

# SOAS Arbitration in Africa Conference 2016

22 - 24 June 2016



## Venue

Lagos Court of Arbitration  
1A Remi Olowude Street, Lekki Peninsula Phase 1  
Lagos, Nigeria

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## Principal Organisers and Funders of the Conference

### SOAS University of London Team

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

**Co-convenor:** Judge Edward Torgbor (Kenya).

**Rapporteur:** Mr Ikpeme Nkebem (ICAMA)

Mr Prince Olokotor (SOAS)

Mr Tolu Obamuroh, (LCA)

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

**Administration:** Ms Christine Djumphah School of Law, SOAS, University of London.

### Lagos Court of Arbitration Team

Ms Megha Joshi, General Counsel.

Ms Opeyemi Akinlade, Counsel.

Mr Tolu Obamuroh, Associate General Counsel

### Financial Sponsors

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Ms Xander Meise

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Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA)

International Lawyers for Africa (ILFA)

Mrs Kate Emuchay

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## **2. Programme**

## SOAS Arbitration in Africa Conference Series

**Rethinking the Role of Courts and Judges in supporting Arbitration in Africa, Lagos Court of Arbitration International Centre for Arbitration and ADR, Conference Hall, Lagos, 22-24 June 2016**

### Programme

**22 June 2016:** Arrivals

1800-2000: Welcome reception for delegates: Hard Rock Café, Victoria Island, Lagos.

**23 June 2016**

**Morning Session Rapporteur: Mr Ikpeme Nkebem (ICAMA)**

0830-0930: Registration and welcome

0930-0955: Welcome formalities (Ms Megha Joshi, LCA Centre)

1000-1015: Introduction of SOAS Research Project by Dr Emilia Onyema, SOAS

1015-1035: Keynote address by Judge Edward Torgbor (Kenya/Ghana): Judges and the Effectiveness of Arbitration/ADR in Africa.

1030-1045: Tea/Coffee Break

1045-1245: Panel 1: Report from Arbitration Institutions and actions from Addis Conference (chair: Ms Xander Meise): Panel discussion by the following:

- Dr Fidele Masengo (Kigali IAC, Rwanda)
- Ms Ndanga Kamau (LCIA-MIAC, Mauritius)
- Dr Narcisse Aka (CCJA, OHADA)
- Hon Wilfred Ikatari (Lagos Regional Centre)
- Mr Emmanuel Amofa (Ghana Arbitration Centre)
- Mr Ustaz Alshaby (Arab Centre for Arbitration, Sudan)
- Ms Megha Joshi (Lagos Court of Arbitration, Lagos)

**1245-1400: LUNCH**

**Afternoon Session Rapporteur: Mr Prince Olokotor (SOAS)**

1400-1600: Panel 2: The role of Courts and Judges in Arbitration (chair: Justice Ayo Phillips, rtd)

- Dr Emilia Onyema: The Symbiotic Nature of the Relationship between Judges and Arbitrators.
- Dr Hakeem Seriki: Judicial Support during the Arbitration Reference.
- Prof Uche Ewelukwa: African Courts and International Investment Law.
- Ms Leyou Tameru: Publication of Arbitration related Judgements from Africa: I-Arb Judgment Gathering Project.
- Prof CJ Amasike: Training of African Judges in the Law and Practice of Arbitration.
- Ms Rukia Baruti: The Training and Recognition of African Lawyers: AILA Project

1605-1615: Tea/Coffee Break

1615-1815: Panel 3: The view from Domestic Arbitrators (chair: Prof Paul Idornigie, SAN)

- Mr Babajide Ogundipe (Nigeria)
- Ms Ryham Ragab (Egypt)
- Dr Sylvie Bebohi (OHADA, Cameroon)
- Mr Phillip Alier (East Africa)
- Dr Tunde Ogowewo (Nigeria)
- Prof Andrew Chukwumerie (Nigeria)

**1900-2100: Evening Drinks Reception and Dinner at LCA**

**Day 2: 24 June 2016**

**Morning Session Rapporteur: Mr Tolu Obamuroh (LCA)**

1000-1220: Panel 4: Practitioners experience on the role of judges in arbitration in Africa (chair: Ms Lise Bosman of PCA)

- Mrs Funke Adekoya (Nigeria)
- Mr Tunde Fagbohunlu (Nigeria)
- Mr Jimmy Muyanja (Uganda)
- Mr Ahmed Bannaga (Sudan)
- Ms Esine Okudzeto (Ghana)
- Mr Edward Luke II (Bostwana/Sierra Leone)
- Mr Isaiah Bozimo (perspective of young practitioners)

**1230-1400: LUNCH**

**Afternoon Session Rapporteur: Dr Jean Alain Penda**

1400-1600: Panel 5: Foreign practitioners' experience of the attitude of African Judges towards arbitration (chair: Mr Ucheora Onwuamaegbu)

- Mr Steven Finizio, Wilmer Hale LLP
- Mr Roderick Cordara, QC, Essex Court Chambers London
- Mr Duncan Bagshaw, Stephenson Harwood LLP
- Mr Baiju Vasani, Jones Day LLP
- Mr Charles Nairac, White & Case, Paris
- Mr John Gaffney, Al Tamimi, UAE

1600-1615: Tea/Coffee Break

1615-1730: Panel 6: Response from Judges on how they can better support arbitration/ADR (chair: Judge Edward Torgbor)

- Hon Chief Justice Mahmoud, Chief Justice of Nigeria
- Lady Justice Irene Chirwa Mambilima, Chief Justice of Zambia
- Judge Marcel Serekoisse-Samba, President of OHADA CCJA
- Prof. Haider Ahmed Daffala, Chief Justice of Sudan

1730-1800: Closing and action points from the conference

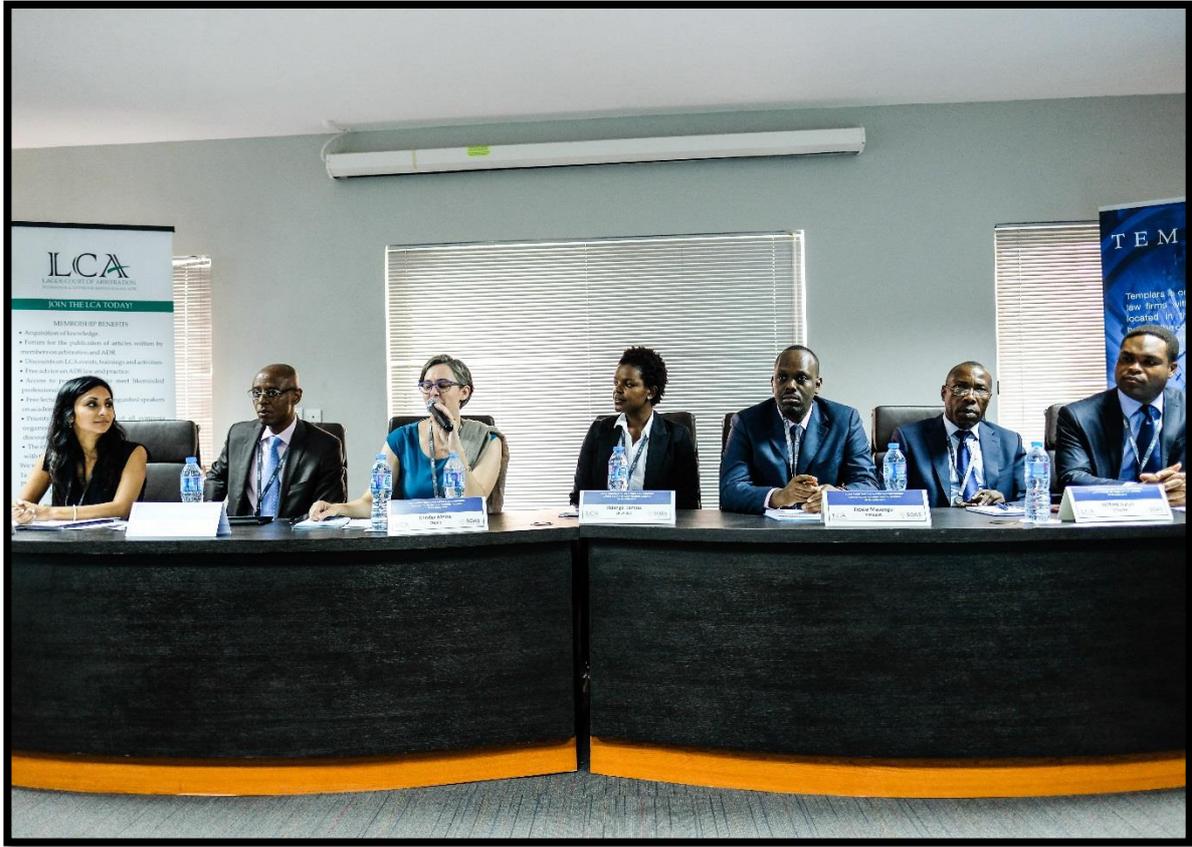
1930-2200: Closing dinner and after dinner speech by Chief Bayo Ojo, FCI Arb, SAN: sponsored by ICAMA, Abuja.

**SOAS Arbitration in Africa Conference Series**

**Rethinking the Role of Courts and Judges in supporting Arbitration in Africa**



**Group Photograph at The Lagos Court of Arbitration**



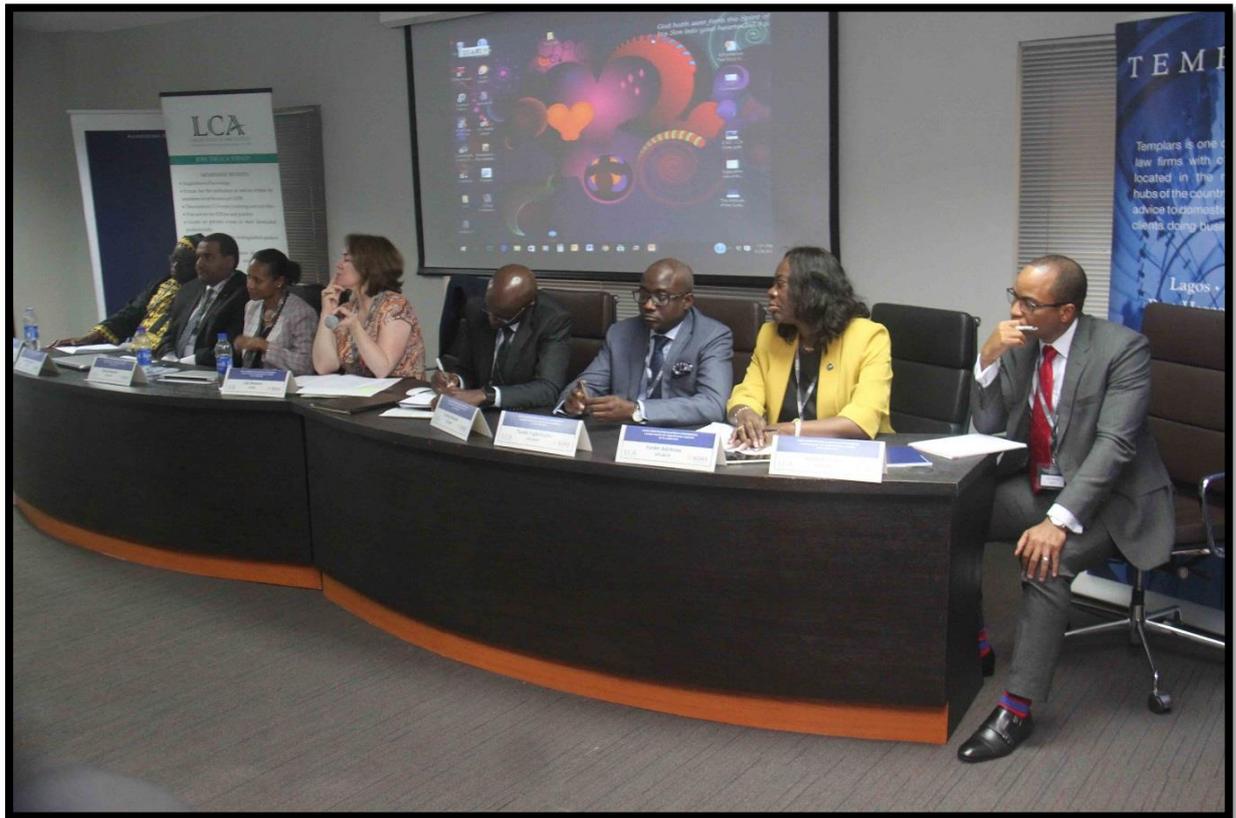
**Panel 1: Feedback from Arbitration Institutions**



**Panel 2: Role of Courts in Arbitration**



**Panel 3: View from Domestic Arbitrators**



**Panel 4: View from African Practitioners**



**Panel 5: View from Foreign Practitioners**



**Panel 6: Response from Judges**

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## **3. Speakers Profiles**

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## Rapporteur

### Mr. Ikpeme Nkebem



**Mr. IKPEME NKEBEM** is the General Manager of International Centre for Arbitration and Mediation Abuja (ICAMA). He previously served as the Branch Administrator of the Chartered Institute of Arbitrator (UK) Nigeria Branch. A Member of the Chartered Institute of Arbitrators (UK) and Member Chartered Institute of Economics of Nigeria. He is a non-lawyer with a keen interest in ADR and a rich experience spanning over a decade in Management, Investment Portfolio and Hospitality & Recreation

## Speakers Profiles – Panel 1

### Ms. Xander Meise



**MS. ALEXANDRA (XANDER) KERR MEISE** Alexandra (Xander) Meise's practice at Foley Hoag LLP focuses on international arbitration (including investor-State and commercial arbitration), public international law disputes, and sovereign representation. Xander advises governments, NGOs, and multinational corporations on legal reforms, human rights compliance and conflict prevention, and resolution of human rights disputes through alternative mechanisms. She is an adjunct law professor at Georgetown University, teaching International Human Rights Law. Before her legal career, Xander worked in finance and international political development.

### Mr. Fidele Masengo



**DR. FIDELE MASENGO** is Board member of Kigali International Arbitration Center (KIAC) who has been appointed to serve as KIAC Executive Director assuming temporary the duties of KIAC General Secretary. He has served as the Deputy Chief of Party and Senior Technical Adviser within USAID-Chemonics International- LAND Project since June 2012 up to May 2015. Before joining USAID-LAND Project, Fidèle worked and is still working as legal consultant. He also worked as independent Advocate registered with Rwanda Bar Association since 2005 and in various other key legal positions in Rwanda, most notably in Rwanda Ministry of Justice as the Director of Public Prosecution services and Relations with the courts (from 1999 to 2001) and as the Director of the Administration of Justice (from 2001 to September 2004).

### Ms Ndanga Kamau



Ms. NDANGA KAMAU is Ndanga is Registrar of LCIA-MIAC in Mauritius. Prior to that, she lived in Cape Town, Geneva, Houston, London and Nairobi. Her career spans international law, international development, and the extractive industries in law firms, governments, research institutions and international organisations.. Ndanga has an undergraduate degree in economics, postgraduate diplomas in law and an LL.M in international dispute settlement. She was called to the Bar by Middle Temple. Ndanga is Kenyan.

### 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 Aka is author of several publications on arbitration, including the commentary to OHADA Uniform Act on arbitration law, practice and institutions in Africa.

### Hon. Wilfred Dan Ikatari



**HON. WILFRED D. IKATARI** is a Legal Practitioner, Arbitrator, Administrator and Agricultural Economist. He has a vast legal experience at the bar and the bench having practiced and thereafter sat as Presiding Chairman (Judge) at the Investment and Securities Tribunal in Nigeria. He has participated in several local and international seminars, workshops and conferences. He was appointed Director of the Lagos Centre in July, 2014 and has since then been working tirelessly to reposition the Centre in its rightful place.

### 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 is a lecturer in Alternative Dispute Resolution at the Ghana School of Law.

### 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.

## Rapporteur

### Mr. Prince Olokotor



**MR. PRINCE OLOKOTOR** is a Barrister and Solicitor of the Supreme Court of Nigeria. He holds a Bachelor of Laws (LL.B) degree from the University of Benin, Nigeria and, a Master of Laws (LL.M) degree from the University of Glamorgan (now University of South Wales), United Kingdom. In 2012, Prince was appointed a research assistant at SOAS, University of London for a research project on: "The Multi-door Court House (MDC) Scheme in Nigeria – A Case Study of the Lagos MDC". Prince is currently a PhD candidate, on the recognition and enforcement of transnational commercial arbitral awards in England and Nigeria, at SOAS, University of London.

## Speakers Profiles – Panel 2

### Justice Ayo Phillips



**JUSTICE AYOTUNDE PHILLIPS** attended the University of Lagos, Nigeria and the Nigerian Law School in 1974. She was appointed a Judge of the Lagos State High Court in February 1994. In June 2012 she was sworn in as the 14th Chief Judge of Lagos State and retired from the High Court Bench on the 26th July 2014. She is a Member of the Chartered Institute of Arbitrators.

### Dr. Emilia Onyema



**DR EMILIA ONYEMA** is a senior lecturer in International Commercial Law, and Associate Dean at SOAS, University of London; Fellow of the Chartered Institute of Arbitrators; qualified to practice law in Nigeria; a non-practising Solicitor in England; alternative tribunal secretary of the CSAT; and is listed on various arbitrator panels. Her current research is on, “Creating a sustainable culture of arbitration as a mechanism for commercial dispute resolution in Africa”.

### Prof. Uche Ewelukwa



**PROFESSOR EWELUKWA** is also currently the Secretary-General of the African Society of International Law, is the Co-Chair of the Africa Interest Group of the American Society of International Law, and is an active member of the Nigerian Bar Association

### 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. 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).

## PROF. C J AMASIKE



**PROF. C J AMASIKE** has worked as a Special Adviser to the Honourable Attorney- General of the Federation and Minister of Justice and at different times was Chairman of various Federal Government of Nigeria Committees and Panels. He is a Fellow and Chairman of Council of International Dispute Resolution Institute [IDRI] and the Founder & President of Arbitration and Alternative Dispute Resolution In Africa [AAAAA], which firm is a leading Arbitration & ADR Service Provider. He is also an Author, Speaker at several International and Local Conferences and Visiting Professor & External Examiner to a number of Local and Foreign Universities.

## Ms. Rukia Baruti



**MS. RUKIA BARUTI** is the founder and Managing Director of Africa International Legal Awareness (AILA), a not-for-profit organisation working to enhance legal professional competence and raise awareness of existing expertise in international economic laws in Africa. Prior to founding AILA, Rukia practiced law at SJ Berwin's International Arbitration Group. She regularly sits as arbitrator and is currently completing a PhD at the University of Geneva on foreign investment laws in Africa.

## Speakers Profiles – Panel 3

### 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

### Mr. Babajide Ogundipe



**MR. BABAJIDE OGUNDIPE** is a partner in the Lagos firm, Sofunde, Osakwe, Ogundipe & Belgore. He is a former Chairman of the Nigerian Branch of the Chartered Institute and was the first President of the Lagos Court of Arbitration serving between 2010 and 2014. He practises in Lagos primarily providing advice on anti-corruption and anti-fraud matters, as a litigator in commercial disputes and as an arbitrator.

### Ms Ryham Ragab



**Ms RYHAM RAGAB** specialises in international commercial and investment arbitration and corporate law. She worked at leading international law firms in Egypt, New York, London and Paris. At Mishcon de Reya New York LLP, she specialised in international commercial arbitration.

### Sylvie Bebohi Ebongo



**DR. SYLVIE BEHONI EBONGO** is a research officer at the Association for the Promotion of Arbitration in Africa (APAA) based in Yaounde, Cameroon. BEBOHI holds a Ph.D. in Law, with a specialization in international arbitration from the University of Amiens (France) and is currently undertaking the necessary steps to become a member of the French and Cameroonian Bar. Bebohi works also as an independent consultant for law firms. She joined APAA in 2008 as an assistant researcher. She has also been a trainee lecturer at the University of Amiens.

### Mr Phillip Alier



**MR PHILLIP ALIKER'S** practice comprises multi-jurisdictional commercial contractual disputes for corporations and governments of high-value and often of considerable reputation risk and/or with significant political and/or economic implication. Phillip is currently sitting in Kenya as a sole arbitrator in a substantial construction dispute under the Rules of the Chartered Institute of Arbitrators. Recognised in Chambers & Partners 2015 as a Foreign Expert (Uganda) in disputes with an East African connection.

### Dr. Tunde Ogowewo



**DR. TUNDE OGOWEWO** is a Senior Lecturer at The Dickson Poon School of Law, Kings College London. He teaches Corporate Finance Law, Corporate Governance, and Mergers and Acquisitions Law at postgraduate level. He is also a Joint Global Hauser Professor of Law at NYU Law School, New York and Visiting Professor of Corporate Governance at the National University of Singapore. He is presently on the editorial board of the African Journal of International and Comparative Law (Edinburgh University Press) and the Securities Market Journal. He is a qualified Barrister (Middle Temple) and Solicitor (England and Wales) and a Barrister and Solicitor of the Supreme Court of Nigeria. He also sits as arbitrator and has also acted as Counsel to the Federal Republic of Nigeria in investment disputes.

## Professor Andrew Chukwumerie



Prof. Chukwuemerie, SAN, FCI Arb (UK) attended the Colliery Comprehensive Secondary School, Ngwo, Enugu and later proceeded to study Law at the Universities of Maiduguri (for the LL.B) and Lagos (for the LL.M). He was called to the Nigerian Bar in December 1989 after passing the Bar Finals (BL) examination that year. He became a Professor of Commercial Law in 2005 after 7 years of lecturing/teaching. He was appointed a Senior Advocate of Nigeria in 2009 and was sworn in in 2010. Before he became a lecture of Law he had been in private practice since his call to the Bar in 1989. He has been in that practice since then.

## Rapporteur

### Mr. Tolu Obamuroh



**MR TOLU OBAMUROH** obtained his LL.M from Columbia Law School, where he was an editor of the American Review of International Arbitration Journal while also serving as a Research Assistant to Professor George Bermann in respect of the American Law Institute’s Restatement (Third) of International Arbitration. He is a doctoral candidate at Penn State Law. Tolu has worked in Nigerian and international law firms including Babalakin & Co., WilmerHale, London (Visiting Foreign Associate) and a brief stint at White & Case LLP, New York (Weinstein Fellow). He is currently the Associate General Counsel of the Lagos Court of Arbitration.

## Speakers Profiles – Panel 4

### Ms Lise Bosman



Lise Bosman is Senior Legal Counsel at the Permanent Court of Arbitration and Executive Director of the International Council for Commercial Arbitration (ICCA). She is also an Adjunct Professor at the University of Cape Town, a Fellow of the Association of Arbitrators (Southern Africa) and is the general editor and contributing author of *Arbitration in Africa: a Practitioner’s Guide* (Kluwer). She can be contacted via [lbosman@pca-cpa.org](mailto:lbosman@pca-cpa.org) or +31.70.302.2833.

### Mrs. Olufunke Adekoya, SAN



**MRS ‘FUNKE’ ADEKOYA** is a Partner at *ÉLEX*, one of the largest full service commercial law firms in Nigeria where she heads the Dispute Resolution practice group. She is a Chartered Arbitrator and a Vice President of the ICC Court of Arbitration. She both leads as arbitration counsel and also often sits as an arbitrator in both international and domestic arbitration proceedings [institutional and ad hoc].

### Mr. Babatunde Fagbohunlu SAN



**MR. BABATUNDE FAGBOHUNLU** is a partner and head of the Litigation, Arbitration and ADR Practice Group in Aluko & Oyeboode. 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.).

### 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, NCIA legislation Committee and has arbitrated and mediated cases within Uganda.

### Mr Ahmed Bannaga



**MR AHMED BANNAGA** is a practicing lawyer in Sudan and a member of the Chartered Institute of Arbitrator –London holding the title –MCI Arb. He graduated from SOAS, University of London with LL.M in Dispute & Conflict Resolution where he specialized in international arbitration in 2009. He is now the Representative of the Sudanese Bar at the Solicitors Regulation Authority in England & Wales (SRA) – London, the Founder and Partner at Bannaga & Fadlabi LLP and The legal advisor of numerous local and multinational companies in Sudan. He has many publications in relation to arbitration.

### Ms. Esine Okudzeto



**MS ESINE OKUDZETO** is a partner and heads one of Sam Okudzeto & Associates' Corporate/ Commercial law groups. Her focus is on Mergers and Acquisitions, Capital Markets, Oil and Gas law, Corporate law, Commercial law, Labour law, Intellectual property and Arbitration. Esine has performed due diligence for several international clients advising her clients on mergers and acquisitions and the formation of Joint Ventures in Ghana. Esine played a leading role in a Fortune 500 company's acquisition of Unilever Plc's oil palm business in Ghana

### Mr Edward Luke II



**MR EDWARD LUKE II** is the Managing Partner of the firm and one of the leading lawyers in Botswana with a wealth of local and international experience and is listed in Who's Who of Southern Africa, and the International Who's Who of professionals in Washington D.C. He has spoken at several International Conferences on International Arbitration including at the Chartered Institute of Arbitrators, in Mombasa Kenya in August 2014 , the Commonwealth Lawyers Association Conference in Glasgow, Scotland in April 2015, International Arbitration at the International Bar Association conference in Vienna in October 2015 and on Arbitration and judicial case management at the International Bar Association Africa Regional conference in Livingstone Zambia in November 2015 to name a few.

### Mr Isaiah Bozimo



**MR. ISIAH BOZIMO** is a Senior Associate and Deputy Head of Chambers in Law Firm of Ikwueto. He is a Fellow of the Chartered Institute of Arbitrators (UK) and has over nine years post qualification experience as a Barrister and Solicitor. He is an alumnus of the London School of Economics and Political Science and Queen Mary University of London. Isaiah's practice is Commercial Dispute Resolution and Commercial Advice.

## Rapporteur

### 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. 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

## Speakers Profiles – Panel 5

### Mr Ucheora Onwuamaegbu



**MR. UCHEORA ONWUAMAEGBU** is an International Attorney at Arent Fox LLP, Washington, D.C. He provides advisory services to governments and corporations, and sits as arbitrator in international disputes. For about a decade, Uche was Senior Counsel at the World Bank's International Centre for Settlement of Investment Disputes (ICSID), and was a lawyer at the United Nations Compensation Commission, Geneva, before that. He is also qualified in Nigeria and in the UK.

### Mr Steve Finizio



**MR. STEVE FINIZIO** is recognized as one of the leading international arbitration lawyers in London in the *Chambers UKGuide*, named in the *Euromoney Guide to the World's Leading Experts in Commercial Arbitration* and recognized for his standing in the field of international arbitration in *Legal 500*, *Chambers Global*, *Chambers Europe*, *Global Arbitration Review's Who's Who in International Arbitration*, *PLC Which Lawyer?* and Legal Media Group's *The Best of the Best*. Mr. Finizio's practice includes international arbitration and alternative dispute resolution, general commercial litigation, and internal investigations, focusing on complex commercial and regulatory issues. Mr. Finizio also serves as an

### Mr Roderick Cordara



**MR. RODERICK CORDARA** has an expansive commercial litigation and arbitration practice and acts as adviser and advocate in a spectrum of courts and arbitration tribunals worldwide. He has offices in London, Singapore and Sydney. He is admitted to appear in the Courts of the United Kingdom, the European Court of Justice, the Singapore International Commercial Court, and the State and Federal Courts of Australia. He has arbitrated in cases in Europe, Asia, and Africa. His principal practice is advocacy. He also sits as arbitrator. Additionally, he is admitted to appear in the Singapore International Commercial Court and he is a silk in both the UK and Australia.

### Mr. Duncan Bagshaw



**MR DUNCAN BAGSHAW** is a barrister, called to the bar in 2003. He is Counsel in Stephenson Harwood's international arbitration and Africa teams. Duncan's practice is focussed upon representing African governments and corporations, particularly on cases concerning infrastructure and development projects, and shareholder disputes. From 2012 to 2015 Duncan was the first Registrar of the LCIA Mauritius International Arbitration Centre, developing the institution and the arbitration law and environment in Mauritius. of Cape Town, Tsinghua (Beijing) and Wolverhampton (UK).

### Mr Baiju Vasani



**MR BAIJU VASANI** is an international arbitration lawyer and arbitrator. He has served as counsel and arbitrator in international arbitrations involving ICSID, ICC, LCIA, ICDR, SIAC, UNCITRAL Rules, bilateral investment treaties (BITs), the Energy Charter Treaty, NAFTA, DR-CAFTA, and public international law. He also has advised states on the negotiation and drafting of treaties and companies in investment structuring.

### Mr Charles Nairac



**MR. CHARLES NAIRAC** is a partner in the International Arbitration Group of White & Case, based in the firm's Paris office. He has been involved in international commercial and investment arbitrations, under most of the major institutional rules as well as in ad hoc arbitrations, in English and in French. He currently lectures on international arbitration at the Universities of Paris II (Panthéon-Assas) and Nancy. He is recognized in leading legal directories such as Chambers, Legal 500, Who's Who Legal, the International Who's Who of Construction Lawyers and the GAR 100.

### Mr. John Gaffney



**MR. JOHN GAFFNEY**, Al Tamimi & Company, Abu Dhabi, United Arab Emirates – Senior Associate; LLM (Amsterdam); specializing in international arbitration in various areas, including construction, corporate/commercial, energy, investment treaty, IP, and telecommunications matters under variety of rules (DIAC, ADCCAC, ICC, LCIA, UNCITRAL); arbitrator in DIAC cases and WIPO name disputes and an Expert in ICC Expertise proceedings; Case Notes Editor of EIAR; 2016 ICCA Ambassador.

## Speakers Profiles – Panel 6

### 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, Participator and Presenter at numerous arbitration conferences, seminars and workshops in Kenya, Ghana, Nigeria, Uganda, Lesotho, South Africa, and England.

### 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. 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.

## 4. Discussion Paper

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## Discussion Paper

Dr Emilia Onyema (SOAS)

### Introduction

This is the second 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* for our first conference in this series which examined the role of arbitration institutions in this process<sup>1</sup>:

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.<sup>2</sup>

This second conference focuses on another primary stakeholder in the promotion of arbitration in Africa: courts and judges. This conference specifically focuses on the role of judges and courts in the promotion and viability of arbitration in Africa. The conference papers will critically examine the current disposition towards arbitration of the courts and judges from various regions of the continent. The judgments and comments of judges in arbitration related disputes will be examined to objectively determine their disposition towards arbitration. This is in recognition of the fact that decisions of judges in arbitration related matters greatly influence the perception of users and their advisors (both within and outside the continent) on how conducive the legal environment is towards arbitration.

