necessary for the States within the sub-region to agree a development master plan to apply. Such a master plan will definitely ensure not just greater collaboration but also elimination or reduction of overlaps between the various regional organisations. An agreed master plan on development of the sub-region will necessitate each regional organisation having a clearly defined remit and scope of activity which fits into the functions of other organisations within the master plan. This will reduce the numbers of regional organisations within the sub-region, a concern also raised by the African Development Bank in its *Regional Integration Strategy Paper for West Africa, 2011-2015* (AfDB Report) and recognised as one of the major problems in the sub-region, too many regional organisations,³² and remove or limit the overlaps that have been alluded to.³³ From this analysis therefore, and assessing the scope of activities of current organisations within the sub-region, OHADA will be best suited to regulate laws relating to business transactions. This is what OHADA currently does and has established institutions that work towards the achievement of this goal. However the subject matters that fall within the definition of ‘business’ laws need to be better and more clearly defined.

2. CCJA: Role and Function as Arbitration Institution

The CCJA is one of the five principal organs of OHADA.³⁴ Each organ of OHADA is assigned a specific role aimed at the fulfilment of the goals of OHADA. So for example the Council of Ministers (CM) which

²⁷ This revised version came into force on 5 May 2014.

²⁸ See Dickerson CM, “OHADA’s Proposed Uniform Act on Contract Law” (2011), *European Journal Law Review*, vol 13, page 461.

²⁹ Listed by Idris MB, “Harmonization of Business Laws in Africa: an insight into the Laws, Issues, Problems and Prospects” in Dickerson CM (ed), *Unified Business Laws for Africa*, at page 31.

³⁰ Beauchard and Kodo, at page 25.

³¹ Ibid.

³² AfDB Report, para 3.1.1.2 refers to the multiplicity of regional organisations within the sub-region. The Report is available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/RISP%20for%20West%20Africa%20-%20REV%20.pdf> accessed 30 June 2014.

³³ As raised by Beauchard and Kodo at page 25.

³⁴ OHADA Treaty, art 3 lists the other principal organs of OHADA as: The Conference of Heads of State and Governments (created under the 2008 Revised Treaty), the Council of Ministers, and the Permanent

comprises the Ministers of Justice and Finance of the member States adopts the uniform acts, approves the annual programme of harmonisation of business laws, and generally adopts regulations for the implementation of the Treaty.³⁵ The CCJA on its part performs “a dual role as a regional supranational court and as an arbitration institution”.³⁶ As a regional supranational court, the jurisdiction of the CCJA includes interpretation of the OHADA Treaty and regulations, resolving disputes on the interpretation of the Treaty, giving opinions on uniform laws, and making final decisions on disputes arising under the uniform acts.³⁷ It is therefore clear that the CCJA exists to support the OHADA machinery and ensure uniform interpretation of the uniform acts to create predictability and stability in this regard. However, that is just one aspect of its functions. The second aspect of its dualist nature which is of primary interest in this paper is its attribute as a regional arbitration institution.³⁸ ‘Regional’ in this respect refers to the OHADA region which is made up of the OHADA member States. Article 1.1 of the CCJA Arbitration Rules provides:

“The Common Court of Justice and Arbitration hereafter referred to as “the Court” shall perform the functions of administering arbitrations within the domain devolved upon it by article 21 of the Treaty under the conditions hereafter defined”.³⁹

Thus it is the OHADA Treaty by virtue of its Article 21 that grants the CCJA its status as a regional arbitration institution. The CCJA acts in an administrative capacity just like any arbitration institution when administering arbitral references under its Rules.⁴⁰ A quick digest of the arbitration regime of the CCJA reveals a modern mechanism for administering arbitration. The disputing parties commence the reference through filing a request and answer with the Registrar of the CCJA.⁴¹ Article 10 of the Rules clarifies that such parties thereby subject themselves to “the provisions of Part IV of the OHADA Treaty, these arbitration rules, the internal rules of the Court (CCJA), their appendixes and the costs of arbitration rates ... in force at the time of the introduction of the arbitral proceedings ...”⁴² Where one party refuses to participate in the reference, the arbitration shall continue even in such party’s absence. The parties can agree the seat of arbitration while hearings can hold in any location as decided by the arbitral tribunal.⁴³

On arbitrators, the parties can determine number and appointees. The default provision is one or three arbitrators. Where parties appoint the arbitrator, the CCJA will need to confirm such appointee and

Secretariat. There is also notably the Regional Training Centre for Legal officers (ERSUMA) where training and continuing education on business laws is conducted and is provided under art 41 of the Treaty.

³⁵ See Onyema, E, “Arbitration under the OHADA Regime”, (2008) *Int’l Arbitration Law Review*, page 205 (*Ohada Arbitration*) at page 206.

³⁶ *Ibid.*, at page 208. See also Martor B, et al, *Business Law in Africa: OHADA and the Harmonization Process*, 2nd ed., GMB Publishing, 2007, (Business Law in Africa) pages 271-283.

³⁷ OHADA Treaty, art 14.

³⁸ The current CCJA Arbitration Rules was adopted on 18 April 1996 and published in the OHADA Official Journal on 01 November 1997 and became effective in 1998.

³⁹ OHADA Treaty, art 21 provides the connectors that will trigger CCJA jurisdiction as: where a party to the contract has its domicile or usual place of residence in any OHADA Contracting State; or if the relevant contract is to be fully or partially enforced in one or more member states. So to arbitrate a dispute under the CCJA Arbitration Rules, one or more of these connectors must be present.

⁴⁰ The role of the CCJA is very similar to that of the Court of Arbitration of the International Chamber of Commerce (ICC), with its Chief Court Registrar also performing the functions of a Secretary General of the CCJA ‘Arbitral Institution’.

⁴¹ See CCJA Arbitration Rules, arts 5, 6, and 7.

⁴² Part IV OHADA Treaty is the chapter on Arbitration while there is a separate Uniform Act for Arbitration.

⁴³ CCJA Arbitration Rules, art 13.

where they fail to nominate, the CCJA appoints the arbitrator, usually from its list of arbitrators.⁴⁴ It is interesting to observe that in appointing arbitrators, the CCJA “may first take into consideration the opinion of experts whose competence are known in the area of international commercial arbitration”.⁴⁵ Thus the judges of the CCJA themselves do not sit as arbitrators in such references.⁴⁶

Appointed arbitrators are under a continuing obligation to disclose and remain independent of the parties.⁴⁷ Such arbitrators are required to complete their mandate, though they may be replaced by the CCJA as a result of resignation, successful challenge or death, inability to perform their functions or a legal or factual impediment.⁴⁸ It should be noted that arbitrators functioning under the CCJA Rules have greater opportunity of being heard (as compared to other institutional rules) before any decision that affects them is taken. This includes decisions on challenge or replacement on any grounds except death. It is the appointed arbitrators that make decisions over the dispute between the parties and evidence their decision in an award;⁴⁹ rule on their jurisdiction and validity of the arbitration agreement;⁵⁰ determine any application for interim measures of protection or provisional claim;⁵¹ and hear the parties in an adversarial hearing having full control of the proceedings.⁵² Finally, just like the ICC Court of International Arbitration, the CCJA scrutinises all final awards rendered under its Rules.⁵³

It is also important to note that the CCJA fixes the cost of the arbitration including the amount the parties need to pay in advance and any subsequent deposits.⁵⁴ The parties shall pay the required deposits towards the cost of arbitration in equal shares.⁵⁵ Payment of the deposit is very important since the file will only be transmitted to the arbitrators after the deposit requested has been paid in full, and the cost

⁴⁴ See CCJA Arbitration Rules, art 3.1. However in three member tribunals, the CCJA appoints the presiding arbitrator except the parties provide otherwise. This same arbitrator appointment procedure is adopted in multi-party disputes, though in default the CCJA may appoint all arbitrators. The CCJA list of arbitrators is updated annually.

⁴⁵ CCJA Arbitration Rules, art 3.3.

⁴⁶ OHADA Treaty, art 21, para 2, and CCJA Arbitration Rules, art 2.2. See also Onyema, *Ohada Arbitration*, at page 208.

⁴⁷ CCJA Arbitration Rules, art 4.1 and note that the ground of lack of independence mirrors that of art 7 of the 1998 ICC Arbitration Rules. Also note that under the 2012 ICC Arbitration Rules, art 11 now includes lack of impartiality. It is also interesting that the test is in the “minds of the parties” (English translation) which closely mirrors the ICC Arbitration Rules basis of the “eyes of the parties” under its art 7.2 (retained as art 11.2 in the current 2012 ICC Rules).

⁴⁸ CCJA Arbitration Rules, arts 4.3 and 4.4. The decision of the CCJA on this matter is not appealable as it is an administrative decision and the CCJA does not have to give reasons for its decision.

⁴⁹ The award must be issued within 90 days from the close of hearings and the CCJA can extend this time on application of the arbitral tribunal according to art 15.5 and the tribunal can make a consent award under art 20 CCJA Arbitration Rules. Art 22.3 CCJA Arbitration Rules give the presiding arbitrator special powers to decide the dispute alone where there is no majority.

⁵⁰ See CCJA Arbitration Rules, art 10.3 and on the basis of public policy, the arbitrator can *suo moto* determine his/her jurisdiction under art 21 CCJA Arbitration Rules.

⁵¹ See CCJA Arbitration Rules, art 10.5. Note that for urgent measures or those that the tribunal cannot grant, a party can seek such orders from any competent national court, and the CCJA should be duly informed.

⁵² CCJA Arbitration Rules, art 19 and note that the arbitral tribunal may hear the parties separately but in the presence of their legal advisers, and may also hold a documents only hearing.

⁵³ OHADA Treaty, art 24 empowers the CCJA to scrutinise the final award and “suggest any formal amendments to such a decision” which, art 23.2 CCJA Arbitration Rules defines as “modifications of form”. All draft awards on jurisdiction, partial awards and final awards are subject to scrutiny of the CCJA according to art 23 CCJA Arbitration Rules.

⁵⁴ See arts 8 and 11 while art 24 CCJA Arbitration Rules defines what items are included in the cost of arbitration.

⁵⁵ CCJA Arbitration Rules, art 11.2 and note that one party can pay the deposit where the other party fails to pay; and part of the amount can be paid by bank guarantee.

of arbitration fully paid before the CCJA releases the award to the parties.⁵⁶ Once the final award is released to the parties, it then falls within their power to enforce, challenge or seek annulment of the award.⁵⁷ CCJA arbitration enjoys a wide confidentiality clause which includes the arbitral proceedings, deliberations of the CCJA, the documents and award. This confidentiality clause is binding on all those connected to the reference.⁵⁸ After the final award is issued to the parties, the CCJA reverts to being a regional supranational court on the basis of which it takes jurisdiction to hear enforcement or annulment actions in respect of the award.⁵⁹ The administrative role performed by the CCJA in arbitration references under its Arbitration Rules is clear from this brief summary. This also shows that the tasks the CCJA undertakes are not dissimilar to those undertaken by arbitration institutions generally. In recognition of the administrative nature of these tasks, decisions on them taken by the CCJA are recognised as administrative and not judicial in character.

The provisions of Article 27 of the CCJA Arbitration Rules however differ from those of other arbitration institutions, and make CCJA arbitration special. Article 27 provides:

“Awards made in conformity with the provisions of these arbitration rules are binding in respect of the claim on the territory of each member state, as if they were ruling, made by Courts in the state. They may be the object of compulsory enforcement on the territory of any one of the member states.”

The provisions of Article 27 are judicial and not just administrative in character. It regulates matters on enforcement of the resultant award which is usually provided for in national laws or international conventions on arbitration.⁶⁰ Article 27 ensures that CCJA awards are directly enforceable in the seventeen OHADA member States, wherever the judgment debtor has assets against which enforcement can be executed.⁶¹ All the party wishing to enforce such award requires is the grant of exequatur by the CCJA and all the enforcing State needs to confirm is that the exequatur emanates from the CCJA. As a supranational court, its orders cannot be challenged in the courts of OHADA member States since the CCJA is the court of final jurisdiction on OHADA related matters. In the same manner, Article 30.6 of the CCJA Rules provides for very limited grounds on which CCJA Arbitral awards may be challenged or annulled.⁶² It is important to note that this challenge can be made proactively, that is before, or following the grant of exequatur (recognition) of the final award.⁶³ The important power that reflects the dualist nature of the CCJA is that matters of enforcement and challenge of an award rendered under the CCJA

⁵⁶ This also applies to supplementary requests for payment of additional deposits. Lack of payment suspends the arbitral proceedings. It is the Secretary-General of the CCJA that notifies the parties of the final award after full payment of all outstanding costs of arbitration according to art 25 CCJA Arbitration Rules.

⁵⁷ The parties can also seek correction, interpretation or additional award from the tribunal or CCJA in accordance with art 26 CCJA Arbitration Rules.

⁵⁸ CCJA Arbitration Rules, art 14.

⁵⁹ CCJA Arbitration Rules, arts 29 and 30.

⁶⁰ For example, art 35 UNCITRAL Model Law on International Commercial Arbitration (2006 revision) (Model Law) and art III UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

⁶¹ This is through the grant of an order of exequatur by the CCJA which makes the award enforceable in all OHADA member States.

⁶² The grounds for challenging an application for exequatur according to art 30.6 CCJA Arbitration Rules are: (i) where there was no arbitration agreement or the agreement was void or had expired or lapsed; (ii) where the arbitrator ruled without conforming to his/her mandate; (iii) Where the adversarial procedure was not adopted; and (iv) where the award is contrary to international public policy.

⁶³ According to CCJA Arbitration Rules, art 30.2 the exequatur is granted *ex parte* without a hearing. See Martor, et al, *Business Law in Africa*, pages 280-283.

Arbitration Rules is reposed in the CCJA in its judicial capacity. So various paragraphs of Article 29 CCJA Arbitration Rules provide:

“If a party intends to challenge the recognition of the award and its res judicata effect pursuant to article 27 above, he shall seise the Court (referring to the CCJA) of the matter by petition which he shall serve on the opposing party” (Article 29.1).

“The Court (CCJA) shall inquire on the petition and rule under the conditions prescribed by its rules of procedure” (Article 29.4).

“If the Court (CCJA) rejects the recognition and res judicata of the award referred to it, it shall annul the award...” (Article 29.5).

The effect of these provisions of the CCJA Arbitration Rules is that judicial actions on awards rendered under the auspices of the CCJA Arbitration Rules is taken before the CCJA itself unlike awards made under the OHADA Uniform Arbitration Act (UAA). For awards made under the UAA, actions commence from domestic courts in OHADA member States with final appeal to the CCJA. It is this right of parties to directly invoke the jurisdiction of the CCJA which makes recourse to arbitration under the CCJA Arbitration Rules different and attractive. So a party that obtains a CCJA based arbitral award can immediately (without going through the national courts of an OHADA member State) obtain enforcement of the same award before the CCJA and pursue execution in the member State where the defaulting party has assets.⁶⁴ This effectively creates a ‘one-stop’ court over such arbitration awards since there is no appeal from CCJA judgments. There is no similar regime within ECOWAS. This aspect of the CCJA arbitration regime makes it worth exploring whether ECOWAS can and should adopt the same regime, and if it should, how this may be implemented.

3. ECOWAS and its Community Court of Justice (CCJ)

ECOWAS is a Treaty based geographical grouping of fifteen countries (nine of which are also members of OHADA⁶⁵) and the recognised regional economic community (REC) in the sub-region. Most ECOWAS member States have French as their official language (referred to as Francophone countries) while the others (some of which are the economically more powerful states within the sub-region) have English as their official language (referred to as Anglophone countries),⁶⁶ and in the same divide, the civil and common law legal traditions.⁶⁷ In addition to these factors, the Anglophone countries are not parties to the franc monetary zone (one of the major connectors between OHADA member States). These basic

⁶⁴ See *La Societe Benin Control SA v Republic of Benin*, CCJA 004/2013 AR13, decision of 13 May 2014.

⁶⁵ ECOWAS was created under the 28 May 1975 ECOWAS Treaty which was revised on 24 July 1993 with the following member States: *Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali*, (Mauritania withdrew its membership from the Community in 2000 to join the Arab-Mahgreb Union), *Niger, Nigeria, Senegal, Sierra Leone, and Togo*. This list is available online at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> accessed on 7 July 2014. The nine member States in asterisks are also OHADA member States, which is a slight majority of ECOWAS States. All references in this section are to the 1993 Revised ECOWAS Treaty.

⁶⁶ For example Nigeria and Ghana attracted the largest inflows of FDI in the sub-region according to UNCTAD World Investment Report, 2014, UN Publication, pages 37-41. See also Moeller B, “Africa sub-regional Organisations: Seamless Web or Patchwork?” (2009), Crisis States Working Paper Series, no 56, at page 3 where the author describes Nigeria as the “obvious hegemon” within ECOWAS.

⁶⁷ All African countries have pluralist legal systems generally made up of domestic statutes (including national constitutions), customary laws (which are indigenous), religious laws (for example Islamic laws), regional and international conventions, in addition to received laws.

descriptors show the few commonalities (basically geographic location of the States) binding on ECOWAS member States unlike those commonalities binding on OHADA member States.⁶⁸

The aims of ECOWAS as stated under Article 3 of the 1993 Treaty are to:

“promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.”⁶⁹

Thus it is evident that the aims of both organisations are different. OHADA has a narrower scope which is to harmonise business laws within its member States while ECOWAS has a broader vision of general economic development of its member States and gradual integration leading to an economic union. The integration efforts of ECOWAS targets the policies of its member States while the harmonisation efforts of OHADA focus on the substantive provisions of the business laws of its member States. Therefore with divergent goals and purposes across different levels, there is no reason both organisations cannot complement each other. It should be noted that some of the defined sectors of involvement, such as transport, communication, trade, money and finance services overlap in both organisations.⁷⁰ It is argued that even if there is such overlap, the goals of both organisations are different, and they operate by means of different tools: ECOWAS adopts policies while OHADA drafts substantive laws; so with careful planning, both organisations can easily complement each other.⁷¹ Such complementarity should eliminate the concerns of duplication and hierarchy of norms or rules of the various regional organisations within the sub-region. So for example, in keeping with its declared policy of economic integration and the need for a stable environment to achieve this, ECOWAS has been most active in the area of peace keeping and free movement of its citizens, including freedom of establishment by its citizens in its member States.⁷² There has been little movement in its expressed goals of “integration of the private sector, and harmonisation of national investment codes” for example.⁷³ Therefore, if ECOWAS retains and works within its declared goal by creating enabling environment for businesses to thrive (for example through providing security and ease of establishment and movement within the sub-region), then OHADA can design uniform business laws to regulate the conduct of business within the States of the sub-region, either through unification or harmonisation of such laws. This is not the nature of the relationship currently existing between the two organisations. One reason being the fact that though all

⁶⁸ Eight ECOWAS member States (Benin, Burkina Faso, Cote D’Ivoire, Guinea, Mali, Niger, Senegal and Togo) have French as their official language, five (Gambia, Ghana, Liberia, Nigeria, and Sierra Leone) are English speaking while Cape Verde and Guinea-Bissau are Portuguese speaking.

⁶⁹ This provision fleshes out recital 11 of the Preamble to the Treaty which states the final goal of ECOWAS as, “the accelerated and sustained economic development of Member States, culminating in the economic union of West Africa”.

⁷⁰ So for example these sectors are listed under art 3.2(a) of the ECOWAS Treaty with comparators in some of the OHADA Uniform Acts mentioned above. See Beauchard and Kodo, page 25 on the problems raised by overlaps and lack of hierarchy of rules in the various regional organisations within the sub-region. Also note that some States belong to the three primary organisations of ECOWAS, OHADA, UEMOA already mentioned.

⁷¹ ECOWAS can agree the policy and OHADA drafts the law implementing such policy.

⁷² In compliance with ECOWAS Treaty arts: 4 (d) on non-aggression between member States; 4 (e) on maintenance of regional peace, stability and security...; and 4 (f) on peaceful settlement of disputes among member States.

⁷³ See ECOWAS Treaty, arts 3.2 (g) and (i) respectively.

the States of the sub-region are ECOWAS member States, not all ECOWAS member States are members of OHADA, and OHADA also includes some States from Central Africa.⁷⁴

Within the various organs of ECOWAS, two are of interest with regard to the question examined in this article.⁷⁵ The first is the Community Court of Justice (CCJ) and the second is the Arbitration Tribunal of ECOWAS (ATE).⁷⁶ The CCJ was established under Article 15 of the ECOWAS Treaty and its jurisdiction and procedure are contained in the Protocol and Supplementary Protocol on the CCJ.⁷⁷ The jurisdiction of the CCJ covers the adjudication of matters such as those on the interpretation and application of the ECOWAS Treaty and its constituent documents, failure of members to honour their obligations under the ECOWAS Treaty and documents, the Community and its officials, violation of human rights occurring in member States, among others.⁷⁸

On the ATE, this is established under Article 16 of the Treaty but is not yet in existence or functioning and the Protocol relating to the ATE has not been promulgated. The effect of this is that there is no ECOWAS Arbitral Tribunal in place. It will be the case eventually when such a Tribunal is put in place that its remit will be to determine disputes arising from the application of the ECOWAS Treaty. Therefore such a Tribunal will still not be empowered to administer the resolution of disputes of a private nature arising from business transactions as any arbitration institution will do. The ATE will also not have powers or jurisdiction equivalent to the CCJA arbitral reference under OHADA. So it is clear that since the primary aim and focus of ECOWAS is not to harmonise business laws within its sub-region, under its present Treaty (including its constituent documents) ECOWAS does not have the necessary institutions similar to OHADA to introduce and implement a harmonised regime for business laws within its member States. Having so said, if the member States of ECOWAS decide to harmonise their business laws, then there are various possible mechanisms to adopt to achieve such defined purpose within the current organisations in the sub-region without the need to create another regional organisation to achieve such a purpose.⁷⁹

According to the African Development Bank (AfDB) in its *Regional Integration Strategy Paper for West Africa 2011-2015* (AfDB Report) ECOWAS is planning to adopt uniform acts just like OHADA.⁸⁰ It may be useful to quote the relevant part of this section of the Report:

“Along with reform efforts by individual countries, efforts are on-going to harmonize business laws and procedures across ECOWAS to facilitate cross-border business. ... OHADA made a radical contribution to regional integration by transferring the development and enactment of harmonized business laws from national authorities to a supranational body. It also allowed the Common Court to

⁷⁴ Cameroon, Chad, Central Africa Republic, Republic of Congo, Gabon, and Equatorial Guinea are also members of CEMAC (The Central Africa Economic and Monetary Community) and the ECCAS (Economic Community of Central African States) which also includes Democratic Republic of Congo, Sao Tome & Principe, Angola and Burundi.

⁷⁵ The principal institutions of ECOWAS as listed under art 6 of the Treaty include the: Authority of Heads of State and Government; Council of Ministers (two from each member State); Community Parliament; Community Court of Justice, and the Executive Secretariat.

⁷⁶ Under art 15 of the Revised Treaty, the CCJ is renamed as the Court of Justice of the Community while under art 16, the ATE is renamed as Arbitration Tribunal of the Community.

⁷⁷ The Protocol of the CCJ A/P.1/7/91 was amended by the Supplementary Protocol A/SP.1/01/05.

⁷⁸ As listed under art 9 of the Protocol. This list of competencies of the CCJ also evidences the fact that the goal or purpose of ECOWAS is not the regulation of business laws.

⁷⁹ ECOWAS Treaty, art 3(o) empowers the member States to enlarge the aims and objectives of ECOWAS to “any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives”.

⁸⁰ AfDB Report, para 3.1.6.2.

have final jurisdiction over business law cases, although this remains a challenge as incidentally there are frictions between the national courts and the Common Court. Building on the OHADA initiative, ECOWAS is working towards the harmonization of business laws including the adoption of a Regional Investment Policy Framework and a Regional Competition Policy. Clearly ECOWAS should step up efforts with respect to business harmonization in view to promote the private sector”.

This AfDB Report recognises the advantages of having a harmonised business regime as adopted by OHADA and acknowledges some of the challenges OHADA is dealing with as a result. However the AfDB Report does not show how OHADA’s particular method of dealing with business laws is more efficient or effective than those of the individual (non-OHADA) ECOWAS member States, though it recommends harmonisation of business laws to ECOWAS. Beauchard and Kodo, examined the effectiveness of the OHADA harmonisation regime on the attainment of legal certainty within the OHADA region and conclude that legal certainty has not been achieved within OHADA and state that:

“Although sufficiently comprehensive formal laws have been adopted, their overall application and enforcement continue to lag and there are legitimate concerns about whether they will ever be uniformly applied, since the domestic statutes that contradict OHADA have not even been identified, still less removed. ...”⁸¹

It is generally accepted that OHADA’s lead in the harmonisation of its business laws is a positive step in the right direction. However the successes and failures of the OHADA regime need to be studied so that other sub-regions (such as ECOWAS) that may consider following in the same direction, may avoid the pitfalls through learning from the experience of OHADA. In addition, it will still be necessary to examine whether ECOWAS member States have the political will to pursue and implement an OHADA-style harmonisation of business laws within the sub-region.⁸² The importance of political will in discussions on regional organisation cannot be overemphasised. For example Forere has argued that political interference hampers the process of economic integration in Africa following an examination of the ECOWAS and SADC integration processes.⁸³

The support by AfDB for the harmonisation of business laws within ECOWAS also raises one critical question, which is mentioned but not answered in this paper: this is whether the harmonisation of business laws falls within the remit of the ECOWAS Treaty or fits within the wider vision and goals of ECOWAS as enumerated above. It appears that though Article 13(o) of the ECOWAS Treaty empowers its member States to add “any other activity” to the objectives of the organisation, the same article provides a limitation on this power to the effect that such additional activity should be towards “attaining Community objectives” which are the gradual integration towards an economic union. In answering this question, there will be need to also determine whether a harmonised regime of business laws within ECOWAS member States will lead to the attainment of its vision of an economic union or aid development of the sub-region. On the presumption that the States of the West African sub-region wish to harmonise their business laws, two options of how such a desire can be implemented are explored below.

⁸¹ Beauchard and Kodo, page 31. There is no published analysis on the question whether inward FDI has increased in OHADA member States since the adoption of the uniform acts, and the correlation between the adoption of the uniform acts and such increases. This is not the focus of this article and so not discussed.

⁸² It is true that most of the inefficiencies identified by Beauchard and Kodo in the functioning of OHADA evidence a lack of political will on the part of the governments of her member States.

⁸³ See Forere M, “Is Discussion of the “United States of Africa” Premature? Analysis of ECOWAS and SADC Integration Efforts” (2012) *Journal of African Law*, vol 56, no 1, pages 29-54.

Option 1: Join OHADA

This option argues for the remaining seven non-OHADA ECOWAS member States to opt into the OHADA Treaty instead of creating or duplicating the remit of OHADA within ECOWAS or forming a new regional grouping for the same purpose.⁸⁴ This option is attractive since as stated by the AfDB Report, there are effectively too many regional organisations within the sub-region (according to the AfDB, there are 30 of these) with overlapping mandates.⁸⁵ Also as mentioned above, such opt-in will clearly define the roles of the various regional organisations within the sub-region and eliminate or reduce the problem of possible subject matter overlaps. However, there are also arguments against these seven States joining the OHADA Treaty. Such arguments are based on the non-existence of some of the commonalities already mentioned above such as language, legal traditions, and ceding more sovereignty to the regional organisation (because of the role of the CM and CCJA), and imposition of the Uniform Acts already adopted by OHADA without due consideration of the local or domestic laws or legal traditions of these opt-in States. These are all valid and legitimate reasons which should however not stop other States joining OHADA, but can also be negotiated by the States, thus requiring careful study before taking any such opt-in steps.⁸⁶ Such steps should also provide an opportunity for a re-negotiation of the OHADA Treaty between its current members and those wishing to opt into the Treaty.⁸⁷ Examples of some matters that will need to be re-negotiated are: the working languages of the organisation and effective translation services;⁸⁸ the relationship between the supreme courts of member states and the CCJA; the status of uniform acts vis-a-vis domestic laws which will include the question whether the uniform acts should only regulate those aspects of business laws with a foreign element, thereby removing domestic law from its purview.⁸⁹

Option 2: Extend scope of ECOWAS to cover harmonisation of business laws.

The second option relates back to the question on whether such a task will fall within the remit of the ECOWAS Treaty. If it falls outside of the wording of the current Treaty, then ECOWAS may consider expanding its remit or scope so as to extend this to the regulation of the private sector, and so adopt uniform business laws. As a Treaty based organisation, ECOWAS can pursue this enlargement through a revision of the Treaty to specifically include such powers. It is of course arguable that such a revision of the Treaty may not be necessary if business laws also fall within its investment bureau or portfolio (under the Commission for Industry and Private Sector Promotion). This option raises some concerns. The first is on the position of the nine ECOWAS member States who are already parties to OHADA. Will these States be required to submit to both regimes or leave OHADA or opt out of the new ECOWAS regime? None of

⁸⁴ OHADA Treaty, art 53 makes the Treaty “open to all members of the O.A.U (now AU) not signatory to the Treaty.” So non OHADA, ECOWAS States can join OHADA and they will be bound by the Treaty and all the approved Uniform Acts, and be subject to the jurisdiction of the CCJA. See also Ntongho, pages 58-61.

⁸⁵ AfDB Report para 3.1.1.2; a conclusion with which Beauchard and Kodo agree at page 25.

⁸⁶ A third option mooted by Mr Jean Penda in conversation with this author is for the seven non-OHADA member States of ECOWAS to adopt the harmonisation process of OHADA and some or all of the uniform acts but not join OHADA as an organisation. This is the current position of Madagascar while it decides whether or not to join OHADA. The same goes for Burundi and Mozambique. This option is attractive but its workability needs to be carefully examined, which is why it is not discussed in this article.

⁸⁷ Such call for renegotiation before joining OHADA is not new as the DRC did when it joined so that the application of some of the Uniform Acts in the DRC was suspended.

⁸⁸ It is true that the 2008 revised OHADA Treaty has expanded the official languages of OHADA but this has not been practically implemented so there are still no official translations of OHADA documents or changes in the working language of the CCJA or OHADA institutions.

⁸⁹ This preserves domestic laws which may need to protect the citizens of each state especially as there is still a large uneducated illiterate population within these States. In addition such foreign focused laws may better serve the goals of attracting foreign investments and better create the necessary legal certainty for inward foreign investments to thrive.

these will be ideal for these States and the harmonisation within ECOWAS will be less effective if it does not include all the member States. The second concern is that ECOWAS does not currently have the necessary institutions in place to implement a harmonised business law regime following the OHADA style. Such institutions will need to be designed and constructed with attendant costs and expertise among other implications (such as political will).

One institution which ECOWAS does have and which will play a key role in any such harmonisation effort is the CCJ. So in adopting uniform business laws, the competencies of the ECOWAS CCJ will need to be expanded to grant it similar powers and jurisdiction as those of the OHADA CCJA. However within OHADA, the tension between the CCJA and national supreme courts has been mentioned above. To ameliorate this tension, the jurisdiction of the CCJ may be designed so that the supreme courts of ECOWAS member States have jurisdiction over such uniform laws. To further ensure consistency of interpretation of the uniform acts, ECOWAS should retain the referral system to the CCJA within OHADA, though from the Supreme Courts of ECOWAS member States unlike the position within OHADA of referrals from the Courts of Appeals.⁹⁰ The next section examines whether there is a need for a regional arbitration institution similar to the CCJA within the ECOWAS sub-region.

4. Regional Arbitration Institutions within the ECOWAS sub-region

An effective arbitration regime requires the existence of modern arbitration laws, trained and or experienced arbitration practitioners, functioning arbitration institutions and supportive national courts. In this section a brief mention is made of the robustness of the laws and conventions on arbitration adopted by States on the continent before a detailed discussion on arbitration institutions within the ECOWAS sub-region and the question whether ECOWAS needs to establish its own regional arbitration institution (similar to the CCJA).

Most ECOWAS States have modern arbitration laws which uphold the standard principles of party autonomy, arbitrator's independence, lack of interference from national courts, finality of arbitral awards and limited grounds of recourse against the final award.⁹¹ At the level of the continent, 61% of African States are parties to the New York Convention including the economic power houses,⁹² so that convention awards are recognisable and enforceable within such jurisdictions;⁹³ while 47 African States are parties to the ICSID Convention.⁹⁴ So the statutory framework to support arbitration references is available in most African States.

⁹⁰ See OHADA Treaty, arts 13 and 14. See also the same referral provision within the European Communities to the European Court of Justice under art 234 of the Treaty Establishing the European Community (Treaty of Rome) 1957.

⁹¹ See generally on the arbitration laws and environment of various African States, Bosman Lise, (gen.ed), *Arbitration in Africa: a Practitioner's Guide*, Kluwer, 2013.

⁹² Such as Nigeria, South Africa, Mozambique, Egypt, Morocco, and Ghana, the top six receipts of inward FDI in 2013 according to UNCTAD's World Investment Report 2014 (WIR14) at pages 37-39.

⁹³ As at 10 July 2014, 33 of the 54 (61%) African States; 10 of the 15 (67%) ECOWAS member States; and 10 of the 17 (59%) OHADA member States are parties to the New York Convention from data available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html accessed 10 July 2014.

⁹⁴ As at 10 July 2014, 45 of the 150 (30%) ICSID contracting States are from Africa; all 15 ECOWAS member States, and all 17 OHADA member States are parties to the Washington Convention from data available at <https://icsid.worldbank.org/ICSID/FrontServlet> accessed 10 July 2014.

On arbitration institutions, there are arbitration institutions in most ECOWAS States with modern arbitration rules most of which are modelled after the UNCITRAL Arbitration Rules.⁹⁵ No discussion on regional arbitration institutions in Africa will be complete without acknowledging the influence of the Asian-African Regional Consultative Organisation (AALCO) in not only setting up the regional arbitration centres but adopting the UNCITRAL Arbitration Rules for use by such centres.⁹⁶ As articulated in the AALCO 17th Session held in Baghdad in 1977, such regional centres were necessary “so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized”. Currently there are five operational AALCO regional centres for arbitration in Kuala Lumpur (1978), Cairo (1979), Lagos (1989),⁹⁷ Tehran (1997) and Nairobi (2007)⁹⁸ with one in each of North, West and East Africa.⁹⁹

The AALCO regional centres are empowered to assist parties with the enforcement of arbitral awards in States within their covered region.¹⁰⁰ It is not very clear how many arbitral awards or times any of the AALCO regional centres in Africa have assisted parties in this regard.¹⁰¹ This power granted to the regional centres and acknowledged by the host country does not extend the remit of the centres to other States within the centres’ regions.¹⁰² Having so said, even if the regional centres cannot assist parties in enforcing their awards in other States in their region, it will be very useful if the regional centres do assist parties in enforcing their arbitral awards within the State they are domiciled, and publish data on such assistance. This will make arbitration under the rules of the regional centres more attractive to disputants.

