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100 Years

The Fifth SOAS Arbitration in Africa Conference Series

SOAS - Khartoum/Arusha Arbitration in Africa Conference

in Partnership with Bannaga & Fadlabi LLP. (Sudan) and African Institute of International Law (Arusha, Tanzania)

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AFRICAN INSTITUTE OF INTERNATIONAL LAW

Best Practices in Arbitration & ADR in Africa

12- 14 February 2019

Arusha, Tanzania

CRCICA

msk
Mitchell Silberberg & Knupp LLP

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Night Scene from Khartoum, Sudan

Mount Kilimanjaro, Tanzania

SOAS Arbitration in Africa Conference Series 2015-2018

1st SOAS Arbitration in Africa Conference Series, Addis Ababa, Ethiopia 2015

2nd SOAS Arbitration in Africa Conference Series, Lagos, Nigeria 2016
Rethinking the Role of Courts and Judges in supporting Arbitration in Africa

3rd SOAS Arbitration in Africa Conference Series, Cairo, Egypt, 2017

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4th SOAS Arbitration in Africa Conference Series, Kigali, Rwanda 2018

About the SOAS Arbitration in Africa Conference Series 2015-2019

This conference series discuss 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 research project itself is titled "Creating a Sustainable Culture of Arbitration as Mechanism for Commercial Dispute Resolution in Africa".

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". This goal has been pursued through the conference series and conference Discussion Papers which have aided our "knowledge sharing between researchers and academics, arbitration practitioners and arbitration institutions outside and within the continent.

The first conference interrogated the role of arbitration institutions in supporting the development of arbitration in Africa and was hosted by the Office of the General Counsel of the African Union Commission in 2015. It was apt to commence the conference series with the centres that administer arbitration in Africa. This is because prior to our

conference series, there was no definitive list of the centres that operate on the continent. We produced the first of such lists which has been built on by other organisations such as ICCA. In addition, our Addis Ababa conference pulled together Africans engaged in arbitration in the same location in Africa and new relationships were formed. It is particularly gratifying that these relationships continue and have led to additional training and appointments for some colleagues. Some of these arbitration centres contributed to the edited collection by Dr Emilia Onyema, Transformation of Arbitration in Africa: The Role of Arbitral Institutions, (Kluwer Wolters, 2016)

The second conference was hosted by the Lagos Court of Arbitration and it focused on the role of judges and courts in the promotion and viability of arbitration in Africa. The conference papers and discussions critically examined the disposition of various African courts towards arbitration. Our Lagos conference was particularly interesting because several judges from different African countries, including the Chief Justice of Zambia, Her Ladyship, Justice Irene Mambilima, and Justice John Okoro of the Nigerian Supreme Court, were in attendance. The judges in attendance fully participated by listening to our arbitration practitioners and sharing from their own experiences.

Some of the successes recorded following our Lagos Conference include: (1) from Nigeria, a new Chief Justice Onnoghen, who wrote a letter admonishing the judges in Nigeria to honour arbitration agreements. (2) Judges in the various African countries continuing to receive different levels of training in arbitration. (3) The continued and

intensified engagement of the African arbitration community with judges and attorneys-general and other government agencies. (4) The many arbitration conferences that the continent now hosts. These have all contributed to the more supportive judiciaries we now have across the continent. African judges now exhibit in their arbitration connected decisions, better understanding of the role of arbitration in their jurisdictions.

We are very proud that our conference series contributed to these engagements which collectively are leading to change in behaviour towards arbitration across the continent. This change in behaviour and attitude of national judiciaries in several African countries is interrogated in the most recent publication edited by Dr Emilia Onyema, Rethinking the Role of African national Courts in Arbitration (Kluwer Wolters, 2018) which features detailed analysis (with commentaries) of arbitration related decisions from eight prominent African jurisdictions.

In 2017, our third conference was hosted by the Cairo Regional Centre for International Commercial Arbitration (CRCICA). This conference examined the role of the legislative and executive arms of African governments in the development of arbitration. In addition to interrogating the substantive content of the arbitration laws of various African countries and the engagement of UNCITRAL with African states in this regard; the conference also examined the attitude of African governments towards investment arbitration; and non-legal factors relevant to making African countries attractive seats and venues for intra-Africa and Africa-connected international disputes. Extending our interrogation to such non-legal factors was, "to provide a holistic discussion of the gaps which need to be filled to produce a sustainable environment that will attract disputes for resolution on the continent".

Our Cairo conference was particularly special because it celebrated the engagement of North African countries with those of sub-Sahara Africa. This meant we interacted as a united African continent. This conference added the Arabic language to our conference languages which had hitherto being held in the English and French languages. Finally, it was at our Cairo conference that in response to a challenge thrown by Dr Emilia Onyema, Dr Nagla Nassar of NasserLaw, Cairo accepted to host one African candidate for a one month internship in

Cairo. Our fourth conference in this series is co-hosted by the Kigali International Arbitration Centre (KIAC) in Rwanda. Our choice of Rwanda was to ensure we also took our message of 'arbitration in Africa' to the Eastern (and as far South as possible) part of the continent. This was particularly important since we started at the home of the African continent, the Africa Union Commission, went to West Africa (Lagos) and North Africa (Cairo).

Our 2018 Kigali conference will examine the fourth identified stakeholder in the development of arbitration in Africa: the arbitration practitioner. It will particularly identify the arbitration practitioner and the various roles open to such individual in the arbitral process. Having identified the roles and their occupants, attendees at this conference will explore how such role occupants can support the development of arbitration in Africa.

The fifth conference was scheduled to held in Khartoum (SUDAN) and will focus on the development of the arbitration practice in Africa?. This 2019 conference was relocated to Arusha and is co-hosted by BANNAGA & FADLABI LLP. (Khartoum) and the African Institute of International Law (Arusha).

About
The Fifth Conference

This conference starts the new phase in the SOAS Arbitration in Africa series. This year the conference, in addition to the development of arbitration in Africa, discusses one of the significant development in Africa's economy, which is the African Continental Free Trade Area. This is the first time in the series, that two organizers from different countries are co-hosting the conference: The African Institute of International Law - AIIL (Tanzania) and Bannaga & Fadlabi LLP

(Sudan). The Arusha conference attracted over 200 registrants from twenty jurisdictions; eight panels with speakers from fifteen jurisdictions. Arusha is the home of the East African Court of Justice, the Peace Agreement between Sudan and South Sudan and the (former) International Criminal Tribunal for Rwanda. Arusha is also home of the Kilimanjaro and Meru Mountains.

The Fifth SOAS Arbitration in Africa Conference Series (Feb. 2019)

Arusha, Tanzania

Day 1, Welcome

Day 1, Panel 1

Africa's Experience in Adopting UNCITRAL Model Law on Arbitration

Day 1, Panel 2

Africa's Experience in adopting UNCITRAL Arbitration Rules

Day 1, Panel 3

Enforcement of Arbitral Awards in Africa

Day 2, Panel 4

The African Continental Free Trade Area Explained

Day 2, Panel 5

African States, Foreign and Domestic Investments

Day 2, Panel 7

Culture of Arbitration and Institution Building in Africa

Day 2, Panel 8

The modernisation of other ADR Processes in Africa

Day 2, Closing








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Organizers

Organiser/ Convener:

Dr. Emilia Onyema, PhD, FCIArb, School of Law, SOAS, University of London.

Co- organizer: *Amba. Sani Mohammed*, African Institute of International Law
Co- organizer: *Ahmed Bannaga*, Bannaga & Fadlabi LLP
Anchor person: *Ms. Ilham Kabbouri*, Hogan Lovells' International Arbitration

Administration:

- *Professor Mathias Sahinkuye,* African Institute of International Law, Tanzania
- *Mr. Kaunda Vyoseena*, Project Accountant, African Institute of International Law, Tanzania
- *Mr. Amro ELHASSAN,* Bannaga & Fadlabi LLP – Khartoum Sudan
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- King & Wood Mallesons MENA
- The Cairo Regional Centre for International Commercial Arbitration – CRCICA, Cairo, Egypt

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Thanks

Special thank you and appreciation to Ambassador Mohammed Sani for his endless support and dedication to make this event alive.

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The Conference Programme

The Conference Programme

Day 0:
Tuesday, 12 February 2019

17:30 - 18:30:	**Registration of attendees** at Arusha International Conference Centre.
18:30 - 20:00:	**Welcome dinner** with Egyptian music on the lute by Abdallah El Nokaly at African Tulip Hotel **(www.theafricantulip.com)**
	Sponsored by Rankin Engineering Consultants, Zambia
	Anchor person: *Ms. Ilham Kabbouri*
	Conference languages: English and French

Day 1:
Wednesday, 13 February 2019
(The primary focus of discussions will be commercial arbitration)

08:00 - 09:15:	**Registration of attendees** at International Conference Centre, Arusha
09:20 - 09:30:	**Welcome by Anchor person: *Ms Ilham Kabbouri,*** Hogan Lovells LLP
09:30 - 09:40:	**Welcome by *Dr. Emilia Onyema*** (SOAS University of London)
09:40 - 09:50:	**Welcome by *Mr Ahmed Bannaga*** (Bannaga & Fadlabi LLP, co-host, Sudan)
09:50 - 10:00:	***Welcome by Ambassador Sani Mohammed*** (African Institute of International Law, co-host, Arusha)
10:00 - 10:10:	***Welcome by H.E. Prof Dr. Kennedy Gastorn,*** Secretary-General, Asian-African Legal Consultative Organisation (AALCO).
10:30 - 11:00:	**Keynote Address on the Business Case for Arbitration in Africa by *Mrs. Olufunke Adekoya,* SAN, AELEX Lagos**
11:00 - 11:30:	**Group Photo and Tea Break Sponsored by Rankin Engineering Consultants, Zambia**

11:40 - 12:50:

Panel 1:

Africa's Experience in Adopting UNCITRAL Model Law on Arbitration

(This panel will examine the experience of the 11 African states that have adopted the Model Law and provide a recommendation whether other African countries should adopt or adapt the Model Law from their own experience. The panel will focus in particular with peculiarities from their own jurisdiction and interpretation of their courts and the courts of other Model Law jurisdictions).

Chair: *Ms. Esine Okudzeto,* Sam Okudzeto & Co, Accra.

Speakers:

1. Mr. Kizito Beyou will speak on the experience of Ghana and why Ghana did not adopt the Model Law wholesale in its 2010 ADR Act.
2. Ms. Njeri Kariuki will speak on the experience of Kenya and why Kenya adopted the Model Law wholesale in its 1995 Arbitration Act and 2010 Constitution.
3. Dr. Sylvie Bebohi will speak (via skype) on the experience of OHADA and its revised arbitration law.
4. Mr. Hamid Abdulkareem will speak on the experience of Nigeria and the proposed amendments to its arbitration law.
5. Mr. Teyeb Hassabo will speak on the Sudanese Arbitration Law.

13:00 - 14:20: **Lunch sponsored by Mitchell Silberberg & Knupp LLP (Los Angeles, California)**

14:30 - 15:30:

Panel 2:

Africa's Experience in adopting UNCITRAL Arbitration Rules

(Arbitration centre's will share on their experience of basing their rules on UNCITRAL Rules and their experience of administering arbitration references under the rules. They shall focus in particular on the provisions which have been very difficult for them to apply).

Chair: *Mr Babjide Ogundipe, Sofunde, Osakwe, Ogundipe and Belgore Law Firm*

Speakers:

1. Dr Ismail Selim, Director-General, Cairo Regional Centre for International Commercial Arbitration (CRCICA)
2. Dr Fidele Masengo, Secretary-General, Kigali International Arbitration Centre (KIAC)
3. Dr Marie-Andree Ngwe, Secretary-General, Groupement Inter-patronal du Cameroun (GICAM)

15:35 - 15:55: **Tea Break sponsored by Aztan Law Firm (Sudan, South Sudan & Kenya)**

16:00 - 17:15: **Panel 3:**

Enforcement of Arbitral Awards in Africa

(This panel will discuss developments in their jurisdictions on the enforcement of arbitral awards under the NYC or their national laws through an analysis of recent important cases. The foreign speakers will share from their own experience of enforcing awards/judgments in African jurisdictions)

Chair: *Dr. Nagla Nassar,* NassarLaw, Cairo

Speakers:

Mr. Ahmed BANNAGA on the view from Sudan

Dr. Babatunde Ajibade, SAN on the view from Nigeria

Mr. Jonathan Ripley-Evans on the view from South Africa

Mr. Kamau Karori on the view from Kenya

Mr. Tim Taylor, QC on the view from outside Africa

END of DAY 1

Day 2:

Thursday, 14 February 2019

(The primary focus of discussions will be investment, investment arbitration and ADR)

09:00- 10:00: **Panel 4:**

The African Continental Free Trade Area Explained

Chair: Sola Adegbonmire, Sola Ajijola and Co., Lagos

Lead paper: *Mr. Adetola Onayemi* on the African Continental Free Trade Area Agreement as it relates to dispute settlement and arbitration.