This perception feeds directly into the nomination of cities in Africa as seats of arbitration, and the appointment of arbitration institutions and arbitration practitioners, within the continent. Effectively therefore, the perception of a poor attitude towards upholding arbitration agreements and valid arbitral awards or of lack of support of the arbitral process by a judiciary, directly and negatively impacts on the attractiveness of a state as seat of arbitration. This perception in turn discourages arbitral references and the use of legal advisors and arbitration institutions in the particular jurisdiction. This lack of arbitral references consequently reduces the number of arbitration related

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<sup>1</sup> 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)

<sup>2</sup> Addis Ababa Conference paper, page 23.

decisions judges in such jurisdictions make. Another peculiar issue affecting most African jurisdictions is that such few decisions available are not easily accessible. This state of affairs seemingly predominant in a number of African jurisdictions does not encourage disputants to choose to arbitrate their disputes in Africa and so ought to be reversed and improved upon.

We, as stakeholders, believe that this narrative needs to change. The desired change is to make African jurisdictions viable seats for international, intra-Africa and domestic arbitration references; and to make accessible the authoritative decisions of African judges on arbitration related matters.<sup>3</sup> Our conferences built around our core research project, aim to drive or at least contribute to this process of change.

Arbitration does not displace national courts but in an ideal world the two processes co-exist in a harmonious symbiotic relationship (which as in any marriage may not be harmonious all the time!). In this regard, Michael Kerr once succinctly noted,

international arbitration cannot function without the assistance of national courts. Only they possess the coercive powers to enforce agreements to arbitrate, as well as the resulting awards.<sup>4</sup>

It can (for now) be boldly asserted that national courts are indispensable to a successful arbitration environment. However such indispensability arises from national courts playing a supportive and not disruptive role. So what exactly does such a supportive role involve? The discussion below quotes extensively from section 3 of the paper I delivered at our Addis Ababa Conference titled “Africa as a Viable Space for Arbitration: Role of National Courts and Laws”<sup>5</sup>

### **Supportive role of national courts**

The legal framework that supports arbitration includes the courts which appear to be the primary limb that is out of joint or sync with developments in this sector. All current 55 African states 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 (or in some states the Constitutional Court) as the highest court. Though for matters falling within the OHADA Treaty, the Common Court of Justice and Arbitration (CCJA), as a supranational court is the court of last resort. The same also applies to the East Africa Court of Justice for member states of the EAC Treaty<sup>6</sup>. The jurisdiction and powers of these courts are also contained in national constitutions which usually provide rights of access and appeal to litigants.

As is well known, courts at the seat of arbitration may become involved in the process broadly 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).<sup>7</sup> Before the commencement of an arbitration reference, for example, one party to the dispute may contest the existence or scope of the

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<sup>3</sup> The publication of these arbitration related judgements will ensure that African judges contribute to the growth of global arbitral jurisprudence, and also ensure that our “African voices” are heard and taken seriously by the international arbitral community.

<sup>4</sup> Michael Kerr, “Concord and Conflict in International Arbitration” (1997) 13 Arb Int 121 at 127.

<sup>5</sup> This paper is at pages 141 to 147 of the Addis Ababa Conference Discussion Paper.

<sup>6</sup> See for jurisdiction of the EACJ: [http://eaci.org/?page\\_id=27](http://eaci.org/?page_id=27) (accessed 12 February 2016).

<sup>7</sup> For more details see Emilia Onyema, “Power shift in international commercial arbitration proceedings”, (2004) Vol 14 (Nos 1 & 2) Caribbean Law Review, pages 62-77.

arbitration agreement before a national court so that the other party will be forced to assert the existence, scope and effect of the agreement. Such litigation may give rise to anti-suit injunction.<sup>8</sup> The involvement of the court at this stage can be supportive of the arbitral reference. This will be where a robust view is taken to ensure the effectiveness and performance of the arbitration agreement.<sup>9</sup> However it may also lead to courts frustrating the arbitration process even before it starts. Therefore, issues such as the jurisdiction of the arbitral tribunal and validity of the arbitration agreement, 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 honour their promise under the arbitration agreement 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 the problem. The forum of contestation is the problem 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.<sup>10</sup> 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) to determine its jurisdiction. It is perfectly legitimate for disputing parties to challenge an arbitration agreement that in their view is invalid (or to use the terminology of the New York Convention and UNCITRAL Model Law, “null and void, inoperative or incapable of being performed”<sup>11</sup>). It is however for the courts to determine whether parties in pursuing what on its face is a legitimate challenge, should be allowed to circumvent their bargain (to arbitrate their disputes) using the court’s processes. So for example most arbitration laws clearly state that the arbitral tribunal can make such determinations as part of certifying its jurisdiction.<sup>12</sup> So a national court that interferes with the arbitral jurisdiction conferred by its national law not only flouts that law but also denies requisite support for arbitration.<sup>13</sup>

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. National courts may also be requested to support the arbitral reference with the taking of evidence, summoning witnesses and enforcing orders made by the arbitral tribunal. 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 costs and frustrate those disputants who wish to progress the

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<sup>8</sup> For example as required under Art II.3 of the New York Convention, 1958.

<sup>9</sup> The effectiveness of the arbitration agreement is the consent of the parties to arbitrate and not litigate the covered dispute. It is this consent that courts need to give effect.

<sup>10</sup> Examples of such laws include: art. 11 OHADA Uniform Act on Arbitration 1999; s. 24 Ghana ADRA 2010; s. 12 Nigeria ACA 1988; art. 22 Egypt Arbitration Act 1994; s. 17 Kenya Arbitration Act 2012.

<sup>11</sup> Art. II.3 of the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958, New York; art. 8(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (2006 revision).

<sup>12</sup> See examples in footnote no 10 above.

<sup>13</sup> Pursuit of interim measures of protection in the courts before constitution of the arbitral tribunal or where the applicable arbitral rules do not provide for emergency arbitrator or special measures process or pre-arbitral procedure, is not regarded as a breach of the arbitration agreement. For this see for example, art.9 UNCITRAL Model Law (1985 with 2006 revision)

resolution of the dispute in their chosen forum of arbitration. It is such interferences that earn courts the reputation of not being supportive of arbitration or of being interventionist and even disruptive of the arbitral process. There is a perception (correctly or wrongly held) that the courts in most African jurisdictions do not play a supportive role to arbitration (whether domestic or international). This conference will examine these issues with the full participation of judges, whose views on these issues will be critically considered.

I also note that some African states (such as Mauritius) have taken various steps to ensure very limited interference or recourse to the courts in their laws and have established specialist commercial courts manned by judges with specialist knowledge of arbitration law and practice. This conference will interrogate this option to determine whether it will be necessary for states or governments/legislators to step in through legislation as Mauritius has done.

It is my considered view that as it relates to the symbiotic relationship between arbitration and the courts, this may not be one of those challenges we legislate our way out of. My view is that, it will be important to tighten the laws (so show a clear policy preference in favour of arbitration) in this regard but that cannot be all. It will also be equally (or even more) important to properly educate the judges who will interpret these laws and possibly get a buy-in from them so they fully understand the policy considerations and consider these in the exercise of their interpretative powers. Examples abound of courts in other jurisdictions taking into consideration clearly defined policy concerns in interpreting various laws.<sup>14</sup> So to clarify, African states may need to re-examine the contents of their arbitration laws to update them so they are relevant to modern arbitration practice. It is even more important to drastically reduce the opportunities available to disputants to make references (so feeding the interventionist inclination of courts) to courts before and during the arbitral process. This will leave the parties to arbitrate covered disputes and the arbitrators to determine their jurisdiction as permitted by the applicable law and to decide the substantive dispute in the arbitral award, which is the legitimate expectation of the disputing parties.

Access to and determination of disputes by competent courts is part of the Universal Principles on which the definition of the rule of law adopted in the World Justice Project (WJP) Rule of Law Index is based. This Principle no 4 is described as a system where:

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.<sup>15</sup>

The Index notes that the delivery of:

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<sup>14</sup> For example, in *Hebei Import and Export Corp v Polytek Engineering Co. Ltd* (1999) YBCA Vol XXIVa 652, the High Court of Hong Kong SAR held that to set aside an award, it must be so fundamentally offensive to the jurisdiction's notions of justice that it cannot be expected to overlook it. On 19 January 2016 the English High Court (Queen's Bench Division) in *Pencil Hill Ltd v US Citta di Palermo SpA* [2016] WL 212897, enforced an award in which it upheld a penalty clause (which is not enforceable under English law) which was valid under the applicable law of the contract (which was Swiss law). See also *Westacre Investments v Jugoimport-SDPR Holding Co. Ltd* [1998] 3 WLR 770 where in the face of competing two public policies (corruption v enforcement of awards) the English Court of Appeal favoured enforcement of awards.

<sup>15</sup> World Justice Project Rule of Law Index 2015 at page 10.

Effective civil justice requires that the system be accessible, affordable, free of discrimination, free of corruption, and improper influence by public officials. .. It also necessitates that court proceedings are conducted in a timely manner and not subject to unreasonable delays. ... This factor also measures the accessibility, impartiality, and efficiency of mediation and arbitration systems that enable parties to resolve civil disputes.<sup>16</sup>

It will not be too difficult to find in each African country examples of cases that fall foul of these principles. It is this that explains why the African countries surveyed in the *Index* scored very poorly.<sup>17</sup> The WJP Rule of Law Index 2015 scored 18 countries from sub-Saharan Africa<sup>18</sup> and three from North Africa<sup>19</sup> with Botswana retaining its top ranking. Interestingly, there is no known major arbitration institution located in Botswana, and its arbitration law dates from 1959 though it is party to both the New York and ICSID Conventions.

It remains my view that these effectively are the standards African courts and judges need to consistently strive to attain. The authors of the *Index* conclusion show a clear link between an effective rule of law regime and development in its various permutations:

Where the rule of law is weak, medicines fail to reach health facilities, criminal violence goes unchecked, laws are applied unequally across societies, and foreign investment is held back. Effective rule of law helps reduce corruption, improve public health, enhance education, alleviate poverty, and protect people from injustices and dangers large or small.<sup>20</sup>

### **Problems of Court Interference**

The problem of court interference will be examined as it relates to complicity of the court in parties breaching their arbitration agreement and delay caused by satellite litigations.

### **Breach of arbitration agreement**

As is well known, the arbitration agreement is a contract in which the parties promise each other to arbitrate covered disputes that arise from a defined legal relationship to which the agreement is connected. Therefore failure or refusal by one party to the arbitration agreement to arbitrate a covered dispute that arises is a clear breach of the party's contractual promise. Such a breach should be remedied and not acquiesced in by the courts. However it appears that the current situation in quite a number of jurisdictions in Africa is that the courts acquiesce in this breach by one of the parties. It is not too far-fetched to state that by adjudicating such disputes (covered by an arbitration agreement) courts thereby become complicit (advertently or otherwise) in the active breach by the parties. It is therefore important for a strong policy position to be canvassed and taken against such improper judicial interference.

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<sup>16</sup> Ibid at page 13.

<sup>17</sup> See for the 2015 rankings: [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf) (accessed 8 February 2016).

<sup>18</sup> These are (in order of ranking out of 102 countries worldwide): Botswana (31), Ghana (34), South Africa (36), Senegal (38), Malawi (61), Tanzania (72), Zambia (73), Cote d'Ivoire (76), Burkina Faso (78), Madagascar (82), Liberia (83), Kenya (84), Sierra Leone (87), Ethiopia (91), Uganda (95), Nigeria (96), Cameroon (97), and Zimbabwe (100).

<sup>19</sup> These are (in order of ranking and rank out of 102 countries worldwide): Tunisia (43), Morocco (55) and Egypt (86).

<sup>20</sup> WJP Rule of Law Index 2015 at page 9.

## Delay

The second consequence of such lack of support is the delay that satellite litigation occasions in arbitration. If I take an example of delay periods which is in the public domain from the English Court of Appeal decision in *IPCO v NNPC*<sup>21</sup> in 2015, it took 10 years for a simple preliminary question to be dealt with before the Nigerian courts while a former Chief Justice of Nigeria, giving expert evidence stated that it may take a generation for a dispute to go through the hierarchy of courts in Nigeria.<sup>22</sup> It appears the experience of delay before the Nigerian courts is similar to what obtains in other African jurisdictions. Delay before courts must be tackled. It defies understanding how parties can spend under one year in arbitration to get a final award and 12 years after are still going through the courts and in some cases (such as *IPCO v NNPC*) in various jurisdictions just to get the award enforced. The simple commercial question in such cases is why go through arbitration (with all the additional costs) only to end up in the litigation process? In the World Justice Project Rule of Law Index already referred to above, in all the 21 African countries surveyed, 'duration of the cases' featured strongly in influencing people's decision whether or not to go to court.<sup>23</sup> So, we must acknowledge that delay in the courts is not good for arbitration business. This will therefore lead to business flight to other developed jurisdictions by disputing parties (including domestic businesses) choosing to arbitrate their disputes in other jurisdictions. The cumulative effect as already mentioned is less work for our arbitration institutions; less work for our lawyers particularly arbitration specialists as counsel and as arbitrator; and lack of input from our judges in shaping arbitral jurisprudence and practice; and finally less arbitration references with seats in African states. This attitude of our courts leads to a loss for all involved.

## Appendix

Verifiable data is a major resource not easily accessible on the continent but necessary to substantiate assertions commonly made about Africa. Five tables have been compiled in the Appendix of some data which speakers and delegates may find useful to refer in their discussions. Table 1 is a list of the 54 independent states that make up the African continent and their arbitration related laws and conventions as at end of April 2016. Table 2 is a list of 72 centres that describe themselves as offering services for the administration of arbitration disputes operating in various countries of the continent. Table 3 is a list compiled from available ICC data on the number of African parties/cities/arbitrators involved in arbitrations under the ICC from 2000-2015.<sup>24</sup> Table 4 is data from the Headquarters of the Chartered Institute of Arbitrators of their African membership who have taken their courses in 2015.<sup>25</sup> Table 5 is a ranking of 21 African countries in various categories by the World Justice Rule of Law Index for 2015.

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<sup>21</sup> *IPCO v NNPC* [2015] EWCA Civ 1144 and see Emilia Onyema, "IPCO v NNPC Saga and liability of the Nigerian Legal System" in *The Guardian Newspapers* of 22 December 2015 available online at: <http://eprints.soas.ac.uk/21653/> (accessed on 3 February 2016).

<sup>22</sup> As outrageous as the testimony was, it is still happening and it would have been interesting to find out from the former CJN what he did while CJ to reduce these times.

<sup>23</sup> WJP Rule of Law Index 2015 at pages 45-46.

<sup>24</sup> The data from the ICC are from various ICC Bulletins but the details of the 2015 statistics were kindly provided by Mr Tunde Ogunseitan, Counsel at the ICC International Court of Arbitration, Paris, for which I am most grateful.

<sup>25</sup> This data was kindly provided by Mr Nigel Joseph, the Members Services Manager, for which I am most grateful.

## **Conclusion**

Courts therefore play a major role in arbitration generally and 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. In addition and even more viable is the importance of creating an enabling legal environment for domestic and intra-Africa arbitration references to thrive. Thus the centrality of the role of courts and judges in the promotion and attractiveness of arbitration to a jurisdiction cannot be over emphasised.

## **Aim of the conference**

This conference primarily aims to diagnose the reasons African seats and courts do not feature prominently in international arbitration practice. The interrogation will also extend to domestic and intra-Africa arbitration references.

## **Expected contribution from the conference**

The panel discussions will focus on: defining, streamlining and appraising the role of courts in arbitration; clarifying the symbiotic relationship between courts and arbitration; identifying the current gaps in this relationship; and formulating a strategy on how to turn this situation around for adoption and implementation by the courts and judges in various African states. The strategy will consist of clear action points which will be strongly recommended to judiciaries across the continent for adoption.

## **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 website and made freely available to the general public. In addition peer-reviewed versions of the papers presented at the conference will be published in a special volume of the LCA Dispute Resolution Journal.<sup>26</sup>

## **Venue for the conference**

This conference is co-hosted by the Lagos Court of Arbitration Centre (LCA)<sup>27</sup> in their newly completed ultra-modern international conference centre at the megacity of Lagos, Nigeria in West Africa. As noted at the Addis Ababa Conference in 2015, each conference in this series will be hosted by a relevant institution within Africa and in each of her major regions. Each host-centre volunteers and the LCA kindly volunteered to host this 2016 conference.

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<sup>26</sup> This is the journal of the Lagos Court of Arbitration.

<sup>27</sup> The main host of the four conferences in the series is SOAS University of London.

## Conference website

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

## Outline of the conference sessions

This conference is spread over two days partly in response to the feedback from attendees at our Addis Ababa conference in July 2015.<sup>28</sup> On the evening of **Wednesday 22 June 2016**, there will be a delegate's welcome reception.

## Rapporteurs

There are four rapporteurs who will summarise the deliberations of the panels which we hope to email to the delegates at the end of each day. The rapporteurs are: Mr Ikpeme Nkebem (ICAMA); Mr Prince Olokotor (SOAS); Mr Tolu Obamuroh (LCA) and Dr Jean-Alain Penda.

On **Thursday 23 June 2016**, registration and welcome ceremonies for the conference will start at 0830. Ms Megha Joshi the Executive Secretary/Chief Executive Officer of our host, The Lagos Court of Arbitration Centre (LCA) will welcome all participants. Dr Emilia Onyema will briefly introduce the SOAS Arbitration in Africa research project and where this conference fits and what the project hopes to achieve. Judge Edward Torgbor (Kenya/Ghana) will then give the keynote speech on "Judges and the Effectiveness of Arbitration/ADR in Africa".

**Panel 1** will be in the format of a panel discussion to receive feedback from the various arbitration institutions that attended the Addis Ababa conference. This session will be chaired by Ms Alexandra Meise of Foley Hoag LLP, Washington DC. As part of the monitoring dimension of the research project, each arbitration institution will report on the steps they have taken and implemented since (and as a result of) our Addis Ababa conference. Panellists include: Dr Fidele Masengo (KIAC, Kigali); Ms Ndanga Kamau (LCIA-MIAC, Mauritius); Dr Narcisse Aka (CCJA, OHADA); Hon Wilfred Ikatari (Lagos Regional Centre); Mr Emmanuel Amofa (GAC, Ghana); Ms Megha Joshi (LCA); and Mr Ustaz Alsahaby (ACA, Sudan). This panel will discuss the following issues which shall be followed by a question and answer session:

- Any changes the institution has made to its service delivery since Addis Ababa 2015.
- Any results from the implementation of those changes.
- Any additional steps taken by the institution to improve its services.
- Any collaboration between the institution and other institutions in Africa or elsewhere.
- Any plans by the institution to grow its domestic or regional market.

After lunch, **Panel 2** will examine general issues relevant to the role of courts and judges in arbitration. This session aims to clearly articulate when, how and why courts become involved in arbitration proceedings with seat in the continent. It will also examine how the perception of judges and courts can be assessed through making available to the public, arbitration related judgments from various courts in the continent. Dr Emilia Onyema will examine the different stages courts/judges become involved in the arbitral process and interrogate the role/function of judges in arbitration and set out the symbiotic nature of these relationships. Dr Hakeem Seriki will then examine the support judges

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<sup>28</sup> Participants wished additional time to discuss while speakers wanted more time to fully present their papers.

can provide to arbitration during the reference with primary focus on interim measures. Professor Uche Ewelukwa will examine the impact of the perception of African judiciaries on the ability of the continent to host investment arbitration hearings. Ms Leyou Tameru will discuss her I-Arb project on gathering arbitration related decisions and making these available from one online platform. Prof CJ Amasike will discuss the training facilities on arbitration available for judges across the continent. Ms Rukia Baruti will then examine the training and qualification of African lawyers provided by AILA. This panel will be chaired by Judge Ayo Phillips, the former Chief Judge of Lagos state and member of the LCA Court of Arbitration. Each speaker on this panel will make a 15 minutes presentation followed by a question and answer session.

After tea, speakers on **Panel 3** will discuss the view from domestic arbitrators on their perception of the role of judges in arbitration from their experience of sitting as arbitrators in African countries. The panellists will focus on their perception of African judiciaries in their role as arbitrators. They will also discuss and suggest how the judiciary can better support them in performing their task as arbitrators. In this way the panellists will articulate their expectations of the judiciary and the support they require from the judges to effectively and efficiently perform their own functions. The panellists are: Mr Babajide Ogundipe, the former President of the LCA (Nigeria); Ms Ryham Ragab (Egypt); Dr Sylvie Bebohi (OHADA/Cameroon); Mr Phillip Alier (East Africa); Dr Tunde Ogowewo (Nigeria); and Prof Andrew Chukwumerie (Nigeria). This session will be chaired by Prof Paul Idornigie, SAN, FCIArb, who is an experienced domestic and international arbitrator. This panel will discuss the following issues which shall be followed by a question and answer session:

- Any positive experience of sitting as domestic arbitrator in Africa.
- Any negative experience and how they dealt with it.
- Any need during the hearing for court assistance and how this was executed.
- Any need for such assistance but decided against asking the court: why and what did you do?
- Any experience of your appointment or jurisdiction being challenged before a court?
- Any thoughts on how the laws and courts can better support arbitrators.

This will bring **DAY 1** of the conference to a close.

**Friday 24 June 2016** will start with **Panel 4** composed of arbitration practitioners sharing their experience on the role of judges in arbitration in Africa. The speakers are drawn from various regions of Africa for a comparative view of the attitude of judges on the continent. Each speaker will examine whether the perception of poor arbitration related decisions from the courts in the continent is justified. Where there is evidence of such poor decision making, the speakers will make suggestions on possible solutions. Topics for discussion will include: what their experience has been in Africa; where the gaps are in arbitral practice in Africa; what suggestions they have for improving arbitration in Africa, including the view from young arbitration practitioners. The panellists are: Mrs Funke Adekoya, SAN (Nigeria); Mr Tunde Fagbohunlu, SAN (Nigeria); Ms Esine Okudzeto (Ghana); Mr Jimmy Muyanja (Uganda); Mr Ahmed Bannaga (Sudan); Mr Edward Luke, II (Botswana/Sierra Leone); and giving the view of young practitioners, Mr Isaiah Bozimo (Nigeria). This panel discussion will be chaired by Ms Lise Bosman of the Permanent Court of Arbitration at The Hague. This panel will discuss the following issues which shall be followed by a question and answer session:

- Any positive experience of court assistance with arbitration: when an arbitration agreement is challenged; assistance with appointing arbitrator; support during the arbitration and enforcement or challenge of the award.
- Any negative experience of court intervention in arbitration?
- In your opinion, where are the gaps and any suggestions on how these can be fixed?
- Any suggestions on the causes of delay and how these can be fixed in arbitration-related litigation in your jurisdiction?
- Any suggestions on how counsel can better support the judges in their task.

After lunch, **Panel 5** composed of attorneys from various jurisdictions outside Africa will examine why foreign law firms prefer to adopt foreign seats or pursue enforcement of arbitral awards against an African party in a non-African jurisdiction. Speakers will also share their experience (if any) of sitting as arbitrators or appearing as counsel in arbitrations held in Africa. The panellists are: Mr Steven Finizio ( WilmerHale, London); Mr Roderick Cordara, QC (Essex Court Chambers, London); Mr Baiju Vasani (Jones Day, London); Mr Duncan Bagshaw (Stephenson Harwood, London); Mr Charles Nairac (White & Case, Paris); and Mr John Gaffney (Al Tamimi, UAE). This session will be chaired by Mr Ucheora Onwuamaegbu of Arent Fox LLP and formerly of ICSID, Washington DC. This panel will discuss the following issues which shall be followed by a question and answer session:

- Any personal experience of African judiciaries: negative or positive.
- What is your perception of any particular African judiciary and why?
- Where from your experience are the gaps?
- Any suggestions on how in your opinion, these gaps can be fixed?
- What will make you advise your clients to choose an African seat?
- What will make you appoint African arbitrators with expertise?

Having listened to all of these presentations, judges from various African states will give their views on the issues that have been discussed over the two days in **Panel 6**. The speakers on this panel are chief justices of various countries of the continent. Each speaker will respond to the issues raised in the earlier sessions and discuss any solutions being put in place to help make their country (and the continent) more attractive to hosting arbitrations and contributing to the global arbitral jurisprudence. The panellists are: Chief Justice Mahmoud (Nigeria); Lady Justice Irene Chirwa Mambilima (Zambia); Judge Marcel Serekoisse-Samba (OHADA, CCJA); Prof Haider Ahmed Daffala (Sudan). This session will be chaired by Judge Edward Torgbor, former judge and currently active arbitrator.

This will be followed by a closing dinner sponsored by ICAMA (Abuja) with after dinner speech given by Chief Bayo Ojo, SAN.

# 5. Articles

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## RAPORTEURS' REPORT

Mr Prince Olokotor; Mr Ikpeme Ikebem and Dr Jean-Alain Penda

### Introduction

The second SOAS Arbitration in Africa Conference was held at the Lagos Court of Arbitration, Lagos, Nigeria from 22nd to 24th June, 2016. Present at the Opening Ceremony was the Chief Judge of Nigeria represented by Hon. Justice John Inyang Okoro, The Honorable Chief Judge of Zambia Hon. Justice Irene Chirwa Mambilima, The former Chief Judge of Lagos State Hon. Justice Ayotunde Philips among other dignitaries and participants from all over Africa, Europe, and USA.

This conference started with an evening reception at the Hard Rock Café, a few feet away from the shores of the Lagos Lagoon with excellent cocktails and canapés on the evening of 22 June 2016. On the morning of 23 June, conference delegates registered and were each given a goodie bag containing the conference materials and promotional items from the sponsors of the conference. Ms Megha Joshi, the Executive Secretary of the Lagos Court of Arbitration (LCA) welcomed delegates to the LCA premises for the second edition of the 'SOAS Arbitration in Africa Conference Series'. She reminded all, especially those who attended the first conference last year in Addis Ababa at the African Union Commission, of her comments about the LCA. She noted that the LCA was very happy to host the second edition of the conference in their permanent headquarters building located at the Okunde Bluewaters Scheme Peninsular (which is planned to be surrounded with resort, shopping malls and recreational facilities). She noted that the LCA now has a team of talented staff and over 450 members with interest in ADR. She stated that LCA partnership with international organisations, collaboration and support from funding partners has played a major role in their achievements; she enjoined all to enjoy their stay while they share, learn and engage with each other during the dialogues and deliberations.

Dr. Emilia Onyema of SOAS briefly told the audience about the on-going SOAS arbitration in Africa research project. The four year project which commenced last year with a conference at Addis Ababa will in 2017 be hosted by the Cairo Regional Centre for Arbitration and finally in 2018 by Kigali International Arbitration Centre. Hon. Justice Edward Torgbor then delivered his keynote address on 'Judges and the Effectiveness of Arbitration/ADR in Africa'.

The conference was generally structured into 6 panels over two days with 3 panels on each day.

### Panel 1

The first panel focused on 'Report from Arbitration institutions and actions from Addis conference.' This panel was chaired by Ms Xander Meise and the speakers were Ms Megha Joshi of the Lagos Court of Arbitration Lagos, Mr Kizito Beyuo of the Ghana Arbitration Centre, Ms Ndanga Kamau of LCIA-MIAC Mauritius, Dr Fidele Masengo of Kigali IAC, Rwanda and Mr Jimmy Kodo of CCJA, OHADA. Ms Meise gave a brief recap of what happened at the Addis conference and raised some questions for discussion by the panel on their learning from the Addis conference; provision of information on their activities; and their challenges. From the responses, the institutions were engaging in many collaborations with arbitration organisations and institutions within and outside Africa. However most of them still have various difficulties with publishing data on their activities. Various suggestions were made by the delegates including use of law students as interns to collate and process their data for publication, and encouraging the centres to publish arbitration related judgments from their jurisdictions and the list of the arbitrators that operate under their rules. There is a clear need for greater transparency of the activities of the centres.

## Panel 2

The second panel examined 'The Role of Courts and Judges in Arbitration.' It was chaired by Justice Ayotunde Phillips (Rtd.) with Dr Emillia Onyema, Dr Hakeem Seriki, Ms Leyou Tameru and Ms Rukia Baruti as panellists.

The various discussions by the speakers focused on the question of how courts and judges can support arbitration in Africa. The Chair remarked that arbitration as one aspect of justice dispensation and requires judicial support not only for the appointment of arbitrators, as the case may be, but right through to enforcement of the arbitral award. Several dimensions of the collaborative support were assessed and elaborated on by the speakers. First, the symbiotic nature of the relationship between arbitrators and judges were examined. Second, ways of the judicial support during arbitration reference suggested. Third, it was considered that training African lawyers and judges on arbitration practice is one way by which these practitioners and the judiciary can be equipped to adopt a supportive approach rather than an interventionist attitude towards arbitration. Lastly, publication of arbitration related judgements from African judiciaries was also suggested as a means of measuring whether or not African courts give the desired support needed for arbitration to thrive in Africa.

Dr Onyema in her paper examined the reciprocity of services that judges and arbitrators render to disputing parties. She assessed the many fronts by which judges get involved in arbitration and questioned their role in the reference. In highlighting the functions of courts in arbitration, Dr Onyema posed the questions: when should courts get involved in arbitration and, what is the purpose of arbitration? Her paper also evaluated the common nature of the relationship between judges and arbitrators. On the question of when courts may, if at all, get involved, she identified three fronts namely: before the constitution of the arbitral panel, after the constitution of the arbitral and, after the close of the arbitration reference. With respect to 'before the constitution of the arbitrator(s)', she submitted that courts may get involved on issues related, but not restricted, to the appointment of the arbitrator, or extension of time to take certain steps, or preservation of the subject matter of the arbitration. On the involvement of courts 'after the constitution of the arbitral panel, Dr Onyema asserted that the role of courts should be limited. However, if courts must get involved, it must be to support the arbitration and not to interpose. Regarding 'after the close of arbitration', she noted that courts involvement must be to give effect to the arbitral awards, save on restricted grounds. With respect to the symbiotic character of the relationship between judges and arbitrators, Dr Onyema posited that judges and arbitrators are not in competition. Rather, judges and arbitrators render the same services to disputing parties in different fora.