The physical location of the regional centres may also impact on the degree of usage by the citizenry of each region in Africa. The Cairo and Nairobi Centres are located in the capital cities of Egypt and Kenya respectively while the Lagos Centre is located in the commercial centre (and not the capital, Abuja) of Nigeria. These regional centres do not have secondary offices in other States within their region. It is acknowledged that though parties can hold their hearings in any location under the arbitration rules of these Centres,¹⁰³ the lack of physical presence in other States within their covered regions may negatively impact on the knowledge of their existence and the use of their services in such States, though the Lagos Centre noted in its 2006 Annual Report that it visited the Benin, Burkina Faso and Ghana “to publicize the role and usefulness of the Centre in the sub-region” which is commendable.¹⁰⁴

It therefore must be noted that the AALCO regional centres remain relevant within the African continent and continue to not only host arbitration references under their rules but disseminate awareness of

⁹⁵ See Onyema E, “Enforcement of Arbitral Awards in Sub-Sahara Africa”, (2010), *Arbitration International*, vol 26, no 1, at page 138 for a list of examples of arbitration institutions in sub-Sahara Africa. Also see Bosman L (gen ed) *Arbitration in Africa: a Practitioner’s Guide*, Kluwer, 2013.

⁹⁶ For more details on the AALCO regional centres see Asouzu A, *International Commercial Arbitration and African States*, CUP, 2001, (Asouzu) pages 53-112.

⁹⁷ The impact of the Lagos Regional Centre on the Nigerian arbitration space is debatable considering the existence of several other arbitration institutions within the country actively engaged in promoting arbitration.

⁹⁸ Nairobi is still very young having its enabling law only promulgated in 2012.

⁹⁹ See the Report on the AALCO’s Regional Arbitration Centres, AALCO/51/ABUJA/2012/ORG3 of 2012.

¹⁰⁰ See Asouzu, pages 77-80. Art 1(d) and (e) of the Lagos Regional Centre Headquarters Agreement simply refers to assistance with enforcement of arbitral awards, without defining whether in Nigeria or the West Africa sub-region. See text of the Agreement at http://www.rcicalagos.org/downloads/HeadQuarters_Agreement.pdf accessed 14 July 2014.

¹⁰¹ There is no publicly available data on this in the annual reports provided to the AALCO by the Lagos Regional Centre.

¹⁰² Such powers are contained in the Host States Agreements which Asouzu argued has the status of a treaty under customary international law at pages 77-78.

¹⁰³ For example, Lagos Regional Centre Arbitration Rules, art 19.

¹⁰⁴ See para 91 of its 2006 Report to AALCO available at http://www.rcicalagos.org/downloads/report_of_forthfifth_session.pdf accessed 14 July 2014.

arbitration (and alternative dispute resolution mechanisms) within their locations. All said the Lagos regional centre remains just one out of many arbitration institutions within the ECOWAS sub-region. It is acknowledged that all the arbitration institutions within the sub-region are domiciled in the various States and none is supranational, as the CCJA is within OHADA. ECOWAS may therefore decide to transform the CCJ into such a regional arbitration institution for the sub-region with its own set of arbitration rules, effectively the same system as adopted with arbitration under the CCJA Arbitration Rules. However it is noted that such a system will only create another arbitration institution within the sub-region, albeit with certain clearly defined additional powers, which will apply only when the reference is under the institution's rules. It can therefore be concluded that there are adequate numbers of arbitration institutions within the West African States to meet the needs of the sub-region, so that the establishment of a new regional institution, whether under ECOWAS or another organisation, will only congest an already crowded space. What is needed is the strengthening of the current arbitration institutions through collaborations and strategic space sharing, affiliations with other arbitration institutions within and outside the continent (an example is the collaboration between the London Court of International Arbitration and the Mauritius International Arbitration Centre¹⁰⁵) to share knowledge, expertise and promotion of best practices in the administration of arbitration references. Such collaborations will also build confidence in the administration of arbitrations within the continent.

However even with the existence of modern arbitration laws and several arbitration institutions within the sub-region along with a budding group of well-trained and experienced arbitration practitioners, all of which favourably compare with any other developing region of the world, there is still a dearth of arbitration references taking place within the sub-region (as also in the wider continent). It is important to explore possible solutions to this since all of these resources are pointless if they do not lead to an increase in the numbers of arbitrations taking place within the sub-region and continent.

International arbitration practitioners refer to the perceived weaknesses with national courts and their lack of support for arbitrations held within the continent as one of the reasons seats in Africa are not usually preferred.¹⁰⁶ The scope of this paper does not permit a discussion of whether these perceived weaknesses are justified or not. However the impact of such perception is keenly felt within the sub-region and this paper examines the issue of judicial assistance supportive of arbitration references connected to the sub-region. It is accepted that the arbitral mechanism in any jurisdiction needs an effective judiciary which is independent and supportive of arbitration to complete its effectiveness.¹⁰⁷ Arbitration does not replace the judiciary.¹⁰⁸ Each has its sphere of influence and regardless of how effective or efficient arbitration institutions and arbitration practitioners within the sub-region are, the

¹⁰⁵ For details see <http://www.lcia-miac.org/> accessed 10 July 2014. The Lagos Regional Centre notes on its website collaborations with LCIA, AAA/ICDR and City Dispute Panel, London.

¹⁰⁶ For an example of a recent post on these perceived weaknesses see, Dutson, Webster and Smyth, all of Eversheds LLP, "International Arbitration Africa Style" where their list includes: judges lack of support of arbitration, corruption, political instability and unrest, and length of proceedings, at <http://www.globallegalpost.com/global-view/international-arbitration-africa-style-82836387/> accessed on 10 July 2014.

¹⁰⁷ An example is India and the current pro-arbitration movement by its courts as exemplified in recent decisions such as *Reliance Industries Ltd & Another v Union of India*, Civil Appeal No 5765 of 2014, in which the Supreme Court gave a robust decision to counter the effect of the *Bharat Aluminium Company v Kaiser Aluminium* (2012) 9 SCC 552 decision on the application of Part 1 of the Indian Arbitration and Conciliation Act on arbitrations with seat outside India.

¹⁰⁸ See for example Jan Paulsson, "Why Good Arbitration Cannot Compensate for Bad Courts" (2013) *Journal of Int'l Arbitration*, vol 30, no 4, page 345, where he argued that both an efficient court and efficient arbitral system are needed.

third leg of the arbitration stool needs to be present for a firm balance to be maintained.¹⁰⁹ The third leg of the stool is the judiciary. The next section examines various ways national courts within the sub-region may be strengthened and in addition proposes the use of a Treaty based regional supranational court to determine only matters of enforcement, and challenge or annulment of transnational awards within the ECOWAS sub-region.

5 Strengthening national courts and the CCJ

National courts are relevant before commencement of the arbitral reference,¹¹⁰ during the arbitration proceedings¹¹¹ and after the conclusion of the arbitration reference.¹¹² There are examples of instances where national courts in the sub-region have taken jurisdiction even in the face of a written and valid arbitration agreement, so that parties have had to go through the full appeal mechanism of a State at the very early stages of the arbitration reference.¹¹³ This defeats the major reason why the parties chose arbitration in the first place, which is to avoid the courts.¹¹⁴ It is therefore important that courts are clear on what their role in the arbitral process is and determine how to function in that role so as not to frustrate the will of the parties (opting out of the court process) while also protecting the interest of the State in ensuring the observance of basic procedural fairness in the arbitral proceedings. It is these interests that need balancing by the Courts within the sub-region.

There are two critical phases in which courts become involved in arbitration references which are of relevance to this discussion and which will now be examined. The first is during the early stages of the arbitration reference (before commencement of the arbitration or constitution of the arbitral tribunal) when parties can apply to a court to challenge the arbitration agreement or for the appointment of an arbitrator or to challenge the jurisdiction of the arbitral tribunal. The laws in most ECOWAS States give national courts, jurisdiction to determine these matters and usually such jurisdiction rests with first instance courts.¹¹⁵ It is at this level of courts where decisions suggestive of a lack of support of the arbitral process are usually handed down.

It is therefore proposed that at this stage of the reference, the jurisdiction of national courts should be limited to determining the existence of the arbitration agreement in accordance with the relevant national (or applicable) law. Other matters on the validity of the arbitration agreement and jurisdiction of the arbitral tribunal should be left to the arbitral tribunal to determine. Such determination by the tribunal will be in the first instance with the national court taking a 'second look' at such issues in a challenge application to annul or set aside the final award.

¹⁰⁹ The three legs of the arbitration stool constructed in this article are: the laws on arbitration (including the conventions), arbitration practitioners (including arbitration institutions), and the judiciary. It is possible for the legal practitioners (a group not covered in this article because of its length, but which nonetheless play an important role in this discussion) to be included with arbitration practitioners.

¹¹⁰ Usually when a party wishes to challenge or assert the arbitration agreement or seek assistance with appointment of arbitrators.

¹¹¹ Usually to challenge arbitrators, seek assistance with gathering of evidence and grant of interim measures of protection.

¹¹² To obtain the recognition and enforcement of the award; or to challenge the final award.

¹¹³ One recent example from Nigeria is the *NNPC v Statoil* dispute where the Federal High Court granted an injunction to restrain the arbitration proceeding on a without notice application in which NNPC had not fully disclosed material information and over which there was no urgency, and the Court of Appeal set the order aside in *Statoil (Nigeria) Ltd & Another v NNPC & 3 Others* (the arbitrators), Appeal No: CA/L/758/12.

¹¹⁴ The fact that disputants will go through the whole appeal system to the Court of Appeal or Supreme Court just to uphold their arbitration agreement increases both time and cost of resolving the dispute.

¹¹⁵ See as examples: the High Court under s 59 Ghana ADR Act 2010; the High Court under s 57 Nigeria ACA 1988; the High Court under s 49 The Gambia ADR Act 2005.

For all matters on the appointment, challenge and replacement of arbitrators, it is proposed that these should be determined by appointing authorities and not national courts.¹¹⁶ Such appointing authority will make decisions on arbitrator appointment (where a party fails to make the appointment) and determine matters of arbitrator challenge, all as administrative decisions, with no right of appeal or challenge of such decisions before national courts during the arbitration proceedings.¹¹⁷ The facts relied upon for arbitrator challenge may still be relied upon (if the parties reserve their right) to challenge the final award before the courts under an appropriate ground such as partiality of the arbitrator. This proposal will assure that once parties have agreed to arbitration, the court will only get involved if the parties or the arbitral tribunal requires assistance with matters such as interim measures or collection of evidence, and or to enforce or annul or remit the final award. This proposal if accepted also effectively deals with the current problem of parties making several court applications which may start with the commencement of the reference and at various points throughout the arbitral reference, with their attendant time and cost implications. It is envisaged that these few changes will greatly reduce the numbers of such applications before national courts in the sub-region, with the attendant effects on time and cost on the arbitral reference.

The second phase is following the publication of the final award which is then not voluntarily performed so that one party may wish to seek recognition and enforcement of the award, or to challenge the award. It is recognised that it is the courts that have jurisdiction over these matters. However, determining such applications do not necessarily have to be unduly protracted.¹¹⁸ As is evident, the commodity for which parties arbitrate is the final award so that frustrating the enforcement of an arbitral award is a frustration of the whole arbitral process, a waste of the parties (and arbitrators) time and the money the parties have spent prosecuting the arbitration. This is the most important phase of concern, not least because the judgment debtor may not have assets in any other jurisdiction (particularly where a foreign party is involved) for which the judgment creditor may pursue enforcement under the New York Convention (or such jurisdiction may not be party to the New York Convention). Parties will not wish, at this stage, to go through the various court levels in a foreign country.

The key concern here is how courts within the sub-region can better ensure an efficient mechanism for the actions required of them during this second phase. One recommendation is for a change in the laws of these States (which may include the constitutions in some States) so that applications for all matters falling within the second phase will commence at the Court of Appeal level with very limited appeals (with leave of the court) to the Supreme Courts.¹¹⁹ This recommendation is based on the fact that most of the interventionist actions of the courts are made by first instance judges, as mentioned above. In addition, the recommendation seeks to reduce the levels of appeals parties will need to go through before a final determination is obtained. This recommendation will apply to both purely domestic,

¹¹⁶ The UNCITRAL regime envisages the existence of an appointing authority, as does ss 14(3) and 16(3) Ghana ADR Act 2010. On the impact of the expanded role of the appointing authority under the Ghana ADR Act 2010 see Onyema E, "The new Ghana ADR Act 2010: a Critical Overview" (2012), *Arbitration International*, vol 28 no 1, page 101 at pages 111-113.

¹¹⁷ This recommendation is not novel since this is the position under institutional rules. The law in Ghana provides for judicial review of such decisions made by the appointing authority under s 19(5)(b) ADR Act 2010.

¹¹⁸ Another example from Nigeria is the pending enforcement of the award from the IPCO v NNPC arbitration rendered in 2004, which has been partially enforced by the English courts with various applications still making their way through the Nigerian courts. For the latest English decision see *IPCO (Nigeria) Ltd v NNPC* [2014] All ER (D) 188.

¹¹⁹ This is the position in Cote d'Ivoire for example while art 37 Arbitration Law of Cape Verde refers to its Supreme Court of Justice.

foreign and international awards and whether such applications are made on the basis of the national law or an international convention such as the New York Convention.¹²⁰

The second recommendation under this phase will require distinguishing between purely domestic awards from transnational (foreign and international) awards. The proposal is for the CCJ, as the supranational regional court situated within the sub-region, to also have jurisdiction to determine applications emanating from awards that have a foreign element or that are transnational in nature. This effectively will require that some powers are ceded to (or shared with) the regional court from national courts on such matters.

The implementation of this proposal within the ECOWAS sub-region requires that the CCJ should be endowed with powers similar to those of the CCJA but limited to the recognition and enforcement, or challenge of transnational arbitral awards connected to ECOWAS member States. ECOWAS citizens currently have access to sue member States before the CCJ though on limited grounds covering human rights violations.¹²¹ This proposal envisages a widening of the jurisdiction *rationae* and *personae* of the CCJ to include these matters as it relates to transnational arbitral awards and for citizens of ECOWAS to be sued as respondents before the CCJ.¹²² Such a widening of jurisdiction for the CCJ will differ from that of the CCJA because of the lack of a uniform arbitration law within ECOWAS, however such matters can be included in the ECOWAS Treaty just as is contained in Part IV of the OHADA Treaty. In determining such applications, the CCJ will apply the (national) law or convention on which the parties rely.

On implementation, the CCJ will adopt the same procedures and methods for which its judgments are currently enforced within ECOWAS member States.¹²³ This is through a Treaty based undertaking by the member States to treat the decisions of the CCJ as of equivalent status to those of the highest court (so the supreme courts) of the member States and to enforce the decisions of the court. This also implies that where a member State fails to ensure the execution of such arbitral award enforced by the CCJ, such member State may be in breach of the provisions of the ECOWAS Treaty itself for which the member state can be sued before the CCJ. These proposals should not be read as exclusive. Parties should have access to these various regimes from which they can choose which best suits their particular circumstance; whether to pursue their actions before national courts or the CCJ where the final award is transnational.¹²⁴ Parties may still wish to have access to an appeal mechanism at this stage, then for such parties, pursuing their application through the national courts will be preferable. Other parties may wish to avoid national courts completely and so rely on CCJ as a supranational court for this purpose with no prospect of appeal from her decision (so effectively get one shot).

¹²⁰ Awards under the ICSID Convention do not fall within this discussion since enforcement of such awards is determined by the highest courts of States and there is an internal annulment procedure within ICSID according to arts ICSID Convention.

¹²¹ ECOWAS Treaty, art 15.4 provides that the jurisdiction of the CCJ, “are binding on the member States, the Institutions of the Community and on individuals and corporate bodies”.

¹²² This limitation to transnational awards ensures national courts retain jurisdiction on these matters over purely domestic awards. The additional competencies of the CCJ will require the amendment of its 2005 Supplemental Protocol.

¹²³ Revised CCJ Protocol, art 24.2 provides: “Execution of any decision of the Court shall be ... submitted by the Registrar of the Court to the relevant member State for execution according to the rules of civil procedure of that Member State”, and art 24.3 provides that such writ will be enforced upon verification that it is from the CCJ, and art 24.5 provides that such writ can only be suspended by the CCJ itself.

¹²⁴ This recommendation implies that parties who proceed under the CCJ will have a ‘one-court’ stop in similar fashion to the CCJA while those who proceed under national courts will have access to the tiers of appeal available in the particular jurisdiction with the relevant Supreme Court as the court of last resort.

These proposals will definitely reduce the opportunities for parties to interrupt the arbitral process through various applications before national courts, relieve the courts from dealing with such matters (and its impact on their caseloads) during the arbitral proceedings, and preserve the parties and States interest in the court determining matters relating to the final award after the arbitration proceedings. This in effect means that the intention of the parties to resolve their disputes by arbitration is protected by the State (through her courts) and the parties retain access to the coercive powers of the court following the arbitral proceedings. There are also limitations to the proposals. The most important of which is the political will on the part of the States to cede more sovereignty to a regional institution such as the CCJ, as already mentioned. The question of political arises because of the delays in the full implementation of the current provisions of the ECOWAS Treaty. It may be that the different challenges such as security, that some of the member States are dealing with impact on the implementation timetable.¹²⁵ It is apt to quote Justice Torgbor's recent observation on the judiciary and arbitration¹²⁶: He said:

“The debate is entirely different where the call is for sustained improvements and the use of best endeavours to compel judiciaries everywhere to be consistently fair and just in the global delivery of justice. It is then not restricted to judges but extends to lawyers and other role players in the justice delivery system, under a common obligation, to adhere to and be guided by a consistent application of the laws, rules and the universal standards of practice in the dispensation of justice. Otherwise the incompetent, biased and corrupt judge is neither supportable nor defensible in any jurisdiction or continent in arbitration or litigation matters.”

Conclusion

ECOWAS and OHADA fulfil different functions and play different roles in the economic development agenda of their member States. The CCJA of OHADA evidences the functionality of an institution with a dualist nature as both an arbitration institution and supranational court within the sub-region. It has been argued that ECOWAS does not currently need such a dualist institution because the sub-region is home to many arbitrators and arbitration institutions. It has however, been proposed that the competencies of the CCJ of ECOWAS should be expanded to include the determination of applications for the recognition and enforcement, and challenge of transnational arbitral awards. It is also argued that national courts within the sub-region can complement these efforts by consciously adopting pro-arbitration policies that are supportive and not interventionist. It is also proposed that the Courts of Appeals in the sub-region should have original jurisdiction over the recognition and enforcement, and challenge of final awards and the decision can be appealed (with leave) to the Supreme Courts. This will effectively remove such matters from the jurisdiction of first instance courts who will retain jurisdiction over all applications (such as interim measures and compelling witnesses) to assist the arbitral tribunal during the arbitration proceedings. It is also proposed that greater use should be made of appointing authorities to the exclusion of national courts on certain secondary matters such as appointment and challenge of arbitrators.

¹²⁵ So for example, Nigeria as one of the economic power houses of ECOWAS is currently struggling with the Boko Haram Islamist group threatening the security of the country. Matters of security will clearly rank in priority to harmonisation of business laws in such a State, and as noted by the World Investment Report 2014 (at page 39), Transnational corporations are divesting from Nigeria partly because of security issues.

¹²⁶ Justice Edward Torgbor in a keynote address titled, “Opening up International Arbitration in Africa”, delivered at the ICC/FIDIC Conference on International Construction Contracts and the Resolution of Disputes, in Johannesburg, 9-10 June 2014, in which he argued for the opening up of the international arbitration regime to African arbitration practitioners, arbitrators and cities as seats of arbitration.

It is acknowledged that even where all these measures are taken, it is still for lawyers and contract drafters in these jurisdictions to include arbitration clauses in their contracts and to actively nominate or choose a seat within the sub-region so that the goals of increasing the numbers of international arbitration references with seats in the continent and greater involvement of the continent in the arbitral process may finally be set in motion.

Session 1

The Role and Functions of Arbitration Institutions in the African Continent

Panel 1a: Regional Arbitration Institutions/Centres

Chair:

Ms Alexandra Meise, Foley Hoag LLP, Washington DC

Panellists:

AFSA/Africa ADR (Ms Deline Beukes)

Lagos Regional Centre (Mr Wilfred Ikatari, Director-General)

Kigali Centre (Mrs Bernadette Uwicyeza, Director-General)

OHADA CCJA (Mr Narcisse Aka, Secretary, Arbitration Centre)

THE ROLE OF ARBITRATION INSTITUTIONS IN THE DEVELOPMENT OF ARBITRATION IN AFRICA



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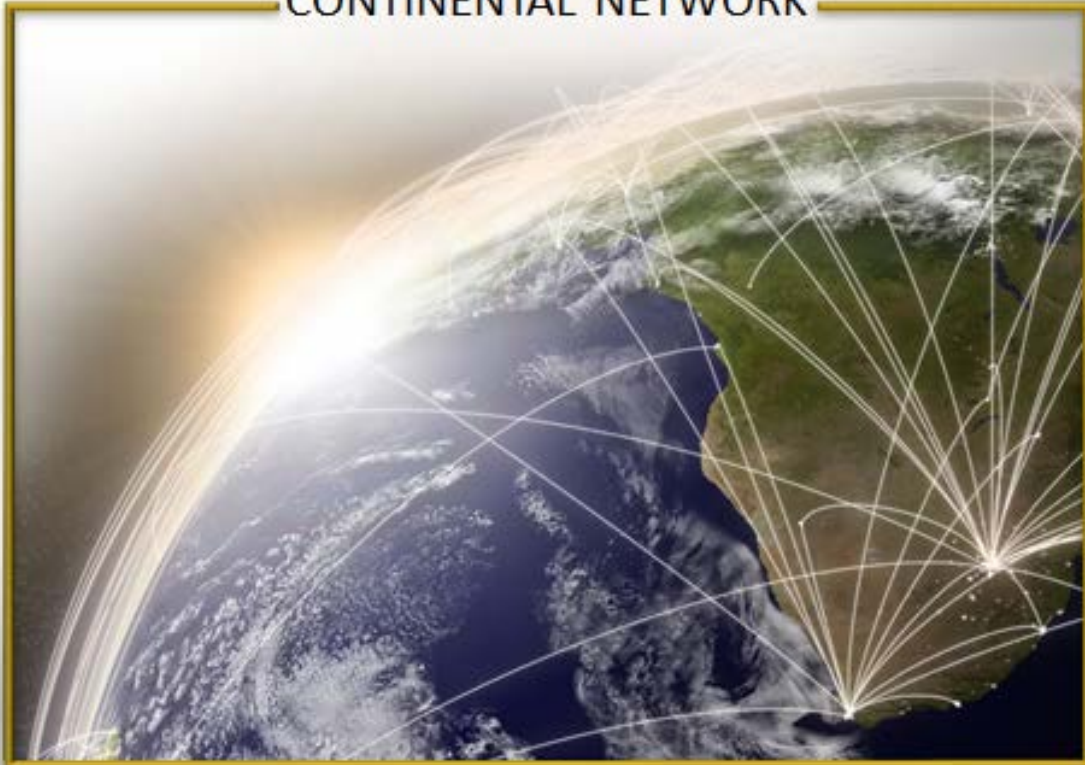
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PAPER DELIVERED BY: HONOURABLE WILFRED D. IKATARI
Director, Regional Centre for International Commercial Arbitration Lagos

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Director, Regional Centre for International Commercial Arbitration Lagos



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Director, Regional Centre for International Commercial Arbitration Lagos

NATIONALITY OF PARTIES AND ARBITRATORS.

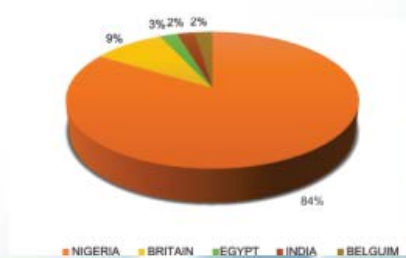
PARTIES CAN BE FROM CANADA, USA, EUROPE, ASIA ETC.
THE ARBITRATORS CAN ALSO BE FROM ANY NATIONALITY.
THE ARBITRATORS ARE APPOINTED VIA THE CENTRE'S LIST
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Director, Regional Centre for International Commercial Arbitration Lagos

PIE CHART REPRESENTATION OF THE LIST OF ARBITRATORS
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Director, Regional Centre for International Commercial Arbitration Lagos

ADDITIONAL SERVICES

RCICAL SHALL, AT THE REQUEST OF EITHER PARTY, RENDER ALL ASSISTANCE IN
THE ENFORCEMENT OF AWARDS WHICH MAY BE MADE IN THE ARBITRATION
PROCEEDINGS HELD UNDER ITS AUSPICES; SUCH AS ASSISTING IN THE
REGISTRATION OF THE AWARD WHERE IT IS REQUIRED.

REGIONAL CENTRE
FOR INTERNATIONAL
COMMERCIAL
ARBITRATION LAGOS



PAPER DELIVERED BY: HONOURABLE WILFRED D. IKATARI
Director, Regional Centre for International Commercial Arbitration Lagos

SEMINARS AND TRAININGS ARE ORGANISED BY THE CENTRE

- COLLABORATION BETWEEN THE CENTRE AND ICSID TO ORGANISE ICSID 101 WORKSHOP
- DISPUTE RESOLUTION IN SPORTS AND INTELLECTUAL PROPERTY WORKSHOP ORGANISED BY THE CENTRE IN CONJUNCTION NIGERIAN FOOTBALL ASSOCIATION(NFA), NATIONAL OFFICE FOR TECHNOLOGY ACQUISITION AND PROMOTION

REGIONAL CENTRE
FOR INTERNATIONAL COMMERCIAL
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Director, Regional Centre for International Commercial Arbitration Lagos

JURISDICTION OF THE CENTRE

THE CENTRE IS AVAILABLE TO PARTIES WHO REQUEST FOR IT, WHETHER GOVERNMENT, INDIVIDUAL OR BODY CORPORATE, PROVIDED THE DISPUTE IS OF AN INTERNATIONAL CHARACTER, THAT IS TO SAY, THE PARTIES BELONG TO OR ARE RESIDENT IN TWO DIFFERENT JURISDICTIONS, OR THE DISPUTE INVOLVES INTERNATIONAL COMMERCIAL INTEREST.

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Director, Regional Centre for International Commercial Arbitration Lagos

THE RCICAL WAS ESTABLISHED BY A HEADQUARTER'S AGREEMENT

THE HEADQUARTERS AGREEMENT IN RELATION TO RCICAL IS A TREATY SIGNED IN 1999 BETWEEN THE ASIAN AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO) AND THE FEDERAL GOVERNMENT OF NIGERIA, FOR THE ESTABLISHMENT OF RCICAL IN NIGERIA. IN CONFIRMATION OF DIPLOMATIC IMMUNITIES AND PRIVILEGES ON RCICAL, THE HOST GUARANTEES ITS INDEPENDENT FUNCTIONING. RCICAL FUNCTIONS UNDER THE AUSPICES ONLY OF AALCO ON THE BASIS OF COOPERATION, MUTUAL UNDERSTANDING AND GOODWILL.

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FUNDING OF RCICAL VS ITS INDEPENDENCE AND ITS DIPLOMATIC IMMUNITIES AND PRIVILEGES

THE HEADQUARTER'S AGREEMENT PLACED INTERNATIONAL OBLIGATIONS ON THE HOST GOVERNMENT (FEDERAL REPUBLIC OF NIGERIA) TO PROVIDE CERTAIN FINANCIAL GRANTS TO RCICAL TOWARD MEETING UP WITH ITS ADMINISTRATIVE NEEDS; SUCH AS RENTAL OBLIGATIONS AND RECURRENT EXPENDITURE.

NOTE, HOWEVER THAT INSPITE OF THE INTERNATIONAL OBLIGATIONS OF NIGERIA UNDER THE HEADQUARTER'S AGREEMENT, THE GOVERNMENT DOES NOT IN ANYWAY INTERFERE WITH THE WORK OF THE CENTRE; HENCE THE CENTRE IS CONFERRED WITH DIPLOMATIC IMMUNITIES AND PRIVILEGES.

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THE RCICAL SELLING POINT

THE CENTRE'S MAJOR SELLING POINT IS BASED ON ITS INDEPENDENT AND NEUTRAL NATURE. THE RULES OF THE CENTRE ALLOWS A GREAT DEAL OF FLEXIBILITY IN THE CONDUCT OF ARBITRATION PROCEEDINGS AND LEAVE A WIDE DISCRETION TO THE PARTIES WITH REGARD TO THE PLACE OF ARBITRATION, CHOICE OF ARBITRATORS, AND THE APPLICABILITY OF PROCEDURAL RULES.

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ACCESSING THE SERVICES OF RCICAL

THE CENTRE IS LOCATED IN LAGOS BUT CAN BE ACCESSED FROM ALL OVER THE WORLD PARTICULARLY THE SUB SAHARA REGION. THIS IS ACHIEVED BY MEANS OF THE FLEXIBILITY OF ITS SERVICES; WHEREBY ARBITRAL SITTINGS COULD BE MOVED TO THE DESIRED LOCATION OF THE PARTIES.

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CO-OPERATION AGREEMENTS

THE CENTRE MAINTAINS COOPERATION AGREEMENTS WITH MAJOR INSTITUTIONS SUCH AS THE WORLD BANK'S INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), THE CHARTERED INSTITUTE OF ARBITRATORS UK AND RECENTLY SIGNED A COOPERATION AGREEMENT WITH THE CHINA LAW SOCIETY. UNDER SUCH AGREEMENTS, ARBITRATION PROCEEDINGS UNDER THE AUSPICES OF SOME OF THESE INSTITUTIONS CAN BE HELD AT THE CENTRE.

REGIONAL CENTRE
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PUBLICATIONS

THE CENTRE PUBLISHES BROCHURES ABOUT THE CENTRE AND ARBITRATIONS PROCESSES; ARBITRATION, MEDIATION AND CONCILIATION RULES FOR USERS OF THE CENTRE AND THOSE INTERESTED IN ARBITRATION AND OTHER ADR METHODS.

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PUBLICITY

THE CENTRE PARTICIPATES IN VARIOUS INTERNATIONAL CONFERENCES, ORGANISES SEMINARS AND WORKSHOPS FROM TIME TO TIME

REGIONAL CENTRE
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UNLOCKING THE DOORS OF INTERNATIONAL ARBITRATION TO YOUNG ASPIRING PRACTITIONERS

THE CENTRE IS OPEN FOR INTERNSHIP FOR THOSE WHO APPLY. AND ALSO THE CENTRE IS WORKING OUT MODALITIES FOR A DIPLOMA PROGRAM FOR YOUNG ASPIRING ARBITRATION PRACTITIONERS AND STUDENTS. THE CENTRE ORGANIZES THE AFRICAN UNIVERSITIES INTERNATIONAL ARBITRATION MOOT COMPETITION FOR UNDERGRADUATES WITH THE SUPPORT OF WILLEM VIS MOOT INTERNATIONAL ARBITRATION COMPETITION, VIENNA.

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COSTS FRIENDLY ARBITRATION

ARBITRATION AT RCICAL IS COMPARATIVELY CHEAP BECAUSE RCICAL IS A NOT-FOR-PROFIT INTERNATIONAL ARBITRAL INSTITUTION. THE FEES OF ARBITRATORS, WHICH WILL DEPEND ON SEVERAL FACTORS, SUCH AS THE COMPLEXITY OF THE CASE, THE NATURE OF THE DISPUTE, TIME AND THE EXPEDITIOUS CONDUCT OF THE PROCEEDINGS, WOULD BE FIXED IN EACH CASE IN ACCORDANCE WITH THE SCHEDULE OF FEES ANNEXED TO RCICAL ARBITRATION RULES. RCICAL FEES AND CHARGES WOULD BE FIXED TAKING INTO ACCOUNT THE ACTUAL EXPENSES INCURRED AND ALSO KEEPING IN VIEW ITS NON-PROFIT NATURE

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PUBLICATION AND REPORTING OF AWARDS

THE RCICAL AWARDS ARE PUBLISHED TO THE PARTIES AND THE ARBITRATORS ONLY; BUT NOT REPORTED EITHER IN A REPORT OR NEWSPAPERS; BECAUSE AWARDS MADE UNDER THE AUSPICES AND ARBITRATION RULES OF RCICAL ARE CONFIDENTIAL.

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PAPER DELIVERED BY: HONOURABLE WILFRED D. IKATARI
Director, Regional Centre for International Commercial Arbitration Lagos

The Role of Arbitration Institutions in the Development of Arbitration in Africa African Union Commission, Addis Ababa, Thursday 23 July 2015

Kigali International Arbitration Centre: A Regional Choice for global Dispute Resolution

A paper presented by Bernadette UWICYEZA Secretary General Kigali International Arbitration Centre

1. KIAC Background

Kigali International Arbitration Centre project started as an initiative of the Rwanda Private Sector Federation (umbrella of professional organizations), with a clear vision to serve the wider sub-region given the fact there was no such a Centre both in COMESA and EAC economic trading blocks. It was in 2008 and since then things have changed, KIAC opened officially in May 2012, LCIA-MIAC in December 2012 and NCIA in 2013.

In 2008 Rwanda enacted a modern UNCITRAL Model law Based arbitration Law and acceded the New York Convention the same year. KIAC was established by an Act of Parliament in 2011 under the Law No 45/2010 of 14/12/2010 and officially launched in May 2012 with a broad mandate to help economic Operators to resolve their disputes in friendly, confidential and efficient manner instead of litigating in courts.

The Centre has governance Board (BOD) comprised of seven members appointed by the Private Sector from professional Associations and international members with knowledge and practice in Arbitration. From its inception, it was clear that the Centre will have a private Sector driven structure.

Among other attributions detailed in article 4 of the Law establishing the Centre, KIAC was established to (i) provide a forum for dispute resolution through arbitration and other friendly ways of dispute resolution, (ii) to promote arbitration and effective use of ADR in General through awareness and education programs, (iii) to administer arbitration and provide facilities and assistance necessary to the conduct of arbitral proceedings (iv) to advise the Government on matters related to arbitration.