Discussants:

1. Prof. Idrissa Bachir Talfi
2. Ms. Leyou Tameru
3. Mr. Gerald Alfadani

10:05 - 11:10: **Panel 5:**

African States, Foreign and Domestic Investments

(This panel will discuss the experience of African states and their push to attract foreign investments. It will discuss the role of domestic investors and how they can be better incentivized and protected; and finally discuss what will attract foreign investors to African States.)

Chair: *Ambassador Sani Mohammed,* African Institute of International Law

Speakers:

1. Mr. Bobby Banson on the experience of West African states.
2. Dr. Achille Ngwanza on the experience of the OHADA region
3. Ms. Xander Meise from the perspective of advisor to foreign investors on what will attract them to African states.

11:15 - 11:30: **Tea Break sponsored by the Cairo Regional Centre for International Commercial Arbitration**

11:35 - 12:50:

Panel 6:

Africa's Engagement with Investor State Dispute Settlement (ISDS)

(This panel will discuss the cases African states and investors have been involved in ISDS to determine a trend and suggest how their success rates can improve; and explore other dispute resolution mechanisms that may serve these parties better especially where all parties are African. It will also engage with the Pan-African Investment Code.)

Chair: *Dr. Emilia Onyema,* SOAS University of London

Speakers:

1. Dr. Chrispas Nyombi on the need for a Pan-African Investment Court
2. Prof. Paul Idornigie, SAN on the Nigerian-Morocco BIT
3. Dr. Mostfa Bek El Behbety on Egypt's experience of ISDS and its remedial action.

13:00 - 14:20: **LUNCH**

14:30 - 15:40:

Panel 7:

Culture of Arbitration and Institution Building in Africa

Chair: *Mr. Thierry Gakuba Ngoga*, Legal Line Partners, Kigali

Lead Paper: *Mr. Olisa Agbakoba, SAN* on Culture of Arbitration and Building Institutions in Africa

Discussants:

1. Mr. Edward Luke Fashole III
2. Ms. Eunice Shang-Simpson
3. Mr. Abdallah El Nokaly

15:40 - 15:55: **Tea Break sponsored by King & Wood Mallesons MENA**

16:00 - 17:00: **Panel 8:**

The Modernisation of other ADR Processes in Africa

(This panel will engage with mediation and negotiation in dispute resolution)

Chair: *Ms. Suzanne Rattray*, Rankin Engineering Consultants, Lusaka

Speakers:

1. Prof. Hiro Aragaki on teaching ADR
2. Mrs. Caroline Etuk on court annexed ADR services (multidoor courthouse)
3. Ms. Madeline Kimei on Online Dispute Resolution or "ODR4Africa"

17:05 - 17:30: **Launch of Arbitration Fund for African Students (AFAS)**

By *Dr. Emilia Onyema; Dr. Chrispas Nyombi; Ms. Yasmin Sebah* and *Ms. Eunice Shang-Simpson.*

17:30 – 17:40: **Closing remarks**

By the President of the East African Court of Justice, Hon. Judge *Dr. Emmanuel Ugirashebuja.*

19:00 - 21:00: **Closing dinner at Mount Meru Hotel** (www.mountmeruhotel.co.tz)

Anchor Person:

Ilham A. Kabbouri, Hogan Lovells, Dubai

Ilham is a Member of the Hogan Lovells' International Arbitration team based out of the Dubai office. She holds law degrees from both common and civil law jurisdictions: she is a graduate of the Universite Catholique de Louvain and of SOAS, University of London.

Over the years, Ilham has demonstrated a keen interest for the development of arbitration and the Rule of Law in Africa and has assisted a number of African Governments with the creation or improvement of their arbitration and trade legal frameworks. She was appointed in 2016 as Member of the International Arbitration Taskforce for the Federal Government of Somalia and was recently chosen to be part of Somalia's Negotiating Team for its Accession to the WTO. Ilham is also Head Coordinator of the IGAD-CCD Task Force for the creation of the Djibouti International Arbitration Centre.

Opening Remarks

By:

Dr. Emilia Onyema

SOAS Arbitration in Africa Conference Convenor

Opening Remarks

By Dr Emilia Onyema

Welcome to our fifth SOAS Arbitration in Africa Conference. This conference was scheduled to hold in Khartoum with the support of the arbitration community in Sudan. Mr Ahmed Bannaga had made a strong case for Khartoum to host one of our conferences in this series. We agreed that hosting one of our conferences in Sudan will be a positive move for the development of arbitration in Sudan. Along with Mr Bannaga and his colleagues, we agreed the program and preparation until January 2019 when the social and political unrest in Sudan became concerning. With Mr Bannaga and his colleagues in Sudan, we agreed to cancel the conference. This was primarily because of concerns for the personal/physical safety of our attendees.

We however, felt the need to even better support our Sudanese colleagues by not cancelling the conference but relocating it to another African country. We asked colleagues in a few other African states and we were overwhelmed with the positive response we received. As a matter of fairness, the first city to respond to us was the one we went with. Amb Sani of the African Institute of International Law immediately accepted our request to co-host with our Sudanese colleagues and very importantly to retain the agreed and diarised dates. This is the 'African spirit' in finest fashion! Dear Amb. Sani, many thanks! We are very grateful for your generous welcome!

The events in Khartoum turned out to be a sort of blessing for us because we have not been to Tanzania for our conference series. We are indeed very happy to be here in Arusha. A city of almost half a million people that hosts the African Court of Human and People's Rights and the East Africa Community including the EAC Court of Justice whose President is with us at this conference.

Arusha is said to nest at the base of volcanic Mt Meru and boasts of Mt Kilimanjaro (most of us flew in through Kilimanjaro airport) nearby and Serengeti National Park, the Ngorongoro Conservation Area; Lake Manyara National Park; and the Arusha National Park among others. There is also the National Natural History Museum; the Cultural Heritage Centre and the Masai Market for shopping.

Our conferences including this one, offer attendees the opportunity to network, meet their fellow Africans who are into arbitration, exchange contact details and business cards; and do remember to consider these people when next you have the opportunity to recommend arbitrators or experts or tribunal secretaries.

Following the end of our four year research project which birth this conference series, we were mandated by the attendees at our Kigali conference in 2018 to continue with the series. We will be happy to be hosted by any of your countries in the future. We can support infant

arbitration communities seeking to grow and we can also support developed or developing arbitration communities.

Our 2020 conference will be hosted by our French speaking sisters and brothers in Cameroon. We will send more details closer in due course.

Our keynote speaker at this conference is Mrs Funke Adekoya, one of the most sought after African arbitrators in both commercial and investment disputes. I will strongly encourage our younger colleagues here to meet her (you never can tell!). She will make a business case for arbitration in Africa and Africans in arbitration – a must listen.

We also have Prof Dr Kennedy Gastorn who is the Secretary General of the Asia-African Legal Consultative Organisation and very supportive of arbitration and the work we do. His Hon Judge Emmanuel Ugirashebuja, President of the EACJ will give a closing remark on Valentine's Day.

Over the next two days, you will hear from speakers and discussants across the various regions of Africa and beyond. We will explore issues on commercial arbitration; institutional arbitration; enforcement of awards; the African Continental Free Trade Area Agreement; foreign investments and dispute settlements; culture and institution building and ADR.

As part of the outcomes of our conference deliberations, we shall launch the AFAS [Arbitration Fund for African Students] a vision from our Kigali 2018 conference.

Enjoy the deliberations!

Dr Emilia Onyema

Welcome Notes

By:

Ahmed BANNAGA

Co-host, BANNAGA & FADLABI LLP (Sudan)

Welcome Notes by the organizers

By Ahmed BANNAGA

I must express our deep apology for creating this confusion of venue at the last minute. 40 million Sudanese and the elite arbitration community of Sudan have missed your presence and your valuable work in arbitration. The African experience in Arbitration is the pivotal point of this series, which must be shared to all African arbitration community.

We were planning since 2017 to host this respectful event. I assure you we had enough time and our intentions where positive to reflect a completely different picture about Sudan, and an encouraging practice of arbitration. But, when the country is faced with challenges as what we have now, we have to stop and listen to the people.

It will not be possible not to extend our deepest gratitude to Ambassador Sani and his team for saving this event and offering their resources and time to make it possible. Appreciation is, of course, extended, to Tanzanians who made it possible for us to come in a very short notice and despite the visa issues faced some of the participants, things have been successful without the necessity to have a partner from the government, which confirms that management of such event will go smoothly without any interference. This "positive negativity" is a great issue many African countries lacks.

The significance of this conference lies into the meeting of minds of arbitration practitioners in discussing their experience of arbitration. It is only this conference that allowed me to visit more African countries that I never dreamed of. I learned also about the rich experience in arbitration. From Lagos where law firms are not less than their counterpart in London or Paris and cases of arbitration may take up to 10 years. In Egypt where I knew that the finality of Award can be a challenge especially when the state is a party. And that Egypt has the largest number of bilateral investment treaties and largest number of arbitration cases in Africa. From Rwanda where this progressing nation managed to have a really developed arbitration centre such KIAC and arbitration case will not take more than 2 months in court by law.

Having pointed the above issues, I do really believe that we African are extremely disconnected, we tend to blame our governments for this disconnection. But it is not the job of the government to connect us. it is the job of the civil society, the private sector, and the elites and the experienced to connect us. Sudan for example used to have nine neighboring countries. I visited only two to date and South Sudan is not one of them. It is quiet seen that there is no sufficient interest to network or consider each other experience, which is greatly disappointing.

In the Continent now, we have the fastest growing economies in the world in Côte d'Ivoire and Ethiopia with over 8% and two declining ones in Sudan with less than -1% and South Sudan with -4%. This shows the disconnection we are experiencing. In the world economy, usually regional development moves forward as one group. Eastern Europe, south east Asia progressed together. But, despite the development of economy in Ethiopia, Its neighboring countries are in rapid decline. This means no trade, no experience, and no cooperation between us at all. Despite all the conventions and treaties of cooperation such as COMESA and other treaties. So we have the text and lack of interest.

The above simple example dictates us to have events such as this conference to understand each other and work together which creates better end for everyone. We cannot progress by keeping distances or waiting our government to move or work on behalf of us.

I must also address the issue of knowledge transfer. Having attended all the conference series since 2016. I was extremely surprised by the talents and experienced lawyers, arbitrators, engineers, judges and students we have in Africa. All of these talents and we cannot see the development of our practice. There is gap between the experienced arbitrators and the young practitioners. And that is not only in arbitration, but rather, in all professions in Africa.

As a young African, I failed to find any institution in Africa interested to offer scholarship or research grants. We have to always look up north or west to get this done. But with this conference, tries to change this fact by offering internship programme and mock courts, result can be expected. For example, we at Bannaga & Fadlabi, consider ourselves a new law firm of 2014 where the average age of partners is 36, would have never been able to stand before you today as a co-host of an international conference without the opportunity offered by Dr. Emilia and SOAS. This makes difference to young practitioners and makes us believe in Africa and skipping the ideas of migration or change of profession. So, we kindly urge every participant who is in charge of a law firm or judge or arbitrator or public office, to consider seriously a programme to channel their experience and a path to the next generation allowing us the opportunity to achieve.

It is vital to extend our sincere gratitude to our sponsors. Mr. Tayeb HASSABO the Managing Partner of AZTAN Law the largest most developed law firm in Sudan with offices in South Sudan and Kenya. Mr. Tim Taylor QC the MD of King & Wood Mealloesns MENA of which I had the hounor to work under his supervision for a while and helped me to become a better lawyer. He is the founder of International Lawyers for Africa – ILFA which benefited over 300 young lawyers in practical experience in international law firms in London, Paris and Dubai. Dr. Ismail Saliem the Director of Cairo Regional Centre for International Commercial Arbitration, CRCICA the oldest arbitration centre in Africa and the host of 2017 conference in Cairo. Ms. Suzanne Rattray of Rankin Engineering Consultants, Zambia this is the first time Ms Rattaray attend the conference and yet largest sponsor. She is highly qualified elite engineer in Zambia with experience in Tanzania, Mozambique and DR Congo, which symbolizes the spirit of the conference. And of course Ms Xander Misse of Mitchell Silberberg & Knupp LLP – California the most dedicated sponsor since the beginning of the series in 2016. She has been in the support of this project without hesitation and the only person and firm asking for sponsorship before we even think of it.

Finally, I have also to thank my team who worked very hard to make this possible. Mr. Amro ELHASSAN and Mutwakil Hassan for working on hourly basis to keep us calm and informed. To Ashraf Amir and Awad Ibrahim for staying up night for days to complete the website, and materials for Mr. Ali Hakem for supporting the project with his calculations and planning. Mr. Mahdi Hamid and Yousif Gasim who transferred their positive energy and supporting the team to conclude its work. And of course, for my partner Mutwakil Fadlabi, for his patience and ambition to keep us on the right track. I also confess that I will not be here without the support of my father Dr. Bannaga for educating me about life and giving us the opportunity to test our values and opportunities available in Africa and his personal support to this conference in Khartoum and Arusha, and finally my wife and son for being patient and supportive to the late work and midnight calls.

Thanks you.