Ms Rukia Baruti examined, "The training and recognition of African lawyers: AILA project." Ms Baruti's presentation focused on the work of the Africa International Legal Awareness (AILA), a not-for-profit organisation based in the UK. AILA is authorised by the Solicitors Regulation Authority of England and Wales as an external Continuing Professional Development provider. In her presentation, Ms Baruti asserted that Africa has the required international arbitration expertise and arbitration institutions to settle her investment and commercial disputes. However, these expertise and institutions are not utilised as much as they should because of the perception that some African courts are anti-arbitration. This raises the need to train African lawyers and arbitrators who may want to be internationally recognised as arbitrators, and to change the negative perceptions about African courts. To this end, AILA organises and runs trainings, workshops, seminars and other exchanges of knowledge for African legal and arbitration practitioners. She noted that AILA also aims to encourage the recognition of African lawyers, arbitrators and mediators by providing them with a platform to promote their legal expertise via the AILA online directory and use of blogs.

Dr Hakeem Seriki spoke on "Judicial support during the arbitration reference." Dr Seriki's paper discussed courts' ability to support and improve arbitration reference by upholding parties' arbitration agreement. He argued that injunctive relief is one of the vehicle through which this judicial support during the arbitration reference can be achieved. For example, if a party to the arbitration agreement

decides not to honour the agreement but instead goes to court to commence legal proceedings. What can the court do? The court can support the arbitration in this instance by restraining the party in breach and at the time compel the party to submit to arbitration. This way, Dr Seriki submitted that the court is not interposing but rendering a supportive service to the course of the arbitration reference. Dr. Seriki also stated that another way courts can use injunctions to support arbitration is by granting the medieval injunction or freezing order. This can happen where an arbitral tribunal has not been constituted and one of the parties to the arbitration agreement decides to destroy or remove the subject matter of the arbitration or its assets from the seat of arbitration.

Ms Leyou Tameru discussed the “Publication of arbitration related judgements from Africa: I-Arb judgement gathering project.” Ms Tameru’s presentation focused on her I-Arb project of creating online visibility of arbitration related judgements connected to Africa for the utilisation of lawyers, arbitrators and judges who are interested in using African arbitration institutions and expertise. Ms Tameru contended that Africa has the institutions, expertise and laws that support and promote international arbitration. For instance, 35 out of the 55 African countries are Contracting-States of the New York Convention of 1958. Ms Tameru also discussed some awards from investment arbitration to support her argument that African practitioners must engage with the international arbitration process. In conclusion, Ms Tameru noted that I-Arb Africa’s aim is to make Africa an active participant as much as it is a consumer of international arbitration. This can be achieved by African arbitrators and institutions making themselves visible by advertising and publishing the works that they do.

### **Panel 3**

The third panel considered ‘The views from domestic arbitrators.’ Prof Paul Idornigie, SAN chaired the panel discussion with Mr Babajide Ogundipe, Dr Jean Alain Penda, Dr Tunde Ogowewo and Prof Andrew Chukwumerie, SAN as panellists.

Prof Idornigie in his preliminary comments noted the boundary between national courts and the arbitration process. He highlighted the issue of Nigerian courts’ intervention in the arbitral process vis-à-vis Article 5 of the UNCITRAL Model Law. Comparatively, he said that in England, the Arbitration Act 1996 on the issue used ‘should’ instead of Article 5 ‘shall’ and that the English courts are known for their pro-arbitration stance. However, the Nigerian Arbitration and Conciliation Act 1988 (ACA) like Article 5 of the UNCITRAL Model Law on the issue, used the word, ‘shall’.

Prof Chukwumerie focused his comments on the correctness or otherwise of the Nigerian Court of Appeal case of SPDC v Crestar. The case concerned the question whether, in Nigeria, the Courts have jurisdiction to make Orders of injunction to restrain a party from taking further steps in respect of an international arbitration seated outside Nigeria. The Court of Appeal after considering the provision of Section 34 of the ACA granted the injunction sought by Crestar. Prof Chukwumerie agreed with the court’s position and emphasised that Section 34 of the ACA only relates to domestic arbitration and not arbitration seated outside Nigeria.

Dr Ogowewo discussed the constitutionality or otherwise of parties’ agreement to settle their dispute by arbitration. He discussed the issue from the backdrop of Sections 6 and 36 of the Nigerian 1999 Constitution (as amended). Dr Ogowewo cited Nigerian Supreme Court case of Agu v Ikwibe where the court held that customary arbitration is recognised under Nigerian law. He also cited the Supreme Court case of Araromi v Eleamor where the court held that the Section 36 right of the 1999 Constitution (as amended) is waivable by parties’ agreement. In conclusion, Dr Ogowewo stated that arbitration is not affected by the said sections of the 1999 Constitution (as amended). In effect, arbitration in Nigeria is constitutional.

Dr Penda focused his comments on the role of courts/judges in arbitration in Cameroon. He stated that Cameroon is friendly to arbitration because of its laws. At the national level, arbitration is governed by the Uniform Act on Arbitration. At regional level, arbitration is regulated by OHADA.

However, Dr Penda stated that one of the challenges that users of arbitration face in Cameroon is the lack of training of the judges and arbitrators especially, those of the English speaking parts of Cameroon.

Mr Ogundipe spoke about the need for the law of obligation to be clearer and for the courts to make clear exposition of substantive laws. This is because arbitrators, by the nature of their tasks, tap into such expositions to arrive at a decision. He also stated that the trend of case law reporting has to change from just reporting decisions on procedural issues to reporting decisions on substantive issues. This way, the common law will be developed to support arbitration and attract international arbitration users.

## **The last day of the conference**

### **Panel 4**

The fourth panel focused on 'Foreign practitioners' experience of the attitude of African judges towards arbitration.' It was chaired by Mr Ucheora Onwuamaegbu with Mr Steven Finizio, Mr Baiju Vasani, Mr Charles Nairac, Mr Roderick Cordara, Mr Duncan Bagshaw and Mr John Gaffney as panellists.

The panellists included six experienced foreign practitioners from various jurisdictions outside Africa. They shared their experiences as to why their firms prefer choosing foreign seats in arbitration proceedings involving an African party or appoint a non-African arbitrator in disputes held in Africa. Duncan Bagshaw described the Mauritius arbitration centre as an example for other arbitration centres in Africa to emulate. Mauritius has designated particular courts, selected judges in both the lower courts and the Supreme Court to deal with arbitration matters. This approach has made Mauritius a preferred seat of arbitration and an image of an arbitration friendly destination. The other panellists agreed with this view and recognized that each jurisdiction has its weaknesses and strengths. Hence, as regard to other African jurisdiction, the tendency is that the qualities of judges are never the issue, but the case procedures are less predictable due to several adjournments and lack of respect for procedural rules. However, Baiju Vasani noted that judges should bear in mind that in making their decisions, the legal community in the world will read them.

On the appointment of African arbitrators, the panellists suggested that practitioners should ensure visibility of their activities, profile and marketing themselves through networking events, contribution with a scholarly article in arbitration journals. During the interaction session with the audience, the members of the panel were asked to pledge to at least consider appointing African arbitrators and a seat of arbitration in Africa, whenever the dispute is connected to Africa.

The fifth panel considered 'Practitioners experience on the role of judges in arbitration in Africa.' The panel gathered arbitrators from various regions of Africa to share their experience with a comparative attitude of judges toward arbitration on the continent. This was based on a thorough analysis of arbitration-related decisions. Ms Lise Bosman of the PCA chaired the discussions with Mr Ahmed Bannaga, Mr Luke Fashole II, Ms Esine Okudzeto, Mr Jimmy Muyanja, Mrs Funke adekoya, Mr Tunde Fagbohunlu, and Mr Isaiah Bozimo.

The first three speakers discussed the position in Nigeria. Mr Bozimo identified two areas as problematic: First, the increasing court intervention in arbitration disputes and, second that the Nigerian arbitration system. He noted that arbitration-related decisions by Nigerian judges were made without consideration that they will be read outside of Nigeria. Mr Bozimo reviewed several recent decisions on arbitration by the Nigerian courts to support his assertion that there were 'good, bad and ugly' decisions from the Nigerian courts.

Mr Tunde Fagbohunlu, SAN and Mrs Funke Adekoya, SAN respectively addressed some challenges of judges in Nigeria when dealing with arbitration cases. They identified the absence of training for judges in Nigeria as a factor in the misinterpretation and misapplication of arbitration rules and procedures.

Esine Okudzeto discussed the Ghana experience and praised the Ghanaian judges and the courts for their expeditious approach to encouraging counsel in the course of arbitration proceedings to attempt to resolve all matters within the arbitration proceedings barring constitutional issues or public policy issues. Although it is widely held among practitioners in Ghana that the judges are arbitration friendly, thus a sitting judge will not be quick to intervene in arbitral proceedings. Though the judges are reserved in intervening in arbitration proceedings, it has not stopped lawyers in Ghana from seeking the intervention of the courts. To deter lawyers from filing frivolous applications, Ms Okudzeto proposed that a sanction be imposed on lawyers that file applications that are determined as frivolous suit. She also recommended an increased use of practice directions, training for judges and lawyers, publication and easy access to previous decisions.

Jimmy Muyanja presented a thriving arbitration practice in Uganda. He attributed this to the separation of arbitral proceedings from the courts. Further, he explained that the Uganda Arbitration Centre enjoys autonomy from the courts. Thus, all matters must first be attempted to be resolved in the course of arbitration proceedings. Where such issues are not successfully resolved they are raised before the director of the arbitration centre who also acts as a "chief justice" in all arbitration related matters. It is only through the directives of the director of the arbitration centre that counsel can seek a court intervention on an issue from an ongoing arbitration.

In the case of Botswana, Edward Luke II reported that based on the decisions that have come out of the various levels of courts in Botswana, it could be agreed that Botswana is an arbitration-friendly jurisdiction.

As for Sudan, Ahmed Bannaga presented an up-to-date development of arbitration in the country. He noted that Sudan passed into law her Arbitration Act 2016 on June 22, 2016, the day the conference was launched. He noted that the arbitration legislation and its interpretation as well as its application is often interfered with by the executive arm of government.

The last panel focused on the 'Response from judges on how they can better support arbitration/ADR' in Africa. The panel was chaired by Judge Edward Torgbor. The panel was made up of Justice Irene Mambilima, Justice John Okoro (representative of the Chief Justice of Nigeria), Judge Candide-Johnson (representative of the Chief Judge of Lagos State), Justice Roli Harriman, and Justice Goodluck.

Justice Mambilima of Zambia admonished all the judges and attorneys present to understand and see the courts and arbitration as a complementary system. She made it clear that the nature of commercial activities is such that delays and inconsistencies cannot support it. She also conceded that there is room for an expeditious training of judges and lawyers to ensure the quality of judges and their support on arbitration matters. Under her jurisdiction, she acknowledges the fact that arbitration is gradually gaining roots in Zambia with the backing of a legal framework. The remaining Justices agreed with the Honourable Chief Justice of Zambia, in particular on the point of expeditious training for both judges and lawyers. The justices decried the practice of lawyers running to the courts for intervention while arbitral proceedings are pending.

The day ended with a closing dinner hosted by ICAMA, Abuja with after dinner speech by Chief Bayo Ojo, SAN. SOAS University of London had given various sculptures and Nigerian arts to various sponsors and partners of the conference and all the judges who attended the conference.

## **SOAS-LCA Conference, Lagos**

### **Welcome Address by Ms Megha Joshi of LCA**

My lords and distinguished and honoured guests, I am very excited to welcome you all to the second edition of the “Africa Arbitration Conference Series”, here in Lagos, especially after meeting so many of you last year in Addis Ababa at the African Union, and telling you all about the Lagos Court of Arbitration and our magnificent International Centre for Arbitration & ADR –now you are able to experience it!

To develop an international standard, institutionalised ADR service centre is a very long term project and investment. We are extremely fortunate to be a product of the vision and foresight of Lagos State Government for conceptualising and delivering ‘a total arbitration solution’, with this centre and all of its facilities to safeguard the long term viability and independence of the project, and support Lagos as a seat for arbitration. The LCA was born out of the Lagos State Arbitration Law and the Lagos Court of Arbitration Law, both enacted in 2009, as reforms to support the proliferation of arbitration and ADR in order to enhance Lagos’ attractiveness and viability for foreign direct investment, and assist with decongesting the commercial courts with cases that could be resolved with an alternative process.

From our location, as you can see, the centre is the first development on the Okunde Bluewater Scheme Peninsular which was earmarked as a tourism and commercial zone, so over the next couple of years the current surrounding environment will be replaced with resorts, shopping malls and recreational facilities. I think one of the most satisfying aspects of developmental work, is not only participating in the process, but also watching transformation as it occurs.

The LCA has come such a long way since I joined the organisation in November 2012 when there were only two members of staff. Now we have a team of 7 very talented people, 450+ members with a bona fide interest in ADR. We have a long list of partnerships with established international organisations such as the School for Oriental & Asian Studies (also known as SOAS); the International Law Association, International Council for Commercial Arbitration, the Law Society of England & Wales; as well as with peer ADR organisations such as JAMS International that recognise the importance of the establishment of the LCA and actively support our mission. Later this year the LCA will deliver a knowledge workshop in collaboration with the World Intellectual Property Organisation (WIPO), and we are planning a conference with UNCITRAL next year. I am also pleased to announce that the first arbitration cases were filed earlier this month.

The growth of the LCA has been strategic and in recognition of the fact that as an institution, the LCA has had to take the lead in creating awareness about the demand for arbitration and alternative dispute resolution services, and take ownership of driving the ADR dialogue in Nigeria.

In March earlier this year, in collaboration with the Nigerian Economic Summit Group, the LCA lead the arbitration and ADR sessions at the National Assembly policy reform dialogues framed around improving Nigeria’s ranking in the World Bank Ease of Doing Business report that the legislative arm of government is addressing head on.

We recognise that dialogues and discussions are very important outreach activities to increase the knowledge and merits of ADR in the vast domestic private sector in Nigeria. Thus with the support of

our funding partners, the Investment Climate Facility for Africa (ICF), we have been able to start a schedule of monthly programmes that includes an ADR Speaker Series and Industry Roundtable focuses - for example within the Nollywood and the entertainment sector, and will also feature tourism and hospitality, and the online/digital space.

The assistance of the ICF has been integral part of the LCA's story and growth. With their support, the LCA has grown its staff strength, and we are in the process of creating an intellectually curated resource and library centre. The ICF has also sponsored all of the LCA's ADR knowledge and awareness workshops for the judiciary, and I will further elaborate on all of these engagements in the first panel discussion with the other institutional ADR service providers.

The LCA has endeavoured to tackle the issue of training and skills head on, and has set up the LCA Executive ADR School to bridge the gap between theory and practical experiences for budding practitioners that was launched earlier this month, and features a series of prominent specialists in international arbitration every month. The quality of the registered candidates is testimony to the type of courses that are in demand, and that the LCA has been able to deliver.

Within the Secretariat, we are focusing on developing policies to govern efficiency and global standards of best practice in our conduct of arbitration proceedings and to deter malpractices – watch this space for *“The Lagos Memorandum for Guidelines for Effective Arbitration”*. Our staff receives on-going training and support for case management from JAMS International and through our partners at the International Senior Lawyers Project (ISLP).

We have revved up the activities to promote our panel of experienced arbitrators, and the list of registered neutrals is now published on the LCA website. This list is live and routinely refreshed with up to date information, after all our experts are our greatest people and assets.

In terms of transparency; annually the LCA holds an AGM for our members and produces a report featuring our activities and financials. It is a forum for our members, and I urge you to join the LCA and register as members to support our mission and work; it is after all an institution that was created by the users of ADR for the users of ADR. Your participation and involvement to promulgate the positive benefits of ADR to resolve disputes quietly, quickly and cost effectively to ease doing business and decongest the courts is vital for our long term success. More information about how to join as a member is readily available; I urge you to register now while the fees are still N15,000 per year as they will surely increase as our activities become more widespread.

One of the first projects I had to coordinate was the production of the LCA's Dispute Resolution Journal which is a platform for LCA members to publish their work so long as the articles are well structured and researched. To ensure the standards are maintained, the submissions are reviewed by an independent peer review committee. So very early on in my LCA career the LCA Board provided me with two recommendations to participate on the peer review committee; Dr Emilia Onyema and Professor Honourable Justice Edward Torgbor. I have to say they that both Dr Onyema and Justice Torgbor, are two of the most committed, hardworking and professional individuals I have had the privilege to work with. Although they give me the tricky task of relaying their (sometimes severe) feedback to the writers, their standards are gold ensuring our publication will be a widely respected and regarded reference point for arbitration in Nigeria and Africa. I would like to take this opportunity to recognise and acknowledge their active support and contribution to the mission of the LCA on a pro

bono basis, in addition to their work to promote African arbitrators and arbitration. After working together for so long, it is particularly gratifying that the 2<sup>nd</sup> conference in the Arbitration in Africa Series is hosted by the LCA here in our permanent headquarters.

I hope that you will enjoy our centre and learning more about the work of the Lagos Court of Arbitration, and **your** facilities here at the International Centre for Arbitration & ADR.

The goal of this conference is to share, learn and engage; I hope that you will enjoy all of the dialogues and deliberations, and widen your networks in the field and in Africa.

For those of you that have come to Lagos for the first time, I hope that you will fall in love with Africa's Big Apple (just like I did 8 years ago), and proudly spread the joy of your new knowledge and experiences far and beyond when you return to your home countries.

On behalf of everyone at the Lagos Court of Arbitration, I welcome you to Lagos and the conference – please enjoy!!!

# **COURTS AND THE EFFECTIVENESS OF ARBITRATION IN AFRICA**

## **Keynote Address**

**By**

**Hon. Justice Edward Torgbor<sup>29</sup>**

*“We know all men are not created equal in the sense some people would have us believe – some people are smarter than others, some people have more opportunity because they’ve been born with it, some men make more money than others, some ladies make better cakes than others – some people are born gifted beyond the normal scope of most men.....*

*The one place where a man ought to get a square deal is in a courtroom, be he any colour of the rainbow.....”<sup>30</sup>*

### **Introduction**

This paper discusses the role of courts and judges in arbitration. It looks at the legal and systemic capacities, functions and constraints of courts and arbitral tribunals, leading to consideration of the symbiotic relationship between the judicial and arbitral legal systems, in meeting user expectations. The discourse is in the context of the Arbitration in Africa Conference Series for the transformation of arbitration in Africa.<sup>31</sup>

### **Courts and Judges**

Users of courts need no introduction to courts or judges.<sup>32</sup> Judges preside over courts and their connection arises from the judge being a government or state appointed official who tries and decides disputed issues in court. Therefore “judge” interchanges with “court” in common speech. The State Court is also commonly known as “a Court of Law” and a “Court of Justice”.<sup>33</sup> Because of the hierarchical order of courts and the fact that in some judicial systems a court may be presided over by a Justice of the Peace (JP), a Magistrate or a Judge it is appropriate to clarify “the court” or “competent court” designated by arbitration law with defined powers of intervention in arbitration matters.

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<sup>29</sup> LLD, Former Judge and Chartered Arbitrator; LCIA Vice President, African Users’ Council. This keynote lecture was delivered at a Lagos Arbitration Conference (22<sup>nd</sup> – 24<sup>th</sup> June 2016) on the broad theme of “Rethinking the Role of Courts and Judges in Arbitration in Africa”.

<sup>30</sup> Harper Lee: *To Kill A Mocking Bird*, Arrow Books 2006. Editions: 1960, 1989, 1997, Arrow Books 2006.

<sup>31</sup> This is the second in a series of four projected conferences focusing on the role of four major arbitration stakeholders in Africa, being arbitration institutions, courts and judges, states, and arbitration practitioners. The first conference on arbitration institutions was convened by Dr. Emilia Onyema of SOAS University of London and Hon. Justice Edward Torgbor in Addis Ababa on 23<sup>rd</sup> July 2015.

<sup>32</sup> “A Court is a place where justice is judicially ministered” Stroud’s *Judicial Dictionary of Words and Phrases* Vol. 1. “Parliament is a Court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is nevertheless a Court. There are many other Courts which, though not courts of justice, are nevertheless Courts according to law. There are tribunals with many of the trappings of a Court which nevertheless, are not Courts in the strict sense of exercising judicial power”, *Words and Phrases Judicially Defined* Vol. 1.

<sup>33</sup> The London “Court” of International Arbitration (LCIA) and ICC International “Court” of Arbitration are therefore not State Courts in that sense of the term.

Designations of the arbitration court are in various instances territorial, country-specific or adaptations of the UNCITRAL Model Law version of court.

In Kenya and Uganda the court designated for arbitration under their national arbitration statutes is the national or state High Court.<sup>34</sup> Two observations: It is noteworthy that a court to be known as the “*Arbitral Court*” was established by a Kenyan statute<sup>35</sup> for proceedings in international commercial arbitration conducted under the auspices of the statute and the Nairobi Regional Centre. The other significant observation is that the wider definition of “court” in the Ugandan Evidence Act<sup>36</sup> which includes all judges, magistrates, jurors, assessors and all persons legally authorised to take evidence, excludes arbitrators and proceedings before an arbitrator, from its purview.<sup>37</sup>

Egyptian arbitration law<sup>38</sup> describes the “court” simply as belonging to the judicial system of the state.<sup>39</sup> The Law assigns the jurisdictional competence to review arbitral matters to the court of original jurisdiction over the dispute; but competence with regard to international commercial arbitration conducted in Egypt or abroad, lies with the Cairo Court of Appeal unless the parties agree on another appellate court in Egypt.<sup>40</sup> The Law thereby recognises and distinguishes between arbitration matters that may be reviewed by a court of originating jurisdiction and international commercial arbitration matters reviewable only by appellate courts.

Examples of territorial or country-specific definitions of an arbitration court are provided by the arbitration statutes of South Africa, England and Nigeria. Under the South African Act “court” is any court of a provincial or local division of the Supreme Court of South Africa.<sup>41</sup> In England the court in the Arbitration Act 1996 is the High Court or a county court.<sup>42</sup>

The arbitration court in the Nigerian Arbitration and Conciliation Act (ACA) Cap 19 is plainly territorial being the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court<sup>43</sup> each one of which is a competent court for purposes of the ACA; and a judge, in that context, is a judge of any of the three territorial High Courts.<sup>44</sup> While in Nigeria we may also mention the Lagos State Arbitration Law<sup>45</sup> in which “court” and “judge” respectively mean the Lagos State High Court and a judge of that court.

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<sup>34</sup> This is apparent, for example, in sections 7(1), 12(5) and 14(3) of the Kenyan Arbitration Act 1995 as revised in 2010; and section 2(f) of the Ugandan Arbitration and Conciliation Act 2000.

<sup>35</sup> The Nairobi Centre for International Arbitration Act, Act No. 26 of 2013, section 21. The Act commencing 25<sup>th</sup> January 2013 provides for international commercial arbitration, the Arbitral Court and alternative dispute resolution mechanisms. Consequently when the Centre is up and running arbitral parties in international commercial proceedings will have an option to proceed under this Act instead of the Kenyan Arbitration Act 1995.

<sup>36</sup> Chapter 6, section 2(1).

<sup>37</sup> Chapter 6, section 1.

<sup>38</sup> Egyptian Law of Arbitration in Civil and Commercial Matters, No. 27/1994 published in the Official Gazette No. 16 (bis) on 21<sup>st</sup> April 1994.

<sup>39</sup> Article 4(2).

<sup>40</sup> Article 9.

<sup>41</sup> Arbitration Act 42, 1965, section 1. This Act repealed provincial legislation on arbitration but did not repeal the common law (see Law of South Africa Vol 1 para 543 and 544). Therefore a submission to arbitration that may be invalid (for example for not being in writing) under the Act may nevertheless be valid and enforceable under the common law (ibid para 544).

<sup>42</sup> Section 105.

<sup>43</sup> Section 57(1) ACA (also referenced as ACA Cap A18 of 2004 of the Laws of the Federation of Nigeria – Cap A18 LFN 2004 for short).

<sup>44</sup> *ibid*.

<sup>45</sup> Section 63. The Law came into force on 18<sup>th</sup> May 2009, (section 64).

The Zimbabwe Arbitration Act replicates the UNCITRAL Model Law definition of court as “a body or organ of the judicial system of a State”.<sup>46</sup> The Model Law prescribes various functions for that court because of which Article 6 allows the state legislature that enacts that Law to designate the state court or authority that is to perform those functions.

### **The Functions of Tribunal and Court: The Doctrinal Underpinnings**

The functions and capacities of arbitral tribunals and courts in arbitration are primarily determined by the arbitration agreement and the governing arbitration law. The function of the arbitral tribunal is to decide disputed issues for the parties before the tribunal. The judge decides disputed issues in court. But the scope of arbitrability, in the sense of what an arbitrator can or cannot arbitrate, is often tested not only by the arbitration agreement and arbitration law but also by other laws and considerations of public interest in the subject matter of the dispute. Conceptually therefore the functions, capacities and constraints on the arbitral tribunal and court can be viewed in the context and doctrines of (a) arbitrability,<sup>47</sup> (b) legality<sup>48</sup> and enforceability of the parties’ contract and, when pertinent, (c) considerations of public policy.<sup>49</sup> Therefore the absence of, or inadequate, provisions on arbitrability in the arbitration agreement or the law is in effect a constraint and an invitation for an arbitral or judicial interpretation of the parties’ contract to determine whether a disputed issue is arbitrable. In the current state of arbitration law and practice the arbitral tribunal, domestic or international can, but does not, have the final say on the scope of application and interpretation of any of these doctrinal concepts, a function often left to the courts and an imperfect point of reference in the relationship between tribunal and court. That is not all.

Public policy, by which disputed issues of arbitrability and legality are tested is a troublesome subject for tribunal and court for the lack of a uniform or universally accepted definition. The importance of the concept of public policy and interest is such that even the Model Law that otherwise delimits court intervention in arbitration matters, cedes the ultimate decision on a disputed issue of arbitrability<sup>50</sup> or public policy<sup>51</sup> to the national court.<sup>52</sup>

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<sup>46</sup> The Zimbabwe Arbitration Act 1996, Article 2(c) and UNCITRAL Model Law Article 2(c).

<sup>47</sup> Arbitrability involving a determination of whether or not an alleged dispute can be submitted to arbitration is not uniformly defined by national laws. In some jurisdictions issues involving insolvency, real and intellectual property registration, family law, criminal law, succession and rights *in rem* are not arbitrable and a national court can refuse recognition and enforcement of an award, domestic or international, tainted by an illegality such as tax evasion and importation or exportation of goods fraudulently obtained. The New York Convention forbids the recognition and enforcement of an award in a dispute not arbitrable by state law; Article V(2)(a).

<sup>48</sup> *ibid*: an illegal contract that is unenforceable under national law cannot produce a valid and enforceable award on the fundamental precept that an illegality cannot found a legal outcome.

<sup>49</sup> Respect for principles of national sovereignty and considerations of rectitude in moral, economic and social practices and the requirement of fairness in international relations have generated judicial pronouncements that frown upon conduct that is injurious to the public interest. It has been suggested that international public policy should be invoked only in flagrant, effective and concrete violations: Francisco Blevi: “The Role of Public Policy in International Commercial Arbitration”, *Arbitration Vol 82 No. 1 February 2016 p. 6*. Blevi discusses the distinction between substantive and procedural public policy, *ibid* pp 6 – 8. See also Patrick Devlin: *The Enforcement of Morals*, OUP, 1968; Simon Blackburn: *In Defence of Moral Philosophy* “Just as we need clean air, we need a clean moral climate”. Some look to Plato and Aristotle, Hume or Kant or garner empirical results from questionnaires on what is moral.

<sup>50</sup> Model Law Art. 34(2)(b)(ii).

<sup>51</sup> Model Law Art. 34(2)(b)(ii). (Setting aside an award) and Art. 36(1)(b) (grounds for refusing recognition and enforcement of awards).

<sup>52</sup> Model Law Art. 5.

National statutory definitions<sup>53</sup> that merely describe an arbitration agreement as an agreement to submit to arbitration all or certain disputes which have arisen or may arise between parties are indefinite for not specifying arbitrable disputes. Therefore where the governing national law is silent<sup>54</sup> or adds nothing to this statutory description the way is wide open for the court to decide whether an alleged dispute is within the remit of this indefinite provision. On the other hand, disputing parties and their legal advisers are afforded some guidance on arbitrability where the law sketches out matters that are or are not arbitrable. The Zimbabwe Arbitration Act does this by specifying disputes that may be arbitrated.<sup>55</sup>

The conclusion is that the doctrinal and contractual principles and requirements of validity and legality that underpin an enforceable arbitration agreement correlate with the principles of validity and legality that ensure an enforceable arbitral award. The recommendation is that arbitration's promises of speed, least expense and finality, should support the expansion, by legislation, of the arbitrator's mandate to take charge of the arbitration from beginning to end, enabling the competent arbitral tribunal to have first opportunity to determine all disputed issues before it without the often misguided and misused threat of court intervention hanging over it during the arbitral proceedings. This will have the desirable and salutary effect of discouraging and preventing resort to court as a tactical ploy for delaying the arbitration.

### **Model Law Constraints on Tribunal and Court**

The limited court intervention in arbitration matters imposed by Model Law Article 5 has been noted. That Law makes no attempt to set out all court functions in its provisions.<sup>56</sup> The specific functions in Article 6 are limited to the appointment of arbitrators (Art 11), deciding challenges (Art 13), terminating the arbitral mandate (Art 14), ruling on jurisdiction (Art 16) and deciding applications for setting aside an award (Art 34). Because the Model Law prescribes other functions to all courts of an enacting State it needs mention that the Article 6 functions are to be performed in international commercial arbitration where the place of arbitration is in the enacting State, with no appeal from the decisions of the court or competent authority.

It is noticeable that (a) in all these specific provisions involving court intervention the opportunity to make a decision or choice is first given to the arbitral tribunal or parties, who may resort to the court, where party disagreement persists or the arbitral tribunal fails or is unable to perform a specified function, within a prescribed time<sup>57</sup> and (b) in all such cases, with no appeal from the competent court.<sup>58</sup>

Restrictions in the other functions assigned by the Model Law to the court are evident in the provisions of articles 8 (power of court to refer parties to arbitration in arbitration matters); article 9 (power to grant interim measures of protection at party request, noting however that the arbitral tribunal may

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<sup>53</sup> Examples: S. 3(1) Kenyan Arbitration Act; section 2(c) Ugandan ACA. Likewise section 3(1) of the Lagos State Arbitration Law that merely allows disputing parties to enter into an arbitration agreement to define their legal relationship to determine issues.