2. Major achievements during the last three Years of Operation

KIAC Caseload

KIAC registered the first arbitration case during the first year and since then the caseload has progressively increased. An institutional review report will be published soon with an analysis of KIAC caseload during the last three Years. While the majority of the Cases are domestic, four are international involving parties from Kenya, Pakistan, South Africa, Uganda, Senegal and USA.

KIAC respects the principle of parties' autonomy in appointment. KIAC has a panel of domestic Arbitrators and a panel of International arbitrators. Parties to KIAC arbitration are free to nominate their arbitrators, subject to confirmation by the Centre in accordance with KIAC Rules. When KIAC is called upon to appoint an arbitrator, it does so primarily from one of its panels, taking into account, the nationality of the parties, the language of the proceedings, the nature and complexity of the case. Arbitrators involved in KIAC arbitrations are from UK, Belgium, Pakistan, Kenya and Rwanda.

The government being the largest Client for the private Sector, two-third of KIAC Arbitrations involves public institutions. Majority of awards issued are in favour of the Government, its counterparts but the losing institution enforced the award on voluntary basis. Although the Government is supportive both financially and at policy level, there is no interference in arbitral proceedings. Appointments are made by an Arbitration Committee set up by the Board.

Setting standards

From the starting KIAC management focused on setting standards: this includes a modern set of arbitration rules consistent with international best practices and covering all aspects of arbitral proceedings. Arbitration services under KIAC Rules are cost effective with a schedule of fees allowing the costs to be kept in line with the size, the complexity of the cases referred to the Centre. The costs of arbitration under KIAC are in average 5% of the value of the Claim.

KIAC has also focused on building capacity of the service providers and offered training opportunities to ensure that local providers have the level of skills that allow them to play their role as counsels, arbitrators or advisers for their clients. This is also a way of creating an Arbitration Culture. Knowledge is a prerequisite to behaviour change.

Over 350 professionals, (Lawyers, engineers architects, accountants, in house Counsels and legal Officers in Public Institutions) have so far attended courses in arbitration run by the Chartered Institute of Arbitrators and leading to various Level of accreditation. KIAC capacity building program includes also training and certification in Mediation and Adjudication by International recognized Institutions. It has been attended by professionals from the region and even beyond, Burundi, Uganda, Kenya, South Sudan, USA and Suitland. Those who achieved accreditation in arbitration are eligible to KIAC panel of Domestic arbitrators. In addition to the panel of domestic arbitrators, the Centre has a worldwide panel of experienced and credible international arbitrators.

KIAC is committed to providing high quality logistical support to its users for organization of the hearings in Kigali; provision of suitable rooms, Secretarial services and catering services. This year, the Centre moved into the new state of the art office premises with appropriate infrastructure for Arbitration proceedings. The office is centrally located in Nyarutarama, a prime location for the perfect setting for dispute resolution needs in a relaxed and comfortable environment. The new location is double our previous space and gives the Centre the additional room needed to support our clients' resource needs such as arbitration rooms, mediation rooms, and library all under the same premises. Parties have access to large conference rooms with the latest business equipment including videoconferencing, LCD projection, and equipped with high-speed wireless internet connections and other Secretarial services.

Advocacy of ADR Services at local and international level

Since the establishment of the centre there has been increased awareness arbitration and ADR in general as a result of KIAC intensive sensitization campaigns through various platforms.

The centre has organized seminars with professional Associations including engineers, architects, manufacturers, banking and financial institutions, accountants, lawyers, mining, Energy sectors and constructions.

Various Media have also been used to educate the public about means of dispute resolution other than litigation; radio, TV, website, newsletters or in-flight Magazines show on a local Newspapers, Socio Medias, SMS. Here the aim is again to promote a culture of arbitration in addition to our home grown solutions in matters of alternative justice; such as Gacaca court system, or local Mediation committees. Behaviour change takes always long time but the last survey conducted on impact of communications activities shows that attitudes toward arbitration are changing favourably.

The Centre has taken the initiative of knowledge sharing platforms have been also created to give opportunity to arbitration practitioners and providers in the region to meet, share experience and learn from each other for better information of the public of users in the region and beyond. KIAC organized an International Conference in May 2014 on Emerging Issues in International Arbitration; what a new seat can anticipate? The Conference attracted 150 people from 18 countries across the five continents.

The Conference is a recommendation of the Regional workshop organized by KIAC in May 2013 to assess the practice of arbitration in the region and share experiences

Partnership with Other Institutions and knowledge sharing

Building relationships with other similar institutions is part of KIAC missions. KIAC has so far signed Memorandum of Cooperation with two arbitral bodies, La Cour d'Arbitrage de la Cote d'Ivoire, an arbitral institution under the auspices of the Chamber of commerce of Ivory Cost). and KLRCA in Malaysia. There are main advantages to such partnership, exchange of information, knowledge sharing, and capacity building opportunities.

KIAC is committed to assist other starting Centres in Africa and share lessons learnt. In December last year, the Director of the Juba Centre stayed with KIAC team to learn about case administration and general management of an arbitral Institution. Internship opportunity is also available for young professionals from Law Schools of Rwanda and the region.

Building on what Rwanda can offer

Ranked in the Global Competitive Report 2014-2015 7th in Governance Report 2015 Rwanda is a safe and secure country with the lowest crime rate in the Region and zero tolerance corruption. The country is more politically stable than most of emerging markets (World Bank Governance Indicators)

Rwanda is centrally located in the heart of African with a Market access of 150 millions of people. There are three Official languages, English, French and Kinyarwanda

The GDP is constantly growing at around 8 % annually and the country is top global consistent reformer since 2008 (World Bank Doing Business reform), most competitive place to do business in East Africa and 3rd in Africa after Mauritius and South Africa (WEF Global Competitiveness index Report 2014-15).

Rwanda offer facilitation for obtaining visas with online application and visa on arrival for all Africans and this is the most appreciated by visitors and users of the Centre. More than 20 destinations per day to Europe, Asia and main Cities of Africa

The Judiciary of Rwanda is very supportive of arbitration. Recognizing the benefits of arbitration and the long local tradition for alternative dispute resolution, the Rwandan judiciary follows a pro-arbitration policy, which includes, for instance, prioritizing arbitration-related matters and handling them in a timely manner

Considering economic growth in Africa, there is a need of credible and well-resourced institutions to preside over dispute resolution through arbitration and ADR in general. KIAC operating in the enabling environment that Rwanda offers, is committed to making this a reality.



KIAC new facilities: 2 arbitration rooms, mediation room, 3 retiring rooms and video conference facilities.

Panel 1b: National Arbitration institutions/Centres

Chair:

Chief Bayo Ojo, SAN; Founder, ICAMA

Panellists:

Ghana Arbitration Centre (Emmanuel Amofa, Director)

Lagos Court of Arbitration Centre (Ms Megha Joshi, Director-General)

LCIA-MIAC (Mr Duncan Bagshaw, Registrar)

Addis Ababa Chamber of Commerce & Sectoral Associations (Mr Yohannes Woldegebriel, Director)

Zambia Centre for Dispute Resolution Limited (Justice Charles Kajimanga)

**THE ROLE OF ARBITRATION INSTITUTIONS IN THE DEVELOPMENT OF ARBITRATION IN
AFRICA AU COMMISSION, ADDIS ABABA, 23RD JULY, 2015**

ROLE AND FUNCTIONS OF THE GHANA ARBITRATION CENTRE;

By Emmanuel Amofa, Administrator, Ghana Arbitration Centre

1. Introduction

I am particularly privileged to be invited to this conference on the role of arbitration institutions in Africa with particular reference to the Ghana Arbitration Centre. I must express my profound gratitude to the organizers in particular Dr. Emilia Onyema for offering the Ghana Arbitration Centre such exposure before this august assembly of experts in the field of arbitration. We trust that this will be the dawn of lifelong collaboration in the development of arbitration in Africa.

2. Establishment of Ghana Arbitration Centre

Over the years it became a notorious fact that the formal adjudicatory process was fraught with challenges arising out of perennial congestion in the courts, delays in administration of justice, lack of expertise in resolving specialized disputes, like intellectual property, commercial and investment disputes among many others. There were calls by successive Chief Justices of Ghana, the Ghana Bar Association, the Ghana Investment Promotion Centre, the Private Enterprise Federation and other stakeholders for the introduction of alternative dispute resolution mechanisms, to alleviate the congestion in the courts and to enhance expertise and specialization in certain areas of the law, in particular, commercial and investment law.

It is instructive to note that such interest in the institution of alternative dispute settlement mechanisms is a global phenomenon and Ghana's efforts in this regard have parallels in both developed and developing countries. This is because empirical evidence from numerous countries attests to the existence of the near-universal problems of slow pace of litigation and adjudication and attendant high costs in the ordinary courts. It is now universally acknowledged that the existence of a viable, reliable, fair and expeditious system of dispute settlement is a key ingredient of the enabling environment for private sector development and for domestic and foreign investment. It was to break these challenges that the idea of establishing an arbitration centre for Ghana Arbitration Centre was mooted.

The Ghana Arbitration Centre was established upon the initiative of a number of senior Ghanaian lawyers to address a critical need in the country's system of resolving civil disputes. It was sponsored by a cross-section of senior members of the Ghanaian legal profession that included a retired Supreme Court Judge, seasoned practitioners in commercial law and arbitration, a former Director of Legal Education and Head of the Ghana Law School, a former Dean of the Law Faculty of the University of Ghana, Past Presidents of the Ghana Bar Association, Directors of Legal Divisions in the financial, investment and international sectors of the public service and a former director of an international institution who is an international commercial arbitrator.

The Ghana Arbitration Centre is an autonomous, non-profit making institution, incorporated in October 1996 as a company limited by guarantee under the Companies Act, 1963 (Act 179).

The objects of the Centre include the following:

- a) "To provide a forum for the resolution of disputes through arbitration and other alternative dispute resolution mechanisms."

The following points may be noted in respect of this object: first the Centre provides a forum or facility for the resolution of disputes by consent of the parties. Second, although officially called the Ghana Arbitration Centre, the Centre is mandated to sponsor the resolution of disputes by other ADR mechanisms such as conciliation and mediation.

- b) "To promote the resolution of disputes by arbitration and ADR and the study of the laws, rules, practices and procedures relating thereto."

This objective relates to the Centre's promotional role with respect to recourse to ADR and the study of the laws and procedures underpinning ADR. In this regard the Centre submitted proposals to the appropriate authorities on the reform of the legal infrastructure of arbitration to ensure that it is in consonance with modern developments and international practice. The Centre played a key role which led to the formulation of the new Alternative Dispute Resolution Act, 2010 (Act 798) which repealed the Ghana Arbitration Act, 1961 (Act 38).

- c) "promote opportunities for educating the public through the reading of papers, delivering of lectures and the holding of seminars on the subjects of arbitration and ADR."

The dearth of knowledge among some practitioners of law in the area of arbitration as an alternative mechanism for resolving commercial and investment disputes cannot be overemphasised. That is why the role of the Centre in providing opportunities for educating the public is critical. In this regard, the Centre has conducted a fair number of workshops on arbitration for professionals, including lawyers, surveyors and engineers among others usually on techniques of arbitration.

We also found that many business executives have very little or no practical knowledge of arbitration or other ADR mechanisms as an expeditious means of resolving disputes. It is agreed that businessmen desire expeditious means as well as the provision of a congenial environment for settling their disputes. The Centre accordingly mounted a number of sensitisation programmes around the country to introduce arbitration and alternative dispute resolution mechanisms to leaders in micro and macro businesses. The feedback from these sensitisation seminars was encouraging as the Centre was inundated with enquiries about its activities and how businessmen can access the services of the Centre.

Generally, it has been observed that workshops and seminars provide a seminal solution to the lack of expertise among African professionals in international commercial arbitration. A founding member of the Ghana Arbitration Centre who is also its current Chairman made the following succinct observation some few years ago which captures this observation:

"Nevertheless, there can be no realistic discussions of this subject without recognising that a contributory cause of African unease about international arbitration is limited experience in this area. Indeed, African expertise in international commercial arbitration is closely related to African experience in the whole area of international business transactions."

Since Independence, African governments have grappled with the negotiation and administration of many kinds of international transactions; loan agreements with international and foreign banks, international procurement contracts, supply contracts, joint ventures, international construction contracts, management agreements, technical assistance agreements, mining and petroleum agreements, licensing agreements and the like. Some countries have made impressive strides in handling such transactions which require multi-disciplinary teams. Throughout the past fifteen years, this writer has organised numerous workshops and seminars on such transactions for developing country personnel under the auspices of the United Nations. The negotiation and drafting of arbitration clauses are covered in these sessions. However, it was realised that the dearth of experience was such that special seminars had to be organised focusing exclusively on international commercial arbitration. It is evident from these seminars that there is no equivalent of an 'Arbitration Bar' in the overwhelming majority of Sub-Saharan African countries. The normal law school curriculum does not address international commercial arbitration, and most African lawyers have not specialised in international business transactions, still less, the intricacies of the various arbitral systems. Apart from the UN efforts referred to above, it does not appear that any concerted efforts have been made by the various arbitral institutions to provide training for African lawyers in international arbitration, although the ICC's Institute of International Business Law and Practice provides training facilities in this area. The result is that African parties to international arbitration are compelled to hire overseas counsel." The Perspectives of African Countries on International Commercial Arbitration, Leiden Journal of International Law, 1993.

I find this conference and others that would be organised in the future as an answer to the existing doubts about our commitment to international commercial arbitration and recommend close collaboration with institutions with similar objectives in organising such workshops or schools to stimulate interest in arbitration practice.

d) "To affiliate and or co-operate with any other centre, societies or which have similar objectives."

At the national level, we have entered into collaborative arrangements with the Private Enterprise Federation and the Ghana National Chamber of Commerce. At the international level, the Centre concluded co-operative agreements with the Association of Arbitrators of Southern Africa and the Indian Council of Arbitration in early formative years, although there has been little effort in enhancing the relationship.

e) "To provide accreditation for members of the Centre to act as arbitrators or mediators or conciliators in resolving domestic and international disputes."

This is an important function of the Centre. Accreditation of members as arbitrators and conciliators is a critical procedure for assuring the public about the qualifications and integrity of the designated members of the Arbitration and Conciliation Panels. Accreditation involves two steps. First, a professional has to qualify for membership of the Centre. Second, members have to be accredited to act as Arbitrators or Conciliators in particular disputes.

3. Rules and Procedures

I now turn to some aspects of the procedures of the Centre with a view to distinguishing between the arbitral process under the Centre's Rules and the rules of other arbitration institutions. The Rules have been designed to specifically reflect the benefits of arbitration as an alternative to litigation. The merits of the arbitral process revolve around the following themes in providing:

- a. Expeditious dispensation of justice;
- b. The option to choose arbitrators with the requisite calibre and expertise and the specialised nature of the forum;
- c. Confidentiality of the proceedings;
- d. Less formal and rigid procedures; and
- e. Cost-effective proceedings.

A. Recourse to the Arbitration Centre

Under the Centre's Arbitration Rules, parties may resort to arbitration under the auspices of the Centre by virtue of an Arbitration Clause in a contract or an *ad hoc* submission which is a written agreement to arbitrate under the Rules of the Centre. (See Articles 7 and 9). In either case, the Parties shall be deemed to have made the Arbitration Rules a part of their arbitration agreement. (Article 1).

B. The Initiation Process

As intimated above, this is governed by Rules 7 and 9. The provisions of these Rules deserve to be quoted in full. Article 7 states:

"Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract may be initiated in the following manner:

- (a) *The initiating party shall give notice to the other party of its intention to arbitrate (Demand), which notice shall contain among others a statement setting forth the following:*
 - (i) *the name in full, description and address of each of the parties;*
 - (ii) *the nature and circumstances of the dispute;*
 - (iii) *the remedy sought, including the amount or claim involved if any;*
 - (iv) *the agreement(s) pertaining to the dispute and the arbitration agreement; and*
 - (v) *any other documents relevant to the dispute should be annexed thereto.*
- (b) *By filing at the Headquarters of the Centre copies of the notice provided in sub-clause (a) above, which copies shall be sufficient to provide one copy for each party, one for each arbitrator and one for the Secretariat together with the payment of the appropriate administrative fee as provided in the Administrative Fee Schedule.*
- (c) *The Centre shall give notice of such filing to the other party. If so desired, the party upon whom the Demand for Arbitration is made may file an answering statement (Answer) in copies which shall be sufficient to provide one copy for each party, one for each arbitrator and one for the Secretariat within seven days after notice from the Centre, in which event the said party shall*

simultaneously send a copy of the answer to the other party. In addition to the Answer if a counterclaim is asserted, it shall contain the following:

- (i) a statement setting forth the nature of the counterclaim;*
 - (ii) the remedy sought including the amount involved;*
 - (iii) any document(s) giving rise to the counterclaim should be annexed thereto; and*
 - (iv) the payment of the appropriate fee provided in the Fee Schedule shall be forwarded to the Centre, if a monetary claim is made in the Answer and Counterclaim.*
- (d) If no Answer is filed within the stated time, it will be deemed that the claim is denied. Failure to file an Answer shall not operate to delay the arbitration.*
- (e) Where an Answer and a counterclaim are submitted by the Respondent, the Claimant shall within seven (7) days be entitled to file a Reply. The Claimant shall file with the Secretariat, copies of the Reply which shall be sufficient to provide one copy for the Respondent, one for each arbitrator and one for the Secretariat.*
- (f) Unless the Centre in its discretion determines otherwise, the Expedited Procedures of Arbitration shall be applied in any case where the total claim of any party does not exceed \$10,000 or its equivalent, exclusive of interest and arbitration costs. The Expedited Procedures shall be applied as described in Article 56 through 60 of these Rules.”*

Article 9 provides as follows:

“Initiation under a Submission

- (a) Parties to any existing dispute may commence an arbitration under these Rules by filing at the Headquarters of the Centre two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties.*
- (b) Article 7 of these Rules which deals with the contents of a Demand and Answer, the period for filing a Reply and the payment the appropriate administrative fee as provided in the Fee Schedule shall apply mutatis mutandis to the filing of a Submission under this Article.”*

The following points are worthy of note:

- i) The Rules merely prescribe what amounts to a Statement of Claim as a part of the Demand from the Claimant and an Answer, together with a Counterclaim, if any, from the Respondent or Defendant. That is to say unlike the rules of some arbitral institutions where a notice of arbitration has to be filed before proceeding to file the substantive claim, the Demand serves both as notice to arbitration and the substantive claim of the claimant. No provision is made for the protracted process of filing a Statement of Claim, Statement of Defence, Rejoinder and Reply as in arbitral proceedings under other arbitration institutions. The Centre’s Rules are streamlined and simplified procedures which are a far cry from the whole range of elaborate procedural steps that are required in the normal process of litigation in the Courts - namely issuing a Writ of Summons, filing a Statement of Claim, Entry of Appearance, filing a Statement of Defence

and Reply in certain cases, application for directions and fixing of the date of hearing.

- ii) The Rules clearly underscore expeditious proceedings by stipulating strict time schedules for the filing of pleadings. The Defendant or Respondent has only seven days to file an Answer.
- iii) Where the amount of the total claim of any party does not exceed US\$10,000 or its equivalent the special Fast Track procedures prescribed under Articles 56 to 60 shall apply.
- iv) The emphasis on expeditious dispensation of justice is reflected in several other rules, such as the need to observe the stipulated periods for the appointment of arbitrators (Articles 13, 14, and 15), the provision for continuation of proceedings notwithstanding the absence of a party (Article 30); the requirement of a prompt award viz. not later than 30 days from the date of closing of the hearings (Article 41) and the provision for the waiver of oral hearings by written agreement between the parties (Article 37).
- v) I hardly need to point out that with arbitration, there is little prospect of competition with other cases for attention in the same forum, and thereby avoid congestion.

C. Interim Measures

In a pending arbitration, it sometimes becomes necessary for the subject matter of dispute to be protected or preserved. An arbitrator may on an application by a party make such orders to safeguard the property or subject matter of dispute. Article 34 of the Centre's Rules which covers this relief is as follows:

"The Arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute."

Where the law governing the arbitration agreement is the laws of Ghana, there is further support for interim measures by Section 38 of Act 798 which allows an arbitrator, at the request of a party to grant interim relief the arbitrator considers necessary for the protection and preservation of property. An interim relief of such nature may be in the form of an interim award and the arbitrator may require the payment of cost for such relief.

D. Disclosure of Documents

You will recall that earlier on in this presentation I indicated that as part of the claimant filing a Demand with the Centre, the claimant is also required to annex any document that he wants to rely on at the trial. Beyond that and also as part of the whole process of gathering of evidence for an arbitration hearing, parties have the opportunity to examine documents that an opposing party intends to rely on at the hearing. This is captured as part of the provisions for producing evidence in Article 32 where all parties shall be afforded the opportunity of examining documents of his opponent.

E. Site of the Arbitration

The Centre only provides a mechanism for the resolution of disputes by ADR. The actual business of dispute resolution by ADR may be sited in any city in any country. According to Article 11, the parties may mutually agree on the place of arbitration. In the absence of such agreement, the Centre shall determine the place of arbitration, and its decision shall be final and binding. An important factor to consider in choosing the site is whether the law of that country allows judicial appeals either from the Arbitral Tribunals' interlocutory decisions or on questions of law. Such reliefs undermine the principal

advantage of arbitration namely the finality of the award. Another important factor in site selection is the availability of support facilities including hearing rooms, interpreters and court reporters. Article 23 obliges the Centre to make the necessary arrangements for taking stenographic record wherever such record is requested by a party. The party requesting such a record bears the cost of the record.

F. The Integrity of the Arbitral Proceedings

As intimated earlier, an essential ingredient of the criteria for membership of the Centre and accreditation as an arbitrator is high moral character and unimpeachable integrity. This is reinforced by Article 19 which requires a person appointed as a neutral Arbitrator to disclose to the Centre any circumstance likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. The Centre will then determine whether the Arbitrator should be disqualified. The Centre's decision in this regard is conclusive.

G. Costs

Although international commercial arbitration could involve high costs by reason of such factors as international travel and administrative expenses, ordinary domestic arbitration under the Centre's Rules is relatively cost-effective for a number of reasons. The expeditious nature of the proceedings saves time and *a fortiori* money. As far as administrative costs are concerned, the modest scale of payments charged by the Centre is not higher than the substantial fees paid in ordinary litigation in the courts. As regards arbitrator's fees the Centre provides objective criteria for assessing arbitrator's fees. Article 51 is in the following terms:

"The Arbitrators' Fees will be calculated by reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular circumstances of the case, including its complexity and any special qualifications of the Arbitrators."

In summary arbitrators' fees charged are based on (i) work done (ii) complexity of the matter in dispute and (iii) qualifications of the arbitrator. In practice however, the Centre creates flexibility with regard to the amount payable as arbitrators' fees by allowing parties to negotiate with the arbitrator(s). Parties have found this practice attractive and engendered confidence among such parties because of the realisation that arbitrator's fees are not unilaterally imposed on them. The parties' involvement in fixing arbitrators fees averts the unfortunate notion that arbitration is expensive and exorbitant.

I am convinced that the compounded and protracted nature of the litigation process far exceeds anything that is likely to be paid by way of administrative costs and arbitrator's fees under the Centre's Rules. Arbitration costs are substantially reduced if parties, for instance, opt for the "Fast Track" or expedited procedures under the Centre's Rules.

4. Appointing the arbitral tribunal or arbitrators

The Centre provides a number of ways for appointing arbitrators. Where the parties have not appointed an arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner:

- "a) Immediately after the filing of the Demand or Submission as the case may be, the Centre shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel.*

- b) *Each party to the dispute shall have seven days from the delivery date in which to cross off any names objected to, number the remaining names to indicate the order of preference, and return the list to the Centre.*
- c) *If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the Centre shall invite the acceptance of an Arbitrator to serve.*
- d) *If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Centre shall have the power to make the appointment from among other members of the Panel without the submission of any additional list.” (Article 13)*

One of the advantages of arbitration is the opportunity it affords the parties to appoint their own arbitrators. The Centre enables the Parties to select persons whether they be jurists, engineers, accountants, architects or other professionals who have the requisite expertise and experience in the subject of the arbitration.

First, the parties may designate Arbitrators directly in the arbitration agreement, in which case, such designation will prevail.

Second, the parties may prescribe a method for the appointment of Arbitrators. Again the prescribed method must be followed.

Third, in the absence of the foregoing two procedures, the parties may seek the Centre’s assistance in appointing Arbitrators from the National Panel of Arbitrators.

Fourth, if, in certain circumstances spelt out in the Rules, the Parties fail to make appointment from the list of Arbitrators provided by the Centre within a prescribed period, the Centre will appoint Arbitrators from among the National Panel of Arbitrators as detailed in Article 14 of the Rules.

15. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators

- (a) *If the parties have appointed their Arbitrators or if either or both of them have been appointed as provided in Article 14, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the Centre shall appoint a neutral Arbitrator who shall act as chairman.*
- (b) *If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the Centre shall appoint such neutral Arbitrator, who shall act as chairman.*
- (c) *If the parties have agreed that their Arbitrators shall appoint the neutral Arbitrator from the Panel, the Centre shall furnish to the party-appointed Arbitrators, in the manner prescribed in Article 13, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in the said Article.*

The facility for appointing arbitrators with the requisite expertise in settling complex commercial or civil disputes cannot be overemphasised in these days of sophisticated commercial activities replete with complex business transactions such as joint ventures, technology transfer agreements,

intellectual property protection, foreign investment, management contracts, design, engineering consulting and construction contracts of all types, i.e. turnkey, BOT, etc. mining agreements, privatisation, banking and insurance. Disputes relating to these transactions cannot easily be handled in the ordinary courts which usually lack specialisation in these areas. Arbitration provides the specialised forum that is fully equipped to handle such disputes.

As intimated earlier, the disputes referable to the Centre may be international as well as domestic. Where one of the Parties is a national or resident of a country other than Ghana, Article 16 requires that the sole Arbitrator or the neutral Arbitrator should be a national of a country other than that of any of the parties.

5. Target users

The Centre generally aims at providing a forum for local and foreign entities to settle their disputes. However, the Centre has set out to position itself in the first instance to being an attractive institution for the settlement of disputes domestically. Indeed, the very first dispute settled under the auspices of the Centre was between two foreign companies operating in Ghana.

On occasions disputes between the Government of Ghana and private companies have been referred to the Centre for resolution. Although these references have been few and far between, it is particularly encouraging for the Government to give due recognition to a domestic arbitration institution other than looking at foreign arbitral bodies which have always been the case.

By far the most cases, which are referred to the Centre are disputes between Ghana companies or between individuals and companies.

The Centre also resolves disputes between some governmental agencies and private companies and disputes involving foreign companies doing business in Ghana.

The critical issue worthy of note is that in most of these disputes the parties voluntarily opted to resolve their disputes under the auspices of the Centre with prior reference of their to the Centre. In other instances, the Commercial Division of the High Court with the consent of the parties, have adopted the Rules of the Centre to resolve their disputes.

6. Subject matter of disputes, value and Statistics

The areas of disputes administered by the Centre include but not limited to commercial and investment disputes, construction, intellectual property, mining, housing, telecommunication services, insurance, banking, energy and petroleum disputes, maritime, labour disputes, service agreements disputes, tenancy Agreements and specialty contracts e.g. Stevedoring

The amounts in contention between parties involved in these disputes range from as low as \$20,000 to over and above \$1,000,000.00. Parties have sometimes sought only declaratory reliefs from the tribunal without special monetary claims. On the average the Centre records at least fifteen (15) cases in a year.

7. Challenges

A major challenge which confronts the Centre is lack of funding or inadequate resources. The Centre does not receive any financial support from the Government or any entity for its operations. It relies on the meagre administrative charges and no more than five (5%) percent deducted at source from arbitrators fees to fund its activities. Since the Centre was no set up to make profit, it is handicapped in charging competitive rates. Even more important is the decision to keep charges very low to attract and persons and corporate institutions to adopt arbitration and ADR as a viable mechanism for the resolution of their disputes.

Closely interlinked with the challenge of inadequate funding is the lack of modern equipment to facilitate proceedings. The Centre has its own building with an arbitration hall and break-rooms to host arbitration hearings. However, the Centre lacks modern equipment for an efficient transcript and translation services to facilitate arbitration proceedings. The Centre has, on occasions had to decline the use of its facilities principally to the unavailability of such modern equipment to enhance arbitration hearings.

Another major challenge that needs to be highlighted is the general apathy and suspicion of the business community towards arbitration as a mechanism for resolving disputes. This attitude is compounded by the lack of enthusiasm of lawyers to gravitate towards the use of arbitration. The Centre has strived over the years to mount a number arbitration workshops and seminars to sensitize lawyers and the business community on the use of arbitration and ADR. The effect of these workshops and seminars has not been overwhelming as expected.

8. Growth plans and collaborations with other institutions

i) Growth Plans:

It is envisaged that for the activities and operations of the Centre to be sustainable, the strategy of operating as a company limited by guarantee without the object of making profit will be reviewed. Similarly, in the near future the Centre will charge realistic administrative and arbitrators fees. These measures will strengthen the financial capacity of the Centre to be able to procure the necessary equipment to facilitate arbitration hearings and also attract skilled human resource to operate these facilities. It is also expected that with such installed capacity the Centre should be able to attract parties to adopt the Centre's facilities to resolve their disputes without the need to particularly apply the Rules of the Centre.

The Centre now has various committees, Education Committee; Nomination and Appointment of Arbitrators Committee; Finance Committee; Rules Committee. The work of these committees is aimed at designing programmes that will promote the activities of the Centre. The Education Committee for instance is tasked to organize workshops and seminars to deepen and sustain interest in arbitration across the country. One such workshop was organized last year with another scheduled to take place in October this year. The Rules Committee constantly makes proposals for revising the Rules of the Centre to make its application relevant to achieve the purpose of assisting the resolution of disputes expeditiously.

The Ghana Alternative Dispute Resolution Act, 2010 (Act 798) envisages the establishment of an Alternative Dispute Resolution Centre, which has not been established yet. The Centre is positioning itself as the foremost arbitration institution in Ghana to fill that gap while progressively developing and working towards transforming the Centre into a regional arbitration centre for West Africa. Indeed must be noted that the Government of Ghana has taken a decision to develop the energy and infrastructural needs of Ghana through a Public/Private Partnership model and the likelihood of arbitration booming is very high indeed. This is because all the PPPs have an arbitration clause as part of their investment contracts, directing all disputes to be resolved by arbitration. It is our expectation that the Centre will become the focal point in providing the necessary direction in the event of disputes arising out such contracts.

ii) Collaboration with other Institutions:

There are three areas that the Centre intends to collaborate with other arbitration institutions to enjoy the benefit of economies of scale harmonise efforts to promote arbitration in Africa. The first is endeavour to collaborate with institutions with analogous objectives to organize training in basic Arbitration Law and Practice. In the past the Centre has relied on the expertise of Prof Van den Berg, Mr.

Tunde Fagbohunlu and John B. Tieder, Jnr. Esq., of the U.S.A. in organizing such training programmes. As indicated earlier the Centre's training programme this year will be organized in conjunction with Prof Martin Hunter. These isolated collaborations will be strengthened by entering into formal arrangements with other institutions in Africa to understand particularly the legal regimes governing arbitration in the respective jurisdictions.

The second area of collaboration with other institutions in Africa is the area of appointment of arbitrators in matters where the parties require the appointment of non-Ghanaian arbitrators as envisaged under the Rules of the Centre. Where it is required that parties should appoint a non-Ghanaian as an arbitrator under the Rules of the Centre, it should be possible with existing collaboration with other institutions to fall on such institutions to provide a list of arbitrators with possible recommendation on the appointment of an arbitration. This process ought to be formalized by entering into some arrangement instead of over reliance on European and American arbitrators to resolve disputes in Africa.

The third of area of collaboration with arbitration institutions in Africa is using the facilities of such institutions where the agreed place of arbitration is in the home country of an arbitration institution. In such a case, it is possible for the Centre to cede the organization and arrangement of the arbitration proceedings to the arbitral body in that country where there is a prior arrangement.

Conclusion

The Centre is ready to cooperate with institutions in Africa and elsewhere to share experiences and adopt measures that will assist in the development of arbitration in Africa. We believe that there are more to learn sister arbitration institutions so that we shall collectively promote arbitration in the Africa continent.

The Role of Arbitration Institutions in the Development of Arbitration in Africa
African Union Commission, Addis Ababa
Thursday 23rd July 2015

National Arbitration Institutions/Centres

LAGOS COURT OF ARBITRATION
INTERNATIONAL CENTRE FOR ARBITRATION AND ADR

Megha Joshi
Executive Secretary/CEO

Background

With Lagos dubbed as Africa's "Big Apple", the state's economy is open to international investment and development partners to improve the State's infrastructure and services in every way. In efforts to support economic prosperity, the Lagos State Arbitration Law Reform Committee 2009 resolved that the establishment of an independent, impartial and competent centre for commercial arbitration and alternative dispute resolution (ADR), (along with other legal and institutional reforms), would provide the building blocks to increase the ranking of Lagos on global growth polls and facilitate the enforcement of contractual obligation.

The Lagos Court of Arbitration (LCA) was subsequently established by the LCA Law No.17 of 2009 that provides the institutional framework for the court, its operation and perpetuity. The primary objectives of the LCA Law are to limit abuse of court intervention and obstruction of the arbitration process, and to promote party autonomy in regulating how disputes should be determined. These objectives would be achieved through the expertise and industry of private commercial business interests and arbitration practitioners.

By design, the LCA is private-sector driven and independent of regulation, direction or control by any branch of government, and the final authority for the application of the LCA Rules. The LCA is an international institution whereby providing a forum for dispute resolution proceedings for all parties, irrespective of their location or system of law.

The LCA operates under a three-tier structure comprising of the General Meeting of registered members that pay annual dues, the Board of Directors of 15 highly reputable ADR specialists headed by the President, and the Secretariat headed by the Executive Secretary. The purpose of the structure was to build a transparent and functional institution regulated by the stakeholders and users of ADR.

The LCA was formally launched and commenced operations in November 2012. In May 2015 the permanent headquarters of the International Centre for Arbitration and ADR (ICAA) were completed and handed over to the LCA from Lagos State Government to own, operate and become self-sustainable. Designed over 1900 square metres, with 20 hearing rooms and the latest technical equipment, the ICAA is the first purpose-built modern ADR facility in Africa.