Discussion Paper:

Best Practices in Arbitration and ADR in Africa

By:

Dr. Emilia Onyema

SOAS Arbitration in Africa Conference Convenor

Best Practices in Arbitration and ADR in Africa

Synopsis

This is the fifth in the SOAS Arbitration in Africa conference series. This Khartoum/Arusha conference is special because it is the first following the four year conferences on Arbitration in Africa which formed part of the research project on transforming and enhancing the use of arbitration as the dispute resolution of choice within the African continent. As noted in the *Kigali Conference Discussion Paper*, the four year research project itself is titled 'Creating a Sustainable Culture of Arbitration as a mechanism for Commercial Dispute Resolution in Africa'. The relevance of the research project and a summary of the conference series was also noted in the *Kigali Discussion Paper*.

This Khartoum/Arusha conference starts a new era as one legacy of this research project. Following a unanimous call by participants at the Kigali conference for the continuation of this conference series, we decided to re-purpose the series while retaining its substantive content and engagement. The new purpose of this conference series will be to work with nascent local arbitration communities in African states that do not have major international arbitration experience, in projecting their state and arbitration. In this way, this conference series, along with its following of attendees that it has developed over the four year period, will fully support such communities and states in the development of arbitration. In this way, the practice of arbitration can spread across various regions of the continent to create the much needed awareness, education, engagement, networking and development in this field of the law and study.

We at SOAS, will work with the local organising committees in preparing the program and resource persons for the conference. The local organising committee will bear the burden of organising the conference. This collaboration is open to any group of arbitration enthusiasts and practitioners in any African country. We also hope to introduce new speakers especially more women and younger practitioners onto our panels. Finally, we hope to draw in discussions on non-adjudicatory dispute resolution processes, primarily mediation and their development in Africa.

At our Kigali 2018 Arbitration in Africa Conference, I suggested the need for a Fund to which African students can apply to enable them attend and participate in arbitration related moots and conferences. After the Kigali conference, a group of us (Dr Emilia Onyema, Dr Chrispas Nyombi, Ms Yasmin Sebah, Prof Walid Ben Hamida, Ms Eunice Shang-Simpson, Prof Tom Mortimer and Mr Joseph Otoo) discussed the format for the Fund and formed the "Arbitration Fund for African Students" (AFAS) which we shall launch at this 2019 conference. The Fund will be registered as a Charity under the laws of England & Wales. The trustees of this Fund are: Dr Emilia Onyema, Dr Chrispas Nyombi, Ms Yasmin Sebah, Prof Walid Ben Hamida, Ms Eunice Shang-Simpson, Mr Joseph Otoo and Prof Tom Mortimer.
We shall circulate more information about the AFAS in due course and via our website at:
https://www.researcharbitrationafrica.com/

Aims of the conference

This conference builds on the foundations laid in our previous four conferences. It will explore best practices in arbitration and ADR in Africa. It primarily aims to identify the best practices in the law and practice of domestic and international arbitration. This will draw from different regions of the continent and internationally in a comparative manner.

Format of this conference

We hope that all attendees will have the opportunity to contribute in the discussions at our conferences. The panels will therefore ensure that there is enough opportunity for audience participation. **Day 1** of the conference will focus on commercial arbitration while the discussions on **Day 2** will focus on investment law and arbitration and ADR.

Venue for the conference

This SOAS 2019 Arbitration in Africa conference will be co-hosted by the law firm of Bannaga & Fadlabi LLP (Khartoum) and the African Institute of International Law (Arusha). The conference sessions will hold at the Arusha International Conference Centre.

Live Music

At the opening dinner, there will be Egyptian music on the lute by Abdallah El Nokaly, Associate at Al Tamimi LLP, Cairo. The dinner is sponsored by Rankin Engineering Consultants, Lusaka, Zambia.

Outline of the conference sessions

Each panel is chaired by a moderator and speakers/discussants.

Panel 1 is titled: **Africa's Experience in Adopting UNCITRAL Model Law on Arbitration.** The panel will examine the experience of the 11 African states that have adopted the Model Law and provide a recommendation on whether other African countries should adopt or adapt the Model Law from their own experience. The speakers will focus in particular on peculiarities from their own jurisdictions and interpretation of their courts and the courts of other Model Law jurisdictions.

This panel will be **moderated by Ms Esine Okudzeto**. Esine will be joined by Mr Kizito Beyou; Ms Nejri Kariuki; Dr Sylvie Bebohi; Mr Hamid Abdulkareem and Mr Tayeb Hassabo. Njeri will speak on the experience of Kenya and why Kenya adopted the Model Law. Kizito will speak on the law of Ghana and why Ghana did not adopt the Model Law. Tayeb will speak on the law of Sudan, another jurisdiction that did not adopt the Model Law. Hamid will speak on the law of Nigeria whose current law is based on the Model Law but undergoing revision. Sylvie will speak on the recently revised OHADA uniform arbitration law. The panel will explore from these various laws whether we need to draft a specific model law on arbitration and ADR for African states to adopt/adapt.

Panel 2 is titled: **Africa's Experience in adopting UNCITRAL Arbitration Rules.** The panel will discuss the impact of the UNICTRAL Arbitration Rules in regulating arbitration in Africa. Representatives of some of the arbitral centres in Africa will share their experience of administering arbitration references under their rules. They shall focus in particular on the provisions which have been very difficult for them to apply. In particular, the panel will also explore whether from their experience, we need to draft a model set of arbitration rules for the use of African centres.

This panel will be chaired by **Mr Babajide Ogundipe**. Babajide will be joined by Dr Selim Ismail (Cairo RCICA); Fidele Masengo (Kigali IAC); and Dr Marie-Andree Ngwe (GICAM). Ismail will share the experience of the Cairo Regional Centre and also draw examples from other AALCO Regional Centres across Africa. Fidele will speak on the experience of the Kigali Centre; and Marie-Andree will provide a counter view from the rules of GICAM Centre which are influenced by the ICC Rules.

Panel 3 is titled: **Enforcement of Arbitral Awards in Africa.** This panel will discuss developments in different African jurisdictions on the enforcement of arbitral awards under the New York Convention or their national laws through an analysis of recent important cases.

This panel will be chaired by **Dr Nagla Nassar**. Nagla will be joined by Mr Ahmed Bannaga; Dr Babatunde Ajibade; Mr Jonathan Ripley-Evans; Mr Kamau Karori; and Mr Tim Taylor. Ahmed will speak on recent decisions from the Sudanese courts. Babatunde will speak on recent decisions from the Nigerian courts. Jonathan will speak on decisions from the South African courts. Kamau will speak on recent decisions from the Kenyan courts. Tim will speak on his experience of enforcing awards in different African jurisdictions.

This will bring Day 1 deliberations to a close.

Day 2 will start with **Panel 4** titled: **The African Continental Free Trade Area Explained.** This panel will explore various issues that arise from the recently signed African Continental Free Trade Area Agreement with particular focus on dispute resolution. A lead paper will be delivered followed by responses from the discussants.

This panel will be chaired by **Mrs Sola Adegbonmire.** Sola will be joined by Mr Adetola Onayemi; Prof Idrissa Bachir Talfi; Ms Leyou Tameru; and Mr Gerald Afadani. Adetola will give the lead paper on the "African Continental Free Trade Area Agreement as it relates to dispute settlement and arbitration". Idrissa, Leyou and Gerald will discuss the paper exploring the possible impact of the AfCFTA on the OHADA, IGAD and ECOWAS regions.

Panel 5 is titled: **African States, Foreign and Domestic Investments.** This panel will discuss the experience of African states and their push to attract foreign investments. It will discuss the role of domestic investors and how they can be better incentivised and protected; and finally discuss what will attract foreign investors to African states.

This panel will be chaired by **Amb. Sani Mohammed.** Sani will be joined by Mr Bobbly Banson; Dr Achille Ngwanza; and Ms Xander Meise. Bobby will speak on the experience of Ghana and West African states. Achille will speak on the experience of the OHADA region. Xander will give the perspective of an advisor to foreign investors on what will attract them to African states.

Panel 6 is titled: **Africa's Engagement with ISDS.** This panel will discuss the cases African states and investors have been involved in ISDS to determine a trend and suggest how their success rates can improve; and explore other dispute resolution mechanisms that may serve these parties better especially where all parties are African. It will also engage with the Pan-African Investment Code.

This panel will be chaired by **Dr Emilia Onyema**. Emilia will be joined by Dr Chrispas Nyombi; Prof Paul Idornigie; and Dr Mostfa Bek El Behbety. Mostafa will discuss Egypt's experience of ISDS and the remedial actions taken by the state. Paul will explore the response under the Nigeria-Morocco BIT. Chrispas will explore the need for a Pan-African Investment Court.

Panel 7 is titled: **Culture of Arbitration and Institution Building in Africa.** This panel will explore issues of culture and its impact on the development of arbitration in Africa.

This panel will be chaired by **Mr Thierry Gakuba Ngoga**. Thierry will be joined by Mr Olisa Agbakoba; Mr Edward Fashole-Luke, II; Ms Eunice Shang-Simpson; and Mr Abdallah El Nokaly. Olisa will give the lead paper on "Culture of arbitration and institution building in Africa". Eunice, Edward and Abdallah will discuss the paper.

Panel 8 is titled: **The modernisation of other ADR Processes in Africa.** This panel is novel in our conferences because it explores issues of non-adjudicatory ADR processes in the resolution of commercial disputes in Africa.

This panel will be chaired by **Ms Suzanne Rattray**. Suzanne will be joined by Prof Hiro Aragaki; Mrs Caroline Etuk; and Ms Madeline Kimei. Hiro will speak on mediation law reform in Africa. Caroline will discuss court annexed ADR services; and Madeline will speak on online dispute resolution from the perspective of 'ODR4Africa'.

To finish off the day and the conference, we shall launch AFAS with closing remarks by the President of the East African Court of Justice, Hon Justice Emmanuel Ugirashebuja.

This brings the two days to a close.

Keynote Speaker

The conference **keynote address** will be given by Mrs Olufunke Adekoya, SAN. Mrs Adekoya will explore the "Business Case for Arbitration in Africa".

There will be **welcome addresses** from the co-hosts and the Secretary-General of the Asia-Africa Legal Consultative Organisation (AALCO), H.E. Prof. (Dr) Kennedy Gastorn. The **closing remarks** will be given by the President of the East African Court of Justice, Honourable Justice Emmanuel Ugirashebuja.

Conference/Project website

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

Languages

The conference proceedings shall be conducted in the English and French languages with simultaneous translation.

Appreciation

We thank the members of the organising team in Khartoum and Arusha. We thank our sponsors: School of Law, SOAS University of London; Rankin Engineering Consultants; Mitchell, Silberberg & Knupp; Mrs Kate Emuchay; Dr Emilia Onyema; Bannaga & Fadlabi LLP; African Institute of International Law; Aztan Law Firm; Cairo Regional Centre for International Commercial Arbitration; and King & Wood Mallesons, MENA.

We also thank our media partners: AfAA, AILA, APAA, I-Arb; and TDM.

We thank all our keynote speakers, moderators, contributors, comperes, rapporteurs and attendees.

Our SOAS 2020 Arbitration in Africa conference shall be hosted by our French speaking/OHADA colleagues in Cameroon in March. We shall circulate information on the conference in due course.

Dr Emilia Onyema

SOAS Arbitration in Africa Conference Convenor

Keynote Paper:
A Business Case for Arbitration in Africa

By:

Mrs. Funke Adekoya, San

Mrs. Funke Adekoya, San

'Funke heads the dispute resolution practice group at AÉLEX, a full-service law firm with offices in Lagos, Port Harcourt, and Abuja in Nigeria, and Accra, Ghana.

With over 40 years' experience in commercial litigation and corporate dispute resolution, she leads a team that advises clients extensively in the area of commercial and corporate litigation as well as business insolvency and reorganisation. 'Funke also appears regularly before the high courts, tax appeal tribunals and the appellate courts in which capacity she represents both Nigerian-based and offshore clients. She is frequently appointed to arbitral tribunals, either as sole or party-appointed arbitrator.

She also assists and advises offshore counsel on issues of Nigerian law and has appeared as an expert witness or provided expert legal opinions on Nigerian substantive and procedural law matters before courts in England, the United States of America and Turkey.

She is representing a major estate development company in a multibillion-naira claim with respect to the company's reclamation of a prime real estate situate in Lagos State. She also represented a Russian conglomerate in an action for conspiracy and tortious interference with the bid process of a Nigerian aluminium company, and is defending a South African retail merchandiser and its local subsidiary in a claim for breach of contract, loss of economic opportunity, and economic interference with a contract. She also currently represents two multilateral development banks in litigation before the Nigerian courts, resulting from their loan activities in Nigeria.

She also sits as a member of the World Bank Group sanctions board.

'Funke is recognised as a "leading individual" with "experience, knowledge and a strong court presence" by The Legal 500 EMEA (2015).

She holds an LLM from the Harvard Law School (1977) and was elevated to the rank of Senior Advocate of Nigeria (SAN) in 2001.