<sup>54</sup> Such as the Nigerian ACA.

<sup>55</sup> Section 4(1); Section 4(2) exempts from arbitration an agreement that is contrary to public policy or a matter specifically exempted by any law, criminal cases, matrimonial causes, matters affecting minors or persons under legal disability, and consumer contracts.

<sup>56</sup> UNCITRAL bears no blame for this. The difficulties UNCITRAL encountered in attempting to formulate standards for universal acceptance are described in the legislative history of its Model Law.

<sup>57</sup> Model Law article 11(3) (a) and (b).

<sup>58</sup> Model Law articles 11(5); 13(3); 14(1); 16(3).

also grant interim orders of protection it considers necessary at party request); article 27 (court assistance in taking evidence at the request of tribunal or party with tribunal's approval); article 35 (recognition and enforcement of the award) and article 36 (grounds for refusing recognition or enforcement).

It is evident also, from the constraints on the arbitral and judicial powers, that party autonomy is paramount and decisive in almost all the stated instances on what tribunal or court can do in arbitration matters. Consequently neither tribunal nor court may do as it pleases in arbitration disputes. Nevertheless, and undesirably, attempts by party legal representatives to circumvent these restrictions by strategic interruptions, procedural and jurisdictional challenges, still persist in arbitration practice in Africa.<sup>59</sup>

## Appeals

In domestic arbitrations some national arbitration statutes specify the High Court as the competent court to perform those functions prescribed by the national statute.<sup>60</sup> So, for example, in the Kenyan Arbitration Act, as noted, it is the High Court of Kenya that is mandated by the Act to perform those functions prescribed by the statute to assist the implementation and enforcement of the arbitration agreement with limited recourse to the Court of Appeal in domestic arbitrations in prescribed circumstances.<sup>61</sup> In effect therefore these appeal provisions in a national statute may override the limitations prescribed in international arbitration by a Model Law-based arbitration statute.<sup>62</sup> In addition, in questions of law arising from domestic arbitration, the Kenyan Arbitration Act<sup>63</sup> allows appeals from decisions of the High Court to the Court of Appeal by party agreement or with leave of the Appeal Court.<sup>64</sup>

The question whether or not national appellate courts exercise “extra-legal jurisdiction” in arbitration matters provoked contrasting views from two Nigerian legal scholars. One contention is that sections 34 and 57 of the Nigerian ACA,<sup>65</sup> based on Model Law Articles 5 and 6, limit litigation in arbitration matters to only first instance courts. This contention therefore opposes “the current free appeals that disregard the law, promote delays, frustrate the policy of finality and speedy settlement and affect the choice of Nigerian Law in arbitration agreements”.<sup>66</sup>

The rejoinder is that judicial powers are vested by the Nigerian Constitution in the established courts with jurisdiction in both state and federal High Courts (as first instance courts) and the appellate system in Nigeria. Therefore both the Court of Appeal and Supreme Court have jurisdiction to hear appeals from the first instance courts in arbitration matters in Nigeria, which jurisdiction is not extra-legal.<sup>67</sup>

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<sup>59</sup> See *Sadrudin Kurji & Another v Shalimar Ltd & 2 Others (2008) eKLR.pdf*. The court noted with reference to the section 10 limitation of the Kenyan Arbitration Act 1995 (equivalent to Model Law Art. 5) that the Court cannot stand aside and helplessly watch even where serious breaches such as non-observance of cardinal rules of natural justice persist; but would intervene only in “*exceptional cases where it must interfere to correct an injustice*”.

<sup>60</sup> As noted above from the relevant provisions of the Nigerian, Ugandan and the English Arbitration Statutes.

<sup>61</sup> Section 39, Arbitration Act 1995 as amended by Act No. 11 of 2009.

<sup>62</sup> *Sadrudin v Shalimar* (supra); *Shell Petroleum Development Company of Nigeria Ltd v Cresta Integrated Natural Resources Ltd, CA/L/331M/2015*.

<sup>63</sup> Section 39(3).

<sup>64</sup> Section 39(3) (a) and (b).

<sup>65</sup> Referenced as Cap A18 LFN 2004.

<sup>66</sup> Per Ola O. Olatawura; “Nigeria’s Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems and Solutions” *Arbitration International*, Vol 28 No. 1, 63 – 76.

<sup>67</sup> Per the rejoinder with same title by Paul Obo Idornigie in *Arbitration International*, 2015, 31, 171 – 180.

Proponents of arbitration who respect the autonomies of party and tribunal and advocate the doctrine of finality in arbitral awards might sympathise with the rejection of unnecessary appeals in arbitration.<sup>68</sup> As noted, Egyptian Law No. 27/1994 places this issue beyond doubt and argument by donating jurisdictional competence in international commercial arbitrations to the Cairo Court of Appeal or any other Egyptian appellate court agreed by the parties.

My views on arbitral appeals are summarised in an earlier article.<sup>69</sup> Appeals are costly proceedings.<sup>70</sup> Because arbitrations are governed by law the need to apply the law correctly would justify party agreement for the retention of a limited right of appeal on questions of law. Therefore a statutory provision to facilitate such party agreement is, to that limited extent, supportable. Three intertwined considerations preponderate against a general right of appeal and the appellate jurisdiction: (i) the Parties' choice of an arbitrator (instead of court) to resolve their dispute, (ii) Parties' use of arbitration as the preferred mode for resolving the dispute finally and for the tribunal to render an enforceable award, and (iii) Court respect for the parties' choice of arbitrator, procedure and the applicable rules. The idea of a private arbitral process being transferred to the public court process, other than for the execution of the award, is imperfect. The goals of private arbitration will be defeated "if the courts are too quick to find fault with the manner in which the arbitration has been conducted and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity."<sup>71</sup>

### **Perspectives on the Relationship between Arbitration and the Court**

Both arbitrators and judges dispense justice within their respective legal systems and jurisdictional domains. But whereas their adjudicative functions are similar, their structural and systemic differences do not warrant being considered competitors. So competitors they are not. Judges presiding over state courts, as noted, are paid public officials within the judicial organ of state governance. Commercial arbitrators in our jurisdictions are primarily private persons usually appointed and paid by party agreement. The State judge's scope of jurisdiction under the whole gamut of national laws and Constitutions (including the inherent jurisdiction) is much wider than that of an arbitrator confined by an arbitration agreement and arbitration law. We know that arbitrators have neither the cloak nor clout of judges; that arbitrators and arbitral parties may have technically superior ability to decide the merits of their dispute but not the coercive powers to sharpen the rugged edges of arbitration; and that arbitration remains risky because of a lack of equal playing field for the two systems. Therefore arbitrators err who assume the aura of judges because they dispense arbitral justice, as do judges who over jealously guard their judicial and jurisdictional powers for the misapprehension of being usurped by arbitrators. Judges are trained in the law. Arbitrators emerge from diverse disciplines and backgrounds. Judges take an oath of office to do justice under the law. Arbitrators also do justice under the relevant law but do not take an oath of office. What both arbitrator and judge lack in terms of specialisation and expert knowledge outside their primary disciplines can be provided by specialist or expert witnesses from the relevant field. In similar vein the non-lawyer arbitrator's lack of legal knowledge or expertise can be mitigated by a legal expert at evidential hearings. What matters, from the perspective of arbitration practice, is how best to harness the respective duties and functions of arbitrators and judges in the services they provide for their communities.

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<sup>68</sup> Comment: These are welcome thought provoking contentions as there is room for innovative thinking in the development of arbitration law on the continent.

<sup>69</sup> Torgbor E., "The Right of Appeal and Judicial Scrutiny (2010) 76 Arbitration 2, p. 244.

<sup>70</sup> As evident from the time and resources expended for example, in the Kenyan case *Shell v Kobil Civil Application No. NAI57 of 2006 (30/2006/UR)* and the English case *Lesotho Highlands Development Authority v Impregilo SPA [2005] UKHL 43; [2006] 1AC 221; [2005] 3WLR 129.*

<sup>71</sup> O'Regan ADCJ in *Lufuno Mphaphuli & Associates Pty Ltd v Andrews Bopanang Construction CC (CCT 97/07) [2009] ZA CC 6.*

The invitation for this keynote address left it open for personal reflection and experiential comment as judge and arbitrator. Aside from generalizations, and at a personal level, my role as judge differed widely from my role as arbitrator. As an arbitrator I engage mostly with sectoral, contractual, commercial and investment disputes at domestic and international levels, sometimes with colleagues from different disciplines, combining our inputs and experiences to resolve disputes. The scope of arbitrability and the arbitral jurisdiction are delimiting, but the challenging opportunities and demands of specialised knowledge, though intensive, can be fulfilling. The opportunity of sitting, conferring and interacting with highly qualified, distinguished and internationally reputable professionals from other jurisdictions, is humbling but deeply enriching and rewarding.<sup>72</sup>

As a judge my primary discipline was the law with the concomitant duty, as the constitutional oath demanded, of doing justice according to law. The scope of litigation and the laws applied, as noted, are wider and far beyond arbitration law and practice. The greater the legal content of any issue the greater the need for further study and research. There is no uniform judicial method, but delving into the cumulative store and wealth of legal and judicial precedent, built up institutionally over the years, promotes consistency and predictability in the dispensation of curial justice. Therefore having a bit of both arbitrator and judge in my professional armoury is advantageous and beneficial for my current practice as a Chartered and International Arbitrator. Is one role loftier than the other? Comparisons demand defined and measurable tests. I had the cloak, clout and the coercive powers of a judge but not as arbitrator. On the one hand, I know highly esteemed and eminent arbitrators who would not swop that role for any other. Professional satisfaction and benefit are highly prized achievements. On the other, I accede to the remarks of a senior and long-serving judicial colleague that there is no privilege better known to him than the great honour of serving as a judge.<sup>73</sup>

A significant point of departure between judge and arbitrator is in the judicial method on which, as noted, there is no uniformity. Ross Cranston<sup>74</sup> brings erudition and perspicacity in an eloquent and elegant analysis of the judicial method of Lord Bingham of Cornwall,<sup>75</sup> and other eminent common law judges. He adverts to the declaratory theory of law and the traditional school of judging associated with Viscount Simonds (“the traditionalist method”); Sir Owen Dixon, Chief Justice of the High Court of Australia<sup>76</sup> (“Dixon’s Legalism”); the “Holmes logic and experience” associated with Justice Oliver Wendell Holmes; Lord Denning’s Justice – founded on his judicial philosophy that judges are there to use the authority of the law to do justice; that in too many respects the law was inadequate for the needs of his day, and that some lawyers cared too much for law and too little for justice; Lord Bingham’s “pragmatism” – that judges had sometimes to make a choice and, unless superseded by legislation, that choice determined what the law should be, that is to say, judges do have a law-making function into which their own values enter. The judicial method is therefore formalistic and, though not always logical, involves the application of principle “reasoned to a defensible conclusion”.<sup>77</sup>

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<sup>72</sup> Arbitration law permits arbitrators to state conclusions without necessarily or in every case giving the reasons.

<sup>73</sup> I claim that my career as barrister, arbitrator and judge exposed me to encounters and interactions with truly distinguished professionals, amongst whom were and are: the late Tom Bingham QC, my pupil master at Fountain Court; the late Lord Michael Mustill – panel chairman and co-arbitrator, Prof. Derek Roebuck – friend and scholarly mentor, and lately Prof. William Park of Boston University and former President of the LCIA – panel chairman and co-arbitrator – all in the pantheon of learned legal scholars, distinguished authors and illustrious contributors to the story, agriculture, and architecture of arbitration, and the dispensation and advancement of knowledge of dispute adjudication and decision-making in our time and for all time.

<sup>74</sup> Ross Cranston Graya, No. 126, Hilary 2013.

<sup>75</sup> My former Pupil Master, and later Lord Chief Justice of England and Wales.

<sup>76</sup> 1952 – 1964.

<sup>77</sup> Cranston, *ibid.*

I am reminded of Prof. William Park's recourse<sup>78</sup> to perceptions in some quarters that arbitrators may be less reliable than judges in applying the law, but that the opposite may be true; that the calculus of duty is simply not the same as between judge and arbitrator; that bearing obligations to the citizenry as a whole, judges may seek to implement societal values that sometimes trump private agreements; that no such social engineering usually falls to arbitrators because as creatures of the parties' consent, arbitrators must show special fidelity to shared expectations expressed in contract or treaty, fixing their eyes on existing norms rather than proposals for the law as it should be; and when interpreting the law arbitrators may be more inclined to take statutes and cases as they are, rather than considering public policies that justify shaping or stretching norms to meet new social or economic challenges. I discern from all this that the difference in the arbitral and judicial methods in the application of law is not that the duly qualified arbitrator is less able than the judge in interpreting the law, but that the expectations of an arbitral party and the public interest, restrict and restrain the esoteric forays and frolicsome eruditions of the one, but not the other.

I know that sometimes the judicial decision is not between right and wrong, but between sound and well established but conflicting principles in which the judge makes a choice. The judicial oath of office and the law-making function are therefore significant points of distinction between judges and arbitrators. I have an abiding respect for the enormous public responsibilities of the court, and share the firm belief that, ultimately, it is the one place where a citizen should confidently expect equal treatment under the law, and a square deal.

I have stated and given reasons why arbitrators and judges are not competitors.<sup>79</sup> But in discussing the relationship between arbitration and the court other related questions emerge, almost all of which imply arbitration's inadequacy or subservience to the court.

Are the roles of arbitration and court collaborative and complementary? They can and ought to be. There is no contradiction in stating however that even a free-standing private arbitration system with clearly defined boundaries of the arbitral mandate and jurisdiction cannot be on equal footing or in competition with a public state court exercising inherent and statutory powers over a broad spectrum of rights, law-suits involving private and public rights, crime, fundamental freedoms and protections guaranteed by national constitutions, including the much needed support for arbitration.

Does party autonomy render the arbitrator subservient to the parties?

The preponderance of the party agreement and freedom to choose the arbitrator and the arbitral procedure, the lack of true alignment between the autonomies of party and tribunal, and the occasional doctrinal and spatial conflicts thereby generated, can mislead the unwary practitioner into bullish but unrewarding confrontations with the arbitral tribunal. Therefore it is important to mention, relevantly, that the arbitrator is, in critical respects, independent of the parties. The arbitrator is a "quasi-judicial adjudicator" and in no sense subordinate to the parties.<sup>80</sup>

Can the arbitration system stand alone without the courts? Is the current state of the law the best possible achievement for arbitration or should the law do more for arbitration?

We can all think up answers to these questions depending on our dispositions, preferences, expectations, experiences and indeed what we each think is best for the party that chooses arbitration in preference to litigation. Lord Mance<sup>81</sup> is credited with the clarification that the arbitrator decides a legal dispute in the same way as, and instead of, a judge, by identifying the law and matching the

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<sup>78</sup> William W. Park: "The Predictability Paradox", Arbitrators and Applicable Law Dossier XI of the ICC Institute of World Business Law (ICC Publication No. 753E).

<sup>79</sup> At the beginning of this section.

<sup>80</sup> *K/S Norjarl A/S v Hyundai Heavy Industries Co. Ltd* [1992] QB 863, 885.

<sup>81</sup> *ibid.*

relevant facts to the relevant legal provisions; that the award is the goal and outcome of his activity; and that apart from any restrictive provisions of the arbitration agreement which prescribes the way to that goal, the arbitrator is “entirely free, freer than that of an ordinary judge”.<sup>82</sup>

The discussion on the relationship between arbitration and courts is therefore conducted from different standpoints. One is that court intervention should be at all stages always respectful of the parties’ intention to arbitrate.<sup>83</sup> Others proceed from the standpoint that the arbitration agreement by which parties choose arbitration in preference to the court does not oust the jurisdiction of the court and give instances of current practice by which the court enters the dispute and the arbitration before, during and after the arbitration, for enforcing the award.<sup>84</sup> Some see the exercise of court powers at the stated stages as supportive of arbitration. Others consider such role as intrusive and unhelpful to the development of a complete arbitration system. Examples of court involvement in arbitration<sup>85</sup> may help the reader to take a stand.

Before the commencement of arbitration the court may enforce the arbitration agreement and in recognition of that agreement, stay its own powers to try the dispute and refer the parties to arbitration. It may, in some instances, even appoint the arbitrator. During the arbitration the court may remove the arbitrator, grant interim orders for the protection and preservation of a disputed property or extend time-limits for compliance with an arbitrator’s orders. After the arbitration a party may ask the court to enforce the award and, despite, and in itself a lengthy arbitral process leading to the award, the court may set it aside or decline to enforce it.

Those who see value in the role of the court from the instances given here consider those roles as supportive of arbitration and would want the court to continue exercising those statutory powers of assistance, intervention and supervision. But precisely because those powers are statutory the proponents of a stand alone arbitration would argue for those powers to be transferred by statute to the arbitral tribunal. In other words it should be for the arbitral tribunal, rather than the court, to exercise the powers of recognition and enforcement of the arbitration agreement, grant the interim orders that are granted by the court and give effect to a valid and enforceable award rather than leaving it to the court to set it aside or decline its enforcement, after all the time, adjournments, fees, costs and expenses consumed by the arbitration. Arbitration proponents therefore argue for the law to do more for arbitration by granting more powers to the arbitral tribunal.

### **Specific Concerns in the Legal and Judicial Roles in Arbitration**

Concern with the finality of the award and curtailment of the courts’ powers in arbitration is recognised in international arbitration by statutory provisions that delimit the extent of judicial intervention in arbitration.<sup>86</sup> Even so there are still several instances, too many perhaps, where courts

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<sup>82</sup> Ibid.

<sup>83</sup> Dominique Hascher: “The Courts as Collaborators in the International Dispute Resolution Project” (2015) 81 Arbitration, Issue 4 pp 443 – 445. Hascher sets out conditions to govern court intervention with the observation that the efficiency of arbitration is directly linked to the quality of the judicial system. I do not subscribe to this view which may be a misreading of London Principle No. 2 because the efficiency of arbitration depends first and foremost on competent arbitrators rather than a supportive Court.

<sup>84</sup> See CA Candide-Johnson and Olasupo Shasore, Commercial Arbitration Law and International Practice in Nigeria, Chapter 7, on Arbitration and the Courts pp 119 – 139.

<sup>85</sup> A selected list of superior Court decisions across the continent is attached for those who may desire to research this subject further. For this reason arbitration institutions should compile and publish significant arbitral awards, rulings and decisions in which arbitral parties and tribunals demonstrate technically superior ability in deciding the merits of their dispute.

<sup>86</sup> Model Law Article 5 leads the way with the provision that bars court intervention in arbitration matters except as provided by that Law, a provision that has been replicated or adapted by national arbitration statutes such as: Section 34 ACA; section 59(1) Lagos State Arbitration Law, 2009; section

enter the arbitration space either through gaps in the arbitration agreement, a liberal interpretation of the arbitration statute or by resort to the inherent powers of the court. In current practice, parties and their lawyers readily interrupt arbitration proceedings with dubious court applications, under incoherent statutory and constitutional provisions, that deliberately delay the arbitration. Arbitration law and rules can change this.

Corruption in the courts and arbitration<sup>87</sup> is a serious concern and the level of corruption in some African judiciaries is particularly alarming if media revelations<sup>88</sup> are believable. The ensuing loss of public confidence in the court systems arising from such damaging stories, if proven, would be devastating in institutions whose public standing and professional integrity ought to be beyond reproach, quite apart from the public humiliations of the individual judges named or found to be associated with corruption.<sup>89</sup> We do well to remember that judges and arbitrators are not alone in this and that the hand maidens of corruption are both the givers and takers of bribery and corruption<sup>90</sup> - that is, the public.

There is good reason for delimiting judicial intervention, such as it is, by more specific legislation. It is that most judges in our regions have little or no training or experience at all in arbitration law and practice or have scant appreciation or understanding of the processes and purposes of arbitration and the scheme of national arbitration statutes. Arbitration law was not a course of study for most judges, and a qualification in arbitration law and procedure is neither a prerequisite nor a requirement for judicial appointments. It is submitted that the occasional arbitration workshop or seminar for judges does not adequately seal this gap in the judicial armoury for intervention in arbitration. It is also not tenable to send all judges to school in arbitration and leave their courts empty.<sup>91</sup> Perhaps we should consider a specialised arbitration court as a more viable option, of which more below.

Consider also the fact that in several instances the application for judicial intervention is from the decision of an arbitrator, with greater experience in the subject matter in dispute, to an inexperienced judge vested with jurisdiction to try any issue from any field of dispute. It is not surprising therefore that the backlog of delayed rulings from the courts include considerable numbers of arbitration applications awaiting determination by the court over several months which in turn delays a final arbitral award. It is no commendation for a judge in such a position to be considered the better placed decision-maker, than the specialist arbitrator, to rule in arbitral matters, but for the statutory powers and inherent jurisdiction of the judge that are denied to the arbitrator.

Therefore the role of courts and judges in arbitration ought to be viewed from the perspective of the qualifications, aptitude, capability and expertise of the court and judge called upon to decide arbitration matters. Parties who go to arbitration freely should expect the outcome to be fully final and the award to be enforced by a process as independent as possible of the court system. If

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9 Ugandan ACA; Article 5 Zimbabwe Arbitration Act, 1996; section 10 Kenyan Arbitration Act 1996; section 1(c) English Arbitration Act 1996.

<sup>87</sup> Lord Chancellor Francis Bacon was prosecuted, imprisoned, fined and deprived of his honours: Derek Roebuck, *Miscellany of Disputes*, Holo Books The Arbitration Press 1999 pp 66 – 68, recounted by Lord Neuberger in Keynote Speech, *Arbitration Vol. 81, No. 4, Nov 2015 p. 427*.

<sup>88</sup> Recent media stories of corrupt judicial practices in Ghana and Kenya have shocked, and shaken public confidence in the communities in those countries. An advocate criticises the Kenyan Judiciary severely perhaps for “swimming like fish in a bowl giving the impression of much activity and movement but plagued by old predicaments – backlog of cases and corruption”; *The Standard*, Sunday April 24, 2016, p. 17.

<sup>89</sup> While the accusations remain allegations until proven, some speculators of outcomes give credit to the judiciaries of Ghana and Kenya for initiating and conducting the investigations aimed at identifying corrupt judges and combating the vice.

<sup>90</sup> *Arbitration p. 427 Vol. 81 – Neuberger on Roebuck, (supra)*.

<sup>91</sup> I hasten to add that judges with training and experience in arbitration law and practice are making a difference to arbitration practice in Africa – but perhaps there are still too few of them.

arbitration is increasingly seen as unable to deliver what it promises then there is much to be done to reverse that perception by statutory provisions to remove the real and apparent impediments in current arbitration practice. Traditionalists cannot see the ends of justice being fully or satisfactorily served without a final curial pronouncement on a dispute. Others would prefer arbitral tribunals to start and finish the arbitration and for arbitral parties to go away with the final outcomes they sought, without stopping or ending up in court for further action or worse still, submitting to a litigation they had avoided.

As both arbitration and litigation operate within their respective legal domains an arbitration system that does not deliver effectively to users needs rethinking, overhauling and to be better equipped. It bears remembering that the extent of court intervention in arbitration is formulated as a bar to courts, not to arbitration. Therefore the circumstances for resort to court or setting aside an arbitral award and denying its enforcement or the finality of the arbitral process should be reviewed and substituted by stricter requirements that will as far as feasible make arbitration free standing with judicial resort only where inevitably and unavoidably necessary, but even then as mandated by law for the enforcement of the arbitration agreement and the award, in order for the final award, to be truly final.

### **Enabling the Arbitral Tribunal to take full charge of the arbitration**

There are problem areas for arbitration that need to be clarified and covered by arbitration law and rules to strengthen arbitration and enable the arbitrator to take full control of the arbitral process confidently and competently.

Problems that exist or arise before the commencement or appointment of the arbitral tribunal should rightly be resolved by a competent authority, such as the court, in whom general jurisdictional, statutory and inherent powers are vested. However, troublesome issues persist even after appointment of the arbitrators in areas not specifically or adequately provided for by the arbitration agreement or arbitration law. These, as noted, revolve around the interpretation of the arbitration agreement, choice of the applicable law, arbitrability, alleged breaches of natural justice, considerations of national and international public policy, and issues of procedural fairness, upon which the fair and just outcome of the proceedings depend. Because, broadly speaking, they involve issues of principle, law, mixed law and fact, and public policy, they call into question the ability and professional competence of the arbitrator, particularly the non-lawyer arbitrator, to determine these issues. The current perception, rightly or wrongly, that the court of law is the appropriate forum on such matters strongly persists. But pertinent also is the adequacy or otherwise of the powers of the professionally qualified and competent arbitrator to determine such issues. Putting it more specifically, is the arbitrator or court better qualified to determine legal or quasi-legal issues?

For purposes of this paper the issue narrows down to a choice between the arbitrator experienced in the area of the dispute or the judge with little or no knowledge or experience of arbitration. We ought to be concerned, rethink and redesign the role of the court in a state with, say some 150 High Court judges of whom less than 10 have some training or exposure to arbitration law and practice, and an Appellate Court of 50 or so judges of whom less than five have working knowledge and experience of arbitration. Consider also a case allocation system whereby arbitration matters and applications are dealt with by a judge who happens to be the one free and available judge on the date of allocation. We ought also to be concerned whether the purposes of arbitration and party expectations are best served in the numerous instances where the decisions of an arbitrator, experienced in the area of dispute, can be and are overturned by an inexperienced or novice judge for no meritorious reason other than being a judge.

There is a role here for party legal advisers to offer sound legal advice and guidance to ensure that the arbitrators they recommend and nominate for appointment are suitably qualified to deal with the

subject-matter of the dispute. The point of emphasis is that provided the arbitrator/tribunal has the requisite professional expertise and ability to determine such issues there should be no good reason to refer such matters to court. Besides, the court (as well as parties who, under expert legal advice and guidance, consciously choose an arbitrator in preference to a judge), should be facilitated by the law to accept the decision of the arbitrator.<sup>92</sup> Dependence on the legal profession for effective arbitration means the legal profession itself ought to be professionally well-trained in the law and practice of arbitration, with lawyers skilled and learned in commercial and international arbitration law and practice. Perhaps this concern may be effectively covered by institutional arbitration rules.<sup>93</sup> It has been noted that both arbitrator and judge have powers to direct and seek the assistance of expert witnesses in areas outside their professional experience; and that the arbitrator who is seised with the dispute should have requisite powers to embark on the dispute and conduct the arbitration from beginning to end. Enforcement of the award with the legal and administrative assistance of a competent authority is then appropriate support for arbitration.

Gross or substantial irregularity (including alleged misconduct) of the sort that should justify the removal of an arbitrator will depend on its facts and governing principles of law and procedure. Who should determine those facts and law? In line with the principle of competence that enables the tribunal to determine its own jurisdiction and jurisdictional challenges it is submitted that the arbitrator should, likewise, have first opportunity to consider allegations of gross or substantial irregularity or personal misconduct and decide whether or not to withdraw before redress is sought outside the arbitral process. The paramount consideration here is the need to promote by law and rules an expeditious arbitral process and the finality of arbitration and the arbitral award. In addition to this is the need to discourage diversionary tactics deployed by party representatives, devious challenges from spurious allegations in order to promote, as much as possible, the finality of arbitration and the arbitral award.

## The Commercial Court

It is increasingly apparent that, in several instances, neither the regular public court nor private arbitration is able to deliver the user expectation of speedy justice with least cost and expense; and that the resistance to arbitration is still felt amongst practitioners and others who, by disposition, instinct and training, distrust private adjudication. Perhaps a properly constituted, well-equipped and competent Commercial Court may well be a preferable partial solution, if not a complete alternative to a stand alone arbitration system. Courts and arbitration users do have a choice of dispute resolution systems with proper guidance from legal and technical advisers. Commercial Courts exist in several countries, albeit in differing formations, structures and competences.<sup>94</sup>

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<sup>92</sup> An independent judiciary that is competent, efficient, with expertise in International Commercial Arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes is one of several so-named London Principles for the conduct of international arbitration; Arbitration Vol. 81 No. 4 November 2015 of p. 405. See also Dominique Hascher, *ibid*, footnote 55: Courts should enforce the parties' right of access to arbitral justice by giving effect to arbitration clauses; enforcing that right obligates the court to ensure that the arbitration agreement is fully effective.

<sup>93</sup> David Rivkin and Samantha Rowe: *"The Role of the Tribunal in Controlling Arbitral Costs"* (2015) 81 Arbitration, Issue 2 pp 116 – 130: *"The long-running debate whether tribunals had to accept procedures agreed by the parties – is over"* with references to Institutional Rules that enhance the Tribunal's powers to take control – UNCITRAL Rules art. 17(1); ICC 2012 Rules arts. 11(2); 22(1); 22(4) and 22(5). LCIA Rules 2014 art. 5(4); art 14(1) – (5); ICDR Rules 2014 art 12(1) and (4), art 20(1) and (2) & (3) & (7). All are concerned with expeditious disposal of disputes and saving time and costs.

<sup>94</sup> As in Kenya, the Gulf States, Singapore and England.

The Commercial and Admiralty Court of Kenya (“CAC”) is untypical. The CAC is a division of the national High Court.<sup>95</sup> The Court, composed of the regular judges of the High Court,<sup>96</sup> began work in 1998,<sup>97</sup> with jurisdiction over commercial matters, classified by the then Chief Justice, to include: proceedings for injunctions to restrain the realization of securities, company, bankruptcy and intellectual property matters, claims for recovery of unsecured debts, and matters certified by a Judge at the Commercial Court as determinable by that Court<sup>98</sup> and, relevantly for this article, “*all matters related to arbitration other than enforcement of awards*”. As such it is not a specialised arbitration court.<sup>99</sup> The challenges of the Court include inadequate Judicial Officers, transfer of judges to other courts, and a “missing files” phenomenon occasioned by concluded cases being refiled back with active cases in the Registry. The greatest challenge, according to the Court’s Status Report, is a lack of good record management system to ensure the availability of accurate and reliable records – all this is bad news for arbitration matters that end up in that court.