Rules

The LCA Arbitration Rules are modelled on the UNCITRAL Rules of Arbitration, and are as contemporary as the rules of any leading arbitration institution, and apply to matters under the Lagos State Arbitration Law 2009 where parties choose them to apply. The LCA is empowered to make rules for the "expeditious conduct of arbitral proceedings" by virtue of a resolution of members in a General Meeting, and the law anticipates that the rules will be updated from time to time. The first set of rules were published in

February 2011 and updated in June 2013 with the provision of a “Special Measures Arbitrator”, whereby the LCA can appoint a temporary arbitrator in order to provide a party temporary relief/protective orders during the time taken to constitute a tribunal. However, the arbitrator will not exercise any powers (or may rescind any orders made) where it is shown that the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures or the parties have agreed to opt out of the Arbitration Rules.

Both the LCA Arbitration Rules 2013 and LCA Mediation Guidelines 2011 can be referenced or downloaded from www.lagosarbitration.org.

Discussion Questions

1) Statistics of their caseload and how frequent this is provided and disseminated; what indices are provided?

In the absence of centralised data/statistics regarding arbitration proceedings conducted in Nigeria, the LCA is in a primary position to compile and produce such references. Details of the LCA’s Dispute Resolution Caseload are published in the Annual Reports every June, and will include indices of nationalities as the docket expands.

As the LCA is a relatively new arbitral institution, there have been few instances of cases occurring when the LCA has been included in the contract dispute resolution clause from the outset. However there have been many more cases where parties have agreed for the LCA to administer the dispute resolution process, or to defer to the LCA as the appointing authority, and for the LCA to advice on the correct application of arbitration as a clause in commercial contracts.

The LCA is very confident of a steady growth in cases, after receiving many confirmations from various multi-national and Nigerian companies (mainly in the oil and gas sector) of the adoption of the LCA’s dispute resolution/arbitration clause in their respective contractual agreements.

2) Nationality of parties and arbitrators; and how the arbitrators were appointed.

The LCA welcomes all nationalities of parties to select Lagos as their seat/venue for dispute resolution, and invites all qualified arbitrators to register for listing on the Panel of Neutrals.

Presently, the LCA has both Nigerian and international arbitrators listed on the Panel of Neutrals. All Neutrals must register as members of the LCA, and will be approved for listing by the LCA Neutrals Selection Committee based on the LCA Neutrals Qualification Criteria.

The LCA acts as the appointing authority if stipulated in a contract or upon request. If parties are choosing the neutral, they can select from the LCA’s list of neutrals, or LCA can short-list and recommend candidates based on experience and special knowledge. In the case that a specific expertise is required, the LCA may recommend an outside neutral. There are due diligence measures in place before any appointment is confirmed to ensure there are no conflicts of interest.

Further information on the LCA Neutrals Qualification Criteria can be found on www.lagosarbitration.org

3) Additional services they provide such as assistance with enforcement of awards; arbitration related workshops/conferences/training; publication of awards, etc.

The LCA may publish an award or assist with the enforcement of the award by consent or request of the parties.

With reference to additional services; the LCA ICAA is a modern and total ADR services provider. The list of services includes; arbitration, mediation, negotiation, conciliation, neutral appointment, neutral evaluation, case-management, administration, secretarial services, fund-holding, fees schedule, facilities hire, transcription/recording, video-conferencing, seminars, membership services, research, policy advocacy, publications, rules, schemes and draft clauses.

As a knowledge-driven centre, the LCA is presently developing a programme of ADR awareness and sensitisation seminars to hold on the last Wednesday of every month at the ICAA. Taking on the format of the 'ADR Speaker Series' and the 'Industry Specific Roundtable Series'; ADR experts and users will engage with legal practitioners and the private sector to share experiences and formulate the basis of schemes and larger policies to promote efficient dispute resolution in Nigeria.

4) *Scope of their jurisdiction [who are their users?]*

The scope of the LCA extends to parties involved in a dispute that agree to have their case administered by the LCA. The users of the LCA include the parties that agree to have the LCA as the administrative body to oversee and administer the dispute resolution process, even where the dispute is not resolved under the Rules of the LCA.

As the LCA is a membership driven organisation, the users of the LCA are also the registered members that seek to develop the LCA as a natural and neutral venue for ADR.

5) *Relationship between the institution and the state where it is established.*

Although the LCA was established by the LCA Law No. 17 of 2009, Laws of Lagos State, which provided an institutional framework for the LCA, its operation and perpetuity, the LCA is independent of any control, participation or intervention by any government. Beyond the start-up infrastructure, by law, the State has no power whatsoever to interfere with the functioning of the LCA and it is driven, owned and funded by the private sector.

Since the formal launch of the LCA there have been many changes in arbitration in Lagos; the most important of which has been the judiciary embracing arbitration and ADR. With the financial support of the Investment Climate Facility for Africa (ICF), the LCA delivered focused ADR training workshops for all of the High Court Judges of Lagos State. This activity has reinforced the importance of the judiciary's role in award enforcement, and in turn helped the LCA become a more appealing destination for ADR. The LCA is presently focused on delivering a similar ADR training workshop for the Federal High Court Judges of Nigeria.

6) *How independent is the institution in its funding? [how can it become self-funding?]*

The LCA is presently funded by grants, income from dispute resolution services and membership fees. The ICAA was strategically established not only to become a hub for ADR in Lagos, but also for the LCA to become fully independent and self-sustainable thus reducing the dependency on grants/donor funding. Other tenants of the ICAA include the Chartered Institute of Arbitrators (UK) Nigeria Branch, the Chartered Institute of Arbitrators Nigeria and the Maritime Arbitrators Association Nigeria (MAAN).

The Investment Climate Facility for Africa (ICF) awarded a grant to assist the LCA to become fully operational by supporting capacity-building, knowledge-sharing for judges, a strategic communications campaign, and to establish a modern document and knowledge management system. The overall objectives of the project are to reduce the amount of time to enforce commercial contracts and the cases applicable for ADR that the LCA can administer that are being channelled via litigation.

7) What differentiates each institution? So what is the particular institution's major selling point?

The major selling point of the LCA is that the organisation, operation and outlook are geared to ensure that the parties may have complete confidence in its credentials and impartiality. It is an international institution that provides a forum for dispute resolution proceedings for all parties, irrespective of their location or system of law, and also private-sector driven therefore independent of any regulation or control by any branch of government.

At the moment as the case docket is small, the LCA is able to streamline processes and interaction with the clients to ensure they receive one-on-one administrative support and maximum value from the administrative fees. The neutrals vetting process ensures only qualified, specialist and skilled arbitrators are listed on the panel, and the LCA ensures the neutral appointment/selection process is completely transparent. All of the fees and the schedule are agreed at the beginning of the process and the LCA can address any issues quickly, as well as intervene when parties cannot agree or enforce penalties when instructions are not adhered to.

Now parties can comfortably use an international standard of facilities at the ICAA to conduct arbitration proceedings in Lagos.

8) Does the institution have collaborative relationships with other institutions? If yes, what are these and details.

Currently, the LCA does not have any specific programs in place with other dispute resolution centres, but has benefitted from knowledge-sharing activities with other international arbitration centres.

In June 2014, the LCA took part in a roundtable discussion about the trends and challenges faced by arbitral institutions; the event was organised by the International Senior Lawyers Project (ISLP) in partnership with Judicial Arbitration and Mediation Services, Inc (JAMS), held at White & Case Plc in New York. Present were key figures from JAMS International, American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR), **International Chamber of Commerce -Secretariat of the International Court of Arbitration North America (ICC-SICANA)**, International Institute for *Conflict* Prevention and Resolution (CPR) and the New York International Arbitration Centre (NYIAC). This forum where everyone shared experiences in ADR administration was a great first introduction of the LCA to the US market. Following the roundtable discussion, the LCA visited all of the participants at their respective headquarters to continue with the knowledge-sharing. The discussions were extremely insightful, especially the role of the centres to continuously create and disseminate ADR content.

The LCA has good relationships with Kigali International Arbitration Centre (KIAC) and Mauritius International Arbitration Centre (MIAC) in Africa. All three centres began operations at roughly the same time and maintain strong ties, participating in one another's events and providing advice when useful.

9) What publications does the institution publish and what its readership base/numbers?

LCA published the first edition of the 'Dispute Resolution Journal' in November 2014; the 2nd edition is will be put out before the end of 2015. The Journal solicits articles from members of the LCA and ADR practitioners that are incisive on topical ADR issues connected to the LCA, the vision, or Africa and the global ADR world. All submissions are assessed by a Peer Review Committee for content and strength of arguments. The readership base extends to all members of the LCA and anyone with a passion for the practice of ADR.

10) How does the institution market itself and its activities and to what audience?

As the LCA represents a positive institutional development for the whole of the economic climate of Nigeria, it has been paramount to engage with all the different strata's of the business, legal and public sectors. The LCA has invested a lot of time in raising awareness about arbitration and ADR; as a result ADR has become more widely recognised as an effective alternative to litigation and the court system.

In the beginning, promotion of the LCA included in-depth presentations about the benefits of using ADR, then explaining the difference between institutional and ad-hoc ADR. Now there are requests for more in depth explanations of the processes, rules and applications. In two years, membership (domestic and international) has grown from zero to 200+ members, and the inclusion of the LCA dispute resolution clause has become more prevalent.

From generating relevant and regular media content, to organising and attending events, as well as visiting corporate and commercial entities, the LCA is constantly pitching for the proliferation of arbitration and ADR in Nigeria.

11) What provision does the institution have for young aspiring arbitration practitioners (eg internships)

Younger arbitrators have requested for opportunities to gain expertise in arbitration; so the LCA has developed a 'small claims scheme' for disputes between the values of one million naira to five million naira (approximately \$5,000 to \$30,000) with capped fees, as a strategy to help the juniors gain experience. Young aspiring arbitration practitioners can also apply for the internship programme at the LCA for a certain period of time.

12) What are the cost implications of arbitrating under the institution?

The LCA has a fixed administrative filing fee of ₦200,000 (approximately \$1,000) to commence an arbitration proceeding, the remainder of the administrative fees are based on the value of the dispute and set in the administrative fee schedule. For example, in a dispute ranging from ₦5,000,000 (\$25,000) to ₦10,000,000 (\$50,000), the parties will pay an additional fee of ₦200,000 (\$1,000) to the LCA. The administrative charges are capped up to a certain value.

The schedules for the arbitrator's fees are based on the rates set by the Chartered Institute of Arbitrators (UK) Nigerian branch. Under the LCA Arbitration Rules, parties can determine the basis for the schedule for arbitrators fees using either the 'time scale' or the 'value scale'. Under the 'time scale' the rate for the arbitrators is \$300 per hour or \$2,500 per day. Similar to the LCA administrative fee schedule, the 'value scale' is based on a percentage formula; for example where the dispute is up to \$50,000, the minimum arbitrator fee is \$2,700 up to a maximum of 16.2180% of the amount of the dispute. Full details of the schedule of fees can be found on www.lagosarbitration.org.

It is important to note that both the administrative fees and arbitrator fees are calculated and agreed at the beginning of the process.

The cost implication for the arbitration proceedings is to be determined by the parties, an arbitral tribunal may apportion cost between the parties depending on the circumstances of the matter in dispute.

13) Are awards of the institution published?

Under the LCA Arbitration Rules 2013 an award may be made public with the consent of the parties, or where a legal duty to disclose is required in order to protect or pursue legal right or in relation to legal proceedings before a court of law or competent authority.

14) Does the institution publish arbitration related decisions from courts within its location?

The LCA does not currently publish arbitration relation decisions from the court, but this may be published in the LCA Dispute Resolution Journal in the future.

15) Any other relevant information on the attractiveness of the institution.

The LCA offers party-driven ADR services that work for our clients that can be summarised in the following points:

- Conduct of arbitration and mediation services under LCA Rules and Procedures
- Fast efficient administrative services
- Competent and professionally qualified Neutrals (international, domestic and junior panel)
- Acts as an appointing authority (when required)
- Fund-holder for deposits
- Clearly defined administrative fees and neutrals fees
- A venue that provides all of the facilities to accommodate simple and complex arbitration hearings

The LCA also offers an 'ADR Audit' service directed to corporate organisations, to review existing dispute caseloads and to recommend on matters that can be resolved by ADR. The LCA also advises and corrects dispute resolution clauses for corporate bodies and private entities involved in commercial activities.

The LCA is very proud to be the dispute resolution body adopted the Lagos State Government in its Home Ownership Mortgage Scheme (Lagos HOMMS). This scheme has been designed to meet the demand for large-scale affordable housing in Lagos, as it provides access to affordable mortgage finance for first-time home buyers. The disputes that arise under this scheme will be resolved under the LCA Housing Arbitration Rules to support the administration of speedy and effective resolution of disputes that arise under the scheme.

Finally, the LCA is currently providing a dispute resolution mechanism for Eko Atlantic City 'the City' project which is one of the largest infrastructural developments in Africa today. As a result of this, all disputes that arise from the sale of plots of land in the City, or from the supply of utilities by a service provider to the residents of the City will be resolved by arbitration under the LCA Arbitration Rules.

Summary

The LCA recognises its integral role for the advancement of international and domestic arbitration in Nigeria. By developing domestic arbitration and shaping the local culture to change the legal mind-set, the institution is laying the foundations for international arbitration to progressively grow. All of the activities discussed in the paper are focused to deepen ADR awareness and root the practice of arbitration in Nigeria. As lawyers become more familiarised with arbitration practise, the judges will become accustomed to arbitration issues and local institutions will have the opportunity to build caseload and reputation. This is when international parties will have a basis for confidence in local institutions and international cases will start becoming decentralised.

The LCA is committed to the development of best practices of arbitration and ADR in the region.

Thank you



LCIA-MIAC, Mauritius and Africa What have we done, where are we going and why?



Duncan Bagshaw
Registrar, LCIA-MIAC Arbitration Centre
Conference on African Arbitral Institutions
Addis Ababa, Ethiopia, 27 July 2015



Introduction



Introduction



The project in summary

- 2008: State-of-the-art new International Arbitration Act 2008.
- Signed a Host Country Agreement with the PCA and installed a permanent PCA representative
- 2011: Establishment of LCIA-MIAC
- Mauritian Chair of the UNCITRAL Working Group on Arbitration for the past 3 years
- Hosting the signature of the UNCITRAL Convention on Transparency in 2015
- Host of ICCA Congress 2016

The International Arbitration Act 2008: A summary

- **UNCITRAL Model Law-based**
 - Challenges and Setting-aside (s. 39) as per Model Law
 - Competence-competence and separability (s.20)
 - Spirit of support and non-interference (s. 2A)
- **Negative competence-competence reinforced (s.5)**
- **Three-judge panel of Supreme Court (s 42)**

The International Arbitration Act 2008: A summary

- **Arbitrability of Company Disputes (s 3D)**
 - For Mauritian GBL companies
 - With restrictions on seat and appeal on point of law
- **Role of the PCA**
 - Appointment in default (s 12)
 - Challenges, even after institutional procedure (s 13)
 - Replacement following removal in default (s 15)
- **International Lawyers can act in arbitrations**

The Journey Continues...

- Amendments to the International Arbitration Act 2008
- Strengthening the enforcement regime
- Improvements to court procedures
- Developing Jurisprudence
- World-Class Hearing Centre
- Activities of LCIA-MIAC

2013 Legal Developments

Amendments to the IAA

- Six Designated Judges for IAA
- Single Judge hears first application for urgent relief (s. 42(1A))
- GBL Company arbitration provisions clarified
- Confidentiality (s. 42(1B))
- Post set-aside provisions (s. 39A)

Other improvements:

- Removal of Reciprocity Reservation from NY Convention
- French an official language for enforcing awards
- Designated Supreme Court Judges

New Supreme Court Rules

The International Arbitration Claims Rules 2013

- CPR-style
- Rapid timetable to hearing
- Presumption against oral evidence
- Costs (assessed according to expenditure) follow the event
- Hearings listed according to party time estimates
- Procedure for enforcement applications

Developing Jurisprudence

- *Liberalis Limited v Golf Development Intl Ltd* (2013 SCJ 211, SCR No. 107600)
 - Jurisdictional challenges
- *Bamwell Enterprises Ltd & ors v ECP Africa FII Investments LLC* 2013 SCJ 327
 - Injunctions and limits on court powers
- *Pieter Both Property Development Ltd v Chemin Grenier Industries Ltd* (2013 SCJ 279)
 - Separability of arbitration agreement reinforced
- *Cruz City 1 Mauritius Holdings v Unitech Ltd and others*
 - Enforcement: Constitutionality, meaning of Public Policy, Jurisdiction of tribunal

Developing Jurisprudence

- *Massilia Limited V Golf Development International Holdings Limited & ors 2014 SCJ 188*
 - Injunction by the arbitral tribunal to preserve assets power and *functus officio*
- *Mall Of Mont Choisy Limited V Pick 'N Pay Retailers (Proprietary) Limited & Ors 2015 SCJ 107*
 - IAA Section 5 stay for arbitration: "the test is, in our view, a very high one."



LCIA-MIAC

- Independent arbitral institution, corporate structure, neutrally appointed directors and staff
- Established and run with support of LCIA
- Arbitrators: Access to LCIA database plus LCIA-MIAC database
- LCIA Court performs identical functions for LCIA-MIAC as for the LCIA
 - Appointments, challenges and costs
- Bilingual English and French



LCIA-MIAC Activities

Developing expertise in the legal profession and judiciary

- MIAC 2012 and 2014 Conferences
- IA Workshop/Mock Arbitration
- RIDAA 2013 (French language conference)
- LCIA-MIAC Symposia, Johannesburg 2013, Ghana 2014

Coming up:

- **LECTURE: PROF HANOTIAU, 29 OCTOBER 2015**
- **23RD ICCA CONGRESS, Mauritius, 8-11 MAY 2016**

The Big Picture: Legitimacy

- A hiatus?
- International arbitration a process “foreign” to Africa?
- Giving Africa a say and an engagement in the process
- A platform and centre of excellence for the benefit of the region

The Big Picture: Achieving Acceptance

- Addressing perceptions of corruption
 - Acknowledging the perceptions
 - Knowing the arbitrators
 - Calling out suspect behaviour
 - Radical measures? Transparency? Nomination?
- Raising awareness of African expertise
- Strategic partnerships with overseas experts
- Choosing African venues where possible

APPENDIX 1

- *Liberalis Limited v Golf Development Intl Ltd* (2013 SCJ 211, SCR No. 107600)
- Ad Hoc arbitration seated in Mauritius arising out of an international property development deal.
- Jurisdiction challenged on the grounds that the arbitration agreement was not binding because it was signed whilst a party was in liquidation. Arbitrator decision: I have jurisdiction.
- Application to Court under section 20: Court reconsiders jurisdiction and decides arbitrator was correct
- Note Court's approach: Not an appeal, but noting the arbitrator's decision on the facts.
- Quaere: Necessary for the court to rehear factual evidence when reconsidering jurisdiction? Even if not asked to do so?

APPENDIX 2

- *Barnwell Enterprises Ltd & ors v ECP Africa FII Investments LLC* 2013 SCJ 327
- Ad Hoc arbitration seated in Mauritius arising out of an international M&A contract for purchase of a construction company.
- Injunction sought to prevent exercise of a Put Option under the shareholders' agreement.
- Supreme Court (first instance): temporary order granted.
- Supreme Court (return date): order discharged. Section 23 IAA: Court should only act to the extent that the tribunal does not have the power to act effectively.
- Note Court's approach: balancing "holding the ring" against the approach required under the Act.

APPENDIX 3

- *Pieter Both Property Development Ltd v Chemin Grenier Industries Ltd (2013 SCJ 279)*
- Contract between Mauritian parties included arbitration clause
- Hence domestic arbitration law applies
- Application to refer proceedings to arbitration resisted on the grounds that the contract never came into effect due to an unfulfilled condition.
- Supreme Court: The Separability principle applies in Mauritian law generally. French caselaw cited.
- The arbitration clause can therefore be binding separately from the contract even if the contract is not effective as a whole.
- Case therefore referred to arbitration.

APPENDIX 4

- *Cruz City 1 Mauritius Holdings v Unitech Ltd and others (2014 SCJ 100)*
- Indian and US investors in project to develop property in Mumbai
- Company incorporated in Mauritius with Shareholders' Agreement
- Governed by Indian Law
- LCIA Arbitrations seeking compulsory transfer of shares upon insolvency
- Arbitral award in the region of USD 300 million
- Challenged in London Commercial Court. Challenge partially successful
- Enforced in Mauritian Supreme Court, unsuccessful arguments on constitutionality, jurisdiction and public policy

ZAMBIA CENTRE FOR DISPUTE RESOLUTION LIMITED

By Justice Charles Kajimanga

The Zambia Centre for Dispute Resolution Limited (ZCDR) was incorporated in 2001 as a private company limited by guarantee. The guarantors are:

Law Association of Zambia

Engineers Institute of Zambia

Surveyors Institute of Zambia

Zambia Institute of Certified Accountants

Zambia Association of Manufacturers

Association of Consulting Engineers and Contractors of Zambia

Bankers Association of Zambia

Zambia Institute of Architects

Federation of Free Trade Unions of Zambia

Zambia Congress of Trade Unions

Zambia Association of Estate Agents

The objective of ZCDR is to provide ADR services. Between 2001 and 2011 it was closely associated with the Chartered Institute of Arbitrators (the Institute) and provided training in arbitration courses offered by the Institute in Zambia. With the establishment of the CIArb Zambia Branch, ZCDR is no longer involved in training. Due to problems associated with its administration, ZCDR is not active at the moment and it has not been providing any services for which it was established.

Panel 2: The Expectations of Users from the Institutions

Chair:

Prof Paul Idornigie, NIALS, Nigeria

Panellists:

Mr Jimmy Muyanja, Muyanja & Associates, Kampala

Ms Leyou Tameru, Ethiopia

Mr Kamal Shah, Partner, Stephenson Harwood, LLP London

Dr Stuart Dutson, Partner, Eversheds LLP, London

Dr Jimmy Kodo, CCJA, Abidjan

Dr Kariuki Muigua, Nairobi

The role of African arbitration institutions in the development of international arbitration in Africa

Users perspective

Leyou Tameru

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A look at numbers

LCIA	ICC	SIAC
• 29	• 352	• 15
• 290	• 767	• 259
• 10.6% Africa	• ~10% Africa	• ~5% Africa

Back to basics: Why use international arbitration?

- Competence of Tribunal
- Flexibility
- Cost
- Efficiency/ Time
- Finality
- Confidentiality

Arbitrator tribunal: Who & How?

LCIA-MIAC	KIAC	LCA	AFSA	CRCICA
<ul style="list-style-type: none"> • List of arbitrators not public • Parties may not appoint arbitrators, only done by centre • Expedited formation available 	<ul style="list-style-type: none"> • List of arbitrators available online • Parties appoint arbitrators • Emergency arbitrator appointment available 	<ul style="list-style-type: none"> • List of arbitrators NOT available online • Parties appoint arbitrators • Special measures arbitrator appointment available 	<ul style="list-style-type: none"> • List of arbitrators NOT available online • Parties appoint arbitrators • Arbitrator has strong powers • Provides for expedited arbitration rules (fast track) 	<ul style="list-style-type: none"> • List of arbitrators available online • Parties appoint arbitrators

Confidentiality

LCIA-MIAC	KIAC	LCA	AFSA	CRCICA
Awards are confidential unless the parties agree for their publication	Award is confidential. No mention of possibility of publication.	No confidentiality provision	Arbitrators shall maintain confidentiality, no mention of possibility of publication	Awards are confidential unless the parties agree for their publication

Costs

LCIA-MIAC	KIAC	LCA	AFSA	CRCICA
<ul style="list-style-type: none"> Registration fee 1414 USD 169.7 USD/hour for Registrar 113 USD/hour Fee for being appointing authority 990 USD + hourly rates Arbitrator hourly rate 565 USD 	<ul style="list-style-type: none"> 1500 USD (Arbitrator) + 1000 USD (Administration) = 2500 USD Fees calculator available on website 	<ul style="list-style-type: none"> Maximum 8109 USD + 6105 USD (12.21%) = 14 214 USD Minimum 2700 USD + 1150 USD (2.3%) = 3850 USD 	<ul style="list-style-type: none"> 1213 USD + 595 USD (per party) = 1808 USD + VAT 	<ul style="list-style-type: none"> 1500 USD (Arbitrator) + 1000 USD (Administration) = 2500 USD Fees calculator available on website

Language

LCIA-MIAC	KIAC	LCA	AFSA	CRCICA
<ul style="list-style-type: none"> The language of the contract/agreement will be the language of the Arbitration Rules of arbitration are available in English, French and Chinese 	<ul style="list-style-type: none"> Parties choose language of arbitration Arbitration rules available in English and French 	<ul style="list-style-type: none"> Arbitration Tribunal chooses the language of arbitration with the agreement of the parties Rules of arbitration available in English 	<ul style="list-style-type: none"> Arbitrators choose language Rules of Arbitration available in English 	<ul style="list-style-type: none"> Parties choose language of arbitration Rules of arbitration available in English and Arabic

Communications

LCIA-MIAC	KIAC	LCA	AFSA	CRCICA
<ul style="list-style-type: none"> Annual report not available Events schedule available 	<ul style="list-style-type: none"> Not available Events schedule available 	<ul style="list-style-type: none"> Annual report not available Events schedule available 	<ul style="list-style-type: none"> Annual report not available 	<ul style="list-style-type: none"> Annual report available

Way forward: carving a niche?

- FDI in Africa 87 billion in 2014
- Intra-Africa trade
 - Currently less than 20%
 - Estimate within 5 years from EAC-COMESA-SADC Tripartite Free Trade Agreement coming into force: 30%

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Thank you

Users Expectations from Arbitral Institutions

By Kamal Shah

- 1 Proactive institutions/Role of Registrars
 - 1.1 Communication frequency/black-outs
 - 1.2 Interaction/liaison with users
 - 1.3 Information centre or website
- 2 Supervision
 - 2.1 Addressing concerns that parties may have promptly
 - 2.2 monitoring of deadlines
 - 2.3 Sending reminders/chasers
 - 2.4 Holding deposits
- 3 Administration of Arbitration

Board of Directors - well-respected lawyers and corporate leaders from the country and its neighbours. Responsibility for overseeing operations, business strategy and development, as well as corporate governance matters.

Court of Arbitration - The main functions of the Court can include the appointment of arbitrators, the determination of jurisdictional challenges and challenges to arbitrators, as well as overall supervision of case administration at the Centre.
- 4 Tribunal fees
 - 4.1 Reference to fee structure in the Rules (may be based on value of subject matter or scale)
 - 4.2 Information on administration and arbitrators fees
 - 4.3 Assessment of fees/costs
- 5 Procedural Rules, articles, updates. All helps profile raising.
- 6 Database of experienced arbitrators
- 7 Physical facilities and support services
 - 7.1 Literature on the centre and its successes – case studies
 - 7.2 Resource centres
- 8 Training/education/moots
- 9 Engagement with judiciary/government
- 10 Involvement in legislative change e.g. Arbitration Legislation

11 Asking for Government support/funding – LCIA-MIAC and SIAC

11.1 PR

11.2 Publicity

11.3 Resources

11.4 Likelihood of success

“Africa’s Century” – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa

Dr Stuart Dutson

Economic advances in Africa have come at an astonishing pace in recent years. According to the IMF, four of the six fastest growing economies in the world in 2014 were in Sub-Saharan Africa.¹²⁷ Foreign direct investment has also increased dramatically over the last decade, from US\$11Bn in 2002¹²⁸ to over US\$ 56.3Bn in 2013.¹²⁹ Over the past 10 years, real income per person has increased by more than 53%¹³⁰, whereas in the previous 20 years it shrank by nearly 10%¹³¹. Drivers for growth include oil production, mining, agriculture, services and domestic demand¹³².

As Africa’s economy has developed, so too has the demand for effective and efficient means to resolve disputes between contracting parties and to protect their investments. In particular, Africa’s linguistic and legal diversity poses challenges to those looking to invest; there are over 700 (known) languages in Africa (although the main working languages are typically English, Arabic, Portuguese and French), and the legal framework is a diverse mix of common, civil, customary and religious law.

This paper explores some of the main dispute resolution considerations for parties doing business in Africa and focuses particularly on the growing use of arbitration, which is fast becoming the dispute resolution mechanism of choice across the continent, and the role that arbitral institutions can play in this development.

Litigation or Arbitration?

A major factor in the rise of arbitration in Africa is the general reluctance of foreign investors to submit disputes to the local courts of an African country. Largely, the concerns are:

- Lack of impartiality – will a particular African court favour the interests of a party from that same country, or an entity owned by that state, over those of a foreign investor?
- Corruption – is this sufficiently guarded against in the local courts? This is a particular concern where investors are subject to onerous, far-reaching legislation from their own State, for example the UK Bribery Act 2010 or the USA’s Foreign Corrupt Practices Act 1977, whilst local parties are not subject to such rigorous anti-corruption regimes.
- Political instability and civil unrest – what will be the effect of any instability on court proceedings?
- Length of proceedings – in Nigeria for instance, cases can take up to 10 years to get through the commercial courts.

Arbitration, on the other hand, offers a number of advantages:

- Relative ease of enforcement internationally under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and other international instruments.
- Perceived neutrality of arbitrators and the arbitral process.

¹²⁷ The Economist: [Middle East and Africa, Digging Deeper](#).

¹²⁸ See [UNCTAD World Investment Report 2003](#).

¹²⁹ See [UNCTAD Global Investment Trade Monitor No.15, 28 January 2014](#).

¹³⁰ African Economic Outlook

¹³¹ The Economist.

¹³² See www.africaneconomicoutlook.org/en/outlook/forecast.

- Control over the process – parties can, for instance, often select their own arbitrators to hear the dispute and dictate the procedures to be employed.
- Minimised involvement of local courts, which can only be invoked in specific circumstances under the relevant arbitral law being used.
- Parties can choose a neutral or familiar law or set of rules to govern their arbitration, which may also take into account public international law principles.

For all of these reasons, international arbitration is increasingly becoming the preferred dispute resolution mechanism for international parties doing business in Africa.

Practical considerations for arbitration in Africa

Choice of seat

A fundamental choice that contracting parties must make at the outset is where the seat of that arbitration will be, i.e. which country's laws will govern the procedure of the arbitration and which country's courts will oversee it.

There are a number of reasons why parties might choose a seat in an African jurisdiction. It may, for instance, be more cost effective to resolve disputes close to where the parties are doing business, particularly if there are likely to be many witnesses based there, or an African party may insist that an arbitration is seated in Africa. However, in a similar regard it should be borne in mind that, despite the growth of arbitration across Africa, some African states have been slow to adopt modern arbitration legislation.

Accordingly, it is vital that parties weigh up their options carefully before choosing a seat, taking account of all the circumstances. Some of the key questions to ask are as follows.

Should the seat of the arbitration be the country where the parties are doing business?

There is some advantage to selecting the country where the parties are doing business as the seat of the arbitration. For instance, the relevant witnesses may be based in that country, therefore making managing any proceedings logistically easier and more cost-effective than if witnesses were required to travel overseas to provide their evidence. It is also the jurisdiction in which most relevant documents are likely to be located, thus avoiding potential complications around removing those documents from that country. Conversely, having an arbitration seated in an African party's home state carries the risk in some jurisdictions that the local courts will favour the local entity if ancillary relief is sought. In addition, because arbitration is relatively new to some jurisdictions, the local courts may not be as favourable towards the arbitral process as others, and may seek to hinder it. If this is perceived to be the case, a compromise might be still to seat the arbitration in Africa, but in a neutral jurisdiction instead.

What is the applicable arbitral law in the African state?

A key issue in determining the applicable arbitral law is what, if any, law of arbitration is in force in the country of seat. An international investor may for instance prefer a state whose arbitration law follows the international norms to which they are accustomed, for example, the United Nations Commission on International Trade Law ("UNCITRAL"), the Model Law on International Commercial Arbitration (the "Model Law"), or the Uniform Act adopted by members of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA").

(i) The UNCITRAL Model Arbitration Law

The Model Law is a standard arbitration law prepared and adopted by UNCITRAL that seeks to harmonise arbitration regimes worldwide. In order for it to apply in a particular state, it must be incorporated by a

State into its own laws. The Model Law has been adopted in 10 African jurisdictions to date (Tunisia, Egypt, Kenya, Uganda, Rwanda, Nigeria, Zambia, Zimbabwe, Madagascar and Mauritius). The Model Law provides a number of useful features, for example:

- parties are free to agree the procedure for appointing arbitrators;
- the procedure for arbitrators to conduct an arbitration must be just and fair from the outset until conclusion;
- local Courts can assist in the arbitration proceedings on a limited basis and as required; and
- it provides for effective enforcement of an arbitral award - the courts can only refuse to enforce an award in limited circumstances.

(ii) OHADA

OHADA is an organisation of 17 African countries, the majority of which are francophone.¹³³ The OHADA Uniform Act on Arbitration (the “Uniform Act”) will be directly applicable in countries that are OHADA member states and will supersede any domestic arbitration legislation. Enforcement of awards under OHADA is only possible for awards from OHADA members. If you are seeking to enforce an award from a non-OHADA state in an OHADA state or, vice versa, you will have to rely on the local laws of the country of enforcement or relevant international instruments, such as the New York Convention. The Uniform Act is less comprehensive than the Model Law, but shares many of its features, e.g. parties can choose the procedure for appointing arbitrators, each party must be treated equally and given the opportunity to present its case and an award may only be set aside or enforcement of it refused on certain limited grounds. However, unlike under the Model Law, arbitrators have no express power to award interim measures. That said, the Uniform Act is subject to any rules of an arbitration institution that the parties may choose, and many of these sets of rules give arbitrators the power to award interim measures.

(iii) Countries that have not adopted the Model Law and are not OHADA members

If a country has not adopted the Model Law and is not a member of OHADA, the arbitration will be subject to the local arbitration law of that state. Most African countries have some form of arbitration law, but their content and application may vary greatly. In this regard, some jurisdictions may be considered “pro” arbitration, whereas others may be seen as arbitration un-friendly, or a bit of both. In Ghana, for instance, the Ghanaian courts have the power to initiate or recommend a referral to arbitration if the judge is “*of the view that the action or a part of the action can be resolved through arbitration*” (section 7(1) of the Ghana Alternative Dispute Resolution Act 2010). However, despite its apparently pro-arbitration law, the resolution of disputes involving the national or public interest, the environment or the enforcement and interpretation of the constitution by arbitration, is prohibited. Accordingly, parties should consider the governing arbitration law very carefully before committing to a particular jurisdiction.