A Business Case for Arbitration in Africa

The Current Economic Climate in Africa

Over the years, Africa has witnessed increasing growth in international commerce with a resultant increase in Foreign Direct Investment (FDI) inflow on the continent. FDI grew by 420% over the past 20 years, from a total of $10,000,000,000 (Ten Billion Dollars) in 1999[1] to about $42,000,000,000 (Forty-Two Billion Dollars) in 2017, with Morocco, Egypt, Ethiopia, Nigeria and Ghana leading as the top five host economies.[2] The World Bank has predicted economic growth in Africa by 3.4% in 2019[3].

With Africa becoming one of the world's fastest growing economic hubs, the shortage of physical infrastructure in sub-Saharan Africa has provided an additional focus for inward investment, with investors looking to finance the construction or redevelopment of assets such as ports, railway lines, toll roads and power stations. Invariably where such high value investments go, disputes are bound to follow; therefore investors are keen to ensure the existence of a strong dispute resolution mechanism for the resolution of such disputes.

In these cross – border relationships, arbitration has always been the dispute resolution mechanism of choice, with contracts requiring parties to resort to international arbitration [usually institutional] in the event of a dispute.

In spite of this however, the majority of African related arbitration proceedings do not take place on the African continent. The 2018 survey conducted by Queen Mary's University School of Law in partnership with White & Case LLP, ('2018 International Arbitration Survey'),[4] states that the top 5 most preferred seats for arbitration are London, Paris, Singapore, Hong Kong and Geneva, with respondents in the African region ranking London, Paris, Geneva and Singapore as the top four most preferred seats of arbitration.[5]

What is more interesting is that no African nation featured as a preferred venue in the high ranks. In an effort to redress this deficiency, and position themselves as 'arbitration friendly', African countries have focused on making their economic climate favourable to arbitration disputes; in the words of Professor Albert Jan van den Berg:

> *"Signs of the growth of arbitration in Africa are apparent on many fronts: in legislative revisions, in the proliferation of arbitral institutions on the continent and in the increased*

* I acknowledge the assistance of Chizaram Uzodinma, an associate at AELEX, in conducting the background research for this paper.

[1] United Nations Conference on Trade and Development. (2000). *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development [UNCTAD/WIR/2000].* Retrieved from https://unctad.org/en/Docs/wir2000_en.pdf
[2] United Nations Conference on Trade and Development. (2018). *World Investment Report 2018: Investment and New Industrial Policies*. Retrieved from https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf, pg. 28.
[3] World Bank Group. (2019). *Global Economic Prospects; Darkening Skies.* Chapter. 2.6, pg. 107. Retrieved from http://www.worldbank.org/en/publication/global-economic-prospects#firstLink51618
[4] Queen Mary University of London, School of International Arbitration, and White & Case LLP. (2018). *2018 International Arbitration Survey: The Evolution of International Arbitration*. Retrieved from https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf
[5] See note 5 supra, Chart 7, pg. 10.

> *importance given to the practice of international commercial arbitration within major African jurisdictions".*[6]

While the African economic climate is a potential breeding ground for arbitration disputes, more needs to be done to enable the region compete favourably with its counterparts like Asia and Europe in terms of attracting international arbitration onshore Africa. This will in turn, impact on the global perception investors have towards doing business in Africa, and ultimately boost the African economy.

Investors' Expectations towards Arbitration and the Current State of Arbitration in Africa

According to the 2018 International Arbitration Survey, the top four most important reasons for the preferences for certain seats are:

i. general reputation and recognition of the seat;
ii. neutrality and impartiality of the local legal system;
iii. national arbitration law; and
iv. track record in enforcing agreements to arbitrate and arbitral awards.

In a survey conducted by Legal Business in association with Simmons & Simmons, majority of the respondents (consisting of more than 100 senior lawyers from a range of international companies doing business in Africa), agreed that the starting point for dispute resolution provisions in African contracts, is a tailored clause which would depend on where any award or enforcement may take place, or where the counterparty is based.[7]

Investors and other arbitration users will prefer a certain seat if they are sufficiently confident that they will be treated with neutrality and impartiality by its courts, and that their recourse to arbitration or enforcement of an award will not be hindered. Having decided to resolve their disputes through arbitration, investors do not want to be seated in a jurisdiction that needlessly interferes with the process, thus the desire for an experienced and arbitration friendly regime. These factors contribute in building the reputation of a seat, as one which promotes values that are necessary for arbitration to thrive.

The question then is: how is Africa performing in promoting these values and actively seeking to attract arbitration users?

While arbitration is relatively well established in some parts of West, Central and Southern Africa such as Ghana, Nigeria and South Africa, various other countries in the continent have only recently been seen to support and embrace arbitration. In East Africa, arbitration is reported to be increasing particularly in the jurisdictions of Kenya, Tanzania and Rwanda. Users from these jurisdictions foresee a significant upturn in arbitration in the next five years.[8] While this prediction may be true for most of East Africa, the recent enactment of the Natural Wealth and Resources Act and the Natural Wealth and

[6] Miles, J., Fagbohunlu, T., and Shah, K. (2016) *An Introduction to Arbitration in Africa, A review of Key Jurisdictions*. London, UK: Sweet & Maxwell. P. 28.
[7] Legal Business and Simmons & Simmons. (2015). *Insight: Arbitration in Africa*. Retrieved from http://www.simmons-simmons.com/-/media/files/corporate/external%20publications%20pdfs/africa%20insight.pdf
[8] International Bar Association Arb 40 Subcommittee. (2015). *The Current State and Future of International Arbitration: Regional Perspectives.* Retrieved from https://www.ibanet.org/Document/Default.aspx?DocumentUid=2102ca46-3d4a-48e5-aa20-3f784be214ca

Resources Contracts Act by the Government of the United Republic of Tanzania may further impact upon that projection. The new laws mandate that all disputes relating to the country's natural resources be resolved in Tanzanian courts, removing international arbitration as an option[9]. There is a distinct likelihood however that investment treaty arbitrations between aggrieved investors and Tanzania would be a direct result of these legislations. The negative effect however is that while the laws may stifle domestic arbitration of disputes resulting from contracts involving the countries natural resources, they effectively provide the basis for international arbitration of such disputes.

The Business Case for Arbitration in Africa

In its Special Focus Africa – May 2017 report, ICSID revealed that as of May 2017, 22% of the cases it had registered involved African State parties, while 4% involved Middle Eastern State parties[10]. As of 31st December 2017 ICSID had registered a total of 650 cases[11], 15% of which came from Sub-Saharan Africa while cases from the Middle East & North Africa made up 11%[12]. In effect ¼ of the cases registered at ICSID in 2017 came from the African continent. The figures are no different in the realm of commercial arbitration.

In 2016 the London Court of International Arbitration [LCIA] recorded a total of 303 cases with African and Middle Eastern cases accounting for 15% of the total [up from 11.5% the previous year] [13].

In 2013 less than 15% of the arbitrators appointed in ICC administered arbitrations were from Africa, Asia and the Pacific, even though these geographical regions made up 32.3% of the parties to the proceedings.[14] In 2015, there were 221 Arab parties involved in ICC cases, but only 54 Arab arbitrator appointments were made.[15]

Why are these statistics important? Firstly, they show that there is a benefit to be gained by attracting just African related arbitration disputes to the African continent. The financial inflows for the fees earned by arbitration counsel and arbitrators, payments for hiring venues, secretaries, transcription services, hotel accommodation and transport costs will have a favourable inflow on the economy of a country that can attract them. Turkey established the Istanbul Arbitration Centre (İSTAÇ) in January 2015, and it started its operations in October of that year. The chairman of the Istanbul Arbitration Association (İSTA) reports an upward trend in the use of commercial arbitration since the establishment of the Centre and predicts that Turkey could generate $10B from the arbitration "economy" over the next ten years.[16] Arbitration is not just a service, it is a source of business inflow and should be viewed as such by African countries.

Secondly, the Investor-State Dispute Settlement System is currently suffering from a legitimacy crisis, with some countries withdrawing from ICSID, alleging bias against developing states and general concerns being raised over excessive costs, lack of diversity on arbitral panels, arbitrator 'bias' and

[9] https://oxfordbusinessgroup.com/overview/unearthing-value-legislative-reforms-seek-make-extractive-industries-more-beneficial-local
[10] The ICSID Caseload – Statistics – Special Focus – Africa (May 2017) @p.7
[11] The ICSID Caseload – Statistics (Issue 2018-1) page 11.
[12] Ibid at page 11
[13] Facts and Figures 2016: A Robust Caseload (The London Court of international Arbitration) @p.5 & 9

[14] The 2013 Statistical Report (August 2014), ICC International Court of Arbitration Bulletin, Vol 25, No 1
[15] 3 "We lag behind on diversity, Ziadé warns," Global Arbitration Review, Nov. 18, 2016,
[16] https://www.dailysabah.com/economy/2018/12/18/turkey-could-generate-10b-from-arbitration-economy-over-next-decade

inconsistent outcomes. At the level of international commercial arbitration, regardless of the increase in the number of arbitration proceedings emanating from the Middle East and Africa in recent times, it appears that there is little growth in the ethnic diversity of arbitrators being appointed in these disputes.

African arbitration practitioners are increasingly commenting on the unwillingness of the disputants [whether State agencies or private parties] to use African arbitration counsel or appoint African arbitrators. If not redressed, this sense of 'exclusion' may negatively impact upon the perceived legitimacy of international commercial arbitration, in the same way as the present ISDS regime has been attacked.

On the positive side, 34 African states have ratified the 1959 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[17] and 45 African states are signatories to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[18]

However only 11 out of 54 African countries including Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, South Africa, Tunisia, Uganda, Zambia, and Zimbabwe have adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 ('Model Law') as their arbitration law, of which only South Africa and Mauritius have adopted the 2006 version of the Model Law.[19] Others rely on their various national arbitration laws. In terms of available arbitration institutions and practitioners, Nigeria appears to have the largest number of arbitration practitioners in Africa, by virtue of membership in the Chartered Institute of Arbitrators (UK), followed by Kenya, South Africa and Egypt. There are 72 Arbitration institutions spread out in 39 African states, with Nigeria and South Africa accounting for the highest number of arbitration institutions.[20]

Despite the steps taken by African countries to present themselves as viable seats for arbitration activities, statistics from the International Chamber of Commerce (ICC) and the 2018 International Arbitration Survey show that most African disputes will still be seated in Paris and London. In 2017, only 2% of ICC arbitrations were seated in Africa.[21] It is therefore evident that there is a deficiency of confidence in the arbitration regime in Africa. Such confidence is essential to persuade arbitration users and investors to utilize African arbitral institutions, arbitration practitioners, and arbitral seats, as opposed to the mainstream/traditional institutions and destinations.

Conclusion

In order to support the business case for arbitration on the African continent, African arbitral institutions need to be more involved in aggressively marketing themselves and making their existence and services

[17] New York Arbitration Convention on the Recognition and Enforcement of Award, 1958, Retrieved from http://www.newyorkconvention.org/countries

[18] International Centre for Settlement of Investment Dispute. (2018). *ICSID/3: List Of Contracting States And Other Signatories Of The Convention* (*as of August 27, 2018*). Retrieved https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf

[19] UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006. Retrieved http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. In Nigeria, Lagos State has also modified its Arbitration Law in line with the 2006 Model Law.

[20] Dr. Onyema, E. (2016). *List of Arbitration Institutions in Africa*. Retrieved from https://www.arbitration-icca.org/media/7/14403606533411/list_of_arbitration_institutions_in_africa_-_emilia.pdf

[21] International Chambers of Commerce. (2018). *ICC Dispute Resolution Bulletin*. 2018 | ISSUE 2 | Retrieved from https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf

known to commercial persons within and outside the continent. A good starting point will be to promote arbitral institutions for intra-African arbitrations. By doing so, local arbitral institutions would build a track record of international arbitrations (albeit African to African parties) and gain enough credibility to administer non-African arbitrations. Asides creating awareness, arbitral institutions must also possess the capacity to manage international arbitrations, by having well-trained support staff, modern rules of procedure, and appropriate technical infrastructure such as e-filing, creating database of cases, big data analytics, video conferencing, etc.

Furthermore, there is a need for better experiential learning or training for the development of relevant skills for African arbitrators. It has been suggested that schemes such as mentoring and appointment of aspiring arbitrators as tribunal secretaries may be useful in this regard.[22] Disputants, in-house counsel, arbitration institutions and other persons charged with the responsibility of appointing arbitrators, need to regularly appoint arbitrators within the continent. Without the opportunity to act as arbitrator in international arbitrations, the narrative of the dearth of skilled arbitrators in Africa cannot be changed. At best, these skills will be limited to those obtained through formal theoretical trainings and workshops, and not from actual experience of arbitration practice. Conversely African arbitration practitioners must remain consistent in marketing themselves professionally, by remaining visible, joining arbitration associations/institutions, engaging in trainings, and keeping abreast with international trends in the arbitration field, in order to be prepared when the opportunity presents itself.

Building a reputation as an arbitration friendly continent is a process. Even the safest and most preferred seats of arbitration like London, Paris and Geneva, built their reputation over a period of time. It is believed that that if the suggested measures are taken, Africa will eventually win the trust of investors and arbitration users as a reliable and arbitration friendly continent.