A competent Commercial Court Judge dealing with arbitration matters might be expected to have a demonstrable ability and expertise in dispute resolution by arbitration, and relevantly, with knowledge and experience in international commercial arbitration law and practice, to warrant the designation of “Seat Court” in international arbitration.

Kenya aspires to internationality with the “*Arbitral Court*” established by the National Centre for International Arbitration Act (NCIA Act).<sup>100</sup> The Court consists of a President, two-Deputy Presidents, a Registrar and, notably, 15 leading international arbitrators. The President has supervisory powers over the Court<sup>101</sup> which has exclusive original and appellate jurisdiction over all disputes referred to it under the Act or any other written law<sup>102</sup> and, again notably, the Court’s decision is final<sup>103</sup> – great advances when the Court actualises and fructifies. The internationality of the Board of Directors administering the Arbitral Court is challenged by the Board’s composition<sup>104</sup> consisting of Kenyan Government Officials – a chairperson appointed by the Cabinet Secretary, the Attorney General, Principal Secretary from the Justice Ministry, and Chief Registrar of the High Court of Kenya.<sup>105</sup> In Mutubwa’s opinion this “*Arbitral Court*” is not one of the Courts envisaged by the Kenyan Constitution<sup>106</sup> and may be “unconstitutional”, adding that, not being a “Court” in the strict terms of the Constitution, it can be nothing more than an “*arbitral tribunal*”. He is discomfited by the fact that the *Arbitral Court* is not subject to the supervisory or appellate jurisdiction of the High Court of Kenya or any courts established by the Constitution, including the Kenyan Supreme Court. This, despite the

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<sup>95</sup> The divisions are: The Family and Children Division, The Commercial and Admiralty Division, The Civil Division, The Criminal Division, and The Constitutional and Human Rights Division.

<sup>96</sup> Information from a documentary report entitled: “Republic of Kenya, Judiciary, Status Report For Commercial and Admiralty Division dated 8<sup>th</sup> October 2015”. The Report provides information on the background, history, structure, functions and challenges of the Court.

<sup>97</sup> The Status Report: *ibid*.

<sup>98</sup> *ibid*.

<sup>99</sup> According to Deputy Registrar Elizabeth Tanui.

<sup>100</sup> Act No. 26 of 2013, section 2. This paper expounds a little on this Court because of its potential claims to independence and internationality and prospective significance for international arbitration.

<sup>101</sup> *ibid*, section 21(5).

<sup>102</sup> *ibid*, section 22(1).

<sup>103</sup> *ibid*, section 22(2).

<sup>104</sup> Wilfred Mutubwa: “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013” (2016) 82 *Arbitration*, Issue 2 pp 135 – 145.

<sup>105</sup> Section 5.

<sup>106</sup> Article 162.

unanimous decision of the Kenyan High Court<sup>107</sup> that asserts and exercises jurisdiction over all public organs and constitutional bodies.<sup>108</sup>

The far-reaching critique of the NCIA Act<sup>109</sup> and its Arbitral Court is an insightful contribution worthy of note by those who see merit in the establishment of an *Arbitral "Court" or "Tribunal"*<sup>110</sup> that is truly independent, professionally well equipped and competent to take on both domestic and international arbitrations as to win the confidence and respect of domestic and international users and investors.

### Other Commercial Courts

The formation of local Commercial Courts in Dubai, the Dubai International Financial Centre (DIFC), the Qatar International Court and Dispute Resolution Centre (QICDRC), and the Singapore International Commercial Court (SICC), is acknowledged as inspired by the model of the London Commercial Court.<sup>111</sup> The Dubai, Qatar and Singapore Commercial Courts aim to attract international commercial cases where the local national courts are unable to deal with such cases.<sup>112</sup>

A Senior Counsel<sup>113</sup> discusses the relationship between commercial courts and international arbitration in the jurisdictions of Singapore and Dubai and the impact of the newly established Singapore International Commercial Court (SICC) on the existing Singapore International Arbitration Centre (SIAC), and opines that the two institutions will likely complement each other.<sup>114</sup> The Singapore International Commercial Court (SICC) is a different kind of Commercial Court from the Kenyan Commercial Court. Though it is also a separate division of the High Court of Singapore<sup>115</sup> it is, unlike the Kenyan Court, set up to hear international, commercial, and offshore cases as defined in the Rules of Court.<sup>116</sup>

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<sup>107</sup> *Republic v Interim Independent Electoral and Boundaries Commission ex.p Elliot Lidibwi Kihusa* [2012] eKLR: "No person or body could claim not to be subject to or beyond the powers of the High Court when it is alleged that he or she has committed a transgression in exercise of a legitimate power conferred by the Constitution and the Law. The jurisdiction of the High Court can only be ousted by very clear and express language of the Constitution.... the Court was not constrained by the statutory provisions or Common Law remedies", *Sadrudin Kurji & Another v Shalimar Ltd & 2 Others*, (2008) eKLR (supra).

<sup>108</sup> Such as the mighty Independent Electoral and Boundaries Commission (IEBC). The High Court's view is that ouster clauses, such as s. 22 of the NCIA Act, are legal propositions of dubious legality.

<sup>109</sup> See Mutubwa at footnote 76. In effect the NCIA Act seems to render the 1995 Arbitration Act subservient or subordinate to it, and, unlike the latter statute, overrides party autonomy, parties' freedom to choose their own procedure, protection of confidentiality and the right of appeal granted by the 1995 Act. In other words there is potential conflict in the provisions of the two arbitration statutes in the specified areas.

<sup>110</sup> The critique even suggests that the description "*Arbitral Court*" was inadvertent as it is more properly an "*Arbitral Tribunal*". This is questionable as the term "*Arbitral Tribunal*" is specifically defined by the Kenyan Arbitration Act as a sole arbitrator or a panel of arbitrators: S. 3(1) KA Act, 1995, and the "*Arbitral Court*" is differently designed and structured.

<sup>111</sup> Sir Vivian Ramsey: "National Courts and Arbitration: Collaboration or Competition? The Courts as Competitors of Arbitration, *Arbitration* Vol. 81, No. 4 Nov 2015 p. 446.

<sup>112</sup> Sir Vivian Ramsey, *ibid*.

<sup>113</sup> Michael Hwang: Commercial courts and international arbitration – competitors or partners: *Arbitration International*, 2015, 31, 193 – 212.

<sup>114</sup> It seems that the Model Law standards of curial review are not yet adopted in the United Arab Emirates (UAE), that includes mainland Dubai, as the arbitration law is contained in the sketchy provisions of an unmodernised Federal Civil Procedure Code. On the other hand, the Dubai International Financial Centre (DIFC) uses an Arbitration Law of 2008, based on the Model Law principles and jurisprudence.

<sup>115</sup> It is said to be similar to the New South Wales Supreme Court (*ibid*).

<sup>116</sup> In the past, parties in cross-border disputes who did not desire to arbitrate went to London and New York. A significant aim, amongst others, of the SICC is to offer cross-border, multi-jurisdictional

The sources of the SICC jurisdiction are the parties' jurisdiction agreement to refer their disputes to the SICC and referrals from the Singapore High Court to the SICC in cases without a jurisdiction agreement. The merit of the SICC seems to be that it is a forum for parties who do not choose either *ad hoc* or international arbitration as practised by arbitration institutions or the national court of one of the disputing parties, for whatever reason. Hwang asserts that the SICC and the SIAC are complementary. The SICC is a hybrid – it emulates some of the distinctive features of international arbitration but also remains a national court possessing certain features peculiar to arbitration tribunals. Consequently although the SICC, SIAC and the High Court will be, to some extent, competitors the arrangement offers a choice of forum to disputing parties.

The Dubai International Financial Centre Courts (“the DIFC Courts”) are described as “a common law island in a civil law ocean”<sup>117</sup> because UAE laws are based on the civil law, while the DIFC laws are based on common law. As noted, the DIFC uses an Arbitration Law 2008 based on the Model Law and applies to all arbitrations seated in the DIFC, which is a separate seat from the Emirate of Dubai. The DIFC Court is therefore the curial court for all DIFC seated arbitrations. The Court is international because at least one party is from outside Dubai or the UAE, with primary jurisdiction over arbitral parties incorporated or registered in the DIFC or related to events within the DIFC. Besides, most occupiers of the DIFC are international persons or companies and there is an opt-in jurisdiction from parties outside the region and jurisdiction over cases with a written jurisdiction agreement. Unlike Singapore, there is no separate court with special rules because the practice and procedural rules are largely based on the English Civil Procedure Rules (CPR) particularly the Rules of the English Commercial Court.<sup>118</sup>

While the Kenyan Commercial and Admiralty Court has no international features or attributes the Singapore International Commercial Court is a hybrid court with distinct arbitral and litigational features and an international outlook.

In England, a judge of the Commercial Court or an Official Referee may accept appointment as a Sole Arbitrator or Umpire by virtue of an arbitration agreement subject to stated circumstances<sup>119</sup> but their fees are taken in the High Court<sup>120</sup> and the London Commercial Court is credited as the venue of choice for many commercial disputes particularly where English law is chosen as the proper law.<sup>121</sup>

For Africa, although the composition and qualitative prescriptions of a good Commercial Court seem rigorous they are attributes that can be cultivated by Africans from the available historical and modern examples of sound practices of the advanced jurisdictions. Moreover, the principles and requirements of procedural fairness and equal treatment of parties that are enshrined in the Model Law<sup>122</sup> and written into or adapted by national arbitration statutes<sup>123</sup> also avail. These universal principles and rules would underpin and guide the performance of the Commercial Court in Africa as would the

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dispute resolution services as Asia becomes a popular destination for foreign trade and investment, to harmonise the differing legal systems in Asia and eliminate their uncertainties and inconsistencies by developing a free-standing body of international commercial law.

<sup>117</sup> Hwang, *ibid*.

<sup>118</sup> The reader will find Hwang's article informative and illuminating on the complex structure of the DIFC Courts.

<sup>119</sup> Sections 93(1), (2) & (3) of the English Arbitration Act 1996.

<sup>120</sup> *ibid*, Section 93(4).

<sup>121</sup> *ibid*.

<sup>122</sup> Model Law Art. 18 (equal treatment of parties); Art. 19 (determination of rules of procedure).

<sup>123</sup> Kenyan Arbitration Act sections 19 and 20; Nigerian ACA, sections 14 and 15; the Ugandan ACA, sections 18 and 19; and the English Arbitration Act, sections 1(a) and (b).

statutory provisions aimed at facilitating easy access and forum safety.<sup>124</sup> A demonstrable capacity to ensure fair and just outcomes can only win confidence in such courts. These attributes could substantially meet user expectations and address some of the perceptions and concerns that negatively impact on the practice, progress and transformation of arbitration in Africa.

We may take a leaf from Judge Allsop's observations that good Commercial Courts exist around the world with deeply embedded skill and expertise attractive to foreign parties; that given an international character and outlook they can provide greater confidence in international arbitration practice; and that these are trends and approaches that challenge nations to adapt their dispute resolution systems to the needs of international commerce. Judge Allsop recognises these challenges also "*as emerging opportunities for nations to harness and deploy their expertise and capital, physical and human, that is locked up in their court systems*".<sup>125</sup> Indubitably a good arbitration can produce decisions as expeditiously and competently as a good court.<sup>126</sup> It is therefore up to nations to promote and uphold what is good in either system of justice, being objectives and processes in the achievement of which all of us in the legal, arbitral or judicial systems can participate to mutual advantage and benefit.

## Conclusion

Some troublesome aspects in the relationship between arbitration and the court have been identified and discussed.<sup>127</sup> In Africa the inadequate powers of the arbitrator and the lack of confidence in both the arbitral and judicial systems have negatively impacted on, polarised their respective positions and compromised, their effectiveness. To win public confidence we may expect law makers who created both systems by legislation to re-design and re-allocate their powers, jurisdictions, ability and effectiveness to do justice.

In this current situation, and bearing in mind the shortcomings of the judicial systems on the continent, the achievement of a free arbitration system is desirable to strengthen the Arbitral Tribunal and eliminate extraneous and diversionary processes that frustrate arbitration and the finality of the award. This will assist arbitration to deliver on its promises as the dispute resolution mechanism of choice. My optimism for arbitration is not dimmed or diminished. It is that, subject to well-defined statutory improvements, arbitration can be a free-standing system, free to settle its own procedures and develop its own substantive law,<sup>128</sup> enabling it to deliver complete and final arbitral justice outside the existing court system.<sup>129</sup>

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<sup>124</sup> London Principles – No. 6.

<sup>125</sup> James Allsop: "National Courts and Arbitration: Collaboration or Competition?" *Arbitration*, Vol 81, Issue 4, Nov 2015.

<sup>126</sup> *ibid.* A sentiment borrowed from Allsop's reference to "best courts" and "best arbitrations".

<sup>127</sup> In the paragraphs on Perspectives and Specific Concerns.

<sup>128</sup> Reminiscent of Lord Wilberforce's vision for arbitration in the then House of Lords' debate on the English Arbitration Bill: Hansard 18 January 1996 col. 778.

<sup>129</sup> Lord Jonathan Mance's article "Arbitration: a Law unto itself?" *Arbitration International* Vol 32, Number 2, June 2016, introduces an English legal and judicial perspective noting an "unfortunate difference" in attitude between common law and French civil law and between strands of doctrinal thought on the fundamental basis of arbitration; and argues that arbitration should not be a law unto itself for lacking a coherent jurisprudence and confidence in its efficacy with no general means of ensuring awards are consistent. Differing perspectives on the progress and development of arbitration laws and practice should be healthy not "unfortunate", it may be thought.

## **ANNEXURE 1**

### **A LIST OF KEY JUDICIAL DECISIONS IN AFRICAN ARBITRATION**<sup>130</sup>

1. Attorney General v Balkan Energy Ghana Limited Balkan Energy LLC and Philip Elders [2012] 2SCGLR, pages 998 –1037.
2. Westchester Resources Ltd v Ashanti Goldfields Co Ltd and Africore (GH) Ltd v Ashanti Goldfields Co Ltd Consolidated Civil Appeal No. J4/63/2013 (11<sup>th</sup> November, 2015).
3. IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation [2015] EWCA Civ 1144 (10<sup>th</sup> November 2015).
4. Statoil (Nig) Ltd & Anor v Nigeria National Petroleum Corporation (NNPC & 3 Others (2013) 14 NWLR (Pt 1373).
5. Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Service & Anor, (2014) LPELR – 23144 (CA).
6. Nigerian Agip Exploration Limited [NAEL] v Nigerian National Petroleum Corporation (NNPC) & Ors (2014) 6CLRN 150.
7. The Shell Development Company of Nigeria Limited & Ors v Cresta Integrated Natural Resources Limited (Appeal No. CA/L/331M 2015)
8. YariCornacchia v Nsanawe Ndekwe, RCOMA 0053/15/CS, 26/2/2016.
9. Southern District Council v Vlug & Another, 2010, 3BLR315 HC Case No. Misca 222 of 2008.
10. Attorney General v Oatile 2011 2BLR 209 CA.
11. Botswana Railways Organisation v Ditshwane [1998] BLR 68, CA.
12. Attorney General v Mafojane & Others [2000] 2 BLR 74 CA
13. Electricity Supply Authority v Maposa 1999(2) ZLR 452 (SC)
14. Telcordia Technologies Inc v Telkom SA Limited [2007] 3SA 266 SCA
15. Lufuno Mphaphuli & Associates (PTY) Limited v Andrews CCT97/07/[2009] ZACC 6.
16. Zhongi Development Construction Engineering Company Limited v Kamoto Copper Company Sarl JDR 2159 (SCA)
17. Kenya Law Reports; Samuel Kamau Muhindi v Blue Shield Insurance Company Ltd [2010] eKLR.htm
18. Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR.pdf
19. Sadrudin Kurji & Another v Shalimar Limited & 2 Others [2008] eKLR.pdf
20. Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR.htm
21. Kenya Law Reports Glencore Grain Ltd v TS.S.S Grain Millers Ltd [2012] eKLR.htm
22. Structural Construction Co. Ltd v International Islamic Relief [2006].pdf

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<sup>130</sup> These cases were sent in for purposes of this paper by courtesy of colleagues, to all of whom I am deeply grateful: Emmanuel Amofa, Olufunke Adekoya, Prof. Paul Idornigie, Bernadette Uwicyeza, Edward Luke II and Des Williams. The list is not closed, the idea being to gather, compile and publish as many relevant arbitration decisions as possible.

23. Kenya Law Reports Tanzania National Roads Agency v Kundan Singh Construction Limited & Another [2011] eKLR.htm;
24. Alividza v LZ Engineering Construction Ltd.[1989].pdf
25. Christopher Kagema Gichuhi v Benson Irungi Mbaria & Rosemary Wanjiku Mbaria.[1998].pdf
26. Timothy M. Rintari v Madison Insurance Co. Ltd.[2004].pdf
27. Engineer Charchi Githinji T/A Charchi Githinji & Partners Consulting Engineers v National Oil Corporation of Kenya. [1999].pdf
28. Mohamed Salim Shamsudin v Trishcon Construction Ltd.pdf
29. Ernie Campbell & Co. Ltd v Githunguri Dairy Plant Co. Ltd & Githunguri Dairy Farmers Co-op Society Ltd.[2003].pdf
30. Adcock Ingram East Africa Limited v Surgilinks Limited [2012] eKLR.pdf

**Rethinking the Role of Courts and Judges in supporting Arbitration in Africa, Lagos Court  
of Arbitration International Centre for Arbitration and ADR, Conference Hall, Lagos, 22-24  
June 2016**

**National Court Judges and the Arbitral Process**

Dr Emilia Onyema

**Introduction**

Arbitrators and judges resolve disputes but in different fora. One acts in a private process, the arbitrators; and the other in a public process, the judge. Both however are in the business of resolving disputes between parties in accordance with the law. They can therefore be said to render complimentary services. This paper examines this complementarity between judges and arbitrators in the service they provide to disputants. I will examine the different stages courts/judges become involved in the arbitral process and interrogate the role/function of judges in arbitration and set out the symbiotic nature of these relationships. I will use the terms courts and judges interchangeably. This paper sets in context the discussions on the role of courts in arbitration and how they can better support the arbitral environment in African states, as the theme of this conference.

My presentation will be divided into three sections: Section 1 will outline when courts become involved in arbitration; section 2 will examine the functions of courts in arbitration; and section 3 will examine the symbiotic nature of the relationship between judges and arbitrators.

**1. Identifying the Court**

In domestic or international arbitration, recourse to a particular national court by the disputing parties may be relevant. Such recourse may happen at different stages of the life span of the arbitration proceedings. In international arbitration, different factors may connect such arbitration to a particular state or country. It is such connection to a state that implicates the laws and courts of that state in the arbitral reference. Such factors include: the place of the arbitration; the place where enforcement of the arbitral award is sought; the place where the parties have assets; or where a court perceived by a party as being supportive (without any connection to the dispute) is located. Any of these factors will localise the arbitral reference (effectively connect it to that state).

Such connection of the arbitral reference to a state also implicates the application of its laws to regulate the arbitration and the support of its courts. It has long been debated whether all of these factors have equal value or whether there are some factors that are more valuable than others. These have led to different theoretical analysis of such factors in connection with the arbitration. For some commentators the seat of the arbitration has a superior value as the place with the closest connection to the dispute. So for example Article 1(2) of the UNCITRAL Model Law provides in part, "The provisions of this Law, except articles (...) apply only if the place of arbitration is in the territory of this state."<sup>131</sup> The English Arbitration Act on its part in Section 2 expressly state that, "The provisions of

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<sup>131</sup> Article 1(2) UNCITRAL Model Law on International Commercial Arbitration (2006 revision).

this Part apply where the seat of arbitration is in England ...”<sup>132</sup> This effectively means that any arbitration seated in England is subject to the English Arbitration Act. In contrast to some other jurisdictions such as France, where there is no such localisation of international arbitral references. According to Article 1504 of the French Arbitration Law 2011, “Arbitration is international when international trade interests are at stake”, this definition is very broad.

The contestation between the various theories is evident: the seat theorists basically contend that since the seat has the closest connection to any arbitration, the law of the seat (and by reference the regulatory powers of its courts) should have an overriding interest in such arbitration as compared to other laws. The autonomous theorists on their part do not see why the seat should be relevant least of all, enjoy an overriding interest in the arbitration, simply because it was chosen by or for the parties. They argue that international arbitration should enjoy an autonomous existence, so completely emancipated from the domination of the state. For example, the French Cour de Cassation in *PT Putrabali Adyamulia (Indonesia) v Rena Holding (France)*<sup>133</sup> noted that:

An international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought.

The proponents of the delocalisation theory on their part agree that arbitration may be connected to a particular seat but this should be the place where enforcement of the award is sought and not necessarily the seat of the arbitration.<sup>134</sup> These theories are interesting and they help us think more deeply about the nature of arbitration and its relationship with the courts. I have provided a few references for those wishing to further explore these various theories.

For purposes of this panel discussion, in domestic arbitration, the national courts of the state will be the relevant courts while for international arbitration references, generally the relevant laws and courts are those of the seat of arbitration (if any), and the place where assets are located (primarily for interim measures applications and enforcement of awards). The particular courts with jurisdiction over international arbitration are generally clearly defined under most national laws.<sup>135</sup>

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<sup>132</sup> S.3 EAA defines seat of the arbitration to mean the juridical seat; while s.4 EAA states that the mandatory provisions of the Act apply “notwithstanding any agreement to the contrary”. See for example the decision in *C v D* [2007] EWCA Civ 1282.

<sup>133</sup> *PT Putrabali Adyamulia (Indonesia) v Rena Holding (France)* decision of the French SC, First Section, No 05-18053 of 29 June 2007; *Rev Arb* 2007, 507.

<sup>134</sup> For a good summary of these theories and the attitude of courts in various jurisdictions, see Ahmed Massod, “The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration” (2011) *Arbitration*, vol 77 no 4, pp. 406-422; Hong-Lin Yu, “Explore the Void: an Evaluation of Arbitration Theories, Part 1”, (2004) *Int ALR*, Vol 7(6), pp 180-190; Hong- Lin Yu, “Explore the Void: an Evaluation of Arbitration Theories, Part 2”, (2005) *Int ALR*, Vol 8(1), pp 14-22; and Jan Paulsson, “Arbitration unbound: award detached from the law of its country of origin”, (1981) *ICLQ*, pp 358-387.

<sup>135</sup> These are the laws and courts referred to in my presentation.

## 2. Functions of Courts in Arbitration

Having identified the state whose law and courts may be engaged in arbitration, this section examines the role such courts may be requested to play in the reference.<sup>136</sup> The role of the court in arbitration can conveniently be divided into three phases: before the formation of the arbitral tribunal (A); after the formation of the arbitral tribunal (B); and after the conclusion of the arbitration (C).

### 2A. Before the formation of the Arbitral Tribunal

The arbitral tribunal cannot make any decision regarding the dispute between the parties or any ancillary matters until it has been constituted. Therefore any assistance that one or all the parties may require prior to the constitution of the arbitral tribunal, will need to be sought from either the arbitration institution or a national court. Arbitration Rules of some institutions empower the institution (or a pre-arbitral referee<sup>137</sup> or emergency arbitrator<sup>138</sup> or special measures arbitrator<sup>139</sup>) to decide certain matters, while national laws empower national courts to decide other matters.

Examples include:

Where one party seeks an anti-suit injunction, a national court will grant such an order (Article II.3 New York Convention; Article 8 Model Law; Section 6 EAA; Article 1448 French Law; Section 4 Nigerian ACA; Section 6 Ghana ADR Act). All these laws require their courts to determine the question of whether to refer parties to arbitration where there is an arbitration agreement covering the dispute before the court.

To appoint arbitrators: this function by national courts remains relevant under ad hoc references where the parties have not nominated an appointing authority. The modern trend is to leave this task to an appointing authority or arbitration institution.<sup>140</sup>

Extension of time to take various steps, for example commence the arbitration.<sup>141</sup>

Interim measures: this function can be performed by national courts or an emergency arbitrator (or any of its variants mentioned above). Dr Seriki will discuss this in greater detail.

It is evident that all of these functions go to the preservation of the subject matter of the dispute for determination of the arbitral tribunal. It can therefore be asserted that at this stage, the role of the court (or the arbitration institution) is to ensure the constitution of the arbitral tribunal so the arbitrators can effectively enter into the reference and determine the dispute. This is a supportive role for the courts.

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<sup>136</sup> For a detailed discussion of this various phases and shifts in arbitral power, see Emilia Onyema, "Power Shift in International Commercial Arbitration Proceedings", 14 (1 & 2) Caribbean Law Review, (2004), pp. 62-77. An electronic copy of this article is available at: <<http://eprints.soas.ac.uk/4425/>> (last accessed 07 April 2016)

<sup>137</sup> For example, under the ICC Arbitral regime.

<sup>138</sup> For example, under art.28 LACIAC Rules; art.34 KIAC Rules.

<sup>139</sup> For example, Under art.11 of the LCA Rules.

<sup>140</sup> For example art.5 LCIA-MIAC Rules; art.9 LACIAC Rules; arts. 13-15 KIAC Rules; arts 8-10 LCA Rules; arts 6-8 Cairo Rules; and art.3 OHADA, CCJA Rules.

<sup>141</sup> Extension of time can be granted by national courts, institutions, the arbitral tribunal, or agreed between the parties, depending on what the extension applies to.

## **2B. After the Formation of the Arbitral Tribunal**

Once the arbitral tribunal is in place, arbitration rules and laws empower the tribunal to manage the reference and take effective control of the dispute, hear the parties and determine the dispute submitted to it. The arbitral tribunal lacks coercive powers so that courts may render support to the arbitral tribunal by enforcing its orders. Such orders include: granting interim measures of protection, summoning witnesses, and gathering evidence.

Where an arbitrator is challenged, arbitration rules and laws empower the arbitration institution or appointing authority to decide the challenge application in the first instance with final recourse to the courts.

The role of the court at this phase is very limited and primarily focused on courts providing enforcement support for the orders of the arbitral tribunal. It can be asserted that at this phase of the arbitral reference, courts are not expected to engage with the arbitral reference. This is understandable considering that there is a decision maker empowered by the parties (with the full support or 'permission' of the state) in place to make such decisions as are required or necessary in the arbitration.

## **2C. After the Conclusion of the Arbitration**

The arbitral tribunal becomes *functus officio* after they have published their award and the arbitrators have been paid for their services. Their role in the arbitration effectively comes to an end and the tribunal disbands. Arbitration rules and laws generally provide for the opportunity for a reconstitution of the arbitral tribunal to make additional awards, interpret or correct their award. Where such post award services are not required (or where the original tribunal can no longer be reconstituted), at this stage there is no longer an arbitral tribunal in place to make any decisions for the parties. So effectively the position reverts back to the arbitral tribunal pre-formation phase (2A above). The parties then revert back to the courts. These may be different courts from the courts under 2A because the relevant courts at this stage will depend on where the losing party has assets if enforcement of the award is sought or the seat of the arbitration if the award is being pro-actively challenged. Application for the recognition and enforcement or challenge of the arbitral award can only be made to a national court which is empowered to decide such matters.

At this stage, national courts get the opportunity to give effect to the decision of the arbitral tribunal or reject it; but such rejection must be on very limited grounds.<sup>142</sup> This limitation of the grounds of challenge is another evidence of the limited role courts play in arbitration and points directly to the nature of the relationship between arbitration and litigation, arbitrators and judges in the arbitral process.

## **3. Symbiotic Nature of the Relationship**

As mentioned above, arbitrators and judges make decisions that are binding on the disputing parties but both operate in different domains with an evident hierarchy of authority. Arbitrators operate in the private domain and are very much subject to judges who act in the public domain (and as a matter of constitutional law, as an emanation of the state). Thus, though the law recognises the decision arbitrators and judges make as binding, the same law provide for this hierarchy by empowering

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<sup>142</sup> See for example: art V of the New York Convention; and arts 34 and 36 UNCITRAL Model Law.

national courts to recognise and enforce the same decisions made by the arbitral tribunal or annul it.<sup>143</sup> Evidently there is no question of competition between these two processes. Most national laws clearly demarcate the spheres of influence of judges and arbitrators. These spheres as shown under section 2 above are dedicated to supporting each other. It is therefore argued that national court judges and arbitrators, in the same manner as the processes of litigation and arbitration, can co-exist symbiotically, as they each understand the functions of the other in the dispute resolution provision service. Arbitrators do not have any powers to encroach on the functions of the judges and do not. This is primarily because their powers are circumscribed by the agreement of the parties (as the source of the powers of the arbitrator). It is posited that one reason for the interventionist attitude from some members of the judiciary is the lack of a clear understanding of the role and functions of arbitrators in the dispute resolution process and how arbitrators add value to the task performed by national court judges.

### **Conclusion**

An appreciation of this symbiotic nature of the relationship between judges and arbitrators, and between arbitration and litigation, will assist judges in their decision making in arbitration-related matters: to seek to support the arbitral reference within the purview of the law applicable to the reference and give due deference to the decisions of the arbitral tribunal. Such co-existence will bring to fruition the intention of the legislators in the African states as reflected in their arbitration laws. It will also instil confidence in the commercial community (both domestic and international) that their choice to arbitrate their disputes will be respected by the state through the judiciary. It will reduce the workload of judges who, at the same time, retain a watchful eye over the arbitral process to ensure the basic tenets of procedural fairness and their laws (including public policy) are not breached and parties left without adequate redress. Finally it will ensure that the perception of interventionist judiciaries across the continent (and the attendant impact of such perception) begins to shift away from intervention to support.

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<sup>143</sup> Or remit the decision back to the arbitral tribunal.

# The Attitude of the Sudanese Courts to Arbitration

Ahmed Bannanga

## Abstract

Arbitration existed in Sudan in civil disputes before independence.<sup>144</sup> Arbitration was provided first in Section 6(4) of the Civil Procedures Act 1983 (CPA). This Section gave Sudanese courts control over the arbitral process. In 2005, the first Sudanese Arbitration Act (SAA 2005) was promulgated with great similarities to the UNCITRAL Model Law, 1985. In 2016, a new Arbitration Act was promulgated (SAA 2016) to enhance the practice of arbitration and incorporate judicial precedents from the application of SAA 2005.

