

The Role of African States and Governments in Supporting the Development of Arbitration in Africa

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Discussion Paper

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Introduction

This is the third conference in the series of four identified themes in our research project on transforming and enhancing the use of arbitration as the dispute resolution of choice within the African continent. The four year research project itself is titled 'Creating a Sustainable Culture of Arbitration as a mechanism for Commercial Dispute Resolution in Africa'. This research project is necessary because as stated in my introduction to the *Addis Ababa Discussion Paper*¹:

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.

The primary purpose of this research project is to:

increase the visibility (of arbitration practitioners in Africa) and the viability of arbitration in the domestic, intra-Africa and international dispute resolution market.

To achieve this, this project:

will pull together stakeholders in the sector of dispute resolution, articulate and monitor their practices and (measure the) 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 practitioners; and the state. The second (goal) of this research (project) is knowledge sharing between researchers and academics, arbitration practitioners, and arbitration institutions outside and within the continent.²

Our second conference which was hosted by the Lagos Court of Arbitration (22-24 June 2016) focused on the role of judges and courts in the promotion and viability of arbitration in Africa. The conference papers and discussions critically examined the disposition of various African courts towards arbitration.³ In 2016, our Lagos Conference Paper partly concluded:

¹ Our first conference held in the premises of the African Union in Addis Ababa on 23 July 2015. The conference papers are available online at: <http://eprints.soas.ac.uk/20421/> (hereafter, 'Addis Ababa Conference Paper')

² Addis Ababa Conference Paper, page 23.

³ For more information see the SOAS/LCA Conference Booklet available for download at: <http://eprints.soas.ac.uk/22727/> (hereafter, 'Lagos Conference Paper')

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. In addition and even more viable is the importance of creating an enabling legal environment for domestic and intra-Africa arbitration references to thrive.

This third conference will interrogate these concluding words in greater depth.

Aims of the conference

This conference primarily aims to examine how African States and governments can better support the growth of domestic and international arbitration in their individual countries and collectively across the continent.

This third conference will therefore focus on the role of African governments (executive and legislative branches) in creating efficient legal and regulatory environments for arbitration (and its support industries) to thrive. The papers and discussions will interrogate the role of African States and governments in arbitration. It is important to clearly define this role especially with the private nature of the arbitration process. Having identified these generic roles governments play in arbitration, the discussions will closely interrogate the performance of various African States and explore how they can contribute to the promotion and growth of arbitration in their various states and across the continent.

The role states and governments play in arbitration can be conveniently divided into legal and non-legal regimes. The legal or regulatory regime will focus primarily on the legislative arm of government by examining the process and content of laws relevant to arbitration. In this context there will be a Roundtable discussion with UNCITRAL⁴ to interrogate the reasons behind the few adoptions of UNCITRAL texts by African States and suggest possible remedial measures.

Though arbitration is a private dispute resolution mechanism, at various stages reliance on the powers of States and governments may become necessary. In addition, States have competence over such matters as: law reform, opening up of the African legal market, legal professional training as it relates to university curricula (to include training in dispute avoidance and ADR); negotiating and concluding investment related agreements; sovereign immunities; etc.

It is now recognised that a strong regulatory regime with weak or inadequate supporting environment, primarily made up of non-legal factors which are within the competence of the executive arm of government, will not pull in the arbitral references.⁵ In recognition of this fact, the gaps in the support facilities by various African governments will be examined and possible solutions suggested. The primary aim of examining the impact of such non-legal factors is to provide a holistic discussion of the gaps which need to be filled to produce a sustainable environment that will attract disputes for resolution on the continent. It will also help government officials in attendance

⁴ UNCITRAL is the United Nations Commission on International Trade Law
<http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html>

⁵ Such non-legal factors include: efficient transportation; power; communication technologies; hotels; security; political stability; etc.

understand the far reaching impact of governmental policies and actions. In this way our conference proceedings will contribute to the continued development of an enabling environment for commercial activities to thrive on the continent, thereby enhancing its economic development.

In examining the role of states and government in arbitration, investment arbitration cannot be left out. This is primarily because states are primary players in concluding investment agreements and as disputants in investment arbitration. States therefore need to create a viable environment for dispute avoidance and where disputes arise, effectively and efficiently manage the dispute resolution process, and comply with legitimate awards, while sparingly deferring to the protection of sovereign immunity.

This third conference will therefore discuss:

- The role of African States and governments in making their countries attractive seats for arbitration.
- How African States and governments can better support the development of arbitration in their various countries.
- How African States and governments can better promote the use of arbitration in resolving commercial disputes.
- How arbitration specialists can partner with and support African States and governments in their tasks of promoting the use of arbitration.
- How UNCITRAL can better engage with African States and governments in achieving her mandate.
- The reformation and modernisation of arbitration laws in African States.
- Whether African States should open up their legal markets to embrace new developmental initiatives.
- The right of disputants to freely choose their legal representation in arbitration and its implication for the legal market of African States.
- The role of government lawyers in supporting the development of arbitration.
- Whether African governments are ready and well equipped to participate beneficially in international investment arbitration.
- The impact of the recourse to sovereign immunity on African States.
- The tension between the exercise of the regulatory powers of the State and support for arbitration by African States.
- Whether Africa needs a pan-African court for arbitration and related matters.