[22] Onyema, E. (2019). *Effective Utililization of Arbitrators and Arbitration Institutions in Africa by Appointors*. pg. 8. Retrieved from file:///G:/A%20Business%20Case%20for%20Arbitration%20in%20Africa/Arbitrators_and_Institutions_in_Africa.pdf

Conference Panels

Panel 1

Africa's Experience in Adopting UNCITRAL Model Law on Arbitration

Africa's Experience in Adopting UNCITRAL Model Law on Arbitration

This panel will examine the experience of the 11 African states that have adopted the Model Law and provide a recommendation whether other African countries should adopt or adapt the Model Law from their own experience. The panel will focus in particular with peculiarities from their own jurisdiction and interpretation of their courts and the courts of other Model Law jurisdictions.

Chair:

Ms. Esine Okudzeto, Sam Okudzeto & Co, Accra.

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 these clients on mergers and acquisitions in Ghana. She played a leading role in a Fortune 500 company's acquisition of Unilever PLC's oil palm business in Ghana. Esine was also the lead transactional advisor for the creation of a joint venture public-private partnership to set up a cargo hub, warehouse and handling service at Kotoka International Airport, including the establishment of a subsidiary company to manage the warehouse facility. In the aforementioned transactions, Esine was instrumental in the negotiation and drafting of licensing agreements, shareholders agreements, leases, company regulations and contracts, and the registration of trademarks and leases, as well as providing legal advice on tax and labour issues

Speakers:

Mr. Kizito Beyou

Mr. Kizito Beyou will speak on the experience of Ghana and why Ghana did not adopt the Model Law wholesale in its 2010 ADR Act. Kizito has been the Managing Partner of Beyuo & Co since he founded the firm in 2008 after fifteen years of private civil commercial practice. In his entire legal practice he has advised international and domestic companies, ranging from financial institutions, to state and parastatal institutions on complex transactions and tasks. These have included advising State owned banks listing on the Ghana Stock Exchange and a host of clients on syndicated financial packages, commercial agreements, regulatory and compliance issues He studied law at the University of Ghana from 1988 to 1991. He obtained his professional certificate from the Ghana School of Law in 1993. He was appointed a Notary Public for the Republic of Ghana in 1994. He is a member of the Rules of Court Committee, a body set up under the Constitution of Ghana to make rules and regulations for regulation the practice and procedure of all courts in Ghana and specified tribunals and bodies.

Ms. Njeri Kariuki

Ms. Njeri Kariuki will speak on the experience of Kenya and why Kenya adopted the Model Law wholesale in its 1995 Arbitration Act and 2010 Constitution. Njeri is an advocate who has specialised in resolving disputes through arbitration and ADR. Besides being an arbitrator, Njeri is also an accredited mediator and is listed as a trainer and a tutor of several courses with the AFL of the Chartered Institute of Arbitrators. In addition, Njeri sat as Chair of a Dispute Adjudication Board set-up to nurse an international geothermal project to fruition for a period of three years. Njeri has been a Member of the ICC-International Court of Arbitration, representing Kenya, since June 2018. She graduated from York University (Toronto), Queen's University (Kingston, Ontario); Keble College, Oxford.

Dr. Sylvie Bebohi

Dr. Sylvie Bebohi will speak (via skype) on the experience of OHADA and its revised arbitration law. Sylvie BEBOHI EBONGO is an independent lawyer working with a number of Paris and Africa based law firms where she is actively involved in arbitration-related work. Member of the Paris Bar, BEBOHI EBONGO practice areas include international arbitration, enforcement procedures and civil law procedures, contract law, international commercial law. A holder of a doctorate in Private Law from the University of Picardie Jules Verne in France, BEBOHI EBONGO has been awarded the year 2015 OHADA School of Magistrates (ERSUMA) best doctorate thesis. Previously, BEBOHI EBONGO held teaching positions both at the University of Yaoundé II in Cameroon and Picardie Jules Verne in France.

Mr. Hamid Abdulkareem

Mr. Hamid Abdulkareem will speak on the experience of Nigeria and the proposed amendments to its arbitration law. Hamid is a litigator skilled in deploying creative solutions that combine otherwise disparate legal strategies into a multi-pronged battle plan, often breaking new legal ground. In a recent victory, Statoil v. NNPC, he successfully defeated an anti-arbitration injunction by persuading the Nigerian Court of Appeal that existing legislation prohibited the courts from issuing such injunctions. He graduated from London School of Economics and Political Science, LLM, Nigerian Law School, BL University of Ilorin.

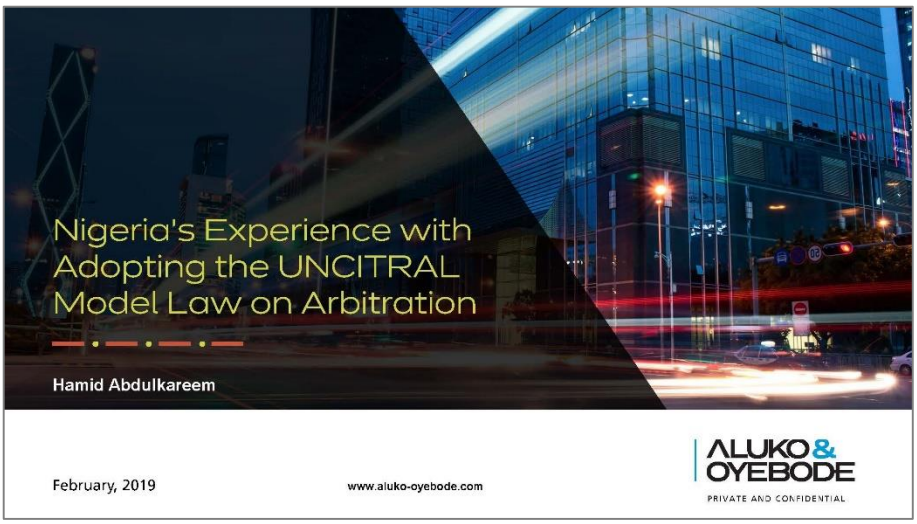
Mr. Teyeb Hassabo

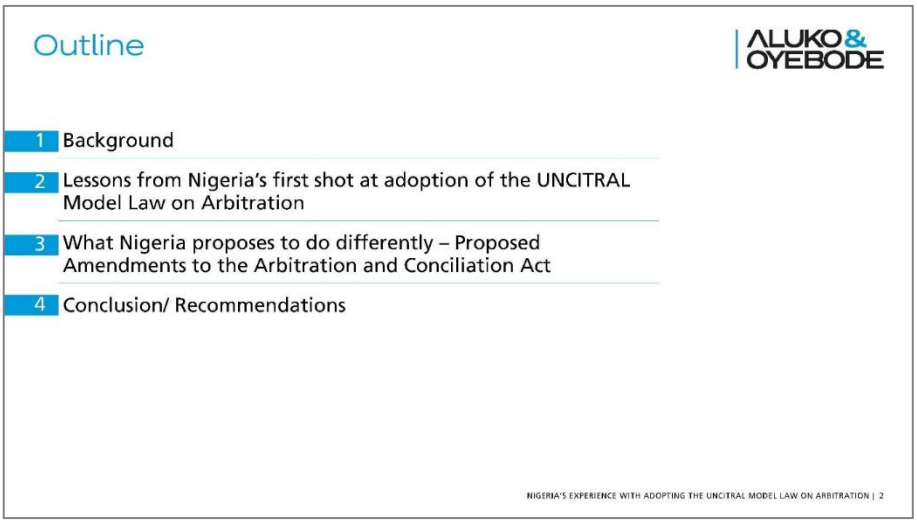
Mr. Teyeb Hassabo will speak on the Sudanese Arbitration Law. Managing Partner of the Firm. Mr. Hassabo received his LLB. From the University of Khartoum ,1986. He is specialized in business laws, international commerce, international procurement agreements, telecommunication, distribution and agency agreements, acquisition and merger of companies, with good experience in intellectual property. Mr.Hassabo has gained extensive experience in the laws of the United Arab Emirates and the GCC States through a period of 13 years of work in Dubai.

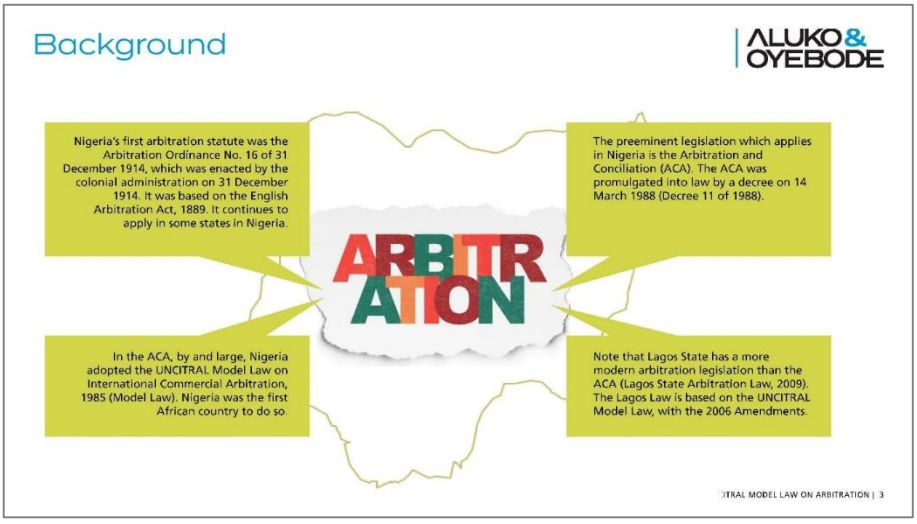
Articles:

1. Nigeria's Experaince with Adopting the UNCITRAL Model Law on Arbitration

By Hamid Abdulkareem







Background

ALUKO & OYEBODE

Illustrative Statistics

In the ACA

22 of 51 sections are almost verbatim reproductions of the Model Law.

16 sections derive their provenance from the Model Law, but Nigeria added or removed some content.

10 provisions have nothing at all to do with the Model Law.

Note: we have excluded the 7 provisions on Conciliation in Part II of the ACA, as well as Section 55 of the ACA, which deals with Conciliation as well.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 4

Lessons from Nigeria's first shot at adoption of the Model Law

ALUKO & OYEBODE

Plaudits

- The Model Law bequeathed Nigeria with modern arbitration legislation which contains most of the desirable features to make arbitration workable, including: (a) the authority of an arbitral tribunal to rule on its own jurisdiction, (b) party autonomy, and (c) limited court intervention.
- By and large, the ACA works well in practice, and case law affirms important provisions derived from the Model Law, such as:
  - *NNPC v Clifco* (2012) – on (negative) *kompetenz-kompetenz*
  - *Statoil v NNPC* (2013) – on the principle of limited court intervention
  - *LSDPC v Adold Stamm* (1994), *Maritime Academy of Nigeria v AQS* (2008) – proceedings in default
  - *Waltersmith v NDPR* (2014) – on the deadline for set aside applications

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 5

Lessons from Nigeria's first shot at adoption of the Model Law

ALUKO & OYEBODE

Ill-considered deviation has led to unforeseen problems

- **Stay of proceedings:** ACA contains two different provisions on stay of proceedings, one from the Model Law (section 4) and one from the Ordinance (section 5). The wording is similar, but with material differences. This has led to some monstrous consequences:
  - decisions to the effect once "any" step is taken in the proceedings, a stay cannot be granted, even if the step has nothing to do with the substance of the dispute (e.g. to ask that an injunction be lifted) because section 5 requires an application for stay to be made "*at any time after appearance and before delivery pleadings or taking any other steps in the proceedings*". Contrast with section 4 (Article 8 of Model Law) which only requires that the application to be made "*not later than when submitting his first statement on the substance of the dispute*".

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 6

Lessons from Nigeria's first shot at adoption of the Model Law

ALUKO & OYEBODE

Ill-considered deviation has led to unforeseen problems

- the requirement that the applicant for stay show that he is "*ready and willing to do all things necessary to the proper conduct of the arbitration*" (section 5(2)(b) of the ACA). This had led to decisions requiring that the applicant provide evidence of his readiness and willingness to arbitrate, beyond a mere deposition in his stay application (*Onward v Matrix* (2010), *UBA v Trident Consulting* (2013)). This is now being relaxed somewhat (Mekwunye v. Lotus Capital (2018)) but it is perhaps best that this jurisprudence goes away altogether.

- **Absence of review mechanism for challenge of arbitrators:** in section 9 of the ACA, Nigeria excluded Article 13(3) of the Model Law, which provides a review mechanism for tribunal decisions rejecting a challenge. This has led to an open question about whether courts have authority to review tribunal decisions rejecting a challenge and whether such review will involve a re-hearing or a review on the grounds for challenge of awards.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 7

Lessons from Nigeria's first shot at adoption of the Model Law

ALUKO & OYEBODE

Ill-considered deviation has led to unforeseen problems

- **Absence of review mechanism for decisions on jurisdiction** – in Section 12 of the ACA, Nigeria omitted the portion of Article 16(3) of the Model Law which allows parties to seek review of a decision on jurisdiction made as a preliminary question and says that a decision upon such review shall be subject to no appeal. This *lacuna* has created a situation in which no one wants a bifurcation, especially if you're the claimant. The situation would be much improved if certain matters could be tested in court immediately, while the claimant and tribunal have the assurance that the proceedings will not be scuttled while the court challenge is pending – especially where court proceedings can be protracted.