In general and in the last decade, Sudanese courts can be said to be supportive of arbitration. The published decisions of the courts confirm this support. Decisions from the Supreme Court and the Constitutional Court of Sudan have focused on two main issues. These are: the validity of the arbitration agreement and the contest of the arbitral award under the nullity of suit conditions. It projects the debate in the legal practice regarding these two significant issues and how the higher courts guided the process positively.

Therefore, this paper examines the decisions of these two courts on these issues to understand the attitude of the Sudanese judiciary towards arbitration and project the future path of the judiciary under the new SAA 2016.

## Introduction

Sudan is a Common Law jurisdiction, which observes the doctrine of precedents and 'judge-made law'. Hence the interpretation of any law by the courts is as significant as the legislation itself. In 2005, Sudan adopted its first arbitration legislation in the form of the Sudan Arbitration Act (SAA 2005). It was anticipated that the interpretation of the text by the courts would be a challenge since the history of arbitration in Sudan did not regard arbitration as an independent method of resolving disputes<sup>145</sup>. In order to understand the interpretation of the court of this legislation, it is important to discuss arbitration precedents prior to and after the SAA 2005 to assess the development of arbitration in Sudan. The discussion will also focus on the controversial case of Tractors Co. v The Gov. of Sudan, by the Supreme Court.

This paper (and my presentation) is divided into three sections. The first section discusses the court precedents prior to the adoption of the SAA 2005 (1). The second section discusses some arbitration related decisions of the courts under the SAA 2005 (2). The third section concludes this paper by analysing the practice of arbitration under SAA 2005 and the expectation under the new SAA 2016 (3).

## 1. The Precedents Prior to the Sudan Arbitration Act 2005

In the Almagmou'a Almutakamela case,<sup>146</sup> the Supreme Court held that the agreement of arbitration is not "sufficient" so that parties have to agree to arbitrate before the court. This means that the

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<sup>144</sup> Dr. Draig explaining the history of arbitration in "*Arbitration Act 2016 and the Implications on the Engineering Sector Forum*", Engineers Society, 1<sup>st</sup> March.2016, Khartoum-Sudan

<sup>145</sup> CPA, sub section 6-4 (*repelled*)

<sup>146</sup> *Civil Recourse No.624/1999, Almagmou'a Almutakamela (Integrated Group) v Borahn and other, Sudan Law Journal & Reports, 1999 p 192.*

parties have to submit their case first to the court and then agree to arbitrate. Otherwise their agreement to arbitrate is not valid and does not bind the court to refer the dispute to arbitration. In this 1999 case, the Supreme Court confirmed this situation which had existed since Sudan's modern judicial system in 1900<sup>147</sup>. This case was the first precedent published on arbitration in Sudan. It reflected that arbitration was not recognised as an independent method of resolving disputes. Thus, the Almagmou'a Almutakamela case is significant to assess the courts stand and understanding of arbitration and points out the development of that understanding after 2005 Act.

## 2. Judicial Precedents after Arbitration Act 2005

In 2005, and after a few months of the SAA 2005 coming into force, the first precedent GNPOC v Ramsees<sup>148</sup> was published. The case was referred to arbitration after the request of the parties prior to the SAA. By the time the arbitral award was rendered, SAA was in force and the Civil Procedures Act 1983 (CPA) Section 6 was repealed. The losing party requested the court to apply this Section 6 of the CPA instead of the SAA as the parties had agreed and proceeded with arbitration while Section 6 was the valid law. The court refused this appeal as the CPA was already repealed. The Supreme Court, however, accepted the concept of the finality of the award, and therefore, the first instance court decision remained intact. At the same time, the Supreme Court's interpretation of the Nullity Suit<sup>149</sup> was not supportive of arbitration. It held that although the losing party cannot contest the arbitral award unless under nullity suit conditions, but the decision of the first instance court in the nullity suit is subject to all levels of appeal under the provisions of the CPA. This decision meant that it was only the procedure the losing party followed that was wrong. According to this decision, the appellant should have followed the conditions of the nullity suit to appeal before the Appeal Court with further right of appeal to the Supreme Court as the CPA provides.

A new case emerged to correct the interpretation in the GNPOC case. In Faisal Bank v Osman Musa<sup>150</sup>, The Supreme Court held that "the Nullity Suit is not a separate suit applicable to all rules in the CPA. This is because the arbitral proceedings purpose was set to reduce the time of adjudication and its domains". In other words, the GNPOC case understanding was corrected making the nullity suit decision final and not subject to any appeal or recourse process. With this decision, it became clearer that arbitration practice and the interpretation of the courts are leaning towards favouring the arbitral process.<sup>151</sup>

One of the shortcomings of the SAA 2005 is the lack of any guidance to courts to assist with the appointment of the default party arbitrator, which frustrates the arbitral process. In Alamin v Abualarki,<sup>152</sup> the first instance court dismissed the claimant's request for assistance with appointing the respondent's arbitrator. In its judgment, the judge said the SAA 2005 did not mention or give the court the power to appoint the parties' arbitrators. In addition, that the court is not a lawmaker to

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<sup>147</sup> There has been no precedent of arbitration since the first law journal and report of 1900.

<sup>148</sup> Civil Recourse No. 1216/2005, *Greater Nile Petroleum Operating Co. v Ramsees Engineering Co*, 2006 Law Journal & Reports, pp 148-151.

<sup>149</sup> Art: 40 SAA allows the losing party to contest the award before the competent court following the Nullity Suite process. It follows most of art 34 of the Model Law "Application for setting aside as exclusive recourse against arbitral award"

<sup>150</sup> C.R/86/2007-Revision/21/2008, Sudan Journal & Law Reports, 2008, pp137-141

<sup>151</sup> Art: 41-2 "The request referred to in sub-section (1), shall be presented before the competent court, whose decision shall be final."

<sup>152</sup> Civil Appeal No. 2370/2006, *Huda Abu Alaraki v Abdalla Al-amin* (unpublished)

initiate its own power.<sup>153</sup> However, the Appeal Court overruled this decision. In the judgment of the Supreme Court in Nile Inter Trade Co. v Atcoco Co,<sup>154</sup> the judge noted that,

Although article 14 does not give the court the authority to appoint the reluctant party arbitrator, which considers a literal interpretation violates the intent of the legislator. The role of the court is to interpret the law by the way that makes it executable...despite the fact that the law does not clearly authorize the court to do so, but the law embodies such authority.<sup>155</sup>

This judgement is considered to be supportive of arbitration and it provides positive guidance to lower courts and stakeholders that the Supreme Court will make sure that arbitration will be supported and not crippled as in the Abualarki case.

In SAS Co v A. Fattah,<sup>156</sup> the Supreme Court was explicit in identifying the validity of the arbitration agreement. The court explained that the arbitration agreement can take two forms: the first is the agreement after the dispute has arisen and the second is the arbitration clause or agreement stipulated prior the dispute arising. In both cases, the agreement and the award upon that agreement are valid and subject to the Nullity Suit conditions only. This case is significant as it repealed the Almagmou'a Almutakamela case previously noted and strengthens the understanding of the arbitral agreement and its outcome. In 2013, in Kassala State v Sala International,<sup>157</sup> the Supreme Court stated clearly that the court must refer the parties to arbitration unless they both neglect the arbitration agreement and proceed with the litigation. This case ended any debate about the validity of the arbitration agreement and made it clear to stakeholders that the court will not have any discretion in an existence of an arbitration agreement following Article 10 of the SAA 2005.<sup>158</sup>

In 2014, the Constitutional Court made a decision that is very supportive of arbitration in Sudan. In Marble Art Co. v Abdelaziz,<sup>159</sup> the losing party (Marble Art) submitted a constitutional petition claiming that Article 41(2) of the SAA 2005 is not constitutional.<sup>160</sup> The main claim was the contradiction between this Article and the constitutional "right to litigation".<sup>161</sup> The petitioner claimed that according to the Article in question, the decision of the first instance court is final, hence, no appeal application will be accepted, since such appeal effectively limits the party's "right to litigation" as provided in the Constitution. Judge Haj Al Tahir<sup>162</sup> was very clear in his analysis of the issues raised and confirmed that the "right to litigation" was not in question since the SAA allowed any party to apply to the jurisdictional court to annul the award under the nullity suit conditions. Accordingly, the "right to litigation" was preserved. The decision also noted that the legislator was clear in the limited levels of appeal due to the nature of arbitration and its advantages of speed and confidentiality. The Constitutional Court strengthened its decision by quoting similar claims raised in the Alamatong

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<sup>153</sup>Darig, Ibrahim., *Concluded Arbitral Principles (مبادئ تحكيمية مستخلصة)*, 2008, Sudanese House for Books, pp 100-03

<sup>154</sup> Civil Recourse No. 310/2006, *Nile Inter Trade v Atcoco for Advanced Trading and Chemical Works Co.* (unpublished) cited in Darig, Ibrahim., *Concluded Arbitral Principles (2008, (مبادئ تحكيمية مستخلصة)*, Sudanese House for Books, pp 146-149.

<sup>155</sup>Deraig, pp146-49 (translated from the Arabic text)

<sup>156</sup>C.R/1053/2008, Sudan Journal & Law Reports, 2008, pp 180-184

<sup>157</sup> C.R/232/2011- R/94/2012, Sudan Journal & Law Reports, 2013, pp 278-285

<sup>158</sup> SAA Art: 10 "*Stay of Suit proceedings for the purpose of Arbitration*"

<sup>159</sup>C.J/66/2014 Marble Art v Abdel Aziz Abbas & the Gov. of Sudan case. the Constitutional Court decision was notified to the parties in 23.02.2015. (The Law Journal of the Constitutional Court has not yet printed)

<sup>160</sup> SAA art: 41-2 "(2) *The request referred to in sub-section (1), shall be presented before the competent court, whose decision shall be final.*"

<sup>161</sup>The Interim Constitution of Sudan art: 35 "the Right to Litigation" states "*the right to litigation shall be guaranteed for all person; no person shall be denied the right to resort to justice*"

<sup>162</sup> Professor Haj Adam Hassan ALTAHIR, a known Constitutional Court judge and professor of law.

Leather Co v Cleopatra Co<sup>163</sup> and State of South Kordofan v Jebarooky Engineering Co<sup>164</sup> cases. In both cases, the Constitutional Court stated clearly that Article 41(2) of the SAA 2005 does not contradict the constitution. These constitutional precedents were victories for arbitration in Sudan and ended the debate over the finality of the arbitral award and the limitations on the discretion of the jurisdictional court, which are the main motivation to arbitrate.

### 3. Judicial Attitude under Sudan Arbitration Act 2016

However, in January 2016, the Supreme Court followed a new trajectory that shocked the Sudanese arbitration community. The Minister of Justice unveiled a new Supreme Court decision in the Ministry of Finance v Tractors Co.<sup>165</sup> case to defend his proposal in the new Sudan Arbitration Act of 2016 (SAA 2016). The decision clearly states:

Article 41(2) states that the jurisdictional court decision is final... this is a clear infringement to article 35 of the Constitution that has given everybody the right to litigate and it is not allowed to forbid anyone to reside to justice. The constitutional text is a commander and conclusive and neither discretion nor deception can be held against it by any legislative authority to forbid, limit or cripple the right to litigation...

These are very strong words used by the Supreme Court which effectively deviates from the path it followed under SAA 2005. The Minister of Justice published this decision in a newspaper article he penned to defend his position after passing the controversial Arbitration Act of 2016 (SAA 2016). The new Act was designed to clarify some issues in the wording of the SAA, instead the Minister of Justice, according to the Head of the Drafting Committee,<sup>166</sup> changed many of its provisions to remove the finality of the arbitral award and include greater interference by the jurisdictional court, by allowing the parties to exhaust the appeal process under the provisions of the CPA.<sup>167</sup>

Following the precedents previously discussed, revoking the concept of finality can be in favour of the state. In the Almatanog and South Kordofan constitutional precedents previously noted, the government of Sudan was the petitioner before the constitutional court. In the Tractors Co case,<sup>168</sup> the government of Sudan was the defendant. In addition the new SAA 2016 was passed by a presidential temporary decree as the Legislative Committee<sup>169</sup> of the General Assembly rejected the bill and the Minister waited for the General Assembly to go on vacation, to proceed under the Presidential Decree option.<sup>170</sup> This new tendency that treats arbitration as one level of the litigation process<sup>171</sup> is evidence of the government's intent to frustrate the finality of the arbitral award.<sup>172</sup> This intention of the government is understandable as the government enjoys multiple grace times following the CPA rules of many levels of litigation<sup>173</sup> not mentioning the exhaustion of all levels of

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<sup>163</sup>C.J/79/2008.

<sup>164</sup>C.J/23/2008.

<sup>165</sup>S.C/892/2015, *The Finality or the Fees*, Dr. Hassan ALNOR, - Minister of Justice, in AL-Sudani Newspaper, 28.02.2016.

<sup>166</sup>Dr. Ibrahim DRAIG, The Head of the Arbitration Act Review Committee. Interview 23.Feb.2016

<sup>167</sup> SAA16 Art: 44 Procedures of reviewing the nullity request.

<sup>168</sup>Also known as Manga Case.

<sup>169</sup>Badria SULIMAN, a famous lawyer and Head of the Legislative Committee at the General Assembly. She was seriously ill and the Minister couldn't manage to convince the Committee to vote for the bill he presented.

<sup>170</sup>Dr. Awad ALNOR, *The Finality or the Fees*, Alintabah Newspaper, 28.02.2016.

<sup>171</sup>Ahmed BANNAGA, Response to the Minister of Justice, Alahram Newspaper, 23.02.2016

<sup>172</sup> It is to be noted that the CPA gives the state many time extensions and appeal process, which are not applied in SAA. This fair and fast process was not embedded in the government bodies, which makes the finality of the award and the limitedness of appeal process not welcomed by the state.

<sup>173</sup> The CPA articles gives the government grace time in many levels before the suit in art: 33-4 (2 months) and the execution process art: 213 (4 months).

appeal that make the dispute carry on over several years.<sup>174</sup> In arbitration, government bodies do not have this protection, which puts the government in unfamiliar position. The new SAA 2016 reflects this issue, and was contested by the Bar Association,<sup>175</sup> the Arbitration Centres,<sup>176</sup> the Engineers Society<sup>177</sup> and arbitration commentators.<sup>178</sup>

It is significant to state that there has been no attempt to enforce an international arbitration award in Sudan since Sudan is not a New York Convention signatory or member state.<sup>179</sup> This means that no precedents on this convention have been issued to reflect the Sudanese courts attitude towards the enforcement of international awards or interpretation of the New York Convention.

## Conclusion

It is clear that in Sudan arbitration practice has been developing slowly but positively. The precedents of the Supreme Court and the Constitutional Court encouraged disputants to rely on arbitration. In the last, many parties have altered their contract provisions from choice of court to include arbitration clauses. Even government institutions and companies relied on arbitration and the precedents previously discussed show the engagement of the Ministry of justice in many cases. Despite the fact that in most of these cases, the awards rendered were against the government, the Ministry of Justice did not issue any restrictions to governmental bodies to limit or cease referral of state disputes to arbitration. The new SAA 2016 reflects the willingness of the state to arbitrate rather than litigate, and therefore, the Ministry of Justice chose to alter the provisions of the Act rather than limit their use of arbitration. Hence, arbitration has taken its place as an independent dispute resolution method in Sudan and the debate now is how to run the arbitral process not why to arbitrate.

Though the setbacks from the decision in the Tractors Co case and Article 44 of the new SAA 2016 are disappointing, the reaction and objections published by Sudanese arbitration stakeholders are promising and confirm the awareness of the negative impact of this new tendency towards arbitral practice and business. The Bar, unions, arbitration centres and practitioners all agree that the push for the annulment of the new SAA 2016 in the next General Assembly, on the grounds that its promulgation did not comply with the requirement of the Sudanese constitution.<sup>180</sup> Also the Tractors Co decision can be revoked in the revision level<sup>181</sup> by the Supreme Court itself or by the Constitutional Court as it contradicts clearly all the Constitutional Court precedents not to mention the lack of jurisdiction to rule over the constitutional claims.

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<sup>174</sup> According to the CPA, appeal can take up to four levels from the Appeal Court to the Constitutional Court.

<sup>175</sup> A public announcement by the Council of the Bar Association was published in the second day of passing the law 11.02.2016.

<sup>176</sup> Workshop held by the Arab Arbitration Centre in 9th February.16 a week after passing the new Act heavily criticised the Act and most of its new articles that abandoned the basic rules of commercial arbitration. Workshop on the New Arbitration Act 2016, University of Khartoum- Sharjah Hall 9th.Feb.16

<sup>177</sup> Forum of Arbitration 01.03.2016

<sup>178</sup> Dr. Magdi ELSALIABI, "The New Arbitration Act 2015 and the Necessity to pass it Under a Temporary Decree" Alintabah Newspaper, 16.02.2016.

<sup>179</sup> The Minister of Justice pointed, for the first time, the stand of Sudan towards New York Convention. He believes that the NYC needs workshops and debate to avoid the issues raised in different states as result of applying the Convention. Dr. Awad ALNOR, *The Arbitration Act 2016 & the Bar Association Statement*, Alintabah Newspaper, 16.02.2016.

<sup>180</sup> The Interim Sudan's Constitution 2005 art: 109.

<sup>181</sup> The CPA art: 197 allows the Head of the Supreme Court to review its decision by a panel of five Supreme Court judges.

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# **PRACTITIONERS EXPERIENCE OF THE ROLE OF JUDGES IN UPHOLDING ARBITRATION IN AFRICA PERSPECTIVES FROM SOUTHERN AFRICA WITH SPECIAL REFERENCE TO BOTSWANA**

Edward W. FASHOLE-LUKE11

## **Introduction**

I would like to thank the most High GOD and HIS son JESUS CHRIST for making it possible for me to arrive here safely. I would like to thank the organizers of this conference, namely Dr Emilia Onyema of the Prestigious SOAS, University of London, my alma mater for inviting me to speak at this conference whose theme is 'PRACTITIONERS' EXPERIENCE OF THE ROLE OF JUDGES IN UPHOLDING ARBITRATION IN AFRICA.'

I have been asked to speak on the topic of 'PERSPECTIVES FROM SOUTHERN AFRICA WITH SPECIAL REFERENCE TO BOTSWANA ON PRACTITIONERS EXPERIENCE OF THE ROLE OF JUDGES IN ARBITRATION IN AFRICA', I think it would be prudent to start with a quote from one of the most fascinating, dynamic, kind, and extraordinary human beings I have ever had the privilege of meeting. I am told that when this person visited New York, trading on Wall Street was brought to a grinding halt as virtually everyone wanted a glimpse of this amazing statesman. President Nelson Mandela said inter alia the following:

It is through education that the daughter of a peasant can become a doctor.

I respectfully concur with these sentiments as a view of an Africa-based arbitrator. I respectfully believe that Nelson Mandela would have made a brilliant and very effective Africa-based arbitrator as it was these skills that enabled him to effectively and successfully navigate South Africa to Independent democratic rule in 1994.

## **Botswana Arbitration Act**

Arbitration in Botswana, is governed by the Arbitration Act cap 06:01 of the Laws of Botswana. It is extremely out dated in my respectful submission, having been passed in 1959. That notwithstanding, it has been my experience, that the courts in Botswana are pro-arbitration. The Arbitration Act of 1959 vests the courts with certain powers and roles that pertain to arbitration. Where arbitration proceedings are misconducted or awards are procured in a way that is not in accordance with the Act, the courts are vested with the power to intervene. Courts also have the discretion to make an order to stay arbitration where a party to an arbitration agreement requests for that to be done. Furthermore, the courts have the power to appoint or remove arbitrators, set aside arbitration awards and award costs.

Section 11 of the Arbitration Act of Botswana gives the courts the power to appoint an arbitrator in any of the following cases:

- Where a submission provides that the reference shall be to a single arbitrator and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
- If an appointed arbitrator refuses to act, is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
- where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him; or
- where an appointed umpire or third arbitrator refuses to act, is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have similar powers to act in the case and make an award as if he had been appointed by consent of all parties.

Section 18 of the Act provides for interim measures and states that:

Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this part of the Act to an award includes a reference to an interim award.

I must use a quote by that most brilliant English judge, The Right Honourable, the Lord Bingham of Cornhill, who was referred to in The Guardian Newspaper as, 'the most eminent of our judges', who held office successively as Master of the Rolls, Lord Chief Justice of England and Wales and Senior Law Lord in the House of Lords and who was appointed by HM the Queen, a knight of the Garter in 2005, the highest knighthood and the first professional judge to be so honoured. In his gem of a book entitled, 'The Rule of Law', he states the following at page 85:

means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

At page 86 he goes on to say:

An alternative to mediation and conciliation is arbitration: the appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to the terms of reference they give him. This can only be done by agreement, before or after the dispute arises, but where it is done the arbitrator has authority to make an award which is binding on the parties and enforceable by the court.

### **Some Court Judgements**

Let me turn to some decisions my country Botswana. Our Arbitration Act of 1959 as I stated earlier, is rather out-dated, but our courts have over the years upheld arbitrations. My starting point is Section 13(2) of the Arbitration Act which empowers a court to set aside an arbitration award, where it has been established that the arbitrator has, 'misconducted the proceedings', or his award has been 'improperly procured'. In the case of SOUTHERN DISTRICT COUNCIL VS VLUG AND ANO (2010) 3 BLR 315 Newman J said inter alia:

Before giving consideration to these terms, it is an appropriate time to clarify one small, but important, issue. In *Total support vs Diversified Health Systems* 2002 4 SA 661 Smalberger AJP at p673H emphasised the point that an arbitration arises through the exercise of private rather than public powers, and does not fall within the sphere of 'administrative action'. The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement... As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature.

It is respectfully submitted that the conclusion in this case demonstrates that there is a bright future for arbitration in Botswana and Africa. Newman J also noted:

In the premises, it is the finding of this court that the client has failed to make out a case that the arbitrator has 'misconducted the proceedings', and, to the extent that errors of fact or law were committed by the arbitrator, same were not so manifest as to amount to misconduct, as judicially interpreted. As Harms JA aptly put it, in the *TELCORDIA* case at pp 301-302 'The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he

misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry. Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

I have cited the judgment of this case in extensu as it demonstrates the extent to which our courts will go to demonstrate the role of judges to uphold arbitration agreements in Botswana.

#### **New York Convention**

Finally, Botswana is a party to the New York convention on the Recognition and Enforcement of Foreign Arbitral Awards. The law here permits a party in whose favour an award has been made to enforce the award or an arbitration agreement in the same manner as a judgment, with leave of the court. Section 3 of the Recognition and Enforcement of Foreign Arbitral Awards Act provides:

No arbitral award made in any country which is a party to the convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country.

I thank you so very much for your attention.

# RETHINKING THE ROLE OF COURTS AND JUDGES IN SUPPORTING ARBITRATION IN AFRICA – A YOUNG PRACTITIONER’S PERSPECTIVE.

Isaiah Bozimo, FCIArb.

## INTRODUCTION

### *A Flawed System?*

The present topic contains an unstated assumption that the role of Courts in arbitration is, or should be, different from their everyday role. The role of the Courts in the Nigerian Legal System is governmental. They exercise judicial powers under the 1999 Constitution to put an end to controversies finally and authoritatively. As such, the Courts have acquired a privileged status in Nigeria as the final dispute resolution process.

On the other hand, Arbitration is a consensual dispute resolution process. Because it is consensual, the parties to an agreement to resolve disputes by arbitration may need to resort to the Courts to enforce incidents of their agreement.

Ideally, the relationship between Courts and Arbitration should be symbiotic.

However, rethinking the role of Courts and Judges in supporting Arbitration in Africa suggests a flaw in the current system. Two interesting questions arise here:

1. Why do we need to rethink the role Courts and Judges?
2. What are the ideal qualities that practitioners expect of these Courts and Judges?

### *Why do we need a rethink? - Influence of Courts on the choice of arbitral seat.*

With Court support and minimal intervention, Arbitration has the potential to flourish in Africa. If the balance is struck differently, however, parties will avoid choosing jurisdictions in Africa as the seat for international arbitrations, and arbitration will also become less attractive to domestic parties.

Results from the 2015 Queen Mary International Arbitration Survey<sup>182</sup> reflect this sentiment. Respondents to the survey identified the two most valuable characteristics of Arbitration as:

- Enforceability of Awards (65%); and
- Avoiding specific legal systems/national courts (64%).

Respondents to the survey were also asked to specify their preferred seats. The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva. When asked the reasons why they prefer certain seats to others, the three paramount factors relate to the formal legal infrastructure of the seat – namely:

- neutrality and impartiality of the local legal system;

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<sup>182</sup> Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> accessed 15 June 2016.

- national arbitration law; and
- track record of enforcing agreements to arbitrate and arbitral awards.

Empirical data, therefore, confirms a direct correlation between the formal legal infrastructure of a seat, and the selection of that seat for international arbitration.

### ***The ideal Court for International Commercial Arbitration***

The success of any particular jurisdiction as it concerns international commercial arbitration depends on the quality and qualities of its Courts. The Queen Mary data confirms that these Courts, as supervising seat Courts and as enforcing Courts, are a critical component in the successful operation of international commercial arbitration.

Chief Justice James Allsop of the Federal Court of Australia aptly identified that the desired qualities of such Courts can be taken from the description of the subject matter: (1) international; (2) commercial; and (3) arbitration.<sup>183</sup>

According to the Learned Judge:

First, the court must be **international** in focus and approach. This requires an attitude or state of mind of judges, of court administrators and officers, and of practitioners to welcome and encourage foreign commercial parties to the jurisdiction. This international focus of the judiciary should be reflected in an arbitration law (written and unwritten) that is internationally focused and “arbitration-friendly”.

Secondly, the Court must be **commercial** in its focus, skills and approach. This requires that the judges handling arbitral proceedings (whether support, supervision or enforcement) understand the commerce involved in the substantive dispute. How else, for instance, can a seat court or enforcing court assess the fairness, or not, as the case may be, of arbitrators dismissing a point latterly thought up by a party and of little legal worth that would delay the reference or the making of the award. The fairness of the approach of the arbitrators who think the point meritless should be considered by a judge who understands the point. It is critical that international commercial arbitration is supervised by judges who understand commerce.

Thirdly, the court must understand **arbitration**. This is not merely quantitative; it is not simply knowing about arbitration law and practice. But it is also qualitative; it involves understanding the perspective and approach that facilitates the smooth working of the arbitral system. This

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<sup>183</sup> James Allsop, 'National Courts and Arbitration: Collaboration or Competition?' <[http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allsop-ao-\(australia\).pdf?sfvrsn=0](http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allsop-ao-(australia).pdf?sfvrsn=0)> accessed 15 June 2016.

“cultural perspective” comes from experience, judicial education and professional collaboration with the arbitral community.

In summary, the ideal Court (and, by extension, the ideal Judge) is:

- **international** in outlook,
- **commercial** in skill and
- **arbitration** sympathetic.

The pertinent question at this juncture is: have the Nigerian Courts and Judges displayed these qualities in their determination of Arbitration related proceedings?

The Courts will usually become involved with arbitration at the time that either one party seeks to enforce the agreement to arbitrate a dispute while the other aims to litigate it, or one party challenges or seeks the recognition or enforcement of an arbitral award.

In answering the question posed above, therefore, I propose to review decisions that cut across the entire spectrum of the interface between Arbitration and the Courts.

## **UPHOLDING ARBITRATION AGREEMENTS & SUPPORTING THE ARBITRAL PROCESS**

### **A. Upholding Arbitration Agreements**

#### ***Imoukhuede v. Mekwunye & 2 Ors.*<sup>184</sup>**

A dispute arose out of a tenancy agreement between the parties, which contained an arbitration clause to the effect that disputes were to be referred to a Sole Arbitrator to be appointed by the President of the “Chartered Institute of Arbitration (London) Nigerian Chapter”.

“M” issued a notice of arbitration and wrote to the Nigerian Branch of the Chartered Institute of Arbitrators (CI Arb.) requesting the appointment of a sole arbitrator. CI Arb. complied with the request. The arbitral proceedings continued, and a final award was made.

“I” challenged the award at the High Court of Lagos State on the ground, amongst others, that there was no valid arbitration agreement between the parties.

The contention was that “there is no body/organization known as THE CHARTERED INSTITUTE OF ARBITRATION (LONDON) NIGERIAN CHAPTER and as such, there cannot be a referral for arbitration to a non-existent body.”

The High Court dismissed the challenge. It found that the Parties’ intention was to refer their disputes to arbitration and that the intended appointing authority was the Chairman of the Chartered Institute of Arbitrators, Nigeria Branch.

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<sup>184</sup> (2015) 1 CLRN 30

The Court of Appeal disagreed. It held:

There is nothing from the processes before the lower court to support the conclusion reached by the lower court that the Chairman of the Chartered Institute of Arbitrators (United Kingdom) Nigeria Branch is the same person as the president of the chartered institute of arbitrators London - Nigeria Chapter when the words used, in the agreement are clear and 'do not in my view admit of any ambiguity. The duty of the courts inclusive of the lower court where the language of an agreement is clear and unambiguous is to make a pronouncement on the clear and unambiguous agreement and concur with same.

...

If the parties in this appeal really intended that any other person other than the President of the Chartered Institute of Arbitrators London Nigeria Chapter should be the appointing authority as canvassed by learned counsel for the 1<sup>st</sup> respondent, surely same would have been explicitly stated in Exhibit B.

...

It follows therefore that since there is in effect no body/organization known as the Chartered Institute of Arbitration (London) Nigerian chapter, the clause itself is unenforceable.

With due respect, their Lordships' decision does not demonstrate an understanding of the arbitral process – specifically, the interpretation of pathological arbitration clauses.

The decision is questionable because for a number of reasons. **First**, while Nigerian law enjoins the Courts not to rewrite a contract for the parties, where a term of a contract is open to more than one interpretation, it is appropriate to adopt the interpretation that is most consistent with business common sense.<sup>185</sup>

**Secondly**, the commercial intention of the parties was to submit any dispute arising out of the tenancy agreement to binding arbitration. A mistake in the name of an appointing authority does not derogate from that intention. The clause should have been interpreted to give congruent application to this intention. In any event, Nigerian Courts have applied the 'blue pencil' rule to invalidate only the offending portion of a contractual provision.<sup>186</sup>

**Thirdly**, Nigerian Courts recognise that arbitration clauses are to be respected and should be read, and thus construed, as liberally as possible. In *Fidelity Bank Plc. v. Jimmy Rose Co. Limited*<sup>187</sup>, the same Division of the Court of Appeal (through presided over by a different panel of Justices) held:

The position of the law is that whether or not the arbitration agreement is a document signed by the parties as envisaged by Section 1(1)(a) of the Arbitration

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<sup>185</sup> *Texaco Overseas (Nig.) Pet. Co. Unltd. v. Rangk Ltd.* (2009) All FWLR (Pt. 494) 1520.