Appendix

This Discussion Paper includes three Tables. Table 1 lists the 54 independent States that make up the African continent and their arbitration related laws and conventions as at end of December 2016. Tables 2a and 2b reproduce the rankings for African States in the World Bank Ease of Doing Business Report, 2017 (with some 2016 comparators).

Expected output from the conference

The papers presented at the conference and a final report from the conference will be published online on the SOAS and conference websites and made freely available to the general public.

Venue for the conference

This third SOAS Arbitration in Africa conference will be hosted by the Cairo Regional Centre for International Commercial Arbitration.⁶ The Cairo Regional Centre is the oldest of the AALCO⁷ Arbitration institutions in Africa. Others are the Lagos Regional Centre (1989)⁸ and the Nairobi Regional Centre (2013)⁹. The Cairo Regional Centre remains very active in the administration of international arbitration cases market and is a very viable centre which attracts references from across the world primarily the MENA¹⁰ region. We are hopeful that with the greater engagement of African countries with each other, disputants searching for tried, tested and experienced arbitral institutions to administer their dispute within the continent, will find the Cairo Regional Centre an excellent choice.

Conference website

All information relevant to the main research project and all the connected conferences including registration for this conference are available online at: <http://www.researcharbitrationafrica.com/>

Outline of the conference panels

As has become customary with our conferences, the first panel will receive progress reports from arbitration institutions operating in Africa. On this panel, representatives from the various arbitral institutions will present the actions and results (if any) they have taken since our last conference in Lagos and any differences such actions have made on the development of arbitration in their respective countries. This panel will be chaired by Ms Xander Meise.

The second panel will examine the attitude of the governments of various African States towards arbitration. This panel will effectively set the context for the conference deliberations and will be moderated by Judge Edward Torgbor. The third panel will be a roundtable discussion focusing on UNCITRAL arbitration related texts and their possible adoption (or adaptation) by African countries. This roundtable discussion will be moderated by Dr Emilia Onyema. The fourth panel will examine the legal environment for investment arbitration in Africa. The speakers on this panel will critique the performance of African countries on the *Ease of Doing Business* (World Bank Rankings and Report); the environment for foreign and domestic investments and the engagement of African states in investment arbitration. This panel will be moderated by Ms Rose Rameau. The fifth panel will provide the view of non-African practitioners and will be moderated by Professor Emmanuel Gaillard. Speakers on this panel will share the experiences of other countries in supporting arbitration. The last panel will be a response from the attorneys-general from various African countries and will be moderated by Chief Bayo Ojo.

The conference keynote address will be given by Judge Abdulqawi Yusuf, Vice-President of the International Court of Justice (ICJ) while the after dinner speech will be given by Datuk Professor Sundra Rajoo, the Director of the Kuala Lumpur Regional Centre.

⁶ Cairo Regional Centre <<http://crica.org/>>

⁷ AALCO is the Asian-African Legal Consultative Organisation <<http://www.aalco.int/scripts/view-posting.asp?recordid=1>>

⁸ Lagos Regional Centre <http://www.rcicalagos.org/>

⁹ Nairobi regional Centre <<http://www.ncia.or.ke/about-ncia/>>

¹⁰ MENA refers to the countries in the Middle East North Africa region.

There will be several social events focused on networking for delegates. This is one of the primary goals of these conference series: creating a meeting point for Africans in arbitration to interact with a view of working together.

Appendix

Table 1: 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	12 August 2016	-
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	Rwanda	Arb & Conciliation in Commercial Matters Law No 005 of 2008	29 Jan 2009	14 Nov 1979
40	Sao Tome & Principe	Voluntary Arb Law No 9 of 2006	18 Feb 2013	19 June 2013
41	Senegal	OHADA UAA	15 Jan 1995	21 May 1967
42	Seychelles	Commercial Code 1977 & Code of Civil Procedure 1920	-	19 April 1978
43	Sierra Leone	-	-	14 Oct 1966

44	Somalia	Civil Procedure Code, Book III, 1974	-	30 Mar 1968
45	South Africa	Arbitration Act No 42 of 1965	1 Aug 1976	-
46	South Sudan	-	-	18 May 2012
47	Sudan	Arbitration Act 2005	-	9 May 1973
48	Swaziland	Arbitration Act No 24 of 1904	-	14 July 1971
49	Tanzania	Arbitration Act 1931 revised 2002	11 Jan 1965	17 June 1992
50	Togo	OHADA UAA	-	10 Sept 1967
51	Tunisia	Arbitration Code, Law No 93-42, 1993	15 Oct 1967	14 Oct 1966
52	Uganda	Arbitration & Conciliation Act 2000 (amended 2008)	12 May 1992	14 Oct 1966
53	Zambia	Arbitration Act No 19 of 2000	12 June 2002	17 July 1970
54	Zimbabwe	Arbitration Act No 6 of 1996	28 Dec 1994	19 June 1994

OHADA UAA = OHADA Uniform Arbitration Act 11 March 1999

Sources: <https://arbitrationinafrica.com/countries/>; http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html;
<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>; <http://ohada.org/>.