- **Grounds for setting aside awards:** in Section 30 of the ACA, we retained the grounds of "misconduct" and "improper procurement" from Section 12(2) of the Ordinance. This is one of the *biggest problems we created, especially as "misconduct"* has been said to include the common law ground of "error of law on the face of the award".

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 8

Lessons from Nigeria's first shot at adoption of the Model Law

ALUKO & OYEBODE

Ill-considered deviation has led to unforeseen problems

- **Absence of grounds for refusal of recognition and enforcement:** in Section 32 of the ACA, Nigeria simply stated that "*Any of the parties to an arbitration agreement may, request the Court to refuse recognition or enforcement of the award.*" No grounds were included!

- **Inoperable appointment procedure for international arbitration:** in Sections 44 and 45 of the ACA, the draftsman seems to assume that there would always be a designated "appointing authority" in international arbitration, reserving for that authority the duty to break a deadlock in the appointment of arbitrators (without mentioning that a court may intervene), and reserving to such authority the duty to determine challenges (instead of leaving this with the tribunal).

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 9

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Greater degree of fidelity to the Model Law

- Section 5 (Article 8 of the Model Law): the conditions for the grant of stay of proceedings pending arbitration are now premised entirely on the Model Law provisions.
- Section 9 (Article 13 of the Model Law): we have now included Article 13(3), which provides a review mechanism for tribunal decisions rejecting a challenge. We however did not include the stipulation that court decisions on a challenge shall not be subject to appeal. That stipulation is unlikely to work, for constitutional reasons.
- Section 10 (Article 14 of the Model Law): we have now (unlike in the ACA) included the portion of Article 14(1) which allows referral to court of a question as to whether an arbitrator's mandate has terminated by virtue of failure or impossibility to act.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 10

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Greater degree of fidelity to the Model Law

- Section 14 (Article 16 of the Model Law): we now indirectly recognise (in line with UNCITRAL Article 16(3)) that a party may have recourse to court against a decision on jurisdiction made as a preliminary question. It's not clear why we have not fully applied Article 16(3) and set out the time within which recourse is to be had.
- Section 55 (Article 34 of the Model Law): no longer do we have misconduct or improper procurement as grounds for setting aside (domestic) awards. Also:
  - recognising our peculiar jurisprudence, we expressly state (in Section 55(2)) that an award shall not be set aside on the ground of "*error on the face of the award*", and
  - Section 55(5) expressly allows the court to sever awards and set aside, declare ineffective, or remit to the tribunal only a part thereof.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 11

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Adoption of the 2006 Amendments to the Model Law

- Section 2 (Article 7 of the Model Law, Option 1): we propose to adopt the new, progressive interpretation of arbitration agreements.
- Sections 19 – 29 (Article 17 (A-J) of the Model Law): we propose the adopt the elaborate provisions on interim measures of protection, which deal with everything from the conditions for the grant of such measures, to their recognition and enforcement.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 12

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Resolved some peculiar Nigerian problems

- Section 6 (Article 10 of the Model Law): we have departed from the Model Law here by seeking to make the default number of arbitrators one, instead of three. The old position sometimes results in expensive panels for small disputes. By and large, in significant contracts, parties tend to specify the number of arbitrators.
- Section 34: deals with our peculiar limitation of action problem, whereby the limitation period for filing an application to enforce an award starts to run once the original cause of action arises. The period of an arbitration will now no longer be reckoned with in computing the time for the filing of an enforcement action.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 13

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Resolved some peculiar Nigerian problems (Cont'd)

- Section 37: deals with the power of the arbitral tribunal as to remedies. Seeks to clear doubts – which sometimes arise – as to precisely what sort of remedies arbitrators have the power to award. The remedies identified include declarations, monetary awards, injunctions, specific performance (save for land matters).

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 14

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Model Law++++++ provisions

- Section 1: This provision sets out the "General Principles and Scope of Application" of the proposed Act. Its aim is to serve as a guide to users about the objectives of the legislation, and is expected to influence the way in which the other provisions in the Bill are interpreted and applied. Indeed, 83(9) states that: "Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which this Act is based."

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 15

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Model Law++++++ provisions (Cont'd)

- Section 7 (Article 11 of the Model Law); we propose to go beyond the Model Law provisions by including sub-sections which: (i) deal with multi-party disputes, where the parties are unable to agree that they constitute two separate sides. In such circumstances, the appointing authority/ court constitutes the tribunal, and (ii) prescribes the documents to be provided to the appointing authority/ court where a request for appointment is made. This includes: copy of request for arbitration, underlying contract, arbitration agreement (if this is not contained in the underlying contract)

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 16

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Model Law++++++ provisions (Cont'd)

- Section 9 (Article 13 of the Model Law): in additional to following the Model Law by providing a review mechanism for tribunal decisions rejecting a challenge, we also propose to include provisions which: (i) empower a court, where it removes an arbitrator, to make any order as it deems fit with respect to the arbitrator's entitlement (if any) to fees or expenses, or the refund of any fees or expenses already paid, and (ii) entitles the challenged arbitrator to appear and be heard by the court before the court decides a challenge, or makes an order on fees/expenses following removal of the arbitrator.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 17

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Model Law++++++ provisions (Cont'd)

- Section 12: new provision which deals with consequences of resignation, death or cessation of office of an arbitrator. It allows *inter alia* the arbitrator who withdraws (if he cannot reach agreement with the parties) to apply to an appointing authority/ court for a determination as to his entitlement to fees and expenses or relief from any liability incurred.
- Sections 16, 17, 18 – deal with the appointment of, and other matters relating to an emergency arbitrator.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 18

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Model Law++++++ provisions (Cont'd)

- Section 32 (Article 20 of the Model Law): we seek to provide some guidance as to the basis on which a tribunal may determine the seat of arbitration where this has not been agreed to by the parties, referring (non-exhaustively) to such factors as the country with closest connection to transaction, substantive law of the contract, and the law governing the arbitration.
- Section 39: deals with consolidation and concurrent hearing, as well as joinder.
- Section 46: confers power on tribunals to award interest.
- Section 50: deals with the costs of the arbitration, which – interestingly – includes the costs of obtaining Third-Party Funding.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 19

What Nigeria proposes to do differently – Proposed Amendments to the Arbitration and Conciliation Act

ALUKO & OYEBODE

Model Law++++++ provisions (Cont'd)

- Section 54: provides for tribunal's power to exercise a lien on an award, and related matters.
- Section 55(7) to (14) deals with the "Award Review Tribunal", a peculiar innovation of the Bill which derives its provenance from ICSID annulment proceedings, and will (if the parties opt-in) result in the courts only being able to review an arbitral award on the grounds of arbitrability and public policy.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 20

Conclusion and Recommendations

ALUKO & OYEBODE

From Nigeria's experience, the standard Model Law provisions have worked well in practice. Our serious bug bears have tended to arise from departure from the Model Law's provisions.

This leads to two recommendations:

- serious consideration should precede a decision to depart from the balance struck in the Model Law, and
- local circumstances and issues can destroy the benefits to be derived from the adoption/ adaptation of the Model Law. Sound arbitration legislation must therefore adequately deal with local peculiarities as well.

NIGERIA'S EXPERIENCE WITH ADOPTING THE UNCITRAL MODEL LAW ON ARBITRATION | 21

2. The Changes in the Arbitration Regime under OHADA

By Dr. Sylvie Bebohi

- Since the beginning of the existence OHADA (the French acronym of the Organisation for the Harmonisation of Business Law in Africa), arbitration has been promoted as a dispute resolution mode of choice. Arbitration rules under OHADA were established in 1999 on a dual basis : a Uniform Law on Arbitration (UAA) and Common Court of Justice and Arbitration Rules.

- First discussed in 2009, The OHADA arbitration reform was finally introduced in 2015 and finalised in November 2017 by the adoption of the Revised Rules. At the same time, the OHADA legislator filled a gap that existed in most OHADA Member States by adopting a Uniform Act on Mediation, which offers a new and complementary extrajudicial mode of dispute resolution. Both the revised OHADA arbitration texts and the new mediation text came into force on the 15th March 2018.

- OHADA texts on arbitration were already recognised as based on modern practices. The revised rules were updated on the basis of the most recent developments in arbitration. They are a combination of the UNCITRAL model law, developments in different jurisdictions and arbitral institutions.

- Yet the system was not totally overturned, the previous achievements in arbitration law were preserved. The new arbitration regime under OHADA is characterised by transparency, efficiency and new procedural developments which make OHADA arbitration more attractive. Without disrupting the balance of the existing rules, the reforms introduced major changes in arbitration law. The question today is : to what extent will this regime be effective ?

I. The main changes in the arbitration regime under OHADA

1. **Extension of the scope of application** : clarity towards investment disputes

- Investment arbitration was a grey area in OHADA arbitration. Now, on the basis of an Arbitration Convention or an investment instrument, including an Investment Code or a bilateral or multilateral investment treaty (art.3 UUA, 2.1 Rules) an arbitration can be implemented within the OHADA sphere.

2. **Better guidance of arbitral proceedings** : enhancement of efficiency and transparency

- Constitution of the arbitral tribunal : New rules settled as to the number of arbitrators (art.5 UAA) and clarifications related to the appointement procedure of arbitrators in CCJA's arbitration (art.3.3 CCJA's rules).

- Rules for impartiality, independence, and recusal of arbitrators: independence and impartiality of arbitrators have been reinforced, every prospective arbitrator must disclose all the facts that could reasonably cast any doubt on their independence and impartiality (art. 7 UAA) ; the procedure of recusal has been clarified and time limits have been set. If the national court does not make a decision within the time limit, the matter is decided by the CCJA.

- Obligation to respect pre-arbitral proceedings : introduction of a multi-tier dispute resolution clause stating that when a dispute arises, an attempt to settle it amicably must be undertaken at the request of one party to the proceedings (art. 8-1 UAA, art.21.2 CCJA's rules).

- Obligation to conduct proceedings in a better way : The parties must conduct the arbitral proceedings fairly and efficiently. They must avoid dilatory measures (art.14.1 UAA, art. 16.2 CCJA's rules)

- Enlargement of the power of the arbitral tribunal which now has the power to settle any incident related to forgery, appoint experts, and to grant interim measures (art. 14 UAA, art. 10 CCJA's rules).

3. **Consideration of complex arbitration** : The CCJA rules introduce provision for forced and voluntary intervention of third parties (art 8.1 and 8.2) and to multi-party and multi-contract arbitration (art. 8.3 and 8.4), as under ICC's rules of arbitation. This appears to be a provision consistent with modern trends.

4. Setting aside of awards and enforcement rules

- Waiver to set aside annulment proceedings : OHADA regime has followed the modern trends on that issue by giving a party the possibility to waive his right to challenge an arbitral award on condition that the waiver is not contrary to international public policy

- Tighter delays related to setting aside and enforcement of arbitral awards for more efficiency

  - Setting aside of award : the judge has 3 months to rule on a request to set aside an award ; otherwise the request is brought before the CCJA within 15 days. In all cases, the decision on the annulment has to be given within 6 months (art. 27 UAA, 29.4(2) CCJA's rules).

- Enforcement : The order for enforcement has to be given within 15 days after the application for enforcement has been made and if the Judge is silent the exequatur is considered granted (art 31.5 UAA) the same time limit of granting exequatur within 15 days is applied in CCJA's rules (art.30.2)

The introduction of time limits in OHADA arbitration represents a great change which is aimed at making OHADA arbitration more attractive. Such tight time limits do not exist in many other judicial systems.

II. The new arbitration regime under OHADA – to what extent will it be effective ? / to what extent will it improve arbitration in the area ?

1. A new provision on arbitrators fees : the spectra of the GETMA's case

✓ After the outcry created by the GETMA's case in 2015 where CCJA had set aside an award on the ground that arbitrators had entered into a separate fees agreement with the parties, the CCJA's rules have implemented a provision stating clearly that fees can, in limited circumstances, be subject to review by the Court and that any fees arrangement between the court and the parties is null but does not constitue a ground of nullity of an award (art. 24.4 CCJA's rules)

✓ This provision is broadly welcome and confirms the friendly character of OHADA arbitration.

2. Will the national courts play the game ?

✓ Arbitation regime under OHADA can spread only if there is a real cooperation by the national courts. OHADA lawmakers have bet on tighter time limits to make the OHADA regime more attractive. This is especially the case at the enforcement stage where the cooperation of these judges is highly requested. It is unclear as yet whether the national courts will respect the time limits set out in the new rules.