<sup>186</sup> *Idika v. Uzoukwu* (2008) 9 NWLR (Pt. 1091) 34.

<sup>187</sup> (2012) 6 CLRN 82.

and Conciliation Act ... or discoverable from their correspondences as per Section 1(1)(b) thereof, the essential prerequisite is that it must be precise and unequivocal. The court will hold such an agreement to be unequivocal if the word used is neither permissive nor discretionary. (Emphasis added.)

Likewise, in *Frontier Oil Limited v. Mai Epo Manu Oil Nigeria Limited*, the High Court of Lagos State affirmed:

Courts of law have inherent jurisdiction to decide disputes between parties, but where the parties by their own agreement opt for arbitration the courts will always respect such agreements and decline jurisdiction. See - *Obi Obembe v. Wemabod Estates Ltd* (1977) 5 SC 131.

...

For courts to accept and recognise an agreement as an arbitration agreement it must be precise and mandatory... The Agreement will be held to be mandatory and unequivocal if it contains the mandatory word “shall” and not the permissive and discretionary “may”. (Emphasis added.)

I commend the rationale of the respective Courts in *Fidelity Bank* and *Frontier Oil*. The primary focus of the Court should be to determine whether the parties have a real intention to submit their dispute to arbitration. That intention crystallises where the reference to arbitration is mandatory.

To paraphrase the UK House of Lords (as it was then known) in *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others (“Fiona Trust”)*, where the parties make provision for an arbitration clause, the interpretation of the said clause should begin with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their contractual relationship to be decided by an arbitral tribunal.

## **B. Allowing Third-Parties to intervene in Arbitral Proceedings**

### **Statoil Nigeria Limited v. Federal Inland Revenue Service<sup>188</sup>**

A dispute arose between Statoil and the Nigerian National Petroleum Corporation (NNPC) as to the interpretation and performance of the Petroleum Sharing Contract (PSC) between the parties. This resulted in arbitration proceedings being instituted by Statoil.

The Federal Inland Revenue Service (FIRS) subsequently commenced proceedings against all the parties to the arbitral proceedings seeking to determine whether the Arbitral Tribunal has jurisdiction to determine the subject matter of the arbitration. FIRS’ position was that the dispute was based on issues of tax and the interpretation of the Petroleum Profit Tax Act and was not arbitrable as it impacted upon its statutory obligations under the Federal Inland Revenue Act.

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<sup>188</sup> (2014) LPELR-23144(CA)

Without deciding whether the dispute before the arbitration tribunal was arbitrable, the Court of Appeal held that although FIRS was not a party to the arbitration agreement it could intervene in the arbitration proceedings. It held:

if a party to an arbitral agreement can challenge the jurisdiction of the Arbitral Tribunal, or that the arbitral agreement was ab initio, null and void, what about a person or authority such as the 1<sup>st</sup> respondent who was not a party to the agreement but complains or that if an award is eventually made one way or the other is of the view that the proceedings or subsequent award by an arbitral tribunal constitute an infringement of some provisions of the Constitution or the laws of the land or impede her constitutional and statutory functions or powers, would the person be debarred from seeking declaratory remedies or by originating summons? I do not think so. Where there is proved a wrong, there has to be a remedy.

The Court also held that the third party was not required to wait for an award and then seek to set it aside, it could bring independent proceedings to challenge the arbitration proceedings. It held:

I am of the humble opinion that it will be in the best interest of the 1<sup>st</sup> respondent not to wait or stand by for the Arbitration Tribunal to complete the proceedings and make an award. 1<sup>st</sup> respondent has the locus standi to act timeously to arrest the situation by a declaratory action or originating summons in a Court of law. Where the claim succeeds, the Court may make a declaration that the arbitral agreement was void ab initio or that the Arbitral Tribunal lacked the jurisdiction to have entertained the dispute on grounds of constitutional or statutory illegality, etc.

In light of this decision, it appears that a non-party to an arbitration agreement can challenge an award in circumstances where the issue of jurisdiction is raised and where the powers conferred by the Constitution or by statute are contravened or need to be interpreted.

This decision highlights the tension between the need for judicial restraint under Section 34 of the Arbitration and Conciliation Act (ACA) and the inclination of Courts to enforce their Constitutional role as the ultimate arbiters of disputes. This is an important point; to which I will return below.

### **C. Interim Measures of Protection**

#### **Econet Wireless Limited v. Econet Wireless Nigeria Limited<sup>189</sup>**

A dispute arose between the parties concerning the operation of a Shareholders Agreement. Before the constitution of the Arbitral Tribunal, the Econet Wireless Limited (Econet) sought injunctive reliefs against Econet Wireless Nigeria Limited (Econet Nigeria) before the Lagos Division of the Federal High Court.

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<sup>189</sup> Suit No: FHC/L/CS/832/2003

The Court found that it had jurisdiction to entertain the Application because the substantive dispute impacted on the operation of the Companies and Allied Matters Act. Having said that, the Court found that an injunction is a remedy and not a cause of action. Since there was no substantive action before the Court from which injunctive reliefs could flow, the Court adjudged the application to be incompetent.

Some commentators attempt to justify the Court's decision by an analysis of Section 34 ACA. The contention is that, under Section 34, Courts are precluded from intervening in arbitral matters except in circumstances provided under the Arbitration Act. To this end, the ACA does not contain a provision that allows a party could apply to Court for an interim order of protection prior to the constitution of the arbitral tribunal.

With respect, this contention is based on the erroneous proposition that the entire scope of Court intervention is to be found in the ACA and nowhere else. I disagree with this. Rather, Section 34 envisages two distinct systems of Court intervention. In matters governed by the Act, the ACA takes effect, and no other relief may be sought or granted except for those set out in the Act.

However, in matters not governed by the Act, the Courts may continue to offer all such remedies in all such circumstances as are available under existing law.

To ascertain which of the two systems is applicable in a given case, it must be determined whether that case is a 'matter governed by' the ACA. To "govern" a matter implies the existence in the ACA of a defined power to regulate and control a specified matter.

Happily, the Courts have departed from the rationale displayed in the *Econet* decision.

### **Lagos State Government v. Power Holding Company of Nigeria<sup>190</sup>**

A dispute arose between the Lagos State Government and Power Holding Company of Nigeria (PHCN) in respect of a Barge Power Purchase Agreement and Contribution Agreement. The said dispute was referred to arbitration.

Lagos State Government sought interim measures of protection against PHCN and third parties that were not signatories to the Arbitration Agreement.

The High Court of Lagos State found that it had jurisdiction to grant the interim measures sought, even while arbitral proceedings were pending between some of the parties to the Application. Also, the Court found that the provisions of the Arbitration Act did not apply to Arbitral Tribunals alone. The jurisdiction of the High Court could also be engaged in appropriate circumstances.

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<sup>190</sup> (2012) 7 CLRN 134.

## D. Supporting the Arbitral Process

### **Statoil Nigeria Limited v. Nigerian National Petroleum Corporation**<sup>191</sup>

This case concerns the dispute between Statoil and NNPC as to the interpretation and performance of the Petroleum Sharing Contract (PSC) between the parties. NNPC challenged the arbitral tribunal's jurisdiction on the ground that the subject-matter of the dispute (which it alleged to be taxation) was not arbitrable under Nigerian law.

Before the hearing of the jurisdictional challenge, NNPC applied to the arbitral tribunal for a stay of proceedings on the ground that the proceedings would be affected by the decision of the Federal High Court in Suit No: FHC/ABJ/CS/774/11- FIRS v. Nigerian National Petroleum Corporation & 4 Ors. which related provisions of a production sharing contract involving tax issues.

The arbitral tribunal refused the application. NNPC proceeded to file an *ex parte* application at the Federal High Court (FHC) for an order of interim injunction restraining the arbitral tribunal from continuing the arbitration proceedings. The FHC granted the interim order of injunction.

In a unanimous decision, the Court of Appeal held that a Court cannot issue an injunction to restrain arbitral proceedings. The Court held:

In this instant case, the issuance of *ex parte* interim injunction does not fall under the exceptions to Section 34 of the Arbitration Act. It is very clear from the intendment of the legislature that the court cannot intervene in arbitral proceedings outside those specifically provided.

Where there is no provision for intervention, this should not be done. The learned trial judge of the lower court acted outside the jurisdiction conferred on him by granting the *ex parte* interim order." (Emphasis added.)

The Court of Appeal affirmed the *Statoil* decision in *Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation*<sup>192</sup>. As with *Statoil*, the underlying dispute arose from the operation of a Production Sharing Contract between the parties. NNPC challenged a Partial Award under which the tribunal assumed jurisdiction over the substantive dispute; and sought an interlocutory injunction restraining the tribunal from continuing with the Arbitration. The Federal High Court granted the interlocutory injunction.

The Court of Appeal reaffirmed that the Courts did not have jurisdiction to issue anti-arbitration injunctions. Relying on Section 34 of the ACA, the Court held:

On the import of Section 34 of A.C.A., J.O. Orojo and M.A. Ajomo the learned authors of LAWS AND PRACTICE OF ARBITRATION and CONCILIATION IN NIGERIA at p. 269 on the input of S.34 of A.C.A., stated thus –

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<sup>191</sup> (2013) 7 CLRN 72

<sup>192</sup> (2014) 6 CLRN 150

“The Decree provides for the intervention of the court in certain aspects of the arbitral process ... Where, however, the Decree does not provide for the intervention of the court, this should not be done...”

The *Statoil* and *NAE* decisions have been celebrated as reinforcing the position that domestic courts should not intervene where parties have consented to arbitral proceedings, except to the extent that such intervention is expressly permitted by the ACA.

While I might agree with the outcome of the decisions, I nevertheless question the Court’s interpretation of Section 34 of the Arbitration and Conciliation Act. My reasons have been articulated above. Having said that, the ‘correct’ application of Section 34 ACA can yield uncertain outcomes.

Shell Petroleum Development Company of Nigeria v. Crestar Integrated Natural Resources Limited<sup>193</sup>

In *SPDC v. Crestar*, the applicant (Crestar) sought an interlocutory injunction from the Court of Appeal to restrain (amongst others) SPDC from continuing with an ICC Arbitration between the parties, seated in London. SPDC relied on the *Statoil* and *NAE* decisions in inviting the Court to dismiss the application.

The Court of Appeal considered necessary to clarify:

... Section 34 of the Arbitration Act is only applicable to matters ‘governed by the Act’ so that if it is found in any proceeding, that the particular facts and circumstances do not come within the purview of the Act, the provisions of Section 34 cannot apply with full force.

The Court found that the ACA only applied to ‘domestic’ arbitral proceedings seated in Nigeria. For that reason, it considered a Court’s jurisdiction to restrain foreign arbitral proceedings is not a matter that is governed by the Act.

Relying on Section 15 of the Court of Appeal Act, the Court found that it had jurisdiction to grant the injunction, and further found that it was appropriate the grant the said injunction in the circumstances.

In my humble opinion, the Court’s interpretation of Section 34 was correct. However, I have some concerns as to the application of Section 34 and the effect of the Court’s decision.

**First**, it would appear that the Court of Appeal has inadvertently declared the ACA to be inapplicable to international arbitration, even if seated in Nigeria.

**Secondly**, it also seems that the decision has created two regimes. As it concerns domestic arbitration, the Courts do not have jurisdiction to issue anti-arbitration injunctions. However, in international arbitration, the jurisdiction remains intact.

**Thirdly**, the Court of Appeal interfered with the Tribunal’s power to determine its jurisdiction. The injunction was sought on the premise that the arbitration agreement was null and void. The tribunal did not have the opportunity to decide this question.

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<sup>193</sup> Appeal No. CA/L/331M/2015

## ENFORCING/SETTING ASIDE ARBITRAL AWARDS

Guinness Nigeria Plc. v. NIBOL Properties Ltd.<sup>194</sup>

Guinness issued proceedings to set aside a Final Award made pursuant to arbitral proceedings between the parties. NIBOL commenced separate proceedings to enforce the said Award. Both applications were consolidated.

The High Court of Lagos State made a number of ‘arbitration friendly’ pronouncements and succinctly summarised the position under Nigerian Law. It held:

I am in total agreement ... that there is a live Judicial Policy of ascribing priority to the upholding of Arbitral Awards, by the regular Courts ... and that there is a narrow compass that attracts the Courts to override this Policy by setting aside an Award. This argument is valid and pivotal for a Court to keep in mind in these type of matters for reasons espoused in the Case Law ...

The Court proceeded to make reference to the following decisions of the Court of Appeal:

Aye-Fenus Ent. Ltd. v. Saipem Nig. Ltd.<sup>195</sup>, where the Court found:

Parties to a transaction choose their Arbitrator for better or for worse to be the Judge both as to the decisions of Law and decisions of fact in dispute between them. Thus none of them can when the Award is prima facie good on the face of it, object to its decision wither upon the Law of the Facts simply because the Award is not in his favour.

Arbico Nigeria Limited v. Nigeria Machine Tools Limited<sup>196</sup>, on the point that:

The Court in spite of its wide power has to bear in mind that he Parties have provided in their Agreement to have their dispute or difference referred to Arbitration as against the regular Courts ... and it has to show reluctance to interfere with the Arbitrator’s jurisdiction as the Sole Judge of the Law and Facts unless it is compelled to do so...

Baker Marine Nigeria Limited. v. Chevron Nigeria Limited<sup>197</sup>, which confirmed:

The lower Court was not sitting as an Appellate Court over the Award of the Arbitrators. The lower Court was not therefore empowered to determine whether or not the findings of the Arbitrators and their conclusions were wrong in Law. What the lower Court had to do it to look at the Award and determine whether the state of the Law as understood by them and as stated on the face of the Award the Arbitrators complied with the Law as they, themselves, rightly or

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<sup>194</sup> (2015) 5 CLRN 65

<sup>195</sup> (2009) 2 NWLR (Pt. 1126) 483.

<sup>196</sup> (2002) 15 NWLR (Pt. 789) 1.

<sup>197</sup> (2000) 12 NWLR (Pt. 681) 391.

wrongly perceived it. The approach here is subjective. The Court places itself in the position of the Arbitrator, not above them, and then determines on that hypothesis whether the Arbitrators followed the Law as they understood and expressed it.

Based on the foregoing decisions, the High Court of Lagos State concluded (in the *Guinness* decision):

... I am satisfied that the evidential burden on GUINNESS must necessarily be a strident one ... I agree and hold that it is a high hurdle, indeed, to be scaled, for GUINNESS to get the regular Court to ignore the contractual, consensual and Arbitral Forum elected by the Parties; elongate the more summary and timely Arbitral experience; and interfere with, subvert and substitute the Arbitrator's Jurisdiction as the Sole Judge of Law or Fact.

Though the evidential burden for applicants seeking to set aside an arbitral award is high, any benefits derived are eroded by the slow pace of the administration of justice before the Nigerian Courts.

*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation*<sup>198</sup>

*IPCO v. NNPC* is an English decision, but it contains very interesting information concerning the lack of efficiency of the Nigerian judicial process in setting aside/enforcing arbitral awards.

At para 158 of the Judgement, the English Court of Appeal observed:

The analysis set out above derives from (i) a consideration of the applications now in issue; (ii) the timescales for determination at first instance contemplated by Tomlinson J; (iii) and what has happened in fact. It is supported by the expert evidence before Field J. The Hon Justice S.M.A. Belgore, former Chief Justice of Nigeria, instructed on behalf of IPCO, agreed with the evidence of the late Justice Eso that it was "conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for twenty or thirty years or longer". I take him to be meaning another 20 or 30 years from the date of his report in 2013 rather than from that of Justice Eso in 2007 i.e., at the very lowest, an additional 6 years. Consistently with that he said that there had been no change in the delay in the administration of justice in Nigeria since Justice Eso made his first witness statement and that in fact the circumstances were "far worse" as the courts were experiencing more congestion.

The Court of Appeal ordered that IPCO should be able, in principle, to enforce the Award, notwithstanding the existence of challenges to it in Nigeria, given the very significant delay in resolving those challenges before the Nigerian courts.

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<sup>198</sup> [2015] EWCA Civ 1144

## **CONCLUDING REMARKS**

Have the Nigerian Courts been international in outlook, commercial in skill and sympathetic to arbitration? The answer is evocative of old Western Film, “The Good, the Bad and the Ugly”.

### **The Good**

Generally speaking, arbitration awards are not easily set aside in Nigeria. The decision of the High Court of Lagos State in *Guinness Nigeria Plc. v. NIBOL Properties Ltd* confirms that there is a high evidentiary threshold to be met, and few and far between are those cases where the challenges have been found successful.

Likewise, the contemporary view is that Nigerian Courts have the power to grant interim relief pending arbitration (*Lagos State Government v. Power Holding Company of Nigeria*).

While the Nigerian Courts have broad Constitutional powers to decide disputes between parties, they recognise that where the parties by their agreement opt for arbitration, the Courts will always respect such agreements and decline jurisdiction (*Frontier Oil Limited v. Mai Epo Manu Oil Nigeria Limited*; *Fidelity Bank Plc. v. Jimmy Rose Co. Limited*).

The principle of limited Court intervention is robust in Nigeria. The Court of Appeal decisions in *Statoil v. NNPC* and *NAE v. NNPC* support the position that a Court cannot issue an injunction to restrain arbitral proceedings.

### **The Bad**

There is a lack of consistency in the Court decisions. While the Court lacks the jurisdiction to restrain arbitral proceedings in domestic arbitration, it appears that this prohibition does not extend to international arbitration (*SPDC v. Crestar*).

The wheels of justice turn “fantastically” slow in the Nigerian Courts (*IPCO v. NNPC*). This negates the beneficial effect of decisions that are considered to be arbitration friendly.

Some decisions demonstrate a lack of understanding of the qualitative perspective and approach that facilitates the smooth working of the arbitral system (*Imoukhuede v. Mekwunye*; *Econet Wireless Limited v. Econet Wireless Nigeria Limited*).

### **The Ugly**

A disturbing trend is emerging, which appears to suggest that cases with a political element are more likely to negatively impact the arbitral process – I have in mind the first instance decisions the first instance decisions of the Federal High Court in *NNPC v. Statoil* and *NNPC v. NAE*, where anti-arbitration injunctions were issued by the respective Courts.

Nevertheless, this trend is curbed by the Court of Appeal decisions in *Statoil v. NNPC* and *NAE v. NNPC*.

### **How can the system be reoriented to be more ‘arbitration friendly’?**

The disparity in judicial decisions flowing from arbitral proceedings is inimical to the growth of Arbitration in Nigeria and Africa. A number measures can be taken to enhance judicial efficiency in this regard.

We can ensure efficiency in Court decisions by:

- Introducing guidelines for the interpretation of provisions of the Arbitration and Conciliation Act, the UNCITRAL Model Law and the New York Convention.
- Continuous training of Judges and legal practitioners in the field of commercial arbitration.
- Introducing an online repository of domestic and foreign decisions arising from arbitration applications.
- Introducing an 'Arbitration Support Judge' in each State, in whom jurisdiction will be vested to support domestic and arbitration proceedings.

Given the criticism in *IPCO v NNPC*, is it also time to consider:

- Introducing time limits for the determination of arbitration applications. The Lagos State Arbitration Law and the Draft Federal Arbitration and Conciliation Bill contain Case Management Provisions to achieve this aim.
- Conferring exclusive jurisdiction to the Court of Appeal for all arbitration applications? This removes one layer of 'bureaucracy' in the form of the High Courts. Besides, there is a trend in Nigeria that arbitration-related decisions become more coherent as they travel up the judicial hierarchy.

Implementing these measures will go some way to ensuring that Nigerian Courts and Judges are international in outlook, commercial in skill and arbitration sympathetic.



***The Courts and Arbitration – Triumphs, Unforced Errors and Own Goals***

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24 June 2016



**Own Goal!!**



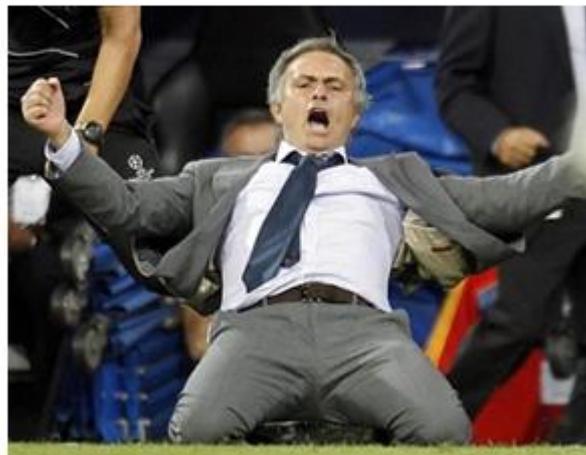
2

## Unforced Error



3

## Triumph!!



4

### ***Enforcing Arbitration Agreements***

- Section 4 ACA vs. section 5 ACA
- Section 4 (mandatory/international)
- Section 5 (discretionary/domestic)
- MV Lupex (Owners MV Lupex vs. NOCS Ltd [2003] 15 NWLR (Part 844) 469

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### ***Enforcing Arbitration Agreements***

The effect of discretion

- Easy to attack arbitration agreements
- The "commence arbitration" decisions
  - M.V. Panormos Bay v. Olam [2004] 5 NWLR (Pt. 865) 1 at 15
  - U.B.A. v Triident Consulting Limited (2013) 4 CLRN 119 at 129
- Joining irrelevant parties
- The Shell Petroleum Development Company of Nigeria vs. Crestar Integrated Natural Resources Limited [CAL/331M/2015]

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### ***Court Support and Intervention***

Injunctions to support arbitration:

- Turbine Technology Services Ltd vs. AES Barges [2002] 3 FHCLR 201 at 212
- Court of Appeal

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### ***Court Support and Intervention***

Injunctions to restrain arbitration

- Nigeria Agip Exploration and Oando vs Nigeria National Petroleum Corporation [CA/A/628/2011 of 25 February 2014]
- Statoil Nigeria vs Nigeria National Petroleum Corporation [2013] 14 NWLR (Part 1373)
- The Shell Petroleum Development Company of Nigeria vs. Crestar Integrated Natural Resources Limited [CA/L/331M/2015]

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## ***Enforcing and Setting Aside Awards***

IPCO vs NNPC

- The Hon Justice S.M.A. Belgore, former Chief Justice of Nigeria, instructed on behalf of IPCO, agreed with the evidence of the late Justice Eso that it was "*conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for twenty or thirty years or longer*"
- Justice Eso: "*The mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not yet geared towards arbitration in a manner which meets with the international standards it agreed to when adopting the New York Convention*".

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## **What next?**

- Constitutional Reform
- Institutional reform
- Legislative reform

10



**Thank  
You!!!**

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# RETHINKING THE ROLE OF COURTS AND JUDGES IN SUPPORTING ARBITRATION IN AFRICA - OUTLINE OF THE NIGERIAN PERSPECTIVE -

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## Upholding Arbitration Agreements

- Inconsistency on the binding nature of arbitration agreements
  - Fidelity Bank Plc v. Jimmy Rose Co. Ltd & Anor (2012) 6 CLRN 82
- Inflexibility in the interpretation of pathological arbitration clauses
  - Imoukhuede v. Mekwunye & 2 Ors (2015) 1 CLRN 30
- Do non-signatories to the arbitration agreement have the standing to challenge arbitral proceedings?
  - Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & Anor (2014) LPELR-23144

## Inconsistency on the binding nature of arbitration agreements

- In *Fidelity Bank Plc v. Jimmy Rose Co. Ltd.*, the Court of Appeal had to decide whether the decision of the sub-committee on Ethics and professionalism of the Chartered Institute of Bankers of Nigeria (CIBN) was an arbitral award.
- Jimmy Rose had sent petitions to the CIBN complaining of Fidelity Bank's alleged unethical behavior. Therefore it was cognizant of the fact that, contrary to Fidelity Bank's submissions, the issue of arbitration was not raised in its petitions.
- The court held that Fidelity Bank was aware it was responding to a query and not accepting an offer to go to arbitration. The court further held that should the proceedings at the CIBN have been an arbitral hearing, Fidelity Bank would have refrained from subsequently instituting the suit at the High Court.
- On the final determination of the issue raised, the Court held that the decision of the Bankers' Committee was not an arbitral award.

## Inflexibility in the interpretation of pathological arbitration clauses

- The Court of Appeal in *Imoukhuede v. Mekwunye* was faced with the issue of determining whether the appointment of the sole arbitrator was effected vide the proper means and by the proper person and/or body.
- The Arbitration clause in the agreement between Imoukhuede and Mekwunye was to the effect that disputes were to be referred to the "Chartered Institute of Arbitration (London) Nigeria Chapter".
- When a dispute arose, a notice requesting the appointment of an arbitrator was issued to the Chartered Institute of Arbitrators UK (Nigeria Branch), the 3<sup>rd</sup> Respondent, to which it nominated Olusola Adegbonmire, the 2<sup>nd</sup> Respondent.
- When the final award was delivered, Imoukhuede challenged the decision on the ground that the arbitrator lacked jurisdiction.
- Even though there was a clear intention to arbitrate, the court held that because there was no body known as the Chartered Institute of Arbitration (London) Nigeria Chapter, the arbitration clause was unenforceable. The Chartered Institute of Arbitrators (UK) Nigerian Branch therefore did not have the locus standi to appoint Olusola Adegbonmire.

## Do non-signatories to the arbitration agreement have the standing to challenge

- In *Statoil v. Federal Inland Revenue Service (FIRS)*, the Court of Appeal was faced with deciding whether a non-party to an arbitration agreement can bring an action in the court to challenge the arbitral proceedings.
- The FIRS challenged the arbitral tribunal's jurisdiction on the ground that the arbitral proceedings arose from taxation issues that allegedly encroached on its powers, and in extension, are within the exclusive jurisdiction of the Federal High Court (FHC).
- Although the court agreed that the FIRS had no locus standi to challenge the jurisdiction of the tribunal, it held that the FIRS could intervene in the arbitral proceedings because:
  - a) section 12(1-4) Arbitration and Conciliation Act (ACA) allows for a party to the arbitration agreement to challenge the jurisdiction of the arbitral tribunal;
  - b) where there is a proved wrong, there has to be a remedy. Therefore, a non-party should not be debarred from seeking remedies from the court; and
  - c) Statoil and Texaco had admitted that the FIRS had the statutory duty to assess, collect and account for Federal taxes, on which basis the FIRS could institute the action.

## Supporting The Arbitral Process

- *Statoil (Nig.) Ltd & Anor v. NNPC & 3 Ors* (2013) 7 CLRN 72
- *Nigeria Agip Exploration Ltd v. NNPC & Anor.* (2014) 6 CLRN 150
- *SPDC v. Crestar Integrated Natural Resources Ltd* (2015) LPELR-40034
- *NNPC v. CLIFCO Nigeria Limited* (2011) LPELR-2022

## Anti-Arbitration Injunctions

- The Court of Appeal in *Statoil (Nig.) Ltd v. NNPC* had to decide whether the FHC could intervene in an arbitral proceeding and grant an injunction, in light of section 34 ACA.
- Statoil focused its arguments on the mandatoriness of 'shall' in section 34 ACA to persuade the court to hold that courts' intervention in arbitral proceedings is strictly prohibited.
- NNPC supported the decision of the lower court by citing section 13(1) of the Federal High Court Act which gives the courts wide powers to grant an injunction 'in all cases' in which it appears to be just and convenient.
- In allowing the appeal, the court intimated that courts, in exercising their discretion, must act on the agreement of parties to arbitrate. This way, 'the purpose of alternative dispute resolution would be accomplished'.

- On similar facts as the preceding case, the Court of Appeal in *Nigeria Agip Exploration (NAE) Ltd v. NNPC* was faced with interpreting section 34 ACA.
- However in this case, NAE was aggrieved because it was not allowed to adduce facts against NNPC's application for interim injunction.
- NNPC justified the decision of the lower court by stating that should the interim orders not have been granted, it will have been injurious to the Federal Government, and by extension, itself.
- The court following its decision in *Statoil (Nig.) Ltd v. NNPC*, held that based on a combination of the fact that NNPC had voluntarily participated in the arbitral proceedings, it was unable to show any special circumstances to warrant the grant of the injunction and based on the purport of section 34 ACA, the lower court was wrong to have granted the injunctive orders sought by NNPC.

- On a slight departure from its decisions in Statoil and NAE, the Court of Appeal in SPDC v. Crestar distinguished between domestic and foreign arbitral proceedings.
- The facts are that Crestar had sought an order for injunction to restrain SPDC from taking further steps in the arbitral proceedings.
- Crestar proffered arguments to show that section 34 ACA being similar to and promulgated from article 5 of the UNCITRAL Arbitration Model Law 1985, the decisions in Statoil and NAE could not apply in this case because, section 34 ACA does not govern foreign arbitral proceedings.
- Meanwhile, SPDC argued in support of the decisions in Statoil and NAE.
- The Court of Appeal agreeing with the total submissions of Crestar held that courts can grant anti-arbitration injunctions against foreign arbitral proceedings because, they do not fall within "matters governed by the Act".

### Jurisdictional Objections

- In NNPC v. Clifco Mfg. Ltd, the Supreme Court had to determine when the issue of jurisdiction can be raised and whether the arbitration clause in the old contract was valid, bearing in mind that the terms of the old contract had been novated.
- NNPC submitted that the arbitration clause in the old contract cannot confer jurisdiction on the arbitral panel in respect of the new contract. It further stated that jurisdiction can be raised at anytime in the proceedings or on appeal.
- Clifco argued that modification of the terms of the obligation in the old contract did not extinguish the arbitration clause. It was also its position that since NNPC had voluntarily submitted to arbitration, it cannot be heard to resile at this stage.
- The court inferred that as an arbitration clause can exist independent of the underlying contract, it survives subsequent novation arrangements.
- With respect to the jurisdiction of the arbitral tribunal, the court held that pursuant to section 12(3) ACA, a party who did not raise the issue of jurisdiction before the arbitral panel cannot raise it for the first time in the High Court.