Where can an award be enforced?

It is vital that an award granted in an arbitration is capable of being enforced in the relevant jurisdictions – particularly if the other party has assets globally. Accordingly, another primary consideration when deciding whether to seat an arbitration in an African State is whether that State has acceded to any treaty or convention which provides reciprocal arrangements for the enforcement of arbitral awards,

¹³³ The members are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, the Republic of the Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo and the Democratic Republic of the Congo.

such as the New York Convention or OHADA. 32 of the 54 African states have acceded to the New York Convention. This means that an arbitral award granted in arbitrations seated in those states can be enforced in other states that have also acceded to the New York Convention. The Courts of the country where enforcement is sought have only limited grounds on which to reject enforcement, namely if:

- *“the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law where the award was made.”* (Article V(1)(a)); or
- *“the recognition or enforcement of the award would be contrary to the public policy of that country.”* (Article V(2)(b)).

Other key considerations

Other considerations for parties when choosing the seat of arbitration include:

- Whether judges in a State’s courts are trained in the practice and procedure of arbitration, so that they support the arbitration process and enforce arbitration agreements and awards.
- Anti-arbitration injunctions should only be granted in exceptional cases that warrant the making of such orders, and must deal expeditiously with proceedings involving arbitrations.
- Recognition and enforcement of arbitral awards must be the norm, and refusal only to be made in the circumstances set out in Article V of the New York Convention.
- Security, political stability and corruption (whether real or perceived) should be evaluated.
- The procedure for enforcement of, or challenges to, arbitral awards should be relatively simple and expeditious. By way of example, in Nigeria, arbitration cases can take between four and ten years to reach the Supreme Court before a final decision is issued in favour of enforcement of the award, or confirming the arbitrability of the subject matter of the dispute, except for ICSID awards, which are enforced directly by the Supreme Court as the court of first instance.

Selecting an arbitration centre

Africa has a number of established arbitration centres. These centres are an attractive alternative to the more traditional arbitration centres of London or Paris, and may well be less costly. Key examples include:

- **Mauritius:** The London Court of International Arbitration – Mauritian International Arbitration Centre (“LCIA-MIAC”) was formed as a joint venture between the LCIA and Mauritius in 2012, following the enactment of arbitration legislation in Mauritius. The LCIA-MIAC has its own set of rules which are based largely on the LCIA Rules and so may suit those parties who are familiar with arbitrating through the LCIA but want to resolve any disputes in Africa.
- **Egypt:** The Cairo Regional Centre for International Commercial Arbitration (“CRCICA”) was established in 1979 and its rules are based on the UNCITRAL Arbitration rules (as revised in 2010), with minor variations relating mainly to the CRCICA’s role as an arbitral institution and an appointing authority. The CRCICA has four branches within Egypt, including one dedicated to specialist maritime arbitration.
- **Côte d’Ivoire:** If one of the parties is resident in an OHADA state or the business carried out under the contract is performed wholly or partially in an OHADA state, the Uniform Act provides for arbitration administered by the Common Court of Justice and Arbitration (“CCJA”) in Abidjan.
- **Rwanda:** The Kigali International Arbitration Centre was launched in 2012. Its rules place an emphasis on reducing costs for parties and include measures similar to the recently amended rules of the International Chamber of Commerce (“ICC”), such as the availability of an emergency arbitrator to provide urgent interim relief prior to the constitution of the arbitral

tribunal. The Centre is able to provide high quality logistical support to its users for the organisation of the hearings in Kigali.

Choosing a seat in other international centres

Some parties will prefer to use more traditional arbitration centres such as the LCIA in London or the ICC in Paris. For instance, in 2012, 5.5% of referrals to the LCIA were made by African parties (including 2% from Nigeria), an increase from 4.5% in 2011.¹³⁴

However, a popular alternative for international investors in Africa is now the Dubai International Finance Centre (the “DIFC”). Dubai is a convenient geographical location for African parties, with frequent direct flights to and from Africa, and also enjoys a status as a key international commercial hub. The DIFC has reported a threefold increase in enquiries received from African parties in the last year showing that, as arbitration has risen in Africa, so too has the demand from African arbitrating parties to arbitrate in Dubai.

Another key attraction of the Middle East for parties contracting in Africa is the availability of enforcement of arbitral awards under the Riyadh Convention. Eight out of the twenty Riyadh Convention member states are African countries. These are largely Islamic countries and accordingly, selecting a Riyadh Convention state may be particularly appropriate where a party is an Islamic entity. Five Riyadh Convention states (Algeria, Djibouti, Mauritania, Morocco and Tunisia) have also acceded to the New York Convention, so parties arbitrating in these countries may have multiple options for enforcing an award. Crucially, under the Riyadh Convention, enforcement of an award can be refused if the judgment or award is contrary to Shari’a law or the constitution, public policy or good morals of the country where a party is seeking enforcement.

Bilateral Investment Treaties (“BITs”)

Another important consideration for international investors in Africa is whether any BIT is applicable to their investment. BITs generally provide protection from expropriation and guarantee fair and equal treatment, as well as providing for international arbitration as the method for resolving any disputes. BIT disputes are often dealt with by the International Centre for the Settlement of Investment Disputes (“ICSID”), which was set up by the World Bank in Washington, and can provide protection where states are parties to the ICSID Convention - 48 of which are African countries. Investors and host states must have agreed to submit disputes to ICSID, and this can be done by way of a BIT or contract between parties. Currently there are around 760 BITs in place in Africa, for the most part entered between African states and non-African states. Egypt for example has entered into over 100 BITs.

In contrast, South Africa has recently sent notices of termination of its BITs to Belgium, Luxembourg, Germany, Spain, Switzerland and The Netherlands, which appears to buck the growing trend of international arbitration across the African continent. Once the relevant notice periods expire, new investments from these countries will no longer be protected under the BITs and disputes will not automatically be resolved by international arbitration. It is understood that South Africa intends eventually to replace all its BITs with domestic legislation; the Promotion and Protection of Investment Bill (the “Bill”) will apply to all foreign investments. It provides for a narrower definition of expropriation than that contained in existing BITs and does not make any mention of “fair and equal treatment”, which is guaranteed by most BITs. The Bill also denies investors the right to have disputes resolved by international arbitration, unless otherwise agreed. Instead, disputes must ordinarily be submitted to the South African courts or domestic arbitration or mediation. At the time of writing, there was no publicly available information about when the Bill might come into force, but a period of public consultation on the Bill has ended and a new draft bill is expected to be put before Parliament in the near future.

¹³⁴ See the LCIA Registrar’s Report 2012 at: http://www.lcia.org/LCIA/Casework_Report.aspx

According to local sources, the latest draft may water down some of the more hard-line elements of the Bill.

Recent Developments

As a result of the economic boom in Africa, dispute resolution solutions, and particularly international arbitration, are constantly evolving. Key recent developments include:

- The Democratic Republic of the Congo (“DRC”) adopted the New York Convention in June 2013, but has made four reservations to its adoption. Two of those reservations are particularly significant. First, enforcement will only be available in the DRC where awards post-date the DRC’s accession. Second, immovable property situated in the DRC is excluded from the application of the New York Convention, thereby excluding mining rights from its ambit. Notwithstanding those points, it is likely that the adoption of the New York Convention will increase the attraction of the DRC as an arbitration destination.
- A number of new arbitration centres are expected to open soon. In Kenya, the Nairobi International Arbitration Centre is expected to start receiving cases soon. The International Chamber of Commerce has also recently announced that it plans to establish an arbitration centre in Ghana.
- In a recent decision, the Nigerian Court of Appeal in *Nigerian National Petroleum Corporation v. Statoil (Nigeria) Limited and Others* refused to grant an injunction to halt arbitral proceedings, as to do so would undermine the parties’ agreement to submit the dispute to arbitration. This has been welcomed as evidence to show that courts in Africa are supportive, rather than obstructive, to the arbitral process.

The role that arbitral institutions can play in increasing Africa’s desirability as an arbitration destination

Historically, one of the main perceived advantages of arbitration has been that it is a streamlined, quick and user friendly mechanism which provides parties with a practical solution to their disputes at a reasonable cost. In recent years, this has become somewhat more of a myth than a reality. Arbitration these days can often be just as expensive as litigation and parties can, in some cases, wait years for the Tribunal to produce an award. If African arbitral institutions are able to address this problem, this will increase the attractiveness of Africa as an arbitration destination significantly.

Various attempts have been made by institutions to address these problems for example by providing parties with access to a speedy solution should the need arise. Most notable of these attempts is the introduction of the emergency arbitrator in various institutional rules which helps to provide a simple, user friendly, streamlined mechanism for the parties to achieve an enforceable award. In light of this, the ICC, for example, has introduced emergency arbitrator provisions whereby an emergency arbitrator can make an order for urgent interim measures. The LCIA has also introduced emergency arbitrator provisions in its new rules, effective since 1 October 2014. These provide that the Emergency Arbitrator may “*make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement (excepting Arbitration and Legal Costs under Articles 28.2 and 28.3); and, in addition, make any order adjourning the consideration of all or any part of the claim for emergency relief to the proceedings conducted by the Arbitral Tribunal (when formed)*” (see Article 9.8, LCIA Rules).

Ostensibly, these rules give the parties access to extensive urgent interim relief. However, it should be noted that the powers of an emergency arbitrator are quite limited under each set of rules. The LCIA Rules, for instance, provide that “*Any order or award of the Emergency Arbitrator (apart from any order adjourning to the Arbitral Tribunal, when formed, any part of the claim for emergency relief) may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.*” The ICC Rules contain similar

limitations. Crucially, however, recent case law suggests that it is far from clear as to whether an award made by an emergency arbitrator could be enforced under the New York Convention, due to its lack of finality. This, therefore, appears to deprive emergency arbitrators of the power to give parties a solution of sufficient weight to be of any real use to them.

A potential alternative solution to this issue is to provide for an expedited procedure for the resolution of a dispute or interim issue, in order to minimise costs and expedite the process for achievement of an enforceable award. Accordingly, parties may wish to include specific provision for expedited procedures in any arbitration agreement as a means of minimising their costs or expediting the proceedings. This is permissible in many jurisdictions where, for example, the parties may agree to restrict or exclude disclosure, or to vary or eliminate the right to an oral hearing or a reasoned arbitral award.

Key features of an expedited procedure may include:

- that an arbitrator or arbitrators is appointed within seven days of the request for arbitration, thus avoiding the risk of significant delay in the constitution of the Tribunal;
- that a response to the request for arbitration is provided within seven days;
- that a single hearing be held on the jurisdiction, the merits and quantum of a dispute within four months of the formation of the Tribunal; and
- that an award is rendered within one year of the request for arbitration.

Further, parties can provide for an emergency arbitrator to have any power to make an award that a Tribunal would otherwise have made, giving parties access to an enforceable award via a cost-effective streamlined procedure. Expedited procedures such as this are currently being implemented by the Financial Sector Branch of the Arbitration Club in London, whose standard clauses have been harmonised with the rules of various arbitral institutions. It is this sort of innovative solution that could give arbitral institutions in Africa the chance to promote the use of arbitration and arbitral solutions in Africa as a means of resolving their disputes.

Africa as an arbitration destination

Hand in hand with the increasing opportunity in Africa for foreign investors is the need for there to be a means of resolving disputes that is both neutral and cost effective. International arbitration in Africa is starting to fulfil this need. Investors should be encouraged by this trend, but must be wary of the important considerations when choosing a jurisdiction in which to seat an arbitration. The increasing number of arbitration centres in Africa shows that countries are seeking to attract foreign investment whilst at the same time providing easy access to an independent arbitral forum. These institutions have the opportunity to provide innovative solutions to making Africa an attractive arbitration destination. States are also, generally, showing a greater willingness to accede to internationally recognised enforcement regimes and the local courts are becoming increasingly familiar with arbitration as a valid method of resolving disputes. If the 21st Century is indeed to be “Africa’s century”, the development of international arbitration in Africa must be a key part of this.

Reawakening Arbitral Institutions for Development of Arbitration in Africa

Kariuki Muigua*

Abstract

This paper examines the current trends, successes and challenges facing the arbitration institutions in Africa. Due to the importance of international arbitration and its ever growing popularity across the world, it is important that the African Continent, being a key global economic partner is not left behind in entrenching the practice of arbitration in settling international commercial disputes. The author analyses the international arbitration institutions in the East African region with a view to highlighting the state of legal and institutional frameworks for the effective determination of international disputes through arbitration.

The discussion highlights some of the emerging trends with regard to the users of international arbitration in the region. The ultimate goal is to recommend ways of reawakening arbitral institutions for development of arbitration in the East African region and Africa as a whole.

1. Introduction

With increased globalisation, arbitration has become the preferred mechanism for settling international disputes.¹³⁵ Actually, it has been argued that international arbitration should grow in tandem with the globalisation of trade.¹³⁶ Arbitration has thus gained popularity over time amongst the business community due to its advantages over litigation. One of the most outstanding benefits of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Further, it has been observed that among the primary advantages of international arbitration are its finality and the relative ease of enforcement of arbitral awards throughout the world.¹³⁷

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¹³⁵ S.D. Franck, "The Role of International Arbitrators," p.1. Available at <https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docx> [Accessed on 27/04/2015].

¹³⁶ P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators*, United Kingdom, February 2014, pp.10-13 at p.10; See also Court's comment in the American case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) where the Court stated that: "the expansion of [American] business and industry will hardly be encouraged if, notwithstanding solemn contracts, [we] insist on a parochial concept that all disputes must be resolved under [our] laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

¹³⁷ W.L. Kirtley, "Bringing Claims and Enforcing International Arbitration Awards against Sub-Saharan African States and Parties," *The Law and Practice of International Courts and Tribunals* 8 (2009) pp.143-169, p. 143.

Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.¹³⁸ It is in this recognition of international arbitration as one of the most viable approaches to international disputes management that structures/institutions for arbitration are being established across the continent.

This discussion focuses on their commonalities and differences, scope and quality of their services with a view to identifying the challenges, if any, that hinder their effectiveness towards placing the institutions at the forefront of dispute management in Africa and subsequently suggest the best ways to overcome them. The author focuses on the current trends, development of domestic and international arbitration in the East African region and highlights the successes, failures and the way forward for arbitration in the region.

The scope of the paper is therefore limited to arbitration in Kenya, Tanzania, Uganda, Rwanda and Burundi, being the Member States for the East African Community. The discourse briefly highlights the legal and institutional frameworks in the foregoing countries and examines their effectiveness in developing arbitration in the region. Finally, there are recommendations on improving the same for effective arbitration practice in the region.

2. Institutional Arbitration in Africa

Increased globalization has brought about the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions thus resulting in emergence of transnational dispute management mechanisms. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.¹³⁹ One of the most preferred approaches is international arbitration which has more popularity over litigation due to its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned.

3. Commercial and International Arbitration in the East African Region

3.1 Kenya

The scope of the Kenya's *Arbitration Act* extends to cover both domestic and international arbitration. This is provided for under section 2 of the Act which provides that *except as otherwise provided in a particular case the provisions of this Act shall apply to domestic arbitration and international arbitration.*

¹³⁸ K.P. Sauvart and F. Ortino, *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf> [Accessed on 27/04/2015].

¹³⁹ "Africa ADR – a new African Arbitration Institution", available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> [Accessed on 27/04/2015]; See also Article 33 of the United Nations Charter.

Section 3(2) defines what arbitration is domestic arbitration while section 3(3) stipulates the requisite conditions for an arbitration to qualify as an international one.

Arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya: and at the time when proceedings are commenced or the arbitration is entered into; where the arbitration is between individuals, the parties are nationals of Kenya or are habitually resident in Kenya; or where the arbitration is between bodies corporate, the parties are incorporated in Kenya or their central management and control are exercised in Kenya; or where the arbitration is between an individual and a body corporate firstly, the party who is an individual is a national of Kenya or is habitually resident in Kenya; and secondly, the party that is a body corporate is incorporated in Kenya or its central management and control are exercised in Kenya; or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject-matter of the dispute is most closely connected, is Kenya.¹⁴⁰

Arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or one of the following places is situated outside the state in which the parties have their places of business: firstly, the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or secondly, any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.¹⁴¹

The *Arbitration Act 1995* generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act defines arbitration as contemplated in the scope of the Act to mean any arbitration whether or not administered by a permanent arbitral institution. There exist a few arbitral institutions in the country that have been established under specific regimes and are therefore mandated with conducting arbitration under such laws. This is because the *Arbitration Act, 1995* does not establish a sole arbitral institution and its provisions therefore apply to institutional and sole arbitrators operating under other Rules. However, other institutions exist under different regimes of law in Kenya.

3.1.1 Chartered Institute of Arbitrators-Kenya Branch (CIArb-K)

The Chartered institute of Arbitrators (Kenya Chapter) was established in 1984, as one of the branches of the Chartered Institute of Arbitrators, United Kingdom which was founded in 1915 with headquarters in London. It is registered under the *Societies Act*.¹⁴² It promotes and facilitates the determination of disputes by arbitration and other forms of Alternative Dispute Resolution (ADR), which includes mediation and adjudication. The Kenya Branch, now with over 700 members, has a wide pool of

¹⁴⁰ Sec. 3 (2) of the 1995 Act as amended by the Amending Act.

¹⁴¹ Section 3(3) (Act No. 11 of 2009, s. 2)

¹⁴² Cap 108, Laws of Kenya

knowledgeable and experienced Arbitrators and facilitates their appointment.¹⁴³ The Institute also runs a secretariat with physical facilities for Arbitration and other forms of ADR. To further support the process of Arbitration and ADR, the Branch has published the Arbitration, Adjudication and Mediation Rules. The arbitrators are governed by the Chartered Institute of Arbitrators Arbitration Rules when conducting the arbitral proceedings.¹⁴⁴

3.1.2 Nairobi Centre for International Arbitration (NCIA)

The institution was established under the Nairobi Centre for International Arbitration Act as seen earlier in this paper. Its functions are set out in section 5 of the Act as inter alia to: first, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;¹⁴⁵ second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;¹⁴⁶ third, ensure that arbitration is reserved as the dispute resolution process of choice;¹⁴⁷ fourth, develop rules encompassing conciliation and mediation processes.¹⁴⁸ Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars;¹⁴⁹ to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;¹⁵⁰ to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;¹⁵¹ to in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;¹⁵² to establish a comprehensive library specializing in arbitration and alternative dispute resolution;¹⁵³ to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;¹⁵⁴ to provide advice and assistance for the enforcement and translation of arbitral awards;¹⁵⁵ to provide procedural and technical advice to disputants;¹⁵⁶ to provide training and accreditation for mediators and arbitrators;¹⁵⁷ educate the public on arbitration as well as other alternative dispute resolution mechanisms;¹⁵⁸ and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to

¹⁴³ The Chartered Institute of Arbitrators Kenya Branch Website, available at <http://ciarbkenya.org/> [Accessed on 08/05/2015]

¹⁴⁴ Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, December 2012

¹⁴⁵ S.5(a), No. 26 of 2013

¹⁴⁶ Ibid, S. 5(b)

¹⁴⁷ Ibid, s.5(c)

¹⁴⁸ Ibid, s. 5(d)

¹⁴⁹ Ibid, s.5(e)

¹⁵⁰ Ibid, s. 5(f)

¹⁵¹ Ibid, s.5(g)

¹⁵² Ibid, s. 5(h)

¹⁵³ Ibid, S.5(i)

¹⁵⁴ Ibid, S.5(j)

¹⁵⁵ Ibid, S.5(k)

¹⁵⁶ Ibid, S.5(l)

¹⁵⁷ Ibid, S.5(m)

¹⁵⁸ Ibid, S.5(n)

enable the Centre achieve its objectives,¹⁵⁹ *inter alia*. The Centre is administered by a Board of Directors provided for under section 6 of the Act. Section 9 of the Act provides for the appointment of a Registrar by the Board of Directors. Section 9 (3) mandates the Registrar to oversee the day to day management of the affairs and staff of the Centre and shall be the secretary to the Board.

There is also an Arbitral Court established under section 21 of the Act which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.¹⁶⁰ Section 10 of the Act confers the Registrar with the powers to oversee the business of the court including enforcement of decisions of the Court. The Court has a President and two Deputy Presidents and the Registrar. The Court also has fifteen other members all of whom are leading international arbitrators.¹⁶¹ The Centre has the capacity to handle domestic and international arbitration. It is hoped this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration.

3.1.3 Centre for Alternative Dispute Resolution (CADR)

The Centre for Alternative Dispute Resolution is another registered institution that is aimed at enhancing settlement of disputes through ADR Mechanisms. With the recognition of ADR in Article 159 of the current Constitution of Kenya, 2010, it is hoped that this Centre will enhance the services of ADR mechanisms in dispute settlement in Kenya.¹⁶² Its Membership is drawn from the Chartered Institute of Arbitrators (Kenya branch).¹⁶³

3.1.4 Kenya National Chamber of Commerce and Industry (KNCCI)

The Kenya National Chamber of Commerce and Industry (KNCCI), is a non-profit, autonomous, private sector institution and membership based organization.¹⁶⁴ It was established in 1965 from the amalgamation of the then three existing Chambers of Commerce: the Asian, African and European chambers, to protect and develop the interests of the business community. It works in close collaboration with the Government, stakeholders and business development organizations internationally. It is an affiliate member of the International Chamber of Commerce and Industry (ICC), the G 77 Chamber of Commerce and Industry, Pan African Chamber of Commerce and Industry (PACCI), the Common Market for Eastern and Southern Africa (COMESA), the East African Chamber of Commerce, Industry and Agriculture (EACCIA), and the East African Business Council (EABC), among others.¹⁶⁵

KNCCI works towards promoting, protecting and developing commercial, industrial and investment interests of members in particular and those of the entire business community in general. They aim at

¹⁵⁹ Ibid, S.5(o)

¹⁶⁰ S. 22, No. 26 of 2013.

¹⁶¹ Ibid, S. 21(2)

¹⁶² The Centre was registered under the *Companies Act* Cap 486 of the Laws of Kenya as Company limited by guarantee.

¹⁶³ CIArb-K members become automatic members of CADR.

¹⁶⁴ Kenya National Chamber of Commerce and Industry website, visit <http://www.kenyachamber.or.ke/> [Accessed on 9/05/2015].

¹⁶⁵ Ibid.

influencing development policies, strategies and support measures so as to achieve the best economic climate for these varied interests.¹⁶⁶ It thus follows that the Chamber would be involved in effective mechanisms of handling business and commercial related disputes. The Chamber operates through a Committee form of management, with several Standing Committees, although the operations are essentially executed by the Chamber Secretariat. The Legislation and Local Authorities Committee is charged with *inter alia*, domestic and international arbitration and International Chambers of Commerce (ICC) matters.¹⁶⁷

The Chamber can therefore play a significant role in promoting institutional arbitration in the region.

3.2 Tanzania

The Tanzanian *Arbitration Act*¹⁶⁸ was enacted in 1931 to provide for arbitration of disputes. The Act has general provisions relating to arbitration by consent out of court¹⁶⁹ as well as provisions on court-annexed arbitration.¹⁷⁰ Further, provisions on arbitration are contained in the *Arbitration Rules of 1957*,¹⁷¹ made under the Arbitration Act.¹⁷² It has been noted that the arbitration legislation in force (both the Arbitration Act and the Rules) pre-dates the UNCITRAL model law and has never been changed to take into account its provisions.¹⁷³ Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992.¹⁷⁴ It has been argued that the arbitration system in Tanzania lacks active and competent arbitration institutions and practitioners to facilitate arbitration process for the construction disputes.¹⁷⁵ It is noteworthy that there are two main institutions that carry out institutional arbitration and they are discussed herein below.

3.2.1. Tanzania Institute of Arbitrators (TIA)

The Tanzania Institute of Arbitrators (TIA) is a Non-Governmental Organisation registered under the Societies Act (cap 337).¹⁷⁶ Together with the National Construction Council, TIA act as facilitators, enabling the parties (in consultation with their arbitrators) to set ad hoc rules on the procedures which

¹⁶⁶ Kenya National Chamber of Commerce and Industry, 'Vision, Mission and Objectives,' available at <http://www.kenyachamber.or.ke/the-chamber/mission-vision> [Accessed on 9/05/2015].

¹⁶⁷ Kenya National Chamber of Commerce and Industry, 'Operations of the Chamber,' available at <http://www.kenyachamber.or.ke/the-chamber/chamber-operations> [Accessed on 9/05/2015].

¹⁶⁸ Cap 15, Laws of Tanzania (2002 Revised Edition).

¹⁶⁹ *Ibid*, ss. 3-26

¹⁷⁰ Tanzania's Civil Procedure Code (the Code) deals with arbitration where it arises in the course of court proceedings (see Schedule 2 of the Code).

¹⁷¹ Published in Government Notice 427 of 1957.

¹⁷² 'Tanzania', *Arbitration in Africa*, June 2007. p. 5.

Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 27/04/2015].

¹⁷³ *Ibid*, p.6.

¹⁷⁴ W. Kapinga, *et. al.*, 'Getting the Deal through - Arbitration- Tanzania', Chapter 2014, p. 406. Available at https://www.academia.edu/9872218/Getting_the_Deal_Through_-_Arbitration-_Tanzania_Chapter_2014 [Accessed on 27/04/2015].

¹⁷⁵ G. Mandepo, "Resolving Construction Disputes Through Arbitration - An Overview of Tanzanian Legal Framework," p. iv. Available at <https://www.scribd.com/doc/104535725/66/Tanzania-Institute-of-Arbitrators> [Accessed on 03/05/15]

¹⁷⁶ Cap 337, Laws of Tanzania.

will bind them.¹⁷⁷ They also jointly arrange short professional courses and examination for arbitrators and then compile a list of arbitrators available for proceedings.¹⁷⁸

3.2.2. National Construction Council (NCC)

This is a statutory body created under the *National Construction Council Act*.¹⁷⁹ The Council is mandated with *inter alia*; promoting and providing strategic leadership for the growth, development and expansion of the construction industry in Tanzania with emphasis on the development of the local capacity for socio-economic development and competitiveness in the changing global environment; and facilitating efficient resolution of disputes in the construction industry.¹⁸⁰ The arbitration services of this institution are mainly available to persons in the construction industry although it also offers its services to persons outside the industry albeit at a lower scale.¹⁸¹

For a vibrant institutional framework on international arbitration in Tanzania, much more needs to be done to project these two institutions into international arena and change the idea that they deal with arbitration on domestic matters only or even the perception that they are industry-specific. These way users of arbitration in Tanzania can confidently approach them for international arbitration services.

3.3 Uganda

Uganda's *Arbitration and Conciliation Act* was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing.¹⁸² Its provisions on arbitration apply to both domestic arbitration and international arbitration.¹⁸³ The national Courts may assist in taking evidence,¹⁸⁴ setting aside arbitral awards¹⁸⁵ and recognition and enforcement of the arbitral awards.¹⁸⁶

3.3.1. Centre for Arbitration and Dispute Resolution (CADRE)

Uganda's *Arbitration and Conciliation Act* establishes the Centre for Arbitration and Dispute Resolution (CADRE).¹⁸⁷ This Centre is charged with *inter alia*: to make appropriate rules, administrative procedure and forms for effective performance of the arbitration, conciliation or Alternative Dispute Resolution process; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate

¹⁷⁷ 'Tanzania', *Arbitration in Africa*, June 2007. *Op cit* p. 5.

¹⁷⁸ *Ibid.*

¹⁷⁹ No. 20 of 1979, cap 162.

¹⁸⁰ National Construction Council (NCC) Functions, available at <http://www.ncc.or.tz/functions.html> [Accessed on 27/04/2015].

¹⁸¹ *Ibid.*

¹⁸² CAP 4, Laws of Uganda, Preamble.

¹⁸³ *Ibid.*, S. 1.

¹⁸⁴ *Ibid.*, s. 27.

¹⁸⁵ *Ibid.*, s. 34.

¹⁸⁶ *Ibid.*, ss. 35 & 36.

¹⁸⁷ *Ibid.*, s. 67.

certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act.¹⁸⁸

This is the main arbitral institution in the country. It is therefore necessary to have more institutions in Uganda as well as improve information dissemination in order to promote international arbitration in the country.

3.4 Rwanda

Rwanda has been a party since 1979 to the *Washington Convention on the Settlement of Investment Disputes*, which provides for protection for investors and direct arbitral recourse against the State. On November 3, 2008, Rwanda became the 143rd country to accede to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). The Convention entered into force for Rwanda on January 29, 2009.¹⁸⁹

Rwanda Parliament enacted a law in February 2011 establishing Kigali International Arbitration Center (KIAC) as an independent body which carries out mediation, adjudication and arbitration.¹⁹⁰

3.4.1 Kigali International Arbitration Center (KIAC)

Kigali International Arbitration Center (KIAC) was established as an independent body which carries out mediation, adjudication and arbitration. The Centre has a panel of domestic and international arbitrators.¹⁹¹ Parties to KIAC arbitrations are free to nominate their arbitrators, subject to by the Centre in accordance with the KIAC Rules. However, when KIAC is called upon to appoint an arbitrator, it does so primarily from its panel of arbitrators.¹⁹²

It is noteworthy that until the establishment of the Kigali International Arbitration Centre (KIAC), there was no formal mechanism for amicable dispute resolution, more so international commercial arbitration.¹⁹³

KIAC holds a potent potential to promote development of international arbitration in the region and Africa as a whole.

3.5 Burundi

In 2007, the Burundian Government created a Centre for Arbitration and Mediation to deal with commercial and investment disputes.¹⁹⁴ In 2009, *Investment Code of Burundi*¹⁹⁵ was enacted with its

¹⁸⁸ *Ibid.*, s. 68.

¹⁸⁹ Rwanda Accedes to UN Convention on Commercial Arbitration', UN NEWS CENTRE, Nov. 3, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=28799&Cr=Trade&Cr1=Convention> [Accessed on 28/04/2015].

¹⁹⁰ Law No 51/2010 Of 10/01/2010, Laws of Rwanda.

¹⁹¹ Kigali international Arbitration Centre website, available at <http://kiac.org.rw/spip.php?rubrique25> [Accessed on 26/04/2015].

¹⁹² *Ibid.*

¹⁹³ Kigali International Arbitration Center, *Annual Report July 2012-June 2013*. P. 4

¹⁹⁴ Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

purpose being to encourage direct investments in Burundi.¹⁹⁶ This Investment Code allows the competence of international arbitration chambers for disputes arising over investments made in Burundi. In 2014, Burundi became the 150th state party to the *New York Convention* 1958. Burundi however made a “commerciality reservation” to the Convention, which means that the Convention will only apply to disputes characterized as commercial under municipal law. The Convention was to come in force in the country on 21 September 2014 thus enabling arbitral awards made in Burundi to be enforceable in all states that are party to the New York Convention, and awards made in other states to be enforceable in Burundi.¹⁹⁷

International commercial arbitration in Burundi is thus supported by the legal framework. The framework casts a ray of hope for arbitration in Burundi and beyond.

4. Challenges

A number of challenges affect the effectiveness of the East African regional international arbitral centres and thus affect their popularity amongst the users of their services in the region.

4.1 Confidentiality Requirements

The fact that arbitration is a private process makes it enjoy confidentiality, an important aspect in private matters. Unlike litigation where there is official law reporting, arbitral awards or proceedings are never published without the parties’ approval. It has been argued that while confidentiality is an important aspect of international commercial arbitration, there should be adoption of a presumption that arbitral awards should be made publicly available, unless both parties object.¹⁹⁸ This argument is based on the justification that the benefits of greater transparency in arbitration brought about by the publication of awards often outweigh concerns for confidentiality.¹⁹⁹ The *Arbitration Act*²⁰⁰ which is the principal law regulating arbitration in Tanzania does not provide for confidentiality. If the parties want the proceedings or the award to remain confidential, they should enter into a confidentiality agreement between

¹⁹⁵ Law No. 1/24 of 10 September 2008 Establishing the Investment Code of Burundi.

¹⁹⁶ *Ibid*, Art. 2.

¹⁹⁷ Herbert Smith Freehills Dispute Resolution, ‘Burundi becomes 150th state party to the New York Convention’. Available at <http://hsfnotes.com/arbitration/2014/09/03/burundi-becomes-150th-state-party-to-the-new-york-convention/> [Accessed on 29/04/2015].

¹⁹⁸ C.G. Buys, “The Tensions between Confidentiality and Transparency in International Arbitration,” *American Review of International Arbitration*, Vol. 14, No. 121, 2003. Available at SSRN: <http://ssrn.com/abstract=1330243> [Accessed on 27/04/2015].

¹⁹⁹ *Ibid*. It is however important to point out that the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors, publishes its arbitral awards and has always published information on the institution, conduct, and disposition of proceedings administered by the Centre. Article 48(5) of ICSID’s constituent Convention requires the consent of both parties for any publication by ICSID of the award rendered in their case. A.R. Parra, “Enhancing transparency at ICSID,” Oxford University Press’s Blog, 17th February 2014. Available at <http://blog.oup.com/2014/02/enhancing-transparency-at-icsid/> [Accessed on 10/05/2015]; See also New York City Bar, “Publication of International Arbitration Awards and Decisions,” *Report by the Committee on International Commercial Disputes of the Association of the Bar of the City of New York*, February 2014.

Available at <http://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf> [Accessed on 10/05/2015].

²⁰⁰ Cap 15, Revised Edition 2002.

themselves and the arbitrators.²⁰¹ In such a scenario, if parties do not sign such an agreement, it is therefore possible to publish the outcome of the matter with obvious impact on the perceived advantage of confidentiality. This trend may soon affect the way arbitration is viewed and carried out considering that it emanates from the users of arbitration services and not the arbitrator or a third party. Normally, arbitrators cannot take such steps as to violate confidentiality requirement on their part. For instance, Rule 8 of the *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members* provide that a member must abide by the relationship of trust which exists between those involved in the dispute and (*unless otherwise agreed by all the parties*, or permitted or required by applicable law), both during and after completion of the dispute resolution process, must not disclose or use any confidential information acquired in the course of or for the purposes of the process. This position is thus similar to the Tanzanian one where parties can decide to go public on their award.