3. Will the CCJA be able to fulfil all its engagements ?

✓ The new OHADA arbitration regime imposes many duties on the CCJA as the superior court : consider proceedings relating to jurisdiction (art. 13.2 UAA), consider requests for setting aside awards in case the national court did not rule within the prescribed time limit (art. 27.2 UAA) etc. The CCJA also plays a central role in CCJA arbitrations in both administrative and judicial capacities, being the authority considering applications to set aside and grant exequatur. Moreover, CCJA is the supreme court of 17 members states with jurisdiction to deal with questions of law arising in business matters.

- ✓ The Court consists of 13 judges and 3 assistant judges to fulfil this huge task. Hopefully they will be able to meet the challenges under the new OHADA arbitration regime.

The new OHADA arbitration regime law is loaded with more precision and clarification. However this regime will need the cooperation of national courts and adequate human resources for a real take off.

4

3. Comments on Sudan Arbitration Laws:

By Mr. Teyeb Hassabo

In a panel of three or more arbitrators, the harmony between arbitrators plays a significant role in reaching a fair judgment in the dispute before them. One of the major factors that could contribute in securing such harmony is the legal background of the arbitrators in terms of legal systems which they are experienced in (meaning to say Common Law or Civil Law System). It is always advisable, in panels of three or more arbitrators, to have all of them from the same legal system. This is simply because (of course, as you are aware), of the difference between the two systems in the method of hearing the dispute. While the Common Law System is an adversarial one, the Civil Law System is inquisitorial.

For that reason, I used, whenever my presentation relates to Sudan, to bring to the attention of the attendees that Sudan follows the Common Law System where examination of witnesses is the decisive factor in reaching a fair conclusion in the dispute. In Sudan, calling a witness to testify before a court of law or arbitral tribunal is a right conferred on both parties and the court or arbitral tribunal may not decline such a right except for strong reasons. Such reasons will be subject to the supervision of higher courts. On the other hand, all other Arab countries follow the Civil Law System where courts and arbitral tribunals rely mainly on experts' reports. Examination of witnesses in the Civil Law System is very rare and in most cases a request to hear a witness will be declined.

Prior to 2005, arbitration in Sudan was governed and regulated by Sections139-156 of the Civil Procedures Act 1983. In 2005 the legislature enacted and passed the Arbitration Act which came into force on June 2005. This law remained into force until 2016 where it was repealed and replaced by the Arbitration Act 2016 (shall herein refer to it as the "Act"). Most of the provisions of the Act are derived from the UNCITRAL Arbitration Rules which are well-known to all of you. So, I am not going to address the entire law, rather, I will focus on the most important issues.

Similar to other arbitration laws in the region, the Act provides that the arbitration agreement must be in writing. Such written agreement could, under the Act, be extracted from the written correspondence exchanged between the parties. Again, similar to other laws, the Act provides for autonomy of the arbitration agreement. An arbitration clause shall be treated as an agreement independent from the other terms of contract.

The Act did not specify the matters that cannot be arbitrated. Restrictions on agreements to arbitrate can be found in other laws such as the Civil Procedure Act 1983. Disputes that are not subject to arbitration include those relating to labour matters (the labour Act provides in Section 109 and 112 for an official conciliation and arbitration board), disputes relating to family affairs, and cases relating to guardianship of minors.

One of the good features in the Act is that it does not prohibit agreeing on arbitration in governmental contracts. Actually there is no law in Sudan prohibiting such an agreement. However, there is a recent negative development where the Undersecretary of the Ministry of Justice issued a circular on June 2018 prohibiting agreeing on arbitration in government contracts except where there is EXTRA NECESSITY. I sought interpretation to this "extra necessity" where a counselor at the Ministry of Justice said "it is where there is an important contract with a foreign entity.

The application of the 2005 and 2016 laws was followed by a rich basket of judicial precedents tacking various issues. For instance, where, in a panel of three arbitrators, one party refuses appointing his arbitrator, the Supreme Court held that courts have power to appoint an arbitrator for the reticent party.

The parties to an arbitration with a venue in Sudan are free to agree on the applicable procedural and substantive laws, and the arbitral tribunal must adhere to the parties' agreement. Difficulties arises when the agreement is silent in respect to the applicable law. In such a case, the arbitral tribunal shall apply the law that is most connected to the subject-matter of the dispute.

The mechanism of hearing the dispute by the arbitral tribunal in accordance with the Sudanese legal system (i.e., Common Law) is one ne of the most important issues that should be brought to the attention of our colleagues with Civil Law System background. It is STRICTLY as follows:

(1) The plaintiff to file his Statement of Claim which must numbered and must be VERY BRIEF. If it is not brief, the plaintiff will be ordered to submit a so-called "*Better Statement*".

(2) The respondent to answer the Statement of Claim. This should also be very brief and should follow the chronological order of the Statement of Claim. The respondent's response to the issues mentioned in the Statement of Claim should be confined to saying: "admitted" or "denied". The respondent may also make brief clarifications to each of its answers.

Panel 2

Africa's Experience in adopting UNCITRAL Arbitration Rules

Africa's Experience in adopting UNCITRAL Arbitration Rules

Arbitration centre's will share on their experience of basing their rules on UNCITRAL Rules and their experience of administering arbitration references under the rules. They shall focus in particular on the provisions which have been very difficult for them to apply

Chair:

Mr. Babjide Ogundipe

Mr. Babjide Ogundipe, Sofunde, Osakwe, Ogundipe and Belgore Law Firm. Babajide graduated with LL.B (Hons) University of London, 1978; Called to the Nigeria Bar, 1979; Legal Practitioner in F. Oguntoye & Co., Kaduna, 1979 – 1980. Counsel in Chief Rotimi Williams' Chambers 1980 – 1989. External Examiner Nigeria Law School, 1989 – 1990. Notary Public, 1991. Fellow Chartered Institute of Arbitrators (FCIArb) 1994 and an approved tutor of that Institute who lectures widely on arbitration in Nigeria and abroad. Member, London Court of International Arbitration, Pan African Council. Member, Executive Committee AIJA (International Association of Young Lawyers 1994 – 1997. A founding member of the firm

Speakers:

Dr Ismail Selim

Dr. Ismail is the Director of the CRCICA and Secretary Treasurer of the International Federation of Commercial Arbitration Institutions (IFCAI). Dr. Selim is also a board member of the African Arbitration Association (AfAA), as well as Vice President of the Cairo Branch of the CIArb. He graduated from Cairo University in 1997 with an LL.B., where he also obtained an LL.M in International Business Law from the I.D.A.I in 1999. He then earned his Master's degree in Public Administration from the E.N.A, in Paris in 2001. He also earned a Certificate in International Commercial Arbitration from Queen Mary University of London in 2005. In 2007, he accomplished an internship program at the ICC Court of International Arbitration. In 2009, he earned his PhD from Burgundy University (France).

Dr Fidele Masengo

Dr. Fidèle is a Secretary General of Kigali International Arbitration Center (KIAC) and teaches International Economic Law ; International Competition Law at Kigali Independent University (Masters Level). He also teaches International Arbitration Law at the Institute of Legal Practice and Development, a Post graduate Institute that trains judges and other legal practitionners. Before joining KIAC, he served as the Deputy Chief of Party and Senior Technical Adviser within USAID Chemonics International LAND Project (2012 to 2015). Dr. Fidèle worked as the Director of Public Prosecution services (1999 to 2001) and Director of the Administration of Justice (2001 to 2004) with the Rwanda Ministry of Justice. He holds a Master Degree in Economic law from the University of Louvain in Belgium in 2003, a PhD in Law from the University of Antwerp, a Doctorate in Theology from Life Pacific University of Canada. He is registered as an Advocate in Rwanda since 2006.

Dr Marie-Andree Ngwe

Marie-Andrée Ngwe has been an advocate of the Cameroon Bar Association for several years and is an expert in business and investment law. For some years now, she has specialized in alternative dispute resolution. Marie-Andrée Ngwe is a member of the ICSID Panel of Conciliators. She is a certified mediator and referenced arbitrator in several arbitration and mediation centres in Africa. She is active on the African continent on matters relating to the promotion of ADR in business and investment law. She is also President of the Standing Committee of the GICAM Arbitration Centre (CAG).

Articles:

Africa's Experience in adopting UNCITRAL Arbitration Rules

By Dr. Marie-Andree Ngwe

Introduction

OHADA / Acte Uniforme relatif au droit de l'arbitrage (AUA) / historique du Centre d'Arbitrage du GICAM (CAG)

1ère partie: Présentation du CAG

1. Généralités

- Bases légales de la création du CAG / Opportunité de la création
- Les missions du CAG (arbitrage – organisation de formations diverses – actions pour faire connaître le Centre au Cameroun et à l'international – création d'une culture de l'arbitrage dans le pays)
- Les partenariats

2. Règles de fonctionnement et conduite des arbitrages au Centre

- Textes régissant l'activité du Centre : Règlement d'arbitrage (RA), Règlement Intérieur, AUA.
- Les organes du Centre et leurs rôles : Secrétariat Général, Comité Permanent, Conseil Supérieur.
- Parcours d'un dossier de demande d'arbitrage au sein du Centre
- Les outils mis en place pour un suivi des affaires du Centre
- La tenue de statistiques

2ème partie : Quelques problématiques et mise en perspective du RA CAG avec le RA CCI et CNUDCI

1. Les problématiques liées à la mise en œuvre des dispositions du Règlement d'arbitrage du CAG

a) Problématiques générales :

- Choix des arbitres
- Les clauses compromissoires pathologiques
- Absence d'une culture de l'arbitrage

b) Les problématiques techniques

- Localisation des parties
- Paiement des frais de la partie défaillante
- L'exécution volontaire / l'exécution forcée
- L'inadaptation aux petits litiges

2. Mise en perspective avec d'autres règlements d'arbitrage (dans les 3 Règlements d'arbitrage CAG, CCI, CNUDCI)

a) Quelques points de convergence

- Nomination des arbitres : le principe est celui de la liberté de nomination des arbitres par les parties.
- Défaut de nomination : Le principe est celui de l'arbitre unique nommé soit par l'autorité de nomination, la Cour, le Centre.
- Indépendance des parties : Dans les 3 RA, les arbitres ont une obligation de révélation avant et pendant la procédure arbitrale.
- Confidentialité : Principe de confidentialité des travaux et de la procédure.
- Droit applicable : Liberté de choix du droit applicable par les parties. L'arbitre ne statue en qualité d'amiable compositeur que si les parties l'y ont autorisé.
- Mesures provisoires : A la demande de l'une des parties, le tribunal arbitral peut accorder des mesures provisoires.
- Nomination des experts : Le tribunal arbitral peut nommer des experts (le RA CCI et la RA CNUDCI précisent que cela doit se faire après consultation des parties) Possibilité pour le tribunal de rendre une sentence d'accord parties.
- La jonction de procédure est envisagée dans les 3 textes.

b) Quelques points de divergence

- RA CCI : Contrats multiples : Les demandes découlant de plusieurs contrats ou en relation avec ceux-ci peuvent être formés dans le cadre d'un arbitrage unique.
- RA CCI : Arbitre d'urgence prévu.
- Délais pour rendre la sentence : délais différents dans le RA CAG et RA CCI, pas de délai prévu dans le RA CNUDCI.
- L'examen préalable de la sentence est prévu dans le RA CAG et le RA CCI. Aucune mention de cet examen dans le RA CNUDCI.
- Le RA CAG seul prévoit que le tribunal peut requérir le concours du juge compétent en matière d'administration de la preuve.
- Le RA CAG et le RA CCI prévoient l'établissement d'un procès-verbal de cadrage/acte de mission.
- Seul le RA CCI fait mention de la nationalité des arbitres.
- Dispositions relatives à l'exécution de la sentence dans le RA CAG et dans le RA CCI, ce qui n'est pas le cas dans le RA CNUDCI.
- Recours prévus (rectification d'erreur matérielle, de calcul ou typographique) dans le RA CCI. Par l'application du RA CAG, les parties renoncent à toutes voies de recours auxquelles elles peuvent renoncer. Aucune mention des recours dans le RA CNUDCI. **Conclusion :**
- Les habitués de l'arbitrage CCI et CNUDCI ne seront pas « perdus » en recourant au CAG pour régler leurs litiges.
- Perspectives de développement au CAG: accent mis sur l'arbitrage de proximité
- Une révision du RA du CAG est en cours, et l'introduction d'un Règlement de médiation est en vue.

Panel 3

Enforcement of Arbitral Awards in Africa

Enforcement of Arbitral Awards in Africa

This panel will discuss developments in their jurisdictions on the enforcement of arbitral awards under the NYC or their national laws through an analysis of recent important cases. The foreign speakers will share from their own experience of enforcing awards/judgments in African jurisdictions.

Chair:

Dr. Nagla Nassar

Dr. Nagla Nassar is Senior Partner at NassarLaw which was established in 1885. Before joining NassarLaw she was Senior partner at a leading Egyptian Law firm which she joined upon her return from the World Bank where she was with the ICSID Secretariat. She graduated from Cairo University and Trinity College where she got her M. Litt and has an LL.M from Harvard University as well as a PhD from Geneva University and the Diploma of The Hague Academy in Private International Law. She has several publications relating to arbitral practice.