THANK YOU FOR LISTENING

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# Supportive role of the Courts in Ghana in Arbitration

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Ghana

## Outline of presentation

- Overview of arbitration in Ghana
- Decisions before arbitration commences
- Decisions while arbitration proceedings are ongoing
- Decisions affecting enforcement of Arbitration
- Recommendations

## Overview of Arbitration in Ghana

- Before British Colonial rule there was the practice of mediation, arbitration, and negotiated settlement amongst others as methods of dispute resolution.
- These systems were however “dismantled” and an adversarial system was created
- Previously arbitration was governed by the Arbitration Act, 1961, Act 38.
- In 2010 the Alternative Dispute Resolution (ADR) Act, 2010, Act 798 was enacted;
- The Act seeks to bring into harmony the law on arbitration in Ghana with international conventions, rules and practices in arbitration;
- It gives recognition to customary arbitration

## Prior to Commencement of Arbitration

- **Instances where stay has been refused**
  - the matter in dispute involved difficult questions of law, or if the matter was more convenient and suitable for determination by the court rather than an arbitrator. **De Graft- Johnson v Ghana Commercial Bank [1973] 2 GLR 100**. Cited with approval in **Skansa Jensen International v. Klimatechnik Engineering Ltd [2003-2004] SC GLR 708**
  - Court are empowered to determine actions based on fraud. **Hesse vs Investcom Consortum Holdings SA and another Suit No. ACC.4/06**
  - The disadvantage to an individual fighting arbitration in London and a separate action against the 2<sup>nd</sup> Defendant in another forum far outweighs the advantages to the defendants if stay was granted. **Hesse vs. Investcom Consortum Holdings SA and another Suit No. ACC.4/06**

## Prior to Commencement of Arbitration

- **Instances where the courts have granted a stay**
  - The arbitral tribunal has not been excluded from examining the case of each party and coming to its own conclusions including its pronouncement on the allegation of fraud and undue influence. **Anglogold Ashanti Gh. Ltd v. Mining & Building Contractor Civil Appeal No. H1/201/2015**
  - There is no general principle of law that whenever a question of legal construction arises from the terms of a contract containing an arbitration clause, the same must be reserved for a court. **BCM Ghana Ltd vs. Ashanti Goldfields Ltd [2005-2006] SCGLR**

## After commencement of Arbitration

- **Decisions for**
  - “as regards the failure of agreement over the procedural rules for the conduct of the arbitration, suffice it to say that there is nothing in Act 38 empowering the court’s resumption of jurisdiction to try the case on its merits in such circumstances”  
**Westchester Resources Ltd vs. Asanti Goldfields Co. Ltd and 2 others Consolidated Civil Appeal no. J4/63/2013**
- **Decisions against**
  - The disadvantage to an individual fighting arbitration in London and a separate action against the 2<sup>nd</sup> Defendant in another forum far outweighs the advantages to the defendants if stay was granted. **Hesse vs. Investcom and 2 others**
  - –the effect of an order for stay of proceedings is that the parties were not left to their own fate. **Richard Aggrey vs. Investcom Consortium Holdings SA and 2 others Suit No. ACC.3/06**

## After Arbitration has concluded

- an arbitral award obtained in the UK cannot be enforced in Ghana as LI 262 has not been amended to include all current parties to the convention.
- **David Hesse vs. Investcom Consortium and another suit No. ACC/4/06**
- “An international commercial arbitration draws its life from the transaction whose dispute-resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve.” – **The Attorney General vs. Balkan Energy and others** REFERENCE No. J6/1/2012

## Recommendations

- Training of judges
- Setting up of specialized courts
- Practice directions
- Publication of decisions
- High costs awarded



## EGYPT

The Role of Courts and Judges  
in supporting Arbitration in Africa

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- Background on Egypt's legal system
  - Civil Law System
  - Enacted legislation

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- Arbitration related Conventions to which Egypt is a Signatory

- ✓ ICSID Convention
- ✓ NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- ✓ The Arab League Convention for the Enforcement of Judgments
- ✓ Al Riyadh Arab Convention for Judicial Cooperation

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- Egypt's Arbitration Law

Law no. 27 of 1994 regarding arbitration in civil and commercial matters

- Inspired by UNCITRAL Model Law
- 58 Articles
- Quite detailed thus eliminating the need to have arbitrators and judges fill any gaps

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A Select Five Cairo Court of Appeal Judgements  
regarding the Role of Courts and Judges in  
supporting Arbitration

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(1) Encouraging dissents by arbitrators while  
facilitating that such dissents be made without  
the need for dissenting opinions, provided a  
reason is given in the arbitral award for such  
dissent.

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The Egyptian legislature does not require that dissenting opinions be annexed to the majority arbitrators' arbitral award.

(Cairo Court of Appeal – Commercial Circuit no. (91) – Case no. 70 judicial year 119, hearing of 27 November 2002).

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(2) Necessitating the participation of the whole arbitral tribunal in the deliberations and in the rendering of the arbitral award.

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**Annulment of the arbitral award for the non-participation of the whole arbitral tribunal in the rendering of the award and in the deliberations.**

(Cairo Court of Appeal – Commercial Circuit no. (91) – Case no. 34 judicial year 119, hearing of 29 January 2003).

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**(3) Facilitating the recognition and enforcement of foreign arbitral awards.**

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The Egyptian courts have no international jurisdiction in annulment proceedings of foreign arbitral awards – provided the parties have not subjected the dispute to the Egyptian Arbitration Law no. 27 of 1994 – and in this case the party against whom the foreign award is rendered may only object to its enforcement – according to Article (58) of the Arbitration Law no. 27 of 1994 – and to present evidence of one of the reasons provided in the New York Convention 1958 to prevent the recognition and enforcement of the foreign arbitral award.

Initiating annulment proceedings for the foreign arbitral award before Egyptian Courts, albeit the absence of their legal jurisdiction, in an attempt to disrupt and delay, prompts the invoking of the fine stipulated in Article (110) of the Civil Procedures Code.

(Cairo Court of Appeal – Commercial Circuit no. (91) – Case no. 23 judicial year 119, hearing of 26 February 2003).

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(4) Clearly clarifying the role of a judge hearing an annulment proceeding for an arbitral award.

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An annulment proceeding of an arbitral award is not an appeal, as it does not mean rehearing the subject matter of the dispute and fault finding in the arbitral award. The judge hearing the annulment proceeding may not review the arbitral award to evaluate its suitability or to supervise the good judgement of the arbitrators, and the correctness or wrongness of the arbitrators' efforts in understanding the facts or interpreting the law and applying it, or the extent of the validity of the reasons for the award or the contradiction of the reasons, for all of that is within the scope of jurisdiction of the appeal judge and not the judge hearing the annulment proceeding. There is no dispute that the annulment proceeding is not an appeal.

(Cairo Court of Appeal – Case no. 116 judicial year 121, hearing of 27 April 2005).

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## (5) Facilitating the arbitration procedures.

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There is no prescribed form for notifying the parties in an arbitration of the arbitral procedures, provided the parties did not agree otherwise. The rule in arbitration is that of freedom in form and not restricting it to hard legal norms. The important matter is that the arbitrator enables the parties to know of the procedures in an even, equal manner and to observe, strengthen the principle of confrontation, for arbitration is different than the judicial court system.

(Cairo Court of Appeal – Commercial Circuit no. (7) – Case no. 102 judicial year 123, hearing of 9 June 2009).

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Ryham is an Egyptian lawyer with experience in corporate and commercial legal matters, construction disputes, litigation, international commercial arbitration and mediation, and international transactions. She is an accredited mediator by CEDR in London. Before founding **RAGAB Law Firm**, Ryham worked in leading firms in Egypt, New York, London and Paris. Her legal qualifications are a *license-en-droit* from Cairo University, an LL.M. in Banking and Finance Law from SOAS, University of London, and another LL.M. from Duke Law in the USA.

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## 6. List of Tables

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## 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	-	-
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://arbitrationinfrica.com/countries/>; [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html);  
<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>; <http://ohada.org/>.

**Table 2: African Countries: List of known Arbitration Institutions**

No	Institution/Centre	Country
1	Algerian Chamber of Commerce & Industry, Algiers Web: <a href="http://www.ccis-agadir.com/pages/c_arbitrage.php">http://www.ccis-agadir.com/pages/c_arbitrage.php</a>	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 Web: <a href="http://www.ccibenin.org/">http://www.ccibenin.org/</a>	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 Web: <a href="http://www.camco.bf/">http://www.camco.bf/</a>	Burkina Faso
7	Burundi Centre for Arbitration & Mediation	Burundi
8	Centre d'Arbitrage du GICAM (Groupement Interpatronal du Cameroun), Douala Web: <a href="http://legicam.cm/">http://legicam.cm/</a>	Cameroon
9	Centre d'arbitrage du CPAM, Yaounde Web: <a href="http://www.cadevafrique.org/">http://www.cadevafrique.org/</a>	Cameroon
10	Centre d'Arbitrage, de Mediation et de Conciliation de Centrafrique (CAMC-CA), Bangui.	Central Africa Republic
11	Centre de Mediation et d'arbitrage, Ndjamena (project launched in March 2016)	Chad
12	Centre d'Arbitrage et de Mediation attached to the Brazzaville Chamber of Commerce, Industry, Agriculture and Jobs, Libreville. Web: <a href="http://www.cciambrazza.com">www.cciambrazza.com</a>	Congo
13	Centre de mediation et d'arbitrage au Congo (CEMACO)	Congo
14	Le Centre d'Arbitrage du Congo (CAC) Kinshasa Web: <a href="http://www.cac-rdc.org">www.cac-rdc.org</a>	Democratic Republic of Congo
15	National Centre for Arbitration, Conciliation & Mediation (CENACOM), Kinshasa Web: <a href="http://www.cenacom.cd/">http://www.cenacom.cd/</a>	Democratic Republic of Congo
16	Intergovernmental Authority on Development (IGAD) Business Arbitration Centre	Djibouti
17	Cairo Regional Centre for ICA (CRCICA) Web: <a href="http://www.crcica.org.eg">http://www.crcica.org.eg</a>	Egypt
18	Sharm El Sheikh International Arbitration Centre Web: <a href="http://www.shiac.com/">http://www.shiac.com/</a>	Egypt
19	Dr A Kheir Law & Arbitration Center (AKLAC) Web: <a href="http://www.kheirlaw.com.eg">http://www.kheirlaw.com.eg</a>	Egypt
20	Addis Ababa Chamber & Sectorial Association Arbitration Institute Web: <a href="http://www.addischamber.com/">http://www.addischamber.com/</a>	Ethiopia
21	Centre d'Arbitrage, de Mediation et de Conciliation (CAMC-GA)	Gabon
22	Ghana Arbitration Centre Web: <a href="http://www.ghanaarbitration.org/">http://www.ghanaarbitration.org/</a>	Ghana

23	Ghana Association of Certified Mediators & Arbitrators (GHACMA), Accra Web: <a href="http://www.ghacma.org/">http://www.ghacma.org/</a>	Ghana
24	Arbitration Centre Chambre d'Arbitrage de la Guinee, Conakry	Guinea
25	Arbitration Centre Chambre d'Arbitrage de Cote d'Ivoire Web: <a href="http://www.caci.ci/">http://www.caci.ci/</a>	Ivory Coast
26	Common Court of Justice & Arbitration of OHADA Web: <a href="http://www.ohada.org/ccja.html">http://www.ohada.org/ccja.html</a>	Ivory Coast
27	Chamber of Commerce & Industry of Ivory Coast, Abidjan Web: <a href="http://www.cci.ci">http://www.cci.ci</a>	Ivory Coast
28	Dispute Resolution Centre, Nairobi Web: <a href="http://www.disputeresolutionkenya.org/">http://www.disputeresolutionkenya.org/</a>	Kenya
29	Nairobi Centre for International Arbitration Web: <a href="http://ncia.or.ke/">http://ncia.or.ke/</a>	Kenya
30	The Directorate of Dispute Prevention & Resolution Web: <a href="http://www.ddpr.org.ls">http://www.ddpr.org.ls</a>	Lesotho
31	Libyan Centre for Mediation & Arbitration	Libya
32	The Libyan International Arbitration Commercial Centre Web: <a href="http://odyssea.ly/portfolio-items/the-libyan-international-arbitration-commercial-center/">http://odyssea.ly/portfolio-items/the-libyan-international-arbitration-commercial-center/</a>	Libya
33	Arbitration Centre of Madagascar Web: <a href="http://www.camm-mada.org/">http://www.camm-mada.org/</a>	Madagascar
34	Centre d'Arbitrage et de Conciliation du Mali (CECAM) Bamako Web: <a href="http://www.ccgabon.com">www.ccgabon.com</a>	Mali
35	Permanent Court for Arbitration at the Mauritius Chamber of Commerce & Industry Web: <a href="http://www.mcci.org/en/">http://www.mcci.org/en/</a>	Mauritius
36	LCIA-MIAC Arbitration Centre, Ebene Web: <a href="http://www.lcia-miac.org/">http://www.lcia-miac.org/</a>	Mauritius
37	Euro-Mediterranean Center for Mediation & Arbitration, Casablanca	Morocco
38	Rabat International Mediation & Arbitration Centre (CIMAR) Web: <a href="http://www.cimar-maroc.org/">http://www.cimar-maroc.org/</a>	Morocco
39	CCIS, Agadir Web: <a href="http://www.ccis-agadir.com/">http://www.ccis-agadir.com/</a>	Morocco
40	Centre for Arbitration Conciliation & Mediation (GACM) Maputo Web: <a href="http://www.cacm.org.mz">www.cacm.org.mz</a>	Mozambique
41	Centre de Mediation et d'Arbitrage de Niamey (CMAN) attached to the Niger Chambre de Commerce, d'Industrie et d'Artisan Web: <a href="http://www.camco.bf">www.camco.bf</a>	Niger
42	Regional Centre for ICA Lagos (RCICAL) Web: <a href="http://www.rcicalagos.org/">http://www.rcicalagos.org/</a>	Nigeria
43	Maritime Arbitrators Association of Nigeria (MANN) Web: <a href="http://maanigeria.org/">http://maanigeria.org/</a>	Nigeria
44	Lagos Court of Arbitration Centre Web: <a href="http://www.lagosarbitration.org/">http://www.lagosarbitration.org/</a>	Nigeria
45	International Centre for Arbitration & Mediation, Abuja (ICAMA) Web: <a href="http://www.icama.com/">http://www.icama.com/</a>	Nigeria
46	Lagos Chamber of Commerce International Arbitration Centre Web: <a href="http://www.laciacc.org/">http://www.laciacc.org/</a>	Nigeria
47	Janada International Centre for Arbitration & Mediation, Abuja Web: <a href="http://www.jicam.org/">http://www.jicam.org/</a>	Nigeria
48	Kigali International Arbitration Centre (KIAC) Web: <a href="http://www.kiac.org.rw">http://www.kiac.org.rw</a>	Rwanda
49	Arbitration Centre of the Dakar Chamber of Commerce, Industry and Agriculture Web: <a href="http://www.cciad.sn/">http://www.cciad.sn/</a>	Senegal
50	Dakar Arbitration & Mediation Centre	Senegal
51	Arbitration Foundation of Southern Africa Web: <a href="http://www.arbitration.co.za">http://www.arbitration.co.za</a>	South Africa
52	Equillore Group Web: <a href="http://www.equillore.com/wp/">http://www.equillore.com/wp/</a>	South Africa
53	Africa Alternative Dispute Resolution (Africa ADR) Web: <a href="http://www.africaadr.com/">http://www.africaadr.com/</a>	South Africa
54	The Association of Arbitrators	South Africa

	Web: <a href="http://www.arbitrators.co.za/">http://www.arbitrators.co.za/</a>	
55	Commission for Conciliation, Mediation & Arbitration (CCMA) Web: <a href="http://www.ccma.org.za/">http://www.ccma.org.za/</a>	South Africa
56	Tokiso Dispute Settlement Pty Ltd	South Africa
57	South Sudan Chamber of Commerce, Industry & Agriculture, Juba Web: <a href="http://www.southsudanchamber-commerce.org">http://www.southsudanchamber-commerce.org</a>	South Sudan
58	Arab Centre for Arbitration	Sudan
59	International Chamber of Arbitration	Sudan
60	The Sudanese Centre for Conciliation & Arbitration Web: <a href="http://sudanese-arbitration.com/">http://sudanese-arbitration.com/</a>	Sudan
61	Conciliation, Mediation and Arbitration Commission (CMAC) Web: <a href="http://www.cmac.org.sz/">http://www.cmac.org.sz/</a>	Swaziland
62	The National Construction Council, Dar es Salaam Web: <a href="http://www.ncc.or.tz/index.html">http://www.ncc.or.tz/index.html</a>	Tanzania
63	East African Court of Justice (Arbitration Institution) Arusha Web: <a href="http://eacj.org/">http://eacj.org/</a>	Tanzania
64	Tanzania Institute of Arbitrators (TIA), Dar es Salaam	Tanzania
65	Arbitration Court CATO, Lome Web: <a href="http://www.ccit.tg/">http://www.ccit.tg/</a>	Togo
66	Centre for Conciliation & Arbitration of Tunis (CCAT)	Tunisia
67	Al Insaf Center, Tunis	Tunisia
68	Centre for Arbitration & Dispute Resolution, Kampala	Uganda
69	Zambia Centre for Dispute Resolution	Zambia
70	Commercial Arbitration Centre in Harare	Zimbabwe
71	Africa Institute of Mediation and Arbitration, Harare Web: <a href="http://www.aima.org.zw/">http://www.aima.org.zw/</a>	Zimbabwe

**Table 3: Participation of African parties, cities and arbitrators in ICC Arbitrations: 2000-2015**

Year	Parties	Cities	Arbitrators
2000	89	2	9
2001	74	3	12
2002	74	7	13
2003	79	6	28
2004	72	2	18
2005	68	8	23
2006	81	-	27
2007	50	3	16
2008	87	2	34
2009	126	14	39
2010	122	9	40
2011	174	12	52
2012	127	6	23
2013	174	9	27
2014	163	8	38
2015	48	3	32
<b>TOTAL</b>	<b>1608</b>	<b>94</b>	<b>431</b>

**Table 4: Chartered Institute of Arbitrators Membership Data for Africa: January to December 2015**

No	Country	Associate	Member	Fellow	Total
1	Kenya	238	174	47	459
2	Mauritius	29	19	6	54
3	Nigeria	430	281	96	807
4	South Africa	15	28	16	59
5	Zambia	27	31	4	62
6	Zimbabwe	9	3	5	17
7	Others*	53	47	5	105
	Total	801	583	179	1563

\*Applies to those members in a country without branch/chapter and who do not wish to be attached to any existing branch/chapter.

**Table 5: Extract from WJY Rule of Law Index 2015: Comparative Table for Ranking of African Countries out of 102 Countries worldwide.**

No	Country	Factor 1	Factor 2	Factor 3	Factor 4	Factor 5	Factor 6	Factor 7	Factor 8
1	Botswana	32	29	35	55	28	22	33	27
2	Ghana	28	59	41	30	52	31	34	40
3	South Africa	40	42	27	39	81	33	39	38
4	Senegal	29	36	55	40	59	42	46	52
5	Tunisia	34	44	59	62	50	43	49	41
6	Morocco	48	48	60	86	44	39	54	86
7	Malawi	47	80	65	49	83	73	50	48
8	Tanzania	55	77	62	71	91	77	57	67
9	Zambia	68	70	72	89	62	68	71	65
10	Cote d'Ivoire	72	69	93	79	77	65	43	64
11	Burkina Faso	86	73	90	58	67	67	70	70
12	Madagascar	81	82	74	81	54	87	90	78
13	Liberia	54	94	71	50	94	95	81	92
14	Kenya	50	96	79	76	96	70	73	89
15	Egypt	91	52	91	98	66	93	92	55
16	Sierra Leone	59	91	96	63	86	91	85	85
17	Ethiopia	96	53	94	97	56	98	98	61
18	Uganda	89	100	92	94	85	94	68	80
19	Nigeria	63	97	77	87	102	74	62	73
20	Cameroon	83	101	95	74	98	92	96	91
21	Zimbabwe	101	92	102	101	78	100	79	72

Source: World Justice Program Rule of Law Index 2015 available at:

[http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf) (accessed 9 Feb 2016)

Legend:

Factor 1: Constraints on government powers

Factor 2: Absence of corruption

Factor 3: Open government

Factor 4: Fundamental rights

Factor 5: Order and security

Factor 6: Regulatory enforcement

Factor 7: Civil justice

Factor 8: Criminal justice

Factor 9: Informal justice

# 7. List of Participants

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## SOAS Arbitration in Africa Conference Series

### List of Participants

Rethinking the Role of Courts and Judges in supporting Arbitration in Africa, Lagos Court of Arbitration International Centre for Arbitration and ADR, Conference Hall, Lagos  
22-24 June 2016

No.	First Name	Surname	Country
1	Abayomi	Okubote	Nigeria
2	Abimbola	Odeyemi	Nigeria
3	Abimbola	Atitebi	Nigeria
4	Adefunke	Akoni	Nigeria
5	Adeola	Agunbiade	Nigeria
6	Adewale	Atake	Nigeria
7	Adio	Abdulhakeem	Nigeria
8	Agatha	Okeke	Nigeria
9	Ahmed	Bannaga	Sudan
10	Akin	Wanga	Nigeria
11	Alexander (Xander)	Meise	USA
12	Amos	Sango Sango	Cameroon
13	Andrew	Chukwumerie	Nigeria
14	Anna	Arrey Arranow	Cameroon
15	Ashunchong	Paul Tanyi Ako	Cameroon
16	Aurélia Sylvia	Mafongo Kamga	Côte d'Ivoire
17	Ayo	Adesmi	Nigeria
18	Ayo	Phillips	Nigeria
19	Ayojide	Ajibade	Nigeria
20	Babajide	Ogundipe	Nigeria
21	Baiju	Vasani	UK
22	Bayo	Ojo	Nigeria
23	Beltine	Ndikum Nehzah	Cameroon
24	Catherine	Animashaun	Nigeria
25	Charles	Kajimanga	Zambia
26	Charles	Nairac	France
27	Chikwendu	Madumere	Nigeria
28	Chinwe	Uwandu	Nigeria
29	Chioma	Ishiodu	UK
30	CJ	Amasike	Nigeria
31	Cletus Atanga	Njoke	Cameroon
32	Comfort	Lobe Makane	Cameroon
33	Cynthia	Akueya Nchaw	Cameroon
34	Data Pax	Harry	Nigeria
35	Diane	Okoko	Nigeria
36	Duncan	Bagshaw	UK
37	Edward	Fashole-Luke11	Botswana
38	Edward	Torgbor	Kenya

	First Name	Surname	Country
39	Ekemini	Uwa Umoh	Nigeria
40	Emilia	Onyema	UK
41	Esine	Okudzeto	Ghana
42	Fatma	Muiruri	Kenya
43	Fidele	Masengo	Rwanda
44	Folashade	Alli	Nigeria
45	Fri	Achu	Cameroon
46	Frinwei	Achu	Cameroon
47	Funke	Adekoya	Nigeria
48	Georgiana Sara	Karim	Sierra Leone
49	Gerard Mbah	Tambi	Nigeria
50	Gilbert	Awah Bongam	Cameroon
51	Haider Ahmed	Daffala	Sudan
52	Hakeem	Seriki	UK
53	Harelimana	Jean Baptiste	France
54	Henrietta Ekundayo Emilea	Cole	Sierra Leone
55	Ikechukwu	Ogu	Nigeria
56	Ikpeme	Nkebem	Nigeria
57	Irene Chirwa	Mambilima	Zambia
58	Isaiah	Bozimo	Nigeria
59	Izuchukwu	Oboko	Nigeria
60	Janet	Ilunga	Zambia
61	Jean Alain	Penda	Canada
62	Jespa	Tichock Ajereboh	Cameroon
63	Jide	Adesokan	UK
64	Jimmy	Muyanja	Uganda
65	Jlmmmy	Kodo	Côte d'Ivoire
66	Joe	Tia	Ghana
67	John	Gaffney	UAE
68	Joyce	Williams	USA
69	Joyce	Thompson	Ghana
70	Justice	Mahmoud	Nigeria
71	Justice	Okoro	Nigeria
72	Kate	Emuchay	Nigeria
73	Kenneth	Onyema	Nigeria
74	Khalid	Anas	Sudan
75	Kizito	Beyuo	Ghana
76	Laurence	Ngugi	Nigeria
77	Leyou	Tameru	Ethiopia
78	Lise	Bosman	South Africa
79	Lola Seun	Adebayo	Nigeria
80	Lolade	Seun-Adebayo	Nigeria
81	Luke Mirac Chengayam	Kisob	Cameroon

	First Name	Surname	Country
82	Lydian	Bate Etah	Cameroon
83	Matilda	Idun-Donkor	Ghana
84	Mbanda Epanty	Agbor Nde	Cameroon
85	Megha	Joshi	Nigeria
86	Michael	Swainston	UK
87	Milner Joseph	Katolo	Zambia
88	Mirette	Dorcas Nkongme	Cameroon
89	Narcisse	Aka	Côte d'Ivoire
90	Ndanga	Kamau	Mauritius
91	Ngo-Martins	Okonmah	Nigeria
92	Nkem	Agboti	Nigeria
93	Obinna	Okolo	Nigeria
94	Olabisi	Makanjuola	Nigeria
95	Olasinmibo	Zubair	Nigeria
96	Olusola	Ephraim-Oluwanuga	Nigeria
97	Onyema	Ugorji	UK
98	Opeyemi	Akinlade	Nigeria
99	Osehise	Odigie	Nigeria
100	Pamela Serina	Nantogmah	UK
101	Patricia Mwila	Bowa	Zambia
102	Patrick Libam	Moutngui	Cameroon
103	Patson Wilbroad	Arinaitwe	Uganda
104	Paul	Idornigie	Nigeria
105	Phillip	Aliker	UK/Uganda
106	Phrobet	Nkamwah Limen	Cameroon
107	Prince	Toryem	Nigeria
108	Prince N.C.	Olokotor	UK
109	Promise	Befeh	Cameroon
110	Roderick	Cordara	UK
111	Roseline	Nwosu	Nigeria
112	Rukia	Baruti Dames	UK
113	Ryham	Ragab	Egypt
114	Salman Alhaji	Salman	Nigeria
115	Sammy	Bate Nchacha	Cameroon
116	Sandra	Sangbong Ngwafu	Cameroon
117	Sarr	Leon Patrice	Senegal
118	Sekou Oumar	Camara	Nigeria
119	Stephen Chima	Arubike	Nigeria
120	Steven	Finizio	UK
121	Sylvie	Bebohi Ebongo	Cameroon
122	Tolu	Obamuroh	Nigeria
123	Tsegaye	Laurendeau	UK
124	Tunde	Ogowewo	Nigeria

	<b>First Name</b>	<b>Surname</b>	<b>Country</b>
<b>125</b>	Tunde	Fagbohunlu	Nigeria
<b>126</b>	Tunde	Ogunseitan	Nigeria
<b>127</b>	Uche	Ewelukwa	USA
<b>128</b>	Ucheora	Onwuamaegbu	USA
<b>129</b>	Ustaz	Alsahaby	Sudan
<b>130</b>	Wilfred	Ikatari	Nigeria
<b>131</b>	Williams	Ukonu	Nigeria

## SOAS Arbitration in Africa Conference Series

### Extract from Delegates' Feedback at the Conference

**Below are the verbatim responses from delegates on the question: Could you describe what you will do differently as a result of what you have learned?**

"Ensure arbitration institution is appointing authority while drafting the arbitration clause, and to be in full control of the process, as an arbitrator."

"The need to learn share and engage Africa and Africans as the seat and Arbitrators respectively, the big apple that we are is pertinent."

"Engage more with other arbitration practitioners in Africa."

"I will always have an arbitration clause in agreements; and I will train baby lawyers and students on the practice of arbitration & challenges."

"I have pledged to consider African arbitrators when making nominations!"

"Greater awareness of the quality of African arbitrators."

"Pushing for development in my home country regarding arbitration."

"My Approach to networking with African arbitrators will now be different positively."

"I will more inclined to advise my clients to use arbitration and ADR rather than litigation. I will also not file frivolous actions aimed at frustrating arbitration and ADR. I will advise my colleagues to do the same."

"Minimize the recourse to national courts as much as possible. Encourage collaboration between institutions, and referrals, within Africa."

"I will always make sure that in any contract I am involved in drafting I will insert an arbitration clause and make sure I advise my clients and or parties on the advantages of arbitration."

"Take a keener interest in arbitration related decisions from other African jurisdictions."

"I will as a result of what I have learnt encourage parties to hold Arbitration within Africa."

"Stay connected to the contacts I made during the conference on arbitration related matters and also other legal matters that I might be dealing with which touches on their jurisdiction or practice areas."

"My advise to clients on arbitration and generally shall be different, it shall be more objective and prone to ADR procedures. I shall not engage in any frivolous actions or appeals and shall advise colleagues to do same."

"I will adopt a different approach to a thesis I am writing on arbitration. Also I intend to quicken my steps towards becoming an arbitrator".

"I will ensure I collaborate with the judiciary particularly the judges in Abuja to build capacities of our judges"

"Continue learning and networking with experience(d) arbitrators to build capacity."

"I will from this moment be more and more interested in the training and eventual practice of arbitration."

"I picked up the challenge to develop a law report on arbitration cases within the OHADA jurisdiction and provide certain proposals to our institutional court - CCJA."

"I will urge my institution to communicate more and make data available."

"I have been further encouraged to pursue arbitration as a veritable and reliable source of dispute resolution."

**Please indicate anything you think we could improve on:**

"Have a young arbitrators panel."

"The organisation is simply fantastic, you may wish to develop a template for collaboration among countries."

"Would suggest three days and more networking opportunities needed."

"Periodic, say quarterly, communications to/among participants and other stakeholders on developments in the conference mission, for the purpose of keeping it fresh in our consciousness."

"I think improvements should be done in emphasizing on formal training for both Arbitrators and Judges."

Overall responses received:-

- 70.8% of delegates rated speakers at the conference as 10 out of 10.
- Delegates would recommend a peer to attend our conferences.
- Delegates would attend future conferences.
- Delegates benefited from attending the conference.

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