Sometimes arbitration matters will be litigated all the way to the highest court of the law of the land in search of setting aside of awards.²⁰² This obviously affects the confidentiality requirements since more often than not the matter becomes public especially after the court's decision which may find its way into the national or international official law reports. The effect of this is that parties thereto are left with little or no understanding of the difference between arbitration, with its perceived advantages, and litigation. While it is generally agreed that arbitration does have adversarial aspects, it is normally less adversarial than court litigation. The parties' actions may impact on arbitration in two ways. Firstly, if such parties find themselves in another dispute in future, they may decide to go straight to litigation without trying arbitration at all and this suppresses the growth of arbitration especially if they felt they did not obtain justice.²⁰³ Secondly, it may have the effect of changing arbitration practice across the continent since arbitral institutions respond to the needs of the parties. This may even explain why the trust and confidentiality clauses of these institutions only bind their practitioners and not the parties and even so the practitioners can always opt out if parties so agree. As it has been observed, the role of an arbitrator is a professional role and not a business one.²⁰⁴ For the parties, they are in business looking out

²⁰¹ "Arbitration in Africa," Tanzania, June 2007, p. 3. Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf> [Accessed on 27/04/2015].

²⁰² S. 35(1) of the Act. K. Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration in Kenya*, Kenya Law Review (2010).

Available at <http://www.kenyalaw.org/klr/index.php?id=824>. For instance, the Arbitration between *Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX)* made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR). See also *Glencore Grain Ltd V T.S.S.S Grain Millers Ltd* [2012] eKLR; Daily Nation, 'Not again! Pattni's new Sh4bn scandal,' Saturday, May 11, 2013. Available at <http://www.nation.co.ke/News/Not-again-Pattni-new-Sh4bn-scandal/-/1056/1849756/-/14axo7az/-/index.html> [Accessed on 09/05/2015].

The Newspaper partly read "Controversial businessman Kamlesh Pattni is set to pocket Sh4.2 billion worth of taxpayers' money if the High Court upholds a hefty award issued in his favour by an arbitrator." It went further to state "But it is the hefty award against the government authority that is likely to attract public attention given that it is *wananchi* (meaning citizens) and taxpayers who will foot the Sh4.2 billion bill."

²⁰³ See the case of *Airtel Networks Kenya Limited V Nyutu Agrovet Limited* [2011] eKLR.

²⁰⁴ P. Cresswell, "International Arbitration: Enhancing Standards," *The Resolver, Chartered Institute of Arbitrators, op cit* at p.13.

for their best interests and the transnational disputes management institutions can only facilitate the process of realizing what is best for the parties. Interested parties may also put pressure on the tribunal to do away with confidentiality. A good example is an arbitration involving a Government as one of the parties of course using public funds for the same.²⁰⁵ Public interest may require openness or accountability to the citizens. Confidentiality is thus a fluid concept as far as parties to arbitration are concerned since they greatly influence whether the matter will remain confidential or not.

4.2 Institutional Capacity

It has also been observed that there exists a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. Much more needs to be done to enhance their capacity in terms of the number and quality of arbitrators, adequate staff and finances to ensure that they are up to task in facilitation of international arbitration.²⁰⁶

4.3 National Courts' Interference

It has been noted that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings.²⁰⁷ It has been argued that traditional litigation in a national court can be a costly, time-consuming, cumbersome and inefficient process, which obstructs, rather than facilitates, the resolution of business disputes.²⁰⁸

Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.²⁰⁹ This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

National courts are also not popular because as it has been argued the formal adversarial structure and the possibility of national bias can destroy the business relationships which are conducive to the smooth flow of international trade.²¹⁰ The intricacies of the national procedures may also be unknown to one or more of the parties.²¹¹ For instance, it has also been observed that the Tanzanian national Courts have

²⁰⁵ See the case of *Erad Suppliers 7 General Contracts Limited v National Cereals 7 Produce Board & another* [2013] eKLR

²⁰⁶ K. Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya', page 14. Available at <http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf> [Accessed on 06/07/2014].

²⁰⁷ *Ibid*, p.6.

²⁰⁸ J.T. McLaughlin, "Arbitration and Developing Countries," *The International Lawyer*, Vol. 13, No. 2 (Spring 1979), pp. 211-232 at p. 212.

²⁰⁹ See generally, K. Muigua, *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>

²¹⁰ J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 212.

²¹¹ *Ibid*.

immense powers to intervene on any matter of law in an arbitration proceeding.²¹² As such, party autonomy is restricted thus severely affecting investors' confidence in the Tanzania's law on arbitration. It has also been observed that the arbitration process is becoming more and more litigation-minded and less conciliation-minded and as such the spirit of arbitration has been lost.²¹³ This is especially so if many new issues are raised in the course of arbitration proceedings or in the context of proceedings before domestic courts.²¹⁴ Arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration. This has had the effect of seeing more matters being referred to the national Courts on due to the disputants' dissatisfaction.²¹⁵

The issue of Courts' interference does not however always hold true. For instance, in the Kenyan case of *Anne Mumbi Hinga v Victoria Njoki Gathara*²¹⁶ the Court stated that the concept of finality of arbitration awards and pro-arbitration policy is something shared worldwide by the States whose Arbitration Acts such as Kenya's have been modelled on the UNCITRAL Model Law.²¹⁷ It went further to state that the common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Act. It concluded by stating that the provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation.²¹⁸

This position confirms that courts are not always against arbitration, at least in Kenya, although this does not reflect the state of affairs across Africa.

4.4 Inadequate Legal and Institutional Framework on international commercial Arbitration

There have been inadequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in some of the East African countries with some countries still having archaic laws.²¹⁹ This has denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration since disputants shun the local arbitral

²¹² See generally, N.S. Mkumbukwa, 'Is the Commercial Court Jealous of Arbitration?' Available at http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-Jealous-of-Arbitration_-Commercial-Court-Roundtable-8th-Oct.-2009.pdf [Accessed on 27/04/2015]; K. Kepher, 'Procedural Laws of Commercial Arbitration in Tanzania: An Analysis'. ISSN 2321 – 4171. Available at <http://jsslawcollege.in/wp-content/uploads/2013/12/PROCEDURAL-LAWS-OF-COMMERCIAL-ARBITRATION-IN-TANZANIA-AN-ANALYSIS.pdf> [Accessed on 27/04/2015].

²¹³ F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning," *12 Nw. J. Int'l L. & Bus.* 48 (1991-1992), pp. 48-85 at p. 50.

²¹⁴ *Ibid.*

²¹⁵ K. Muigua, "Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises," p. 15. Available at <http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf>

²¹⁶ Civil Appeal No. 8 of 2009 [2009 eKLR].

²¹⁷ The Model of the United Nations Commission on International Trade Law (UNCITRAL) was adopted in 1985 with a view to encouraging arbitration and processes that would have global recognition. [The Arbitration Agreement, Kenya Law Resource, Available at <http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html> [Accessed on 28/04/2015]

²¹⁸ S. 10 of Kenya's Arbitration Act is to the effect that the Court shall not intervene in the arbitral process except as provided in the Act.

²¹⁹ K. Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf>

institutions, if any, for foreign institutions. There is need to ensure that African countries review and harmonise their arbitration laws so as to ensure that even as arbitration institutions emerge across Africa, they will find conducive environment for the enforcement of foreign awards if need be. One way of achieving this is adoption of UNCITRAL Model law provisions for those countries that are yet to streamline their domestic arbitration laws in line with the Model law. This is important since the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.²²⁰ The justification for this harmonization is the need for improvement and it's based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.²²¹

4.5 Appointment of International Arbitrators by Parties

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to facilitating international arbitration, there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators.²²²

Most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests.²²³ A good example is the Kigali International Arbitration Centre (KIAC) (and probably many others across Africa) where the panel of international arbitrators mainly consist of Non-Africans.²²⁴

Although it is important to borrow from the established institutions outside of Africa, the fact that more than half of the international arbitrators in KIAC are non-African may portray Africa to the outside world as a place where there are no qualified arbitrators (real or perceived) to be appointed as international commercial arbitrators. To the users of international arbitration in Africa, it is therefore possible to argue that it makes more sense to hold their arbitration proceedings outside Africa where the Non-African arbitrators will not only handle the matter but there is also (perceived or real) added benefit of non-interference from national courts as well as ease of enforcement of awards.

²²⁰ United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,' available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [Accessed on 05/05/2015]

²²¹ Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration (UNCITRAL Model Law on International Commercial Arbitration (*United Nations document A140117, annex I*) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

²²² *Ibid*, p. 3.

²²³ J. Lew, 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003]

²²⁴ KIAC Panel Of International Arbitrators, available at http://www.kiac.org.rw/IMG/pdf/final_list_of_international_arbitrators.pdf [Accessed on 27/04/2015] 19 out of the 34 international arbitrators are Non-Africans.

The above scenario thus raises the issue of bias. It has been observed that Parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice.²²⁵ This is especially true considering that the arbitral institutions normally allow the parties who submit their disputes to them to decide whether they will pick the arbitrator themselves or will allow the institution to make the choice on their behalf. For example, the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules provide that the written request for appointment of an arbitrator submitted to the Institute should include *inter alia*, if the arbitration agreement calls for party nomination of arbitrators, the name and address of the Claimant's nominee, and any particular qualification or experience which the parties wish the Arbitral Tribunal to possess.²²⁶

It is therefore arguably possible for parties to pick persons of their choice in terms of preference and expertise since the institutions (and many others across the region) have a database with their arbitrators' qualifications. This flexibility allows parties to appoint arbitrators that have specific expertise in their area of business or nature of their dispute.

In relation to Non-Africans acting in African institutions, the question that arises is how well they separate the differing cultures (African and their home country's) so as to ensure that the same does not affect their effectiveness. It has been argued that Arbitration's effectiveness will always depend upon how well it satisfies the needs of the parties.²²⁷ To ensure that African parties gain confidence with African international arbitration institutions, such institutions need to ensure that they have appointed the best persons with capacity and expertise to handle the matters at hand so that parties will have their fears of inadequacy (of African arbitrators) addressed.

Cultural, economic, religious, and political differences also come into play. It has been observed that diversity - of a cultural, economic, religious, and political kind - exists not only among nation-states and in the sources and interpretation of international law, but also among the group of commentators who study the interactions of transborder actors and institutions.²²⁸ It is noteworthy that an arbitration matter may have different interested parties and many players who include the arbitral panel as well as the parties. Each of the interested parties has expectations which they expect to be met in the process and they may differ based on cultural background of parties or arbitrators.

²²⁵ LexisNexis and Mayer Brown International LLP, "Arbitration in sub-Saharan Africa," p.1. Available at http://www.mayerbrown.com/files/News/937b1c45-31e5-437f-bbe3-39e5f01dd1d/Presentation/NewsAttachment/6fb0a0bf-0164-4c30-a54d-63eccc1dd65f/LexisNexis_2012_arbitration-in-sub-aharan-Africa.pdf [Accessed on 27/04/2015]

²²⁶ Rule 1(2) & (8).

²²⁷ J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 215.

²²⁸ T.E. Carbonneau, "Diversity or Cacophony? New Sources Of Norms In International Law Symposium: Article: Arbitral Law-Making," *Michigan Journal of International Law*, Summer, 2004, 25 Mich. J. Int'l L. 1183. Available at <https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=25+Mich.+J.+Int%27+L.+1183&srctype=smi&srcid=3B15&key=fbda375b78b7e9439f6c5b862e60a262> [Accessed on 27/04/2015].

4.6 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be settled through arbitration and those which are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.²²⁹

Courts often refer to “public policy” as the basis of the bar.²³⁰ The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction. It has been observed that international arbitration law and its practice have become more and more complex and this has been attributed partly to changes in domestic arbitration laws.²³¹

Arbitrability may either be subjective or objective.²³² Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute.²³³ National laws often restrict or limit the matters, which can be resolved by arbitration. It has been observed that certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.²³⁴

In Tanzania, the Arbitration Act is not clear on arbitrability of subject matter under the Arbitration Act.²³⁵

It has been argued under Kenyan law, that arbitrability might have acquired a broader definition after the passage of the current Constitution of Kenya, 2010, which elevates the status of Alternative Dispute Resolution (ADR) as one of the guiding principles of the Judiciary in the exercise of judicial authority by Courts and tribunals.²³⁶ In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the Arbitration Act No. 4 of 1995 (As amended in 2009).²³⁷ However, the effectiveness of this in promoting ADR and specifically arbitration remains to be seen especially due to the subjection of the same to repugnancy clause.

²²⁹ F. Kariuki, “Redefining Arbitrability: “ Assessment of Articles 159 & 189(4) of the Constitution of Kenya,” *Alternative Dispute Resolution Journal*, Vol.1, (CIArb (K), 2013), pp.175-189.

²³⁰ *Ibid.*

²³¹ F. De Ly, “The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning,” *op cit* at p. 48.

²³² K.H. Böckstiegel, “Public Policy as a Limit to Arbitration and its Enforcement,” p.5. Presented at the 11th IBA International Arbitration Day and United Nations New York Convention Day “The New York Convention: 50 Years” in New York on 1 February 2008.

Available at

http://www.arbitrationicca.org/media/0/12277202358270/bckstiegel_public_policy...iba_unconference_2008.pdf [Accessed on 09/05/2015].

²³³ *Ibid.*

²³⁴ See K. Chovancová, “Arbitrability (Extract)”. Available at <http://www.paneurouni.com/files/sk/fp/ulohy-studentov/2rocnikmgr/arbitrability-students-version.pdf> [Accessed on 09/05/2015].

²³⁵ R. Rana, “The Tanzania Arbitration Act: meeting the Challenges of Today With Yesterday’s Tools?”, in Chartered Institute of Arbitrators, Kenya, *Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014. pp. 229-237 at p.231.

²³⁶ Article 159 of the Constitution of Kenya. They are to be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms are to be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

²³⁷ F. Kariuki, *op cit*; See also, Articles 159 (2), 67 (2) (f) and 189(4), Constitution of Kenya.

4.7 Recognition of International Arbitral Awards

The *Arbitration Act, 1995* under section 36 (2) notably provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.²³⁸ This is a show of Kenya's commitment to adopting international best practices in arbitration and consequently existence of requisite legal infrastructure for promotion of international arbitration in the country.

The Kenyan Act on Arbitration was drafted along the lines of the Model Law. Article 35 (1) of the Model Law provides that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. The *Nairobi Centre for International Arbitration Act* provides that subject to any other rules of procedure by the Court, the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply.²³⁹ The foregoing provisions which recognise international legal instruments on arbitration therefore place Kenya in a competitive position to engage with the other regional players in the promotion of Eastern Africa as a hub for International Commercial Arbitration.

4.8 Perception of Corruption/ Government Interference

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy. This impacts negatively on investor confidence and uptake of international commercial arbitration.

4.9 Challenge of Arbitration Clause

It has been argued that an arbitration clause should take into consideration the applicable law, state and attitude of concerned countries towards arbitration as well as the effect of host domestic law on arbitration proceedings and outcome so as to ensure that the parties' intentions are not defeated by technicalities.²⁴⁰ This is because it is the arbitration clause that dictates where the proceedings will be held and the applicable law. As such, it is important to have a clear non-ambiguous clause as this will not only save time but will also save resources for the parties by way of minimized challenges to the whole process.²⁴¹ In drafting the clause, a number of factors touching on the potential arbitral institutions are considered.

²³⁸ This was included in the Act through the Act No. 11 of 2009, s. 27. (2009 amendment to the Arbitration Act, 1995).

²³⁹ *Nairobi Centre for International Arbitration Act*, S. 23.

²⁴⁰ J.T. McLaughlin, "Arbitration and Developing Countries," *op cit* at p. 215.

²⁴¹ See generally P. Ngotho, "Pathological Arbitration Clauses in Ad Hoc Arbitrations: Kenya's Experience." Paper presented at the Chartered Institute Of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution (CADR) International Arbitration Conference held at Whitesands Beach Hotel, Mombasa, 7- 8th August, 2014. Available at <http://www.ngotho.co.ke/PathologicalArbitrationClauses.8.8.14.pdf> [Accessed on 09/05/2015].

5. International Arbitration Users' Concerns

Although the foregoing challenges affect the arbitration users' perception of arbitral institutions in Africa, their concerns go beyond these and touch on other but equally significant issues. The insecurity problem facing East Africa and Africa in general does affect the development of international arbitration in the region. Potential users shy away from Africa due to the instability and even where they have their place of business in Africa, they prefer to have their disputes settled elsewhere. The insecurity arises from persistent conflicts across the globe some of which are natural resource-based, political, religious and terrorism.

Government bureaucracy is another concern especially in matters that involve Government institutions as one of the parties. This may even be complicated if the proceedings are in a Government supported arbitral institution that is funded by the same Government. Naturally, there is fear or bias or excessive bureaucracy due to power differences and influence which may defeat the need for arbitration. For instance, Government proceedings Acts may require special procedures for some aspects of the process and this may clash with the established international arbitration laws and procedures. The concern may be real or perceived but there is need to ensure that the same is dealt with.

Lack of adequate Information Communication Technology (ICT) infrastructure and other relevant physical infrastructure in the existing arbitral centres is another concern. It is debatable whether the existing institutions have modern ICT equipment that facilitate efficiency in arbitral proceedings. Potential users are also concerned with the issue of institutional capacity in Africa's institutions. Institutional capacity touches on both physical infrastructure as well as arbitrators' expertise in handling diverse matters arising mainly in commercial world.

It is also noteworthy that the issue of infrastructure extends to the country as a whole since there is also need for developed support facilities such as airports, transport system, hotel facilities and the like. These are important as they help in marketing a country to the rest of the continent as well as the rest of the world.

6. Way Forward

There is a need to employ mechanisms that will help awaken arbitral institutions in Africa and demonstrate the Continent to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international matters.

Although the author has observed elsewhere that government intervention can raise fears of bias and undue influence, it is important to point out it is possible for the arbitral institutions to get support from the government while still retaining their independence. The government can extend goodwill by helping the institutions get on their feet through financial support as well as marketing while ensuring that it does not meddle with the internal affairs and overall running of the institutions. The state institutions such as courts can also play a critical role in helping the arbitral centres take their place in settlement of international institutions in the region. The assistance can be in form of supporting or facilitating enforcement of international and domestic arbitral awards as well as ensuring that there is minimal

interference in the process so as to win the confidence of the potential users inside and outside the region. Parliament and Courts should also work in tandem in promoting law reforms to reflect the current trends in arbitration practice in the world.

There is also need for putting up the relevant infrastructure which includes ICT and other physical structures. This should be coupled enhanced training for purposes of capacity building. Training should start at school level as opposed to institutional professional courses as is the case with most countries. A good example is the University of Nairobi School of Law which currently offers international commercial arbitration as a course in its Masters of Law Programme (GPR 625). The students who take this course can apply directly to become members of CIArb-K at Associate level. This not only boosts the number of persons eligible to pursue arbitration at a higher level but also helps in creating awareness in the country and the region, a powerful tool for awakening arbitral institutions and boosting the development and practice of arbitration.

Government collaboration is important as in the case of NCIA and KNCCI in Kenya. KNCCI collaborates with the Government of Kenya in promoting business in the country. Some of the investors come into the African countries through government partnerships and the government can thus help sell and promote these institutions as capable of handling their disputes.

7. Conclusion

Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This can enhance users' confidence in arbitral institutions in the African continent and consequently awaken the seemingly dull arbitral institutions and arbitration practice in Africa.

There is hope for the future. Arbitral institutions and arbitration practice in Africa have the potential to grow and flourish. The time to awaken and nurture arbitration for a better tomorrow is now.

Panel 3: Projecting Arbitration in Africa

Chair:

Prof Fidelis Oditah, QC, SAN

Panellists:

Judge Edward Torgbor, Nairobi

Dr Emilia Onyema, SOAS, London

Mr Tunde Fagbohunlu, SAN, Partner, Aluko & Oyebode, Lagos

Mr Brett Hattaway, GC, DHL (Africa/ME)

OPENING UP INTERNATIONAL ARBITRATION IN AFRICA

Hon. Justice Edward Torgbor²⁴²

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Abstract

This article attempts to debunk old prejudices dressed up as “challenges” that prevent the appointment, involvement and participation of African practitioners and arbitrators in international arbitration practice even in disputes emanating from the continent. The situation is not helped by the habit or tendency of African State Law Officers and other arbitration users of transferring African disputes for settlement or resolution abroad. The article offers reasons and argues that it is time now for change in the historically negative perceptions of African arbitration practitioners and institutions and a rejection of the pre-conceived ideas, prejudices and bias that prevent suitably qualified African professionals from appointments, involvement and participation in international arbitration practice on the continent. Recommendations for change and improvements for the future of arbitration in Africa are proposed.

1. Introduction

The purpose of this article is to review old prejudices that hold back African practitioners and arbitrators from appointments and involvement in the practice of international arbitrations in Africa even in disputes emanating from the continent, involving African State Parties, parastatals and other national and corporate entities. Although the article draws mainly from jurisdictions influenced by the United Nations Commission on International Trade Law (UNCITRAL Model Law) like Kenya, it is less concerned with the substantive law of international commercial arbitration than with the promotion of the arbitrators and practitioners of that law on the African continent. As the title suggests the direction and thrust of the article is “opening up” rather than “closing-down” or locking out suitably qualified persons from other parts of the world from participation.

2. Diagnosis and Prognosis

Commentators continue to dwell on perceived drawbacks to international arbitration practice in Africa. A presenter at a London seminar asserted, that if the African Development Bank (AfDB) is to be believed, 90% of all international contracts negotiated in Africa or concerning African investment are drafted as being subjected to English Law, that for the most part African entities are usually the respondent in international arbitrations. That in terms of representation, the parties in 99.9% of all African disputes, both past and present, will be represented by lawyers and law firms based in the UK, USA and France; and that experience naturally remains the overriding concern. From these, he concluded that the future of African arbitration is in Europe.²⁴³ He omitted adding that in nearly all these arbitrations the African respondents with high-profile foreign lawyers were unsuccessful.

The above statistics should however not surprise if the drafters of such international contracts are English or American with preferences for applicable laws with which they are familiar, and for seats and venues with which they are accustomed, and in jurisdictions where they feel comfortable but with unrewarding outcomes for their African clients. It underscores and demonstrates the importance and force of the arbitration clause or separate arbitration agreement as the originating source and the crucial device by and from which Africans and their advisers wittingly or unwittingly transfer their problems and disputes for solutions abroad.

²⁴² Hon. Justice E. Torgbor LLD, former Judge, Chartered Arbitrator, Court Member LCIA.

²⁴³ Wiles J., “The Challenges of Arbitrating in Africa”, London Seminar, 19 September 2012.

The Model Law-based statute does not preclude any person by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.²⁴⁴ There is support therefore for the development of a modern arbitration culture that enables every person to share in the opportunity and experience of participation in international arbitrations where they are suitably qualified to do so. Again therefore, as international arbitration practice and standards calibrate domestic arbitration practice, the involvement of foreign practitioners and arbitrators in African arbitrations will not only open up the international arbitration space in Africa but also beneficially expose the different role players to international dispute resolution standards.

Spare a thought also for the fact that important strides have been made in the arbitration world towards the convergence of national laws on international arbitration. There is also growing international recognition of the commercial importance of arbitration, that these trends have assisted the modernization of many different national laws that regulate international commercial arbitration in different parts of the world, ostensibly for the benefit of the role players – parties, users, advisers, arbitration institutions – and therefore, the need to recognise the continuous interplay between national and international arbitration laws. It makes sense then to be rid of parochial and bigoted preferences for familiar laws and terrains and to open up favourably to other systems of law that may be more effective than one's own in resolving particular kinds of international disputes. This open-minded approach may be even more productive of best outcomes as there is no uniform or standard dispute resolution procedure, despite the UNCITRAL Model Law. And if experience is still an overriding genuine concern then, for purposes of this article, it is good reason for African practitioners and arbitrators not to be excluded, or exclude themselves, but vigorously engage in its acquisition and beneficial provenance.

Preconceived Ideas, Prejudice and Bias against Africa

Preconceived ideas, prejudice and misconceptions have a common foundation in, and association with, a tendency to bias. Bias is an obliquity. If that is not saying much then move down the definition line to a one-sided inclination of the mind, a special influence that sways the mind, or downright prejudice and discrimination. In that last sense bias is not a happy thing to indulge in or write about by one who desires "*the greatest happiness of the greatest number*".²⁴⁵ For present purposes the entry point is bias in international trade and commerce relative to international commercial arbitration practice.²⁴⁶

Prejudice and bias against Africa stem from the negative image of Africa as a hopeless continent forever afflicted by ignorance, poverty and want, always in need of something or the other and even salvation from itself. The negative branding is so potent that the mere mention of Africa calls up images of subservience, incompetence and failure such that any positive development is credited to the controlling involvement of international donors, expatriates and expert advisers. The connection between this negative image and a deliberate design to keep Africa conflicted and fragmented is deeply rooted in exploitation, trade, commerce and the execution of an aggressive and continuing profit motive of a past and present mercantilist agenda. Pre-conceived notions of incompetence and bias against suitably qualified Africans in the discriminatory selection, nomination and appointment of arbitrators in international commercial arbitration practice translate to deliberate acts of prevention with direct

²⁴⁴ Article 11, Model Law.

²⁴⁵ To borrow Hutcheson's summation of Bentham's leading principle.

²⁴⁶ It bears mention that bias is also an unruly horse and pervasive. Therefore the concern that while Africa wants an "international forum for justice and accountability what it gets instead is bias and race-hunting at the International Criminal Court" adds poignancy to this discourse: At the Extraordinary Session of Assembly of Heads of State and Government of the African Union, Addis Ababa, 12th October 2013.

consequences of denial and deprivation inextricably linked with the negative branding of Africans from unremedied historical injustices and today's pernicious arbitrariness.²⁴⁷

Advancements made in putting people first in the development of Africa in various sectors should not be ignored any more than the increasing modernization of towns and cities with growing economies across the continent that offer business opportunities to foreigners.²⁴⁸ Africans must be inspired by the frantic pulse of a vibrant continent. Prejudice, misconceptions, discrimination and bias against Africa in the management of the world economy have kept Africa impoverished. Yet mankind has reached a major threshold in the accumulation of vast experiences with technological and scientific gains to enable wealth managers to reverse current unfavourable trends in trade and investment for the achievement of equity and transparency in Africa's development.

Still, it is no use blaming others for this unpalatable predicament as Africans bear the heaviest responsibility to engage in the creation and projection of a true self-worth. African governments and professionals are probably their own worst enemies. Non-Africans may ignore African experts in international arbitration out of a facile assumption that Africa has no such experts or a genuine difficulty in locating qualified African experts as counsel and or arbitrators. Such assumption is by no means limited to non-Africans as Africans themselves exhibit this attitude. In this connection therefore Africans must aspire to and achieve greater visibility in the formulation of the international laws, conventions and treaties that regulate the global economy and international business relations in particular. In addition, Africans must invest heavily in reclaiming their cultural assets by the re-assessment of their heritage and values and the introduction of new perspectives and strategic programmes upon which to build a better and brighter future.

Commenting on bias against Africa in arbitration practice the Chairman of the Kenya Institute of Chartered Arbitrators observes that *"the business association and interaction of Africa with the outside world is downplayed and kept to a minimum. The result is a weaker business environment culminating in a weaker international arbitration environment"*.²⁴⁹ Arbitration doctrine preaches and demands equal treatment of arbitral parties. It is therefore in the scheme of equality and fair treatment not to restrict this doctrine to arbitral parties but extend its practical essence to affording equal opportunities for the players in dispute and conflict resolution on the African continent, at least in the 99.9% of those African disputes in international arbitration otherwise exported abroad.

3. Commercial Arbitration

The presumption is that foreign interest in Africa was and is natural resources and commerce; that it has been so since the bullion rush and the consequential enrichment of foreign lands therefrom; and that merchants, investors and business seekers do not come to the continent because they are sentimental about the African poor. The reality is that that the serious conflicts arising from resource exploitation

²⁴⁷ In a riveting call for image-change and a new vision for Africa, Tito Alai, Group Chief Commercial Officer for the Zain Group, speaks of a negative global perception and conditioning that puts Africa down as inferior and the inferiority complex is so overwhelming that Africans are predisposed to expect their problems, disputes and conflicts to be diagnosed and solved by foreigners assumed to know best: "Where is Africa's big bold vision?" *New African*, No. 538, April 2014, pp 56 – 58. However this writer is conscious of and appreciates that some of these indications raise or involve fundamental, ideological, philosophical and cultural issues that do not easily translate into international arbitral practice.

²⁴⁸ Exemplified by the "State of the Nation 2014" address to the Ghana Parliament by H.E. President John Dramani Mahama. Rwanda was destroyed in 1994 but recognised today as a model of reconstruction. Liberia and Sierra Leone dubbed basket cases are today showing progress with national recovery and reconstruction.

²⁴⁹ In an unpublished paper entitled "Promoting International Commercial Arbitration in Africa" Dr. Kariuki Muigua, current chairman of the Kenyan Chartered Institute of Arbitrators addresses challenges to the practice of International Commercial Arbitration under various sub-headings that include Bias against Africa.

necessitated international legal instruments and procedures to safeguard profit acquisition, exportation and asset seizure wherever found. However, such historical injustices and disadvantages against Africans ought not be extended or perpetuated; and that Africans should be involved and involve themselves not only in wealth creation on their continent but also in the processes of peaceful settlement of the disputes and serious conflicts generated by trade and commerce, capitalizing on the concepts of inclusivity and mutual advantage.

Arbitration is considered suitable for solving disputes from commercial and business relationships. Commercial contracts were those commonly made by merchants and traders and so they were governed by specific laws and statutes distinct from the general law of contracts or obligations. Therefore in many states such laws are associated with Chambers of Commerce.²⁵⁰ The importance of commerce and trade in international relations is underscored by the centrality of the commercial contract in international commercial arbitration. Indeed a “commercial reservation” clause is preserved by Article 1.3 of the New York Convention and the emphasis on commerce enables states to distinguish and regulate commercial transactions from other relationships not considered suitable for submission to arbitration. But the importance of the commercial reservation, a right that could not be arbitrarily taken away from states, is considerably whittled down by the expansive definition of the scope of commerce as evident in framework arbitration laws and the International conventions²⁵¹ and treaties designed to give states effective methods for the recognition and enforcement of international commercial agreements and arbitral awards.

In the context of international arbitration practice in Africa, the commercial content is emphasised by UNCITRAL’s elaboration of the scope of the word “commercial” – the core element in international commercial arbitration which notably and relevantly covers and includes exploitation and concession agreements, joint ventures, and various other forms of economic, industrial and business activities. There is the additional fact that UNCITRAL’s encouragement of a wide interpretation of “commercial” results in a vast list of economic activities, not restricted to contracts.²⁵² UNCITRAL makes clear the list is not closed and its **Model Law**, copied into arbitration statutes across Africa, is intended to regulate the resolution of a vast array of commercial and investment disputes from this open list by international commercial arbitration.

The point has been made that the evolution of the present global economy, designed by powerful players with historical advantages, has enabled them to attain legendary levels of development and concomitant returns; and by their control and influence over the main multilateral financial institutions of today, these

²⁵⁰. Such as the International Chamber of Commerce in Paris, the Stockholm Chamber of Commerce and the Geneva, Zurich and Belgian Chambers of Commerce, all European, although several others have emerged in other countries in recent years.

²⁵¹ Such as the Geneva Protocol (1923) and Geneva Convention (1927), The New York Convention (1958) and Washington Convention (1965). Others are The European Convention (1961), the Strasbourg Uniform Law (1966), the Panama Convention, and the Amman Convention. The Montevideo Convention 1989, a regional convention for the Union of South American States in respect of Procedural Law, provided for the recognition and enforcement of arbitration agreements between Latin American states parties. The North American Free Trade Agreement (NAFTA) (1993) and the Energy Charter Treaty 1994 are other regional treaties.

²⁵² Including: trade transactions for the supply or exchange of goods and services; distribution agreements, commercial representations or agencies, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, and carriage of goods or passengers by air, sea, rail or road.

players control the decision-making apparatus in matters affecting commerce, trade and investment flows, and even the development agenda of the still developing nations.²⁵³

The commercial emphasis had resonance in the early attempts at providing for international recognition and enforcement of arbitration agreements and awards. In order to be efficacious, international arbitration systems needed linkage with national legal systems without being subsumed to the latter. This had led to the formulation of Conventions and Treaties to provide for the enforcement of arbitration agreements and awards by national courts of State Parties to those conventions and treaties. The early global attempts are exemplified by the Geneva Protocol of 1923²⁵⁴ and the Geneva Convention of 1927.²⁵⁵ The International Chamber of Commerce (ICC) also had an early hand in the establishment of an international regime for the regulation of international commercial arbitration by its 1953 proposals. These were taken up by the United Nations Economic and Social Council (ECOSOC) leading to the adoption of the New York Convention in 1958,²⁵⁶ designed to apply to international arbitration agreements as distinct from domestic arbitration agreements apart from the primary objective of providing for the recognition and enforcement of foreign arbitral awards.²⁵⁷ It is probably unarguable that the enforcement of a Convention Award is better protected than the enforcement of foreign court judgment thereby encouraging the choice of arbitration for dispute resolution. It is noteworthy that membership of the Convention by African states²⁵⁸ has increased not decreased.

The Executive Directors of the International Bank for Reconstruction and Development (“the World Bank”) formulated the **Washington Convention** of 1965²⁵⁹ that established ICSID (hence the “ICSID Convention”). Notably, the preamble declares that no Contracting State, by the mere fact of its ratification, acceptance or approval, is to be deemed obliged without its consent to submit any particular dispute to conciliation or arbitration. It gave investors (both individuals and corporations) in a foreign state the right of direct recourse and redress in their own name and behalf in conciliations and arbitrations against the state.²⁶⁰ Each contracting state recognises an ICSID award and enforces the pecuniary obligations imposed by that award within its territories like a final court judgment of that state, without revision or review under the law of that state.²⁶¹

There is an interesting link between the ICSID and New York Conventions (NYC) through ICSID’s Additional Facility procedure. The procedure allows ICSID to administer an arbitration (or conciliation) not covered by the ICSID Convention - where one party is not a state or national of a contracting state; or

²⁵³ As one perceptive commentator puts it: “Trojan horses and puppet regimes are part of the arsenal against weaker nations globally. And the reason is always economic exploitation”: Pusch Commey, *New African* No. 538, April 2014 p. 11.

²⁵⁴ Its objectives were to ensure the enforceability of arbitration agreements and arbitration awards as reflected in the New York Convention.

²⁵⁵ Its objective was to widen the territorial application of the Geneva Protocol by providing for the recognition and enforcement of Protocol awards in Contracting States and not merely within the host state of the award.