Table 2a: Sub-Sahara African Countries: World Bank's Ease of Doing Business Ranking (2017)

No	Country	Global Ranking (2016)	Ranking in SS-Africa	Starting a business	Getting Electricity	Protecting minority investors	Trading across borders	Enforcing contracts
1	Mauritius	49 (32)	1	4	4	2	4	1
2	Rwanda	56 (62)	2	8	7	12	6	10
3	South Africa	74 (73)	3	22	5	1	25	16
4	Botswana	71 (72)	4	32	11	5	3	21
5	Kenya	92 (108)	5	19	3	8	9	8
6	Seychelles	93 (95)	6	26	15	13	5	20
7	Zambia	98 (97)	7	15	23	10	31	22
8	Lesotho	100 (114)	8	20	21	15	2	9
9	Ghana	108 (114)	9	17	9	7	29	17
10	Namibia	108 (101)	10	38	10	4	17	11
11	Swaziland	111 (105)	11	33	25	20	1	40
12	Uganda	115 (122)	12	36	28	14	22	4
13	Cape Verde	129 (126)	13	14	17	39	13	2
14	Tanzania	132 (139)	14	25	1	35	40	3
15	Malawi	133 (141)	15	30	33	19	15	27
16	Mozambique	137 (133)	16	24	32	18	10	46
17	Mali	141 (143)	17	16	22	34	7	32
18	Cote d'Ivoire	142 (142)	18	5	13	26	27	13
19	Gambia	145 (151)	19	37	24	42	12	15
20	Burkina Faso	146 (143)	20	7	42	30	8	35
21	Senegal	147 (153)	21	12	29	21	19	24
22	Niger	150 (160)	22	11	31	33	20	29
23	Sierra Leone	148 (147)	23	10	37	9	35	12
24	Togo	154 (150)	24	21	20	36	14	25
25	Comoros	153 (154)	25	35	14	29	11	43
26	Benin	155 (158)	26	6	35	31	21	38
27	Burundi	157 (152)	27	1	44	24	30	28
28	Zimbabwe	161 (155)	28	44	30	11	26	37
29	Mauritania	160 (168)	29	9	19	17	23	7
30	Guinea	163 (165)	30	23	27	32	32	18
31	Ethiopia	159 (146)	31	41	12	43	34	6
32	Madagascar	167 (164)	32	18	46	16	18	33
33	Gabon	164 (162)	33	31	26	38	33	42
34	Sao Tome & Principe	162 (166)	34	2	8	46	16	44
35	Sudan	168 (-)	35	34	6	47	44	26
36	Nigeria	169 (169)	36	27	41	3	41	23
37	Cameroon	166 (172)	37	29	2	25	46	34
38	Guinea Bissau	172 (178)	38	39	43	22	28	36
39	Congo, Republic	177 (176)	39	40	39	28	42	31
40	Liberia	174 (179)	40	3	38	44	45	41
41	Angola	182 (181)	41	28	34	6	43	47
42	Chad	180 (183)	42	43	40	37	36	30
43	Equatorial Guinea	178 (180)	43	46	18	23	38	14
44	Congo, Dem Rep	184 (184)	44	13	36	40	47	39
45	Central African Republic	185 (185)	45	47	45	27	24	45
46	South Sudan	186 (187)	46	42	47	45	39	5
47	Eritrea	189 (189)	47	45	16	41	37	19
48	Somalia	190 (-)	48	45	48	48	30	16

2016 ranking is in bracket.

Source: <http://www.doingbusiness.org/>

Table 2b: North African Countries: World Bank's *Ease of Doing Business* Ranking (2017)

No	Country	Global Ranking (2016)	Ranking in MENA Region	Starting a business	Getting Electricity	Protecting minority investors	Trading across borders	Enforcing contracts
1	Morocco	68 (75)	4	3	6	5	3	2
2	Tunisia	77 (74)	5	8	3	10	7	7
3	Egypt	122 (131)	11	2	11	8	15	19
4	Algeria	156 (163)	15	13	14	17	19	8
5	Djibouti	171 (171)	17	19	19	18	12	20
6	Libya	188 (188)	20	20	16	20	9	17

2016 ranking is in bracket. The MENA region comprises of 20 jurisdictions.

Source: <http://www.doingbusiness.org/>