²⁵⁶ Van den Berg, “The New York Arbitration Convention of 1958 (1981)”.

²⁵⁷ *Ibid.*

²⁵⁸ See website: www.newyorkconvention.org. The membership stands at 149 countries in 2013 including 29 African countries.

²⁵⁹ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (the ICSID Convention) in force from October 4, 1966.

²⁶⁰ See Christoph Schreuer: *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).

²⁶¹ Convention Art. 54(1), despite which the underlying conditions of an ICSID arbitration made room for serious consideration and negotiation before committing to the Convention: (i) party agreement was necessary to submit the dispute to ICSID, (ii) the dispute must be between a contracting state (or its subdivision or agency) and a national of another contracting state (iii) it must be a legal dispute, and (iv) arise directly from an investment.

the dispute does not arise directly out of an investment. The connection is that an ICSID Additional Facility award would in such a situation qualify for recognition and enforcement under the NYC.

The Washington Convention governing Bilateral Investment Treaties (BITs) operates through statutory or “treaty consent” and so differs from other conventions regulating international commercial arbitrations based on “contractual consent”. The term “arbitration without privity” has therefore crept into arbitration parlance. The problem of not getting all states to accede to these conventions necessitated the allowance of reservations requiring “reciprocity” and a national criteria for “commercial clauses”, “arbitrability” and “public policy” as states choose to apply to these conventions, with particular regard to the refusal or recognition and enforcement of arbitration agreements and awards. Therefore however compelling these conventions were, there was an opportunity for African states and their advisers to apply their minds to what was and is acceptable to their governments in the best interest of their peoples in consonance with their development agenda goals.

4. Investment Treaty Arbitration

Investment treaty arbitration is an aspect of international arbitration in which African involvement and participation is negligible. Therefore the observations concerning participation in international commercial arbitrations apply in equal measure to investment treaty arbitrations. The term “investment” is not specifically defined by the Washington Convention but is now increasingly interpreted to cover services, technology and various forms of capital outlay. But, the jurisdiction of ICSID and the essential requirement of consent by Convention Article 25(3) and the mechanism by which Contracting States can make known in advance, if they so desired, the classes of disputes for submission to the Centre, allowed states to define investment by national legislation.²⁶²

The modern BITs were preceded by “Treaties of Friendship Commerce and Navigation” by which concerned states granted each other favourable trading conditions and agreed to the resolution of disputes by arbitration. The main objective was to encourage trade and investment. The definition of “investor” was broad enough to include nationals and public legal entities of the host state.²⁶³ From an informed vantage position Baruti writes: “Investment treaty law is a complex area with multiple sources and is in constant state of evolution. Due to its specialised nature, expertise in this field has generally been limited to a small group of lawyers and arbitrators, based mainly in Europe and the United States. African states have usually relied on foreign lawyers to mount an effective defence to investment treaty claims.”²⁶⁴

Regarding the complexity of investment treaties, African states conclude such treaties on the professional legal advice of their state law officers and consultants engaged for that purpose, who ought to be aware of and address the “complexities” before the treaties are signed with commitment to implementation involving the use of the agreed dispute resolution mechanisms. In the main BITs follow the same pattern. The differences relate to the particular circumstances of the parties.²⁶⁵ Typically, they provide legal guarantees and safeguards ostensibly for the fair and equitable treatment and protection of foreign

²⁶² The combined effect of ICSID Convention Article 25(1), (3) and (4) as elaborated in recent decisions such as *Phillip Morris Brands SARL & 2 Ors v Oriental Republic of Uruguay*, ICSID case No. Arb/10/7, 2nd July 2013 paras 197 – 203.

²⁶³ Antonio Parra, “Provisions on the Settlement of Investment Dispute in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment” (1997) 12 *Foreign Investment Law Journal* 287.

²⁶⁴ Rukia Baruti, “Is Africa Finally Confronting Its Challenges On Investment Treaty Arbitration” Kluwer Arbitration Blog, 4 November 2011. Rukia is the Managing Director of Africa International Legal Awareness (AILA). AILA is geared towards capacity building and promotion of sustainable economic development with a core focus on investment treaty law and arbitration.

²⁶⁵ For a bird’s eye view see Peter-John Vickers, *Bilateral Investment Treaties*, Meier – Boeschenstein News Bulletin, Nr 01/03.

investors, protection against expropriation and nationalization, free transfer of capital and profits and international arbitration of disputes between the investor and host state.

It is open to African states to discard disadvantageous old BITs that exploit such states and to renegotiate new ones. Technical advice and expertise are available on the continent for states that need modern and efficacious agreements for the better management and resolution of disputes governed by them. This does not exclude the continuing use of foreign expertise, if still needed, but the doors ought to be open for the engagement of the suitably qualified continental practitioners. Their involvement will not only promote capacity building but also facilitate the acquisition of the much touted experience otherwise denied to them. Africans therefore bear greatest responsibility for the short-changes meted out to them, their disappointments and frustrations, and the consequences of their own decisions and choices on who they appoint to resolve their disputes, how and where they do it.

Disputes, commercial or investment, are about resources and services. Within the ambit of party autonomy, African states are free to write suitable arbitration clauses and agreements and to choose the applicable law, the venue and seat of arbitration. Bring to mind also that the New York Convention, the Washington Convention (and the various institutional rules of arbitration practice) copied into African law enable the usually successful foreign parties in such disputes to access the unsuccessful respondent's assets wherever located. Consequently an African state that chooses foreign laws or arbitral seats to settle its disputes can only have itself to blame if it is dragged willy nilly to the chosen jurisdiction, with open access to its assets.

5. Recycling old Challenges

In arbitration practice the drawbacks commonly dressed up as “challenges” start with a call for the provision of extensive training of Africans ostensibly to enhance capacity building. Stated as such this challenge ignores the virtual exclusion from international arbitration of the already trained and suitably qualified practitioners and arbitrators on the continent who are looking for opportunities for practice and experience in the ever-expanding arbitration space in Africa. There is growing number of qualified Africans who complain about the lack of appointment as arbitrators even in African disputes with African parties and entities. Suitably qualified African practitioners and arbitrators unable to shed the status of perennial students are therefore compelled to turn themselves into perpetual trainees at arbitration institutions. There is nothing against training. The point of emphasis is that mastery of the rules of international arbitration does not translate into expertise in the underlying substantive issues in international arbitration that only the opportunity for practice and acquisition of experience offer.²⁶⁶

Other perceived old challenges speak to the need to adopt modern arbitration laws and to establish arbitral institutions. What has changed? Those involved in arbitration practice on the continent cannot fail to be aware of the improvements in arbitration laws across Africa. Several of the mainly English speaking states have either adopted or adapted the UNCITRAL Model Law making them applicable to both domestic and international arbitrations. States such as Nigeria, Kenya, Uganda, Zambia, Zimbabwe and Mauritius are in this category. The structure of such modern national arbitration statutes closely follows the Model Law scheme covering the various stages of arbitration from the appointment of arbitrators, conducting the arbitral proceedings with the mechanisms for challenging the arbitrator and the arbitral jurisdiction, the making of the final award, termination of the arbitral proceedings by award or settlement, to the setting aside or recognition and enforcement of the award. The statutes include mandatory provisions intended to attract universal application, force and effect. In addition, states like Nigeria, Kenya and Zimbabwe have domesticated the New York Convention to reinforce the award enforcement procedures.

²⁶⁶ See para 7(b) below.

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) came into existence in 1979 and the Lagos Regional Centre for International Commercial Arbitration (LRCICA) in 1989. Since then the establishment of the Kigali Centre for International Arbitration (KIAC) in May 2012, the Lagos Court of Arbitration (LCA) in November 2012, the LCIA-MIAC Arbitration Centre in Mauritius in December 2012 and the Nairobi Centre for International Arbitration (NCIA) in January 2013 – are all recent developments and indicators of continental progress.

There is also in Kenya the Centre for Alternative Dispute Resolution (CADR, an initiative of the Kenya Institute of Arbitrators), incorporated in May 2013 to establish and maintain a regional Dispute Resolution Centre in Kenya. CADR is also mandated to organise, supervise, run and operate international arbitrations and conciliations.²⁶⁷ Successful implementation will not only showcase the skills and expertise of local, regional and international commercial arbitrators but also attract international clients and users to Africa with greater exposure to international experience.²⁶⁸ The Center for Arbitration and Dispute Resolution (CADER) has been in existence in Uganda since its establishment under section 68(1) of the Arbitration and Conciliation Act, 2000 (Act No. 7 of 2000).

For mainly the French speaking countries, the OHADA²⁶⁹ Treaty and system of arbitration have also made comparable advances in dispute resolution under a Uniform Arbitration Act that prescribes the basic rules applicable to any arbitration with a seat in an OHADA member state and supersedes the arbitration law of any member state. For present purposes the significant observation is that the OHADA system of arbitration is modern and that an OHADA award may be refused enforcement only if manifestly contrary to the international public order of the OHADA member State – a public policy limitation consonant with state sovereignty. As some, but not all OHADA States are party to the New York Convention, an investor needs advice and awareness of a limitation that is not necessarily a drawback to award enforcement in all Africa.

Included in the package of impediments to arbitration practice in Africa is a perceived lack of supportive “African” judges and arbitration-friendly environments. With particular reference to Africa this requirement, to an extent, stems from a bias against Africa as there is nothing definitive as an “African” Judge or an “African” Court any more than there is an “European” or “Asian” judge or court. Applied sweepingly by the adjectival “African” this generalization does more harm than good for the promotion of arbitration in the 56 odd states of Africa several of whom have gone some considerable way to modernise and improve arbitration standards in recent years under the impact of UNCITRAL.

This requirement is also troublesome because there is no equivalent or similar requirement for supportive judges or courts in litigation practice against which, ironically, arbitration competes and claims to be a preferred dispute resolution method of choice. In other words litigants do not ask courts to be supportive or friendly other than dispense justice between litigants, and the supportive requirement cannot extend to upholding questionable arbitral awards. Judicial support for arbitration is prompted by the universal recognition of the differences between arbitration and litigation and the desirable supportive role of the national courts in all jurisdictions in which the national courts have supervisory powers over arbitral tribunals. Here, some differences between domestic and international arbitration practice emerge.

At the domestic level, in some African jurisdictions, there are glaring obstacles to domestic arbitration proceedings from the attitude of some unscrupulous lawyers in delaying arbitration by deliberately

²⁶⁷ CIArb Kenya Website available at w.w.w.ciarbkenya.org.

²⁶⁸ There is already a measure of continental co-operation and progress in that the Kenyan CIArb has been training arbitrators across Africa from countries including Nigeria, Zambia, Uganda and Malawi.

²⁶⁹ Organisation pour l'Harmonisation en Afrique du Droit des Affaires, www.ohada.com.

opening the doors to judicial intervention and obtaining injunctive orders that delay domestic arbitration proceedings. There are several arbitration matters languishing, for example, in Kenya's High Court because of stay and injunctive applications hastily filed in court that do not proceed further or quickly enough.²⁷⁰ There is evidence however that the increasing number of arbitration-trained judges is making a difference in the expeditious disposal of arbitration matters and clarification of arbitration law. In addition, the Constitution of Kenya, quite apart from the Arbitration Act, mandates the settlement of disputes by ADR procedures and mechanisms including arbitration. In that respect a judicial decision such as that of the Abuja Division of the Nigerian Court of Appeal that courts do not have legal justification whatsoever to grant an interlocutory injunction restraining on-going arbitral proceedings is welcome support for arbitration practice in an African jurisdiction.²⁷¹

In case of *M.V. Lupex v NOC*²⁷² the Nigerian Supreme Court declared it an abuse of the court process for a respondent to initiate fresh proceedings in Nigeria in an arbitration case pending in London. Over time there still appears to be a need for further statutory limitations on the occasions when courts can intervene in arbitration. With hesitation, one approach would be for the law to allow the arbitral tribunal to conduct the arbitration from start to finish and confine the courts to issues of confirming appointment of arbitrators, interim measures, setting aside, and enforcement of the final award.²⁷³ The hesitation is that arbitrators do make mistakes and when they get things wrong their errors might be too late and too expensive to correct. Notably, the Mauritian arbitration statute provides for all appointments and specified administrative functions to be performed by the Permanent Court of Arbitration in a way that detaches the arbitral process from the national court.²⁷⁴ Again, the Mauritius International Arbitration Act can be exemplified for including specific provisions for the speedy determination of interlocutory issues and endorsement of *competence-competence* to prevent local courts from deciding jurisdictional issues.²⁷⁵

At the international level the restriction of judicial intervention in arbitration matters seems to be taken and enforced more seriously. This is reinforced by the Model Law-influenced statutes that specifically provide for court support for arbitration in specified instances such as in party request for referral of a dispute to arbitration (Article 8), interim measures of protection (Article 9), court assistance in taking evidence (Article 27), award enforcement (Article 35) and appeals where so provided. The debate is entirely different where the call is for sustained improvements and the use of best endeavours to compel judiciaries everywhere to be consistently fair and just in the global delivery of justice. It is then not restricted to judges but extends to lawyers and other role players in the justice delivery system, under a common obligation, to adhere to and be guided by a consistent application of the laws, rules and the universal standards of practice in the dispensation of justice. Otherwise the incompetent, biased or corrupt judge is neither supportable nor defensible in any jurisdiction or continent in arbitration or litigation matters.

6. Recommendations

²⁷⁰ Examples: *Dimken (K) Ltd v Attorney General, Misc. Appl. No. 208, 2013*; *Zadok Furniture Systems Ltd v CBK, Misc. Civil Appl. No. 193, 2014*.

²⁷¹ *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation and Oando OML 125&134 Ltd* summarised in AILA Newsletter, March 2014.

²⁷² (2003) NWLR (Part 844) 469 circulated by Rukia Baruti footnote 23 above.

²⁷³ See Robert Hall, "Pre-Hearing Removal of Arbitrators" for the numerous instances in which US courts discourage interlocutory arbitral injunctions and the fewer exceptional instances in which injunctions may be granted.

²⁷⁴ At the launch of the 2010 MIAC-LCIA the response to this writer's query about the split function was that it was an innovative measure to win foreign confidence in doing business in that country.

²⁷⁵ *Ibid.*

Recommendations from colleagues home and abroad that take in the above concerns start with the recognition that as arbitration appointments are competitive, self-promotional efforts are inevitable for getting known by the appointers – governments, ADR institutions and centres, and users of arbitration.

Proposals for change require setting up (a) a representative group of professionals and (b) substantial funds to implement programs that include:-

- a) Working on changing the African mind-set of inferiority and on confidence-building by mounting vigorous awareness campaigns home and abroad to promote and showcase African arbitrators and practitioners;
- b) Strengthening specialist training events with Africans leading the training programmes tailored to the specific needs in African countries as AILA is doing;
- c) Embarking on membership drives among African lawyers and encouraging the drafting and use of arbitration clauses favourable to the choice of applicable laws, seats and venues on the continent;
- d) Working for the creation and support of arbitration-friendly jurisdictions to encourage the conduct of international arbitrations and hearings on the continent;
- e) Embarking on focused specialist visits to African organisations such as the AfDB, AU, ECOWAS, COMESA, Africa Regional Property Organization (AFRIPO) and others in addition to State Attorney Generals, Ministers of Justice and Chief Judges of local courts to create necessary awareness and sensitising them first to the existence of suitably qualified African practitioners and Arbitrators and second, to their availability for nomination and appointment in arbitrations;
- f) Networking with other arbitration users in the West, the Arab, Latin American, Caribbean and Asia-Pacific countries;
- g) Organising mentoring sessions for young African arbitrators and practitioners;
- h) Identifying and working with major users and appointers of arbitrators in Africa and appointing agencies.

Joint marketing conferences initiative would be a valuable tool for African international arbitrators and the arbitration centres. Joint websites listing such centres and maintaining the profiles of all qualified international arbitrators would be an additional boost. Existing institutions will seek collaboration with reputable international arbitration institutions.²⁷⁶

Such welcome advances, successfully implemented, can assist the growth of arbitral jurisprudence and expertise for the benefit of domestic and foreign parties and enhance the standard and quality of international arbitration practice on the continent, drawing appropriately from the experience of the well-established international institutions like the LCIA, ICC, ICSID and the PCA. Opportunities will open up for users and practitioners with cost and time saving devices for resolving commercial disputes locally.

The door is not closed on exploring the ways and means of opening-up international arbitration practice to Africans and raising the necessary funds to do so.

7. Conclusion

It is apparent that foreign arbitrators and practitioners monopolise or at any rate dominate arbitrations in their own states to the virtual exclusion of Africans. It is also apparent that Africans themselves transfer

²⁷⁶ In this connection, for example, the Kenyan CIArb already maintains close relationship with the International Law Institute in Kampala (ILI) and the Centre for Africa Peace and Conflict Resolution of California State University (CAPCR) in conducting ADR courses locally and internationally; Courtesy of Dr. Muigua's paper, supra. The Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo, at Kuala Lumpur and at Lagos, also have cooperation agreements with ICSID. See: [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FrontPage=Cooperation agreements&pageName=Coop with Oth Inst.](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FrontPage=Cooperation%20agreements&pageName=Coop%20with%20Oth%20Inst)

their disputes abroad and appoint foreigners to resolve them at enormous cost and expense to their governments. With the noted advances made for resolving disputes on the continent there can be no justification for continuing to live the lie that there are no suitably qualified African practitioners and arbitrators or arbitral institutions or centres to manage and administer arbitrations on the continent. Africans must therefore wake up to the realisation that they remain perennial outsiders by choice.

For what else needs or remains to be learnt about dispute resolution, Africans, like everybody else, can learn as they go along and from their mistakes, while also benefitting, like everyone else, from the fruits of participation, effort and experience. Africans must therefore desist from treating themselves or being continually lectured and treated as perpetual students. Going forward therefore from old prejudices formulated as eternal challenges to arbitration in Africa, the doors must be widely open, home and abroad, for African exposure to, and involvement and participation in, continental and international arbitrations. There is resonance with and support for this approach:

Hand in hand with the need for stronger and more predictable enforcement regimes for arbitral awards in Africa is the need for more arbitration hearings to be held on the continent. The regular application and testing of arbitration laws will develop the arbitration experience of domestic courts and increase public awareness in commercial matters, which in turn may alleviate current challenges such as the time it takes to enforce arbitral awards in certain countries.²⁷⁷

This approach could promote confidence-building in African arbitration instead of the defeatist recycling of old prejudices. On the confident note that the future of arbitration in Africa, wherever it is now, will be in Africa, there is pause to recognise that some renowned international arbitration institutions are beginning to expand their business interests and institutional profiles in parts of Africa. The initiative ought to extend across the continent noting that Nigeria is now the largest economy in sub-Saharan Africa, that there are world-class and fascinating destinations in Kenya, and hospitable and business-friendly environments in Ghana and all over the continent.²⁷⁸

²⁷⁷ Prescient message from Hogan Lovells, “Arbitration in Africa” 28 March, 2013, <http://w.w.hoganlovells.com/files/Publications>.

²⁷⁸ Andrew Wutawunashe says, “Dear Africa! It is time to pause and reflect” for “none can change our situation but ourselves”. *New African*, March 2014 No. 537 pp 40 – 49.

**The Role of Arbitration Institutions in the Development of Arbitration in Africa, AU Commission,
Addis Ababa, 23 July 2015**

Paper presented by Dr Emilia Onyema on Panel 3: Projecting Arbitration in Africa

I have been asked to specifically focus on the question: how can courts and laws assist with the projection of Africa as a viable space for Arbitration?

Africa as a Viable Space for Arbitration: Role of National Courts and Laws

Introduction

On the recognition and acceptance that arbitration as a form of dispute resolution process is distinct from litigation in national courts and alternative dispute resolution processes which terminate in a non-binding settlement; and has become the preferred mechanism for dispute resolution in cross-border transactions; its importance can easily be presumed. Though this preface is accepted, I wish to suggest that the relevance of arbitration should not be applied only to cross-border transactions but should be promoted also in purely domestic transactions and intra-Africa transactions. So on the premise that arbitration is relevant to Africa, we need to examine the question whether Africa is relevant to arbitration and note that I have not limited this to international arbitration. I acknowledge that the discussion is usually on international arbitration but we need to widen this discussion as already mentioned by promoting domestic arbitration.

Our Panel 3 discussion focuses on projecting Africa as a destination for arbitration, so how do we achieve this? In acknowledging the different facets to answering this question, my task is to examine the role of national courts and the legal framework supporting arbitration in various countries of the continent. To answer this primary question, I have divided this paper and presentation into three parts: part 1 briefly examines whether Africa is relevant to arbitration. My unequivocal answer being in the affirmative leads to part 2 where I examine the question whether the current legal framework for arbitration in the various African countries can support a modern arbitral regime which I also answer in the affirmative; and finally I examine how national courts in Africa can play a supportive role for arbitration in part 3. This discourse maps out the outlines for a more focused second conference in these series which will be on national courts and judges, hosted by the Lagos Court of Arbitration in their ultra-modern new purpose built headquarters complex in Lagos on 6-7 July 2016 to which you are all invited.

1 The relevance of Africa to Arbitration

Africa as a continent is resource and mineral rich and an active capital importing member of the international community. It is also interesting to note that African investors are increasingly investing in other African states while the same is also true for small and medium sized businesses. It is obvious that disputes arise from such flow of commercial transactions within and across borders. It is therefore important that when such disputes arise there are effective and efficient mechanisms in place to resolve such disputes observing internationally acceptable standards of procedural fairness. The use of arbitration as a tried and tested mechanism for the resolution of such disputes is not in question, whether within the continent or globally. The relevance of African states to arbitration primarily revolves around the choice of cities in Africa as seat of arbitration and appointment of arbitrators of African origin. Judge Torgbor examines the appointment of arbitrators of African origin and so I will restrict my discussion to choice of African cities as seat of arbitration. The question of choice of seat does not arise in purely domestic references but clearly arises in cross border disputes. It is such disputes that implicate more than one jurisdiction. The question of national courts and judges is impacted by the choice of seat

and also when the recognition and enforcement of awards (domestic, foreign or international) is sought either in the same or another state.

As already mentioned the discussion on seat of arbitration is primarily relevant to international arbitral references. In purely domestic transactions, the particular domicile or state also is usually the seat of arbitration. It is well accepted in arbitration laws, rules and commentaries that the venue or place where an arbitral hearing or the performance of any other task connected to the particular arbitration is different from the place or location referred to as the arbitration's 'juridical seat'. The seat is usually identified by the express or implied choice of a venue, place or location, either directly or indirectly made by the disputants. It is now settled that such choice does not preclude various aspects of the arbitration holding in other venues or places, but such a choice has legal implications. The primary relevance of the choice of a city or country hosting arbitration references attaches to the laws of that country; her judiciary; and legal services providers.

Therefore the juridical seat of arbitration reflects upon the connection a geographical location has with an arbitral reference. Applying the test of closest connection, it has been argued that the seat of arbitration is the place that is most closely connected to that particular reference so that the law and courts at the seat should be the proper forum to give assistance or support to the particular reference (as asserted by the seat theorists). This argument has several implications because it effectively excludes the laws and courts of other jurisdictions in rendering such support and gives the seat influence over the reference through its public policy and mandatory laws, gap-filling provisions, and outlook of its judges on arbitration.

The second relevant period is where assets against which an arbitral award may be satisfied is located in an African country. At such period, the particular African country's laws, courts and legal services providers become relevant. Actions to enforce or annul the award are equally applicable in both domestic and international references, though they may be governed by different legal regimes. For example in those African countries that are party to the New York Convention which applies to convention awards, or under national legislation applicable to international arbitral awards (see Table 2 in the *Discussion Paper* for a list of African countries and their arbitration laws and conventions status).

Having established when African states become involved in arbitration, the question of whether African cities and states are important venues for holding arbitration references to disputants may now be examined. The current statistics from arbitration institutions will suggest the contrary (see for example Table 4 in the *Discussion Paper* for the 10 year data from the ICC). However, such data can only be indicative since it is from a section of the market that provides arbitration services, arbitration institutions. There is no data on the numbers of ad hoc arbitration references (domestic and international) that take place in the continent. In addition the data relied upon in this discussion is primarily from international (foreign) arbitration institutions and not from institutions operating within the continent. The reason for this being access to such data. It is however acknowledged that institutions that operate within the continent also administer domestic arbitrations but most publish little or no data. As already mentioned, the other major form of arbitration is the ad hoc sphere for which because of the private nature of arbitration, there is no empirical data of numbers of arbitration references. The final source from which such data may be culled is national courts. However the numbers of arbitration related cases that make it to the courts and decisions that get published are very few and so definitely not representative of the numbers of arbitration references that hold in these countries. In addition, because of the law reporting standards in these countries it will not be valid to use the limited numbers of court decisions arising from the higher courts (courts of appeals and supreme courts) levels. There is also

anecdotal evidence that most arbitration awards are performed by judgment debtors. Again availability of reliable or comprehensive data hinders any viable analysis.

Given these caveats, the data provided in Table 4 in the *Discussion Paper* clearly tabulates the numbers of African parties; number of African cities and number of African arbitrators as provided over the past ten years in statistics provided by the ICC. Over the 10 year period, a total of 1160 African parties arbitrated under the ICC Rules. However these generated only 71 arbitrations with seat in an African country and 347 African arbitrators were appointed. The question therefore that arises is if there are so many parties of African origin or doing business in the continent, why were very few arbitrators of African origin appointed (even in those disputes with African parties) and even fewer African cities chosen as seat of arbitration (even in those references)? In this connection, it is interesting that from the Annual Reports of the Cairo RC, it has little or no African parties (south of the Sahara) utilising its services though it enjoys patronage from countries of the Middle East and West, from who most of its arbitrators are also appointed (showing a clear link between nationality of parties and arbitrators, which further complicates the picture from the ICC data). It is important to note that intra-Africa transactions and disputes (which technically fall within international) have not been captured and so not included in this data set.

Drawing my conclusion on the basis of the data set presented: on the question whether Africa is relevant to arbitration, my conclusion will be in the affirmative.

I will now explore and suggest changes African countries may consider to make as it relates to their laws and courts which may assist in making them more attractive to arbitration generally. In this regard, international arbitration but also to sustain the domestic arbitrations these countries already host.

2 Legal Framework for Arbitration in Africa

Table 2 in the *Discussion Paper* lists 55 African countries and their convention status and national law regime. On the New York Convention, 35 of the 55 states have ratified and by 27 July Comoros will complete this picture. So 63.6% of the 55 African states listed are New York Convention states (this is 22.6% of the 155 strong convention member states worldwide). There are many more ratifications as to ICSID Convention. 51 of the 55 African states have signed and/or ratified the ICSID Convention, this is 92.7% of the continent accounting for 32% (51 of the 159) of all signatory states worldwide. This supports the position in this paper that as it relates to international conventions on arbitration; African states have fared reasonably well. It will be interesting to interrogate the very high volume of ICSID signatory African states to understand why the overwhelming majority of African states signed up to the Washington Convention. One explanation may possibly be because most of these states, as already stated are capital importing states and attract foreign investments from capital exporting states keen to protect the investments of their citizens; and the sponsoring role of the World Bank. But as it is well known the ICSID Convention is limited to investment disputes.

Turning to the New York Convention, it is equally important to interrogate the relatively low ratification numbers. The importance of the New York Convention to the enforcement of arbitration agreements and recognition and enforcement of foreign arbitral awards (so both domestic and international awards) cannot be over-emphasised. It is however interesting to note that the major trading states in the continent are parties to the New York Convention (for example: Egypt, Ghana, Kenya, Mozambique, Nigeria, and South Africa). However there are important trading states yet to ratify (for example, Angola and Ethiopia).

The same Table 2 also lists the national law that applies to arbitration (domestic and international) in the 55 states and only three states have no discernible law applicable to arbitration. These are: Papua New Guinea, Sierra Leone, and South Sudan. So 94.5% of African states have laws applicable to arbitration in

their jurisdictions. This clearly evidences an obvious awareness of the relevance of the mechanism of arbitration and its regulation under national law in one form or the other.

Table 2 therefore is clear evidence of the engagement of African states (as it relates to statutory framework for arbitration) with the legal basis of arbitration in their jurisdictions. There is the need to interrogate the effectiveness of the substantive provisions of these laws to determine whether they are modern in the sense that they provide for party autonomy and certain minimal requirements to ensure limited or no interference from the state and limited or no opportunity of interference during the arbitral procedure. The provisions of some of the laws are predominantly based on the UNCITRAL Model Law (examples are the laws in Egypt, Kenya, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia, and Zimbabwe) while most that were promulgated after the emergence of the Model Law (and did not adopt it) were evidently influenced by it (such as the Ghana ADRA 2010) in addition to other national laws, especially those of European countries with whom such states had a colonial relationship. The OHADA Uniform Arbitration Act 1999, applicable in all 17 OHADA member states falls within this category (with borrowings from the old French Arbitration Law of 1981 (the current Arbitration Law in France is from 2011).

So generally speaking, as it relates to substantive laws on arbitration African countries are making good progress (for example Sudan is currently reviewing her 2005 Arbitration Act). However there are still those countries where either there is no specific law governing arbitration (domestic and or international) or the relevant law is out-dated and no longer fit for purpose. To those countries, it cannot be emphasised enough that their laws need to be modernised. A very helpful starting point in this process of modernisation is reference to the UNCITRAL Model Law.

To those African countries that are not signatory states (or have not implemented) the New York Convention, it is important for such states to consider becoming parties to this very important convention. For resource rich countries such as Angola, it may be correct to argue that their capacity to attract FDIs is not reliant on their membership of these conventions. However, it is not just to protect the foreign investor but also to protect local businesses contracting with foreigners, who may need to avail themselves of the provisions of the Convention by seeking to enforce an award against a foreign business party on the basis of the Convention. For those African countries such as Sudan who, though not party to the New York Convention are parties to the Riyadh Convention, this is commendable but it must be noted that there are more parties to the New York Convention the predominant number of which are not parties to the Riyadh Convention.

An examination of the arbitration rules that apply in these jurisdictions reveal that most arbitration institutions on the continent have adopted or adapted the UNCITRAL Arbitration Rules which is helpful in standardising provisions and certainty of expectation for disputants using these rules. There are dissimilarities in some rules, though generally the arbitration rules are modern and some Institutions have revised their rules to take account of recent developments in arbitral practice such as provisions for emergency arbitrator, multiparties, and joinder, and others will do well to also update their rules in accordance with developments in arbitral practice and as a response to the needs of their users.

So, as concluded in my 2014 paper, the arbitration laws and rules of the vast majority of countries and institutions in the continent are reasonably robust and functional. However these remain a work-in-progress, so that as arbitral practice evolves, these laws and rules must be continually updated to meet the requirements and needs of modern arbitral practice, the disputants, and arbitration practitioners.

3 Supportive role of national courts

This legal framework includes the courts which appear to be the primary limb that is out of joint or sync with developments in this sector. All 55 African states examined have national courts with general jurisdiction also covering civil and commercial matters before which arbitration related matters are heard. In most of these jurisdictions, there is a hierarchy of courts with the Supreme Court as the highest court while for matters falling within the OHADA Uniform Arbitration Act, the CCJA, as a supranational court is the court of last resort. The jurisdiction and powers of these courts are also contained in national constitutions which provide rights of access and appeal to litigants.

As is well known, courts at the seat of arbitration may become involved in the process at three stages: prior to commencement of the arbitration; during the arbitration and after publication of the final award (a stage which they share with the enforcing court). Before the commencement of an arbitration reference for example, one party to the dispute may contest the existence or scope of the arbitration agreement before a national court so that the other party will be forced to assert the agreement. Such litigation may give rise to anti-suit injunction. The involvement of the court at this stage can support the arbitral reference where a robust view is taken to ensure the effectiveness of the arbitration agreement. However it may also lead to courts frustrating the arbitration process even before it starts. Therefore, issues, such as lack of consent, time limits, taking steps in the proceedings, writing requirement, among others, may be raised to frustrate the existence and performance of the arbitration agreement.

Examples abound of situations where one party to an arbitration agreement refuses or fails to participate in the arbitral reference but instead chooses to litigate the very question of the existence of the arbitration agreement and its import. Contesting the existence or validity of the arbitration agreement is not an issue. It is the forum of contestation that raises concerns. This is particularly so in the face of arbitration laws that expressly confer jurisdiction on the arbitral tribunal to determine its jurisdiction and all matters relevant thereto. In defiance of this requirement, some parties still approach the courts to make that determination and some courts, especially first instance courts, take jurisdiction and determine the question. Clearly such courts lack jurisdiction to so determine since their action effectively usurps the powers conferred by their own law on the arbitral tribunal (at least at that stage of the reference).

Upon commencement of the arbitral reference, issues such as arbitrator appointment and challenge, and application for interim measures of protection may also be litigated before the courts. Finally after the award has been rendered, issues of enforcement and challenge of the award pull in national courts again either at the seat or place of enforcement. In most African jurisdictions, any of these stages can entail the start of legal proceedings from the court of first instance all the way to the Supreme Court. These are the issues that consume time, increase cost and frustrate those disputants who wish to progress the resolution of the dispute in their chosen forum of arbitration. It is such interferences that earn courts the reputation of not being arbitration friendly or of being interventionist. There is a perception (correctly or wrongly held) that the courts in most African jurisdictions do not play a supportive role towards arbitration (whether domestic or international). Some African states (such as Mauritius) have taken various steps to ensure very limited interference or recourse to the courts and established specialist commercial courts manned by judges with specialist knowledge of arbitration law and practice to adjudicate arbitration related litigation.

Part of the definition of the rule of law adopted in the World Justice Project Rule of Law Index is:

“Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve” (page 3, 2012/13 Index).

In applying this standard to measure Civil Justice, the Index states:

“Effective civil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent ... (It) also requires that court proceedings are conducted and judgements enforced fairly and effectively and without unreasonable delay” (page 15, 2012/13 Index).

Note that under this factor of civil justice, the Index also measures:

“the accessibility, impartiality, and efficiency of mediation and arbitration systems that enable parties resolve civil disputes” (page 15 of 2012/13 Index).

It will not be too difficult to find in each African country examples of cases that fall foul of these descriptions and which also explains why the African countries surveyed in the Index scored very poorly (see the extract under Table 5 in the *Discussion Paper*). It is however my view that these effectively are the standards African courts and judges need to consistently strive to attain.

Courts therefore play a major role in arbitration generally especially on the continent where there is still a poor culture of voluntary compliance with the order of a validly constituted decision maker such as an arbitral tribunal. Such culture also leads to the involvement of the courts at various stages of the arbitral reference. Evidently such recourse to courts effectively defeats the primary aim or intention of the disputing parties to opt out of the litigation process for a private process of arbitration.

Clearly African governments need to do more to make cities in their countries attractive venues; their courts accessible and credible, ensure security of lives and property, among others, to attract not just investors but to ensure that when these investors and their own citizens have disputes, they choose such cities as seats of arbitration and appoint arbitrators of African origin as their dispute resolvers.

Conclusion

It is obvious that there is real and measurable progress being made in the different African states. It is correct to state that African parties utilise arbitration to resolve their disputes but do not habitually use arbitrators of African origin or resolve such disputes, using arbitration institutions within the continent. It is this attitude of disputants that need to change. This conference has examined the expectation of disputants from arbitration institutions in the continent who are expected to implement those suggestions made to them to make themselves and their services more attractive to disputants. In exchange for this shift by arbitration institutions, users need to ensure that they include arbitration agreements in their contracts nominating one of these institutions, whether in their domestic, intra-Africa or international transactions. It is time to grow our African-arbitration market.

The aim of these series of conferences is to contribute by creating spaces for analysis, interrogation of current practice and to share information and experience with particular stakeholders, for their implementation so that the numbers of arbitration references (domestic, intra-Africa and international) will increase along with the choice of cities in the continent as seats of arbitration with a robustly supportive judiciary, and increased appointment of arbitrators of African origin.

So to answer the question set out at the beginning of this paper/presentation: For courts and laws to assist with the projection of Africa as a viable space for arbitration, African states must continue to modernise their arbitration related laws and rules, paying close attention to the needs of their users. African states need to set out (and implement) a clear policy objective to make their jurisdictions attractive destinations for domestic, intra-Africa and international arbitral references. In the same context, national courts and judges must take a pro-arbitration stand in their decision making and write

well-reasoned decisions that will contribute to the development of global arbitral jurisprudence, grow confidence in their decision-making process and create certainty in the field for users.

The Role of Counsel in Promoting African Arbitral Institutions

Babatunde Fagbohunlu, SAN²⁷⁹

1. This discussion examines the role of three broad categories of counsel:
 - (i) External (practising) lawyers
 - (ii) Corporate in-house counsel (private sector, locals and multi-nationals)
 - (iii) State counsel (in-house counsel in government ministries, departments and agencies)

2. Different priorities

External (practising) lawyers/Corporate in-house counsel:

What choices best protect their client's interest

Problems with African centres identified in earlier papers

- Delays to arbitration because of undue judicial intervention²⁸⁰
- The legal framework for arbitration – *pro-arbitration* or not?²⁸¹

Many of such problems are outside the sphere of control of arbitral institutions

State counsel:

What choices best protect the client's interest

However, they are also often responsible for implementing government policy in the choices they make

Examples:

- Technology transfer and capacity building policies
- Local content policies

Depending on relative negotiating strength, an afro-centric arbitration policy adopted by government is more easily implemented through state counsel in transactions involving government

Example:

²⁷⁹ Partner and Head of Disputes Resolution Practice Group, *Aluko & Oyebode*, Lagos; Chairman Management Board, Lagos Chamber of Commerce International Arbitration Centre (LACIAC); Member, LCIA Court of Arbitration.

²⁸⁰ Hon. Justice Edward Torgbor: "*Opening up International Arbitration in Africa*" in *Arbitration Institutions in Africa Conference 2005*, at page 98; Dr. Emilia Onyema: "*The Role of Arbitration Institutions in the Development of Arbitration in Africa*" in *Arbitration Institutions in Africa Conference 2005*, at page 106

²⁸¹ Stuart Dutson: "*Africa's Century – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa*" in *Arbitration Institutions in Africa Conference 2005*, at page 82.

- Hydrocarbon concession contracts in Nigeria involving NNPC, PSCs
3. However many transactions will not involve governments, so it is important to examine the role that Corporate in-house counsel/External lawyers can play in promoting African arbitral centres.
 4. Starting point – African centres are in competition with non-African centres, and among themselves.
 5. Corporate in-house counsel/External lawyers must give objective advice to their clients about the comparative advantages of arbitrating in African centres.
 6. In doing so:
 - (a) Corporate counsel/External lawyers must ensure they are well informed about the conditions of arbitrating in African centres and the comparative advantages of doing so.
 - The resources available .
 - Comparative advantages of the legal framework.
 - Comparative advantages of African arbitral institutions.
 - Cost advantages .
 - The nature of judicial support for arbitration in African centres.²⁸²
 - (b) Corporate counsel/External lawyers can work with arbitral institutions to improve the comparative advantage of African centres.²⁸³
 - The CCIAG example
 - (c) Corporate counsel/External lawyers can work with justice sector reform projects to improve the comparative advantage of African centres.

²⁸² See Torgbor, *op. cit.* at pages 98 to 99; Dutson, *op. cit.* at page 86.

²⁸³ Corporate Counsel, as users of arbitration, have played a significant role in enhancing the efficacy of arbitral institutions. For example, Gans and Billing note that: “some arbitration users have complained that arbitration is falling short of its objective of providing expeditious and cost-effective dispute resolution in the last two years alone, four major international arbitral institutions - the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) and the Singapore International Arbitration Centre (SIAC) - have made significant changes to their rules and procedures to respond to these types of complaints and make their institutions more attractive to users” – see Kiera Gans and Amy Billing: “Rule Revisions From 5 Top Global Arbitral Institutions” - Corporate Counsel Online at <http://www.corpcounsel.com/id=1202674247927/Rule-Revisions-From-5-Top-Global-Arbitral-Institutions?slreturn=20150620201729>

Tables

Table 1: African countries: legal systems & REC affiliations

No	Country	Received	Regional Economic Communities
1	Algeria	Civil	AMU
2	Angola	Civil	SADC
3	Benin Republic	Civil	ECOWAS; OHADA
4	Botswana	Common law, Roman Dutch	SADC
5	Burkina Faso	Civil	ECOWAS; OHADA
6	Burundi	Civil	EAC; COMESA; ECCAS
7	Cameroon	Civil/Common law	ECCAS; OHADA
8	Cape Verde	Civil	ECOWAS
9	Central Africa Republic	Civil	SADC; ECCAS; OHADA
10	Chad	Civil	ECCAS; OHADA
11	Comoros	Civil	COMESA; OHADA
12	Congo Brazzaville	Civil	ECCAS; OHADA
13	Cote d'Ivoire	Civil	ECOWAS; OHADA
14	Democratic Republic of Congo	Civil	COMESA; ECCAS
15	Djibouti	Civil	COMESA
16	Egypt	Civil	COMESA
17	Eritrea	Civil	COMESA
18	Ethiopia	Civil	COMESA
19	Equatorial Guinea	Civil	ECCAS; OHADA
20	Gabon	Civil	ECCAS; OHADA
21	Gambia	Common law	ECOWAS
22	Ghana	Common law	ECOWAS
23	Guinea	Civil	ECOWAS; OHADA
24	Guinea Bissau	Civil	ECOWAS; OHADA
25	Kenya	Common law	EAC; COMESA
26	Lesotho	Common law, Roman Dutch	SADC
27	Liberia	Common law	ECOWAS
28	Libya	Civil	COMESA; AMU
29	Madagascar	Civil	COMESA; SADC
30	Malawi	Common law	COMESA; SADC
31	Mali	Civil	ECOWAS; OHADA
32	Mauritania	Civil	AMU
33	Mauritius	Common law	COMESA; SADC
34	Morocco	Civil	AMU
35	Mozambique	Civil	SADC
36	Namibia	Common law, Roman Dutch	SADC
37	Niger	Civil	ECOWAS; OHADA
38	Nigeria	Common law	ECOWAS
39	Papua New Guinea	Common law	-
40	Rwanda	Civil	EAC, COMESA
41	Sao Tome & Principe	Civil	ECCAS
42	Senegal	Civil	ECOWAS; OHADA
43	Seychelles	Civil	COMESA; SADC
44	Sierra Leone	Common law	ECOWAS
45	Somalia	Civil	-
46	South Africa	Roman Dutch, Common law	SADC
47	South Sudan	Civil	-
48	Sudan	Civil & Common law blend	COMESA
49	Swaziland	Civil, Roman Dutch	COMESA; SADC
50	Tanzania	Common law	EAC; SADC
51	Togo	Civil	ECOWAS; OHADA
52	Tunisia	Civil	AMU
53	Uganda	Common law	EAC, COMESA
54	Zambia	Common law	COMESA; SADC
55	Zimbabwe	Common law, Roman Dutch	COMESA; SADC

Table 2: African countries: Status of Arbitration Laws and Conventions.

No	Country	National Legislation	New York Convention	ICSID Convention
1	Algeria	Arbitration Law No 08-09, 2008	8 May 1989	22 March 1996
2	Angola	Voluntary Arbitration Law 2003	-	-
3	Benin Republic	OHADA UAA	14 Aug 1974	14 Oct 1966
4	Botswana	Arbitration Act, 1959	19 Mar 1972	14 Feb 1970
5	Burkina Faso	OHADA UAA	21 June 1987	14 Oct 1966
6	Burundi	Civil Procedure Code 2004	21 Sept 2014	5 Dec 1969
7	Cameroon	OHADA UAA	19 May 1988	2 Feb 1967
8	Cape Verde	Arbitration Law of 2005	-	26 Jan 2011
9	Central Africa Republic	OHADA UAA	13 Jan 1963	14 Oct 1966
10	Chad	OHADA UAA	-	14 Oct 1966
11	Comoros	OHADA UAA	27 July 2015	7 Dec 1978
12	Congo, Republic of	OHADA UAA	-	14 Oct 1966
13	Cote d'Ivoire	OHADA UAA	2 May 1991	14 Oct 1966
14	Democratic Republic of Congo	OHADA UAA	3 Feb 2015	29 May 1970
15	Djibouti	Code of International Arbitration 1984	27 June 1977	-
16	Egypt	Arbitration Law 1994 (amended 1997)	7 June 1959	2 June 1972
17	Eritrea	Book IV, Civil Procedure Code 1965	-	Signed 21 Sept 1965
18	Ethiopia	Civil Procedure Code of 1991	-	Signed 21 Sept 1965
19	Equatorial Guinea	OHADA UAA	-	19 Nov 1978
20	Gabon	OHADA UAA	15 Mar 2007	14 Oct 1966
21	Gambia	ADR Act 2005	-	26 Jan 1975
22	Ghana	ADR Act 2010	8 July 1968	14 Oct 1966
23	Guinea	OHADA UAA	23 April 1991	4 Dec 1968
24	Guinea-Bissau	OHADA UAA	-	Signed 4 Sept 1991
25	Kenya	Arbitration Act 2005 amended 2009	11 May 1989	2 Feb 1967
26	Lesotho	Arbitration Act No 12 of 1980	11 Sept 1989	7 Aug 1969
27	Liberia	Arbitration Law, Chapter 7 Commercial Code 2010	15 Dec 2005	16 July 1970
28	Libya	Code of Civil Procedure 1953	-	-
29	Madagascar	Arbitration Law 98-019 of 2 Dec 1998	14 Oct 1962	14 Oct 1966
30	Malawi	Arbitration Act of 6 Nov 1967	-	14 Oct 1966
31	Mali	OHADA UAA & Arb Code 2000	7 Dec 1994	2 Feb 1978
32	Mauritania	Code of Arbitration No 2000-06	30 April 1997	14 Oct 1966
33	Mauritius	International Arbitration Act No 37 of 2008	17 Sept 1996	2 July 1969
34	Morocco	Code of Civil Procedure 1947 (modified in 2007)	7 June 1959	10 June 1967
35	Mozambique	Law on Arbitration, Conciliation and Mediation No 11/99 of 8 July 1999	9 Sept 1998	7 July 1995
36	Namibia	Arbitration Act No 42 of 1965	-	Signed 26 Oct 1998
37	Niger	OHADA UAA	12 Jan 1965	14 Dec 1966
38	Nigeria	Arbitration and Conciliation Act 1988	15 June 1970	14 Oct 1966
39	Papua New Guinea	-	-	19 Nov 1978
40	Rwanda	Arb & Conciliation in Commercial Matters Law No 005 of 2008	29 Jan 2009	14 Nov 1979
41	Sao Tome & Principe	Voluntary Arb Law No 9 of 2006	18 Feb 2013	19 June 2013
42	Senegal	OHADA UAA	15 Jan 1995	21 May 1967
43	Seychelles	Commercial Code 1977 & Code of Civil Procedure 1920	-	19 April 1978
44	Sierra Leone	-	-	14 Oct 1966
45	Somalia	Civil Procedure Code, Book III, 1974	-	30 Mar 1968
46	South Africa	Arbitration Act No 42 of 1965	1 Aug 1976	-
47	South Sudan	-	-	18 May 2012
48	Sudan	Arbitration Act 2005	-	9 May 1973
49	Swaziland	Arbitration Act No 24 of 1904	-	14 July 1971

50	Tanzania	Arbitration Act 1931 revised 2002	11 Jan 1965	17 June 1992
51	Togo	OHADA UAA	-	10 Sept 1967
52	Tunisia	Arbitration Code, Law No 93-42, 1993	15 Oct 1967	14 Oct 1966
53	Uganda	Arbitration & Conciliation Act 2000 (amended 2008)	12 May 1992	14 Oct 1966
54	Zambia	Arbitration Act No 19 of 2000	12 June 2002	17 July 1970
55	Zimbabwe	Arbitration Act No 6 of 1996	28 Dec 1994	19 June 1994

OHADA UAA = OHADA Uniform Arbitration Act 11 March 1999

Sources: <https://arbitrationin africa.com/countries/>; http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html; <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>; <http://ohada.org/>.

Table 3: African countries: List of some Arbitration Institutions

No	Institution/Centre	Country
1	Mediation & Arbitration Centre, Algerian Chamber of Commerce & Industry.	Algeria
2	Annaba Mediation & Arbitration Centre, Annaba	Algeria
3	Centre for Extra Judicial Resolution of Disputes (CREL)	Angola
4	Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce & Industry of Benin	Benin Republic
5	Conciliation and Arbitration Chamber of the Cotton Inter-professional Association of Cotonou	Benin Republic
6	Ouagadougou Arbitration, Mediation & Conciliation Centre of the Chamber of Commerce & Industry	Burkina Faso
7	Burundi Centre for Arbitration & Mediation	Burundi
8	Centre d'Arbitrage du GICAM, Douala	Cameroon
9	National Centre for Arbitration, Conciliation & Mediation (CENACOM), Kinshasa	Democratic Republic of Congo
10	IGAD Business Arbitration Centre	Djibouti
11	Cairo Regional Centre for ICA (CRCICA)	Egypt
12	Sharm El Sheikh International Arbitration Centre	Egypt
13	Dr A Kheir Law & Arbitration Center (AKLAC)	Egypt
14	Addis Ababa Chamber & Sectorial Association Arbitration Institute	Ethiopia
15	Ghana Arbitration Centre	Ghana
16	Ghana Association of Certified Mediators & Arbitrators (GHACMA), Accra	Ghana
17	Arbitration Centre Chambre d'Arbitrage de la Guinee	Guinea
18	Arbitration Centre Chambre d'Arbitrage de Cote d'Ivoire	Ivory Coast
19	Common Court of Justice & Arbitration of OHADA	Ivory Coast
20	Chamber of Commerce & Industry of Ivory Coast, Abidjan	Ivory Coast
21	Dispute Resolution Centre, Nairobi	Kenya
22	Nairobi Regional Centre for ICA (forthcoming)	Kenya
23	The Directorate of Dispute Prevention & Resolution	Lesotho
24	Libyan Centre for Mediation & Arbitration	Libya
25	The Libyan International Arbitration Commercial Centre	Libya
26	Arbitration Centre of Madagascar	Madagascar
27	Mali's Conciliation & Arbitration Centre	Mali
28	Permanent Court for Arbitration (PCA) Mauritius Office, Ebene	Mauritius
29	LCIA-MIAC Arbitration Centre, Ebene	Mauritius
30	MCCI Arbitration & Mediation Centre, Port Louis	Mauritius
31	Euro-Mediterranean Center for Mediation & Arbitration, Casablanca	Morocco
32	Rabat International Mediation & Arbitration Centre (CIMAR)	Morocco
33	Court of Arbitration (ICC Morocco) Casablanca	Morocco
34	Agadir Conciliation & Arbitration Centre	Morocco
35	Centre for Arbitration, Conciliation & Mediation (GACM) Maputo	Mozambique
36	Regional Centre for ICA Lagos (RCICAL)	Nigeria
37	Maritime Arbitrators Association of Nigeria (MANN)	Nigeria
38	Lagos Court of Arbitration Centre (LCA)	Nigeria
39	International Centre for Arbitration & Mediation, Abuja (ICAMA)	Nigeria
40	Lagos Chamber of Commerce Arbitration Centre (LACIAC)	Nigeria
41	International Dispute Resolution Institute, Abuja	Nigeria
42	Society of Construction Arbitrators Association	Nigeria
43	Kigali International Arbitration Centre (KIAC)	Rwanda
44	Arbitration Centre of the Dakar's Chamber of Commerce, Industry and Agriculture	Senegal

45	Dakar Arbitration & Mediation Centre	Senegal
46	Arbitration Foundation of Southern Africa	South Africa
47	Equillore Group	South Africa
48	Africa Alternative Dispute Resolution (Africa ADR)	South Africa
49	The Association of Arbitrators	South Africa
50	Commission for Conciliation, Mediation & Arbitration (CCMA)	South Africa
51	Tokiso Dispute Settlement	South Africa
52	South Sudan Chamber of Commerce, Industry & Agriculture, Juba	South Sudan
53	Khartoum Centre for Arbitration	Sudan
54	International Chamber of Arbitration	Sudan
55	The Sudanese Centre for Conciliation & Arbitration	Sudan
56	Conciliation, Mediation and Arbitration Commission (CMAC)	Swaziland
57	The National Construction Council, Dar es Salaam	Tanzania
58	Tanzania Institute of Arbitrators (TIA), Dar es Salaam	Tanzania
59	Arbitration Court CATO, Lome	Togo
60	Centre for Conciliation & Arbitration of Tunis (CCAT)	Tunisia
61	Al Insaf Center, Tunis	Tunisia
62	Centre for Arbitration & Dispute Resolution, Kampala	Uganda
63	Zambia Centre for Dispute Resolution	Zambia
64	Commercial Arbitration Centre in Harare	Zimbabwe

Table 4: Participation of African parties, cities and arbitrators in ICC arbitrations: 2003-2013:

Detail	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
Parties	79	72	68	81	50	87	126	122	174	127	174	1160
Cities	6	2	8	-	3	2	14	9	12	6	9	71
Arbitrator	28	18	23	27	16	34	39	40	52	23	47	347

Table 5: The World Justice Project produces a Rule of Law Index of various countries and ranks these countries. The latest Index for 2014 ranked 99 countries including the following 21 African countries:

No	Country	WJP Rule of Law Index Ranking for Regulatory Enforcement	WJP Rule of Law Index Ranking for Civil Justice	WJP 2014 Rule of Law Index Global Ranking of 99 Countries
1	Botswana	20 (17)	28 (21)	25
2	Burkina Faso	34 (33)	42 (36)	53
3	Cameroon	93 (96)	95 (95)	95
4	Cote d'Ivoire	58 (58)	57 (60)	72
5	Egypt	75 (77)	84 (73)	74
6	Ethiopia	89 (89)	85 (76)	88
7	Ghana	43 (47)	35 (32)	37
8	Kenya	80 (82)	72 (71)	86
9	Liberia	96 (97)	87 (96)	87
10	Madagascar	82 (63)	78 (50)	81
11	Malawi	77 (65)	31 (35)	55
12	Morocco	36 (61)	51 (48)	52
13	Nigeria	83 (78)	52 (53)	93
14	Senegal	33 (31)	39 (38)	43
15	Sierra Leone	87 (93)	63 (47)	84
16	South Africa	40 (42)	44 (46)	40
17	Tanzania	74 (69)	61 (70)	69
18	Tunisia	47 (38)	43 (42)	41
19	Uganda	90 (86)	59 (57)	90
20	Zambia	72 (81)	65 (75)	70
21	Zimbabwe	98 (92)	81 (90)	97

Data for 2014 (out of 99 countries) and data for 2012/13 (out of 97 countries) Index is in brackets available at <http://worldjusticeproject.org/rule-of-law-index>.

List of Participants

No.	First name	Surname	Country
1	Abenezer	Asfaw	Ethiopia
2	Teshome	Bokan	Ethiopia
3	Aklog Demissie	Gelaglie	Ethiopia
4	Mehrteab	Kokeb	Ethiopia
5	Mekdes	Mezgebu	Ethiopia
6	Leyou	Tameru	Ethiopia
7	Solomon	Tefera	Ethiopia
8	Yohannes	Woldegebriel	Ethiopia
9	Seyoum	Yohannes	Ethiopia
10	Tameru	Wondemagegnehu	Ethiopia
11	Hailu	Hagos	Ethiopia
12	Emmanuel	Amofa	Ghana
13	François	Abondio	Ivory Coast
14	Narcisse	Aka	Ivory Coast
15	Jimmy	Kodo	Ivory Coast
16	El Hadji Yacouba	Tall	Ivory Coast
17	Noella	Lubano	Kenya
18	Kariuki	Muigua	Kenya
19	Edward	Torgbor	Kenya
20	James Muruthi	Kihara	Kenya
21	Simon	Ondiek	Kenya
22	Andrew	Waruhiu	Kenya
23	Duncan	Bagshaw	Mauritius
24	Brett	Hattaway	UAE
25	Babatunde	Ajibade	Nigeria
26	Emmanuel	Dike	Nigeria
27	Babatunde	Fagbohunlu	Nigeria
28	Paul	Idornigie	Nigeria
29	Wilfred	Ikatari	Nigeria
30	Megha	Joshi	Nigeria
31	Ikpeme	Nkebem	Nigeria
32	Vincent	Nmehielle	Nigeria
33	Bayo	Ojo	Nigeria
34	Oyinkansola	Badejo-Okusanya	Nigeria
35	Bernadette	Uwicyeza	Rwanda

No.	First name	Surname	Country
36	Deline	Beukes	South Africa
37	Hassan Mubark Abdalla	Ahmed	Sudan
38	Yousif Elamin Elsharif Hussien	Alhindi	Sudan
39	Tarig Omer Abbas	Alnima	Sudan
40	Ahmed	Bannaga	Sudan
41	Ibrahim M.	Draig	Sudan
42	Ragaa Hohamed	El Khider	Sudan
43	Elfadil A. E.	Elbosily	Sudan
44	Zainab Abdelmoatti	Kamil	Sudan
45	Mutaz	Kashif	Sudan
46	Abuobida Hassan Saeed	Mohamed	Sudan
47	Alsahaby H. A.	Mohamed	Sudan
48	Husham Mahmoud Ahmed	Osman	Sudan
49	Faisal	Alfaki	Sudan
50	Awad	Abroheem Ali	Sudan
51	Jimmy	Muyanja	Uganda
52	Rukia	Baruti	United Kingdom
53	Christine	Djumpah	United Kingdom
54	Stuart	Dutson	United Kingdom
55	Fidelis	Oditah	United Kingdom
56	Emilia	Onyema	United Kingdom
57	Jean Alain	Penda	United Kingdom
58	Kamal	Shah	United Kingdom
59	Juliet	Ssentongo	United Kingdom
60	Alexandra	Meise	USA
61	Charles	Kajimanga	Zambia

Extract from Delegates' Feedback at the Conference

Below are the verbatim responses from delegates on the question: "Overall, do you consider this conference to have been useful?"

Responses:

"I think it was important to have a forum where institutions and users can have a frank and open dialogue about their concerns. The goal is to create value for customers, and deliver efficient (cost effective) services."

"I consider the conference to be very useful indeed"

"Absolutely. There was a great need to have a platform that discusses the role of African arbitration centers as a whole in Africa and brainstorms how we can build their capacity in becoming more attractive. This conference is the answer."

"It was very useful, mainly as a forum to discuss cooperation between institutions. The weakness was that, in spite of having only a few minutes each to speak, some speakers simply read out basic information on their institutions, rather than suggesting ideas and proposals, or providing useful insight."

"Extremely useful because the issue has never been raised been African arbitrator and after this conference we are all certain that we are on the right track to give African arbitration institutions as well as arbitrators the role they deserve."

"I am better informed on the functions of arbitration centres and the various centres that are in existence."

"Yes, it has enhanced my understanding of the important role played by regional institutions on the continent."

"useful because of information on ??? and challenges of arbitration in Africa."

"yes, because it highlights the need for wider collaboration amongst institutions".

"yes, i learned a lot."

"I think it is very very useful to me to attend because we need to discuss, to know plans, projects, other experiences and to participate and share skills and opinions to push arbitration in africa faaar-- away!!"

"Yes. I found the questions and comments that were raised and made to be very useful. They raised issues that are usually ignored or not discussed e.g. what is the focus of the various institutions."

"this conference was useful to me because it was informative and enabled me to put the current state of play with arbitration institutions in Africa in perspective."

"excellent connections. excellent "on the ground" information from institution leader that is not otherwise available. great discussions."

"yes, it has been useful."

“yes. it is now clear to me that we have numerous arb. institutions in Africa. I would wish, moving forward, efforts be made to have a main accreditation body.”

“definitely very useful, because it was held in Africa and many African were involved.”.

“this conference is very useful because I know the rules of arbitration in very important countries in Africa.”

“this conference has helped to create a track perception to the overriding need for arbitration institutions on the continent to evolve a focused integrated capacity and institutional development for excellence.”

“the conference has given me an insight of the arbitration centres in Africa. there should be a dedication of government to support arbitration institutions in their respective countries.”

“it was properly structured and resourced and persons quite capable.”

“I'm very pleased that attend the conference and this my first time to attend a conference like that. That give me a good opportunity to know a wonderful people. Thank you for very thing.”

“yes, and I hope to have 2nd and 3rd in near future.”

“it discussed the obstacles and I think we have many answers for this obstacles.”

“the conference was very useful to Africa in general and to me in particular that because we got enough information about the situation of arbitration in Africa in respect of laws/centres/obstacles/challenges”

Report on the Conference on the Role of Arbitration Institutions in the Development of Arbitration in Africa, AU Commission, Addis Ababa, 23 July 2015

On 23 July 2015 at the very graceful premises of the African Union (AU) Commission in Addis Ababa, over 60 arbitration practitioners in Africa gathered to discuss the role of African arbitration institutions in the development of arbitration in Africa. The conference was organised by Dr Emilia Onyema, an arbitration specialist at SOAS University of London and co-convened by Judge Edward Torgbor of Kenya. The AU Legal Counsel's Office co-hosted the conference with SOAS while ICAMA (Abuja), Foley Hoag LLP (Washington D.C), Stephenson Harwood LLP (London) and LACIAC (Lagos) sponsored the event. Attendees at the conference came from the following countries: Cameroon, Ethiopia, Ghana, Ivory Coast, Kenya, Mauritius, Nigeria, Rwanda, South Africa, Sudan, UAE, United Kingdom, USA, and Zambia.

The conference set out to examine why arbitration references involving at least one African party are not administered by institutions in the continent. This question is part of the wider question of why arbitrations generated by Africans are not resolved in Africa by African arbitrators and practitioners. Prof Vincent Nmehielle, the General Counsel of the AU in his welcome address referred to the need to set up a pan-African arbitration court for Africa and an African institute of Arbitration for training in arbitration.

The first panel discussions was from the following regional arbitration institutions: AFSA/Africa ADR of South Africa, Lagos Regional Centre (West Africa), Kigali Centre (East Africa), and OHADA. This panel was chaired by Ms Alexandra Meise of Foley Hoag LLP. The second panel discussion was from the following national institutions: Ghana Arbitration Centre, Lagos Court of Arbitration Centre, LCIA-MIAC (Mauritius), Addis Ababa Chamber Centre, and Zambia Centre for Dispute Resolution. This panel was chaired by Chief Bayo Ojo, SAN of ICAMA (Abuja). Both sets of institutions administer domestic and international arbitration references, organise trainings and create awareness of arbitration in their respective domains. Ms Bernadette Uwicyeza of Kigali noted the interesting outreach service the centre offers to businesses to create an awareness of arbitration. She stated that the Centre is beginning to see a change in the behaviour of businesses who now more frequently seek information on the use of arbitration from the centre. Ms Deline Beukes of AFSA/ADR Africa mentioned AFSA recent agreement to set up an Africa/China joint arbitration centre in both Shanghai and Johannesburg to which she invited other institutions in Africa to participate. This "super" institution will administer arbitration of disputes emanating from Africa/China business relationships. Mr Aka of OHADA CCJA noted their relationship discussions with both the Lagos Regional Centre and Kigali Centre. He also noted that though OHADA (since 2008) had expanded its official languages to four (French, English, Spanish and Portuguese), the texts of OHADA laws will be translated into the other languages. Mr Ikatari of the Lagos Regional Centre stated the willingness of the Centre to invite more Africans onto its panel of arbitrators. Ms Megha Joshi of the Lagos Court of Arbitration (LCA) Centre noted the LCA small claims scheme specifically set up to help aspiring arbitrators gain experience of arbitration. Mr Duncan Bagshaw of LCIA-MIAC mentioned the affiliation of the Centre with the London Court of International Arbitration (LCIA) and how this has impacted on the credibility of MIAC but also noted that such affiliation is not a fundamental requirement for a centre to thrive. Mr Emmanuel Amofa of Ghana Arbitration Centre (GAC) mentioned the independent nature of the GAC and the role of the Ghana ADR Act in the operation of the Centre. From the Addis Ababa Chambers, Mr Yohannes Woldegebriel noted the growth of the Centre's domestic caseload and made a clear link with the increase in construction

activities in Ethiopia for this year-on-year growth. Finally Judge Charles Kajimanga, as chair of the Zambia Centre noted that the Centre has basically remained inactive though it acts as appointing authority.

The third panel was chaired by Prof Paul Idornigie of NIALS and was composed of arbitration practitioners who had used these and other international arbitration institutions. These users shared from their experience, ideas on viability and sustainability of African institutions. Panellists were from Uganda (Jimmy Muyanja), Ethiopia (Leyou Tameru), London (Kamal Shah and Stuart Dutson), Ivory Coast (Jimmy Kodo) and Kenya (Kariuki Muigua). The panel generally agreed that African institutions must have rules that are fit for purpose and are continually updated, keep costs down and be well equipped to meet the needs of their users. Dr Muigua kicked off the session with a clear list of various physical infrastructures which African governments need to implement for the states to attract international arbitration with seat in the continent. Some of these were security, funding of various governmental institutions, health facilities and their maintenance. Mr Jimmy Muyanja discussed the public lack of understanding of arbitration and its relationship with the courts and how this can be managed. He also mentioned an interesting concept of implementing an arbitration moot competition but for judicial officers (not students as is the norm) with judges acting as arbitrators for the moot. Dr Stuart Dutson of Eversheds LLP on his part noted the limitations of the more traditional international arbitration centres and urged African institutions to embrace innovation and distinctiveness while avoiding these. He listed cost and complicated proceedings as two of these limitations. Ms Leyou Tameru discussed the need for transparency by institutions on the arbitrators listed on their panels, need to publish awards for scrutiny, languages used by institutions, communication by institutions of their annual reports and events, among others, and finally the need for institutions to focus on intra-Africa trade and disputes arising there-from as the future. Mr Kamal Shah of Stephenson Harwood LLP listed the following issues which institutions need to address: timely response to emails and telephone messages, communicating to the public what they do, run their institutions like a company with a board of advisers, create a database of African arbitrators and make these available to other institutions. Others are to seek government support and patronage and funding, keep their procedures short and simple, create a forum for institutions to share experience, and engage with foreign law firms as collaborators. My Jimmy Kodo concluded the discussions with a list of areas OHADA CCJA is working on improving. These include more accessible information, improved website, provide template of suggested arbitration clauses, and to provide continuing professional training for arbitrators

The fourth panel chaired by Prof Fidelis Oditah, QC, SAN considered other legal issues which need to be in place to project arbitration in Africa. The panel was composed of Judge Edward Torgbor (Kenya) who discussed the availability of arbitral expertise on the continent; Dr Emilia Onyema discussed the need for judges to support arbitration; Mr Tunde Fagbohunlu discussed the role of practitioners in appointing African arbitrators. He specifically noted the connection between the firm of external lawyers appointed by clients and the choice of arbitrators. Finally, Mr Brett Hathaway, General Counsel DHL (Africa/ME) set out three prerequisites an arbitration institution must possess before he considers using it. These are: fair processes, knowledgeable arbitrators, and cost effective procedures. Prof Oditah concluded proceedings by noting that African states as parties, must also take some responsibility. He noted that for example, African states appoint foreign firms and foreign arbitrators, even with full knowledge of Africans with requisite expertise.

Participants noted the refreshing opportunity of hearing from the various centres on what they do and expressed the need for better collaboration among the institutions. They further noted the need for continued engagement with governments to provide a viable space to attract arbitration to their states. It was concluded that it is for African businesses and governments to appoint suitably qualified African firms and African arbitrators, and this can always be done in collaboration with foreign firms while choosing African arbitration institutions to administer their references.

It was finally agreed that this was a good initiative which must be encouraged so that there remains continued dialogue between the institutions, their users and the public at large. The involvement of the AU was lauded and it is hoped that the AU will engage more with various arbitration stakeholders on the continent. The conference achieved its purpose and aim as evidenced by the feedback from attendees (above).

Next steps/actions

1. Dr Emilia Onyema will compile and make publicly available a comprehensive list of arbitration institutions/centres operating within the continent.
2. Arbitration institutions are to make publicly available their statistical data which should include numbers of domestic, intra-Africa and international cases, arbitrators appointed, etc.
3. Arbitration institutions are to make publicly available the names of arbitrators on their panels.
4. Each arbitration institution will implement ideas from the exchanges at the conference and notify participants of their impact on the quality of services they render and numbers of arbitration references they host in 2016.
5. To create a forum (possibly online) for exchange of ideas and information by the arbitration institutions.
6. To harmonise the content of the arbitration training offered by the arbitration institutions.
7. Convenors and other delegates will engage with the Office of the Legal Counsel of the AU to explore how to implement the suggestions made the GC of the AU on creating an African Institute of Arbitration that will provide tailored training on arbitration; and the creation of a pan-African continental court of arbitration.

Dr Emilia Onyema, *PhD, FCI Arb*

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Friday, 31 July 2015