Speakers:

Mr. Ahmed Bannaga

Ahmed is a practising lawyer in Sudan, lecturer at the University of Medical Sciences & Technology –UMST, a Member of the Chartered institute of Arbitrators, London. He graduated from SOAS, University of London with LLM in Dispute & Conflict Resolution where he specialised in international arbitration in 2009. He is the Founding Partner at Bannaga & Fadlabi LLP and legal advisor to numerous domestic and multinational companies in Sudan. He has published widely on arbitration in Sudan. In 2017, as an ILFA Lawyer, he was seconded to King & Wood Mallesons – MENA and Quadrant Chambers in London.

Dr. Babatunde Ajibade,

Dr. Babatunde, SAN is the Managing Partner of S. P. A. Ajibade & Co. Since his admission to the Nigerian Bar in 1989, Dr. Ajibade is a council member of the Nigerian Bar Association's Section on Business Law and is currently the Vice-Chairman of the sub-Committee on Banking, Finance and Insolvency. He was the Chairman of the Capital Market Solicitors Association between 2011 and 2013. He was also the Vice-Chairman of the Rules & Regulations Sub-committee of the Nigerian Securities and Exchange Commission's Capital Market Committee from 2008 to 2012. He was elevated to the rank of Senior Advocate of Nigeria in December, 2007. He is a Fellow of the Institute of Advanced Legal Studies in London, an International Practice Fellow of the International Bar Association and a Fellow of the Chartered Institute of Arbitrators, United Kingdom.

Mr. Jonathan Ripley-Evans

Jonathan Ripley-Evans is a Disputes Director at Herbert Smith Freehills; a leading global law firm well known and recognized for its strong Disputes practice. He heads the firms Disputes practice from the Johannesburg office – a strategic gateway to the Sub-Saharan African continent. Jonathan's practice is largely geared towards alternative dispute resolution, in particular arbitration and mediation. Jonathan is an Arbitration Foundation of Southern Africa (AFSA) accredited mediator and arbitrator. He also sits on the committees of both AFSA International and AFSA Construction, two specialist divisions of AFSA. He is a board member of the South African branch of the CIArb and is the current vice-chair of the local CIArb Young Member's Group.

Mr. Ken Melly

Ken Melly is an Associate in the Dispute Resolution practice at IKM. He graduated from the University of Cape Town with a Master of Law (LLM) in Dispute Resolution (with distinction). He has been involved in diverse litigation and alternative dispute resolution processes in the fields of commercial and contract disputes, constitutional and administrative law, election petitions, employment and labour relations, insurance, banking and regulatory compliance.

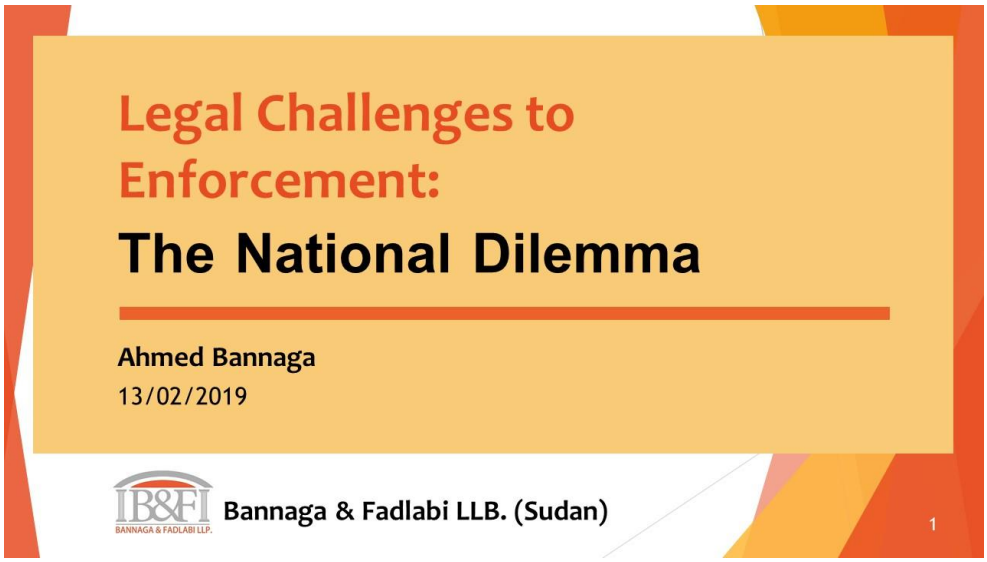
Prior to his admission as an Advocate, Ken attended and passed the Entry Course in Arbitration and Alternative Dispute Resolution offered by the Chartered Institute of Arbitrators (CIArb - Kenya) and also completed Section 6 of the Certified Public Secretary (CPS) course. He has since attended further training and obtained practical experience both within and outside of Kenya.

Mr. Tim Taylor, QC

Tim specialises in complex international disputes. He is a one of a select group of English Solicitor Advocates to have been appointed Queen's Counsel. Tim heads King & Wood Mallesons' MENA practice and is recognised as a leader in the field of dispute resolution in the Legal 500, Legal Experts' Directory and Chambers Global Directory of Leading Lawyers. He is variously described in the directories as "*superb*", "*a strong and intelligent advocate*", "*a marvellous and mercurial figure*", and as having "*an extraordinary mind which allows him to bring something different to any piece of litigation*". Tim is the founder of International Lawyers for Africa, a multi award winning legal capacity building initiative https://www.ilfa.africa/.

Articles:

1. Legal Challenges to Enforcement: the national dilemma



2. The National Stand: **Local Arbitration**

- Mainly driven by the international principles
- **Sudan's 2005 Act**

Contest: art 41

1. ~~Incapacity~~
2. Agreement applicability (procedural misconduct and laws application)
3. Agreement validity
4. Proper Notice
5. ~~Finality of the Award~~
6. ~~Arbitrability~~
7. Public Policy

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2. The National Stand: **Local Arbitration**

- **Sudan's 2016 Act**

The Award Nullity: art 42

1. Incapacity
2. Agreement validity
3. Agreement applicability (procedural misconduct and laws application)
4. Proper Notice
5. ~~Finality of the Award~~
6. ~~Arbitrability~~
7. Public Policy

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3. The National Stand: **International (Foreign) Arbitration**

- **2005 Act : art 46 = CPA 306**

"**No execution**" *unless*:

1. Finality
2. Proper Notice
3. **the award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts**
4. Public Policy
5. Reciprocity

- **2016 Act: art 48**

"the award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts **in the same substantive issue of the dispute**"

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4. The Application: **Manga Case**

- **The Ministry of Finance v Tractors Co. (S.C/892/2015)**
- **Supreme Court review decision under the 2005 Act**

"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…"

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4. The Application: **Manga Case**

- **The Constitutional Court held (C.C 104/2016)**

"Only the Constitutional Court has the jurisdiction on the constitutionality or non-constitutionality of a legal text … The Constitutional Court issued more than a judgment in the constitutionality of art: 41/2 of the Arbitration Act…"

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5. The influence of enforcement: **Manga Case**

- The case value exceeded 10 million Euros as it was funded by the EU.
- The Legal representatives of the Government didn't appear before the Tribunal despite the number of notices by the Tribunal and the court
- Government defaulted at the time in number of construction contracts due to the economical deterioration
- 90% of arbitration cases are won against the Gov. (estimated)
- The Ministers of Justice had no experience in Arbitration

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5. The influence of enforcement: **Manga Case**

1. The New Act 2016

a) Finality of the award ambiguity (art 44-6):
"…the same procedures followed in the appeal court when reviewing an appeal request shall be applicable when reviewing the nullity request"

b) Table of fees (art 19)

c) New powers to the Minister of Justice

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5. The influence of enforcement: **Manga Case**

2. Alienation

a) The exclusion of the state from entering into arbitration agreement. A decision was made by the Ministry of Justice in the past two years forbidding any agreement to arbitrate locally or internationally.

b) Prohibition of practicing judges form being appointed as arbitrator.

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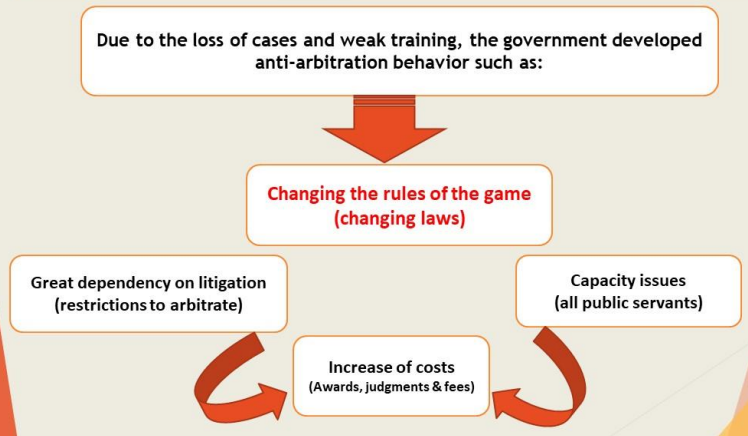
6. The Result: **Changing the Rules of the Game**



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6. The Dilemma: Ratifying New York Convention

- Sudan ratified NYC in June 2018.
- The Judiciary is currently supporting arbitration
- Between the NYC ratification and Manga case is a great gap of understanding arbitration by the same organs of the state

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Conclusion:

Incorporation vs Alienation

Quality Training vs bad training

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2. Special Issues Involving State Parties: (Sovereign Immunity)

Dr. Babatunde Ajibade SAN, FCIArb

Introduction

- Arbitral awards, like other forms of adjudication involving state parties face the challenge of sovereign immunity from execution at the enforcement stage.
- Immunity from execution is the "last bastion of sovereign immunity". (Draft articles on Jurisdictional Immunity of States and their property, with commentaries 1991, Article 18, paragraph 1).
- This is no different under the New York Convention. Article III of the Convention states that each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

Sovereign Immunity in International Arbitration

- A significant advantage of arbitration in disputes with a sovereign is that it dispenses with the jurisdictional aspect of sovereign immunity. Jurisdictional immunity is used to challenge the jurisdiction of a court over a foreign sovereign. However, in arbitration, this is not often controversial as the signing of a valid agreement to arbitrate constitutes a waiver of jurisdictional immunity under international law.
- Sovereign immunity from execution on the other hand is often used by states as a shield at the enforcement stage. Although an agreement to arbitrate is considered a relinquishment of jurisdictional immunity, it does not extend to immunity from execution. It should be noted that this is the position, even under the ICSID Convention.

Theories of Sovereign Immunity

- Absolute Immunity (Structuralist approach): All actions of a state or state agency are covered irrespective of the nature of the transaction from which the dispute arose.
- Restrictive Immunity (Functionalist approach): Bestows immunity on only sovereign acts of the state (also known as acta jure imperii). The commercial activities of the state (also known as acta jure gestionis) are not covered.
- The doctrine of restrictive sovereign immunity sounds good in theory but it is still a burden for claimants who have to go through great expense in locating these commercial assets before litigating it through the courts.

State Parties and the New York Convention

• Practical solutions in dealing with non-compliant states include:

- Seeking the services of asset tracing and recovery experts to find assets which can be attached in favourable jurisdictions.
- Taking political risk insurance as seeking enforcement and execution against recalcitrant states can be a decades long fight.
- Entering contracts with a special purpose vehicle separate from the state and structuring transactions through a separate non-state entity so that the issue of immunity does not arise.

Nigeria as a State Party in other Jurisdictions

- In the English Court of Appeal's decision in Trendtex Trading Corporation v. Central Bank of Nigeria [1977] 2 WLR 356, the doctrine of restrictive sovereign immunity was applied and it was held that the contract in that case was a commercial contract and did not attract sovereign immunity.
- In the more recent English High Court case of LR Avionics Technologies Ltd v. Federal Republic of Nigeria [2016] EWHC 1761 (Comm), the same doctrine of restricted sovereign immunity was applied but with a different result.
- It was decided that the property of the Federal Republic of Nigeria which was being leased to a private company to carry out visa and passport services did not fall under the commercial purposes exception which is now contained in s.13(4) of the State Immunity Act 1978.

Sovereign Immunity under Nigerian Law

- There is no legislation that addresses sovereign immunity of states. The Diplomatic Immunities and Privileges Act. (Act No. 42 of 1962 contained in Chapter D9, LFN 2004) gives jurisdictional immunity to certain international institutions in Nigeria. Such protection however can be waived.
- In the absence of statutory provisions on sovereign immunity in Nigeria, the applicable common law is the common law that was in force in England prior to 1st January 1900.
- As a result of this, English statutes of general application subsequent to 1st January 1900 are inapplicable.
- There is no decided authority that we are aware of touching on sovereign immunity as a defence to the execution of arbitral awards against sovereign states under Nigerian Law.
- However, based on the common law position, it is probable that a foreign sovereign would be held to have restrictive and not absolute immunity from execution.
- The Nigerian Government itself does not have absolute immunity from execution and arbitral awards against state entities can be executed by the courts.
- However, some state entities/agencies are expressly granted immunity by statute. These include the Nigerian National Petroleum Corporation (NNPC), the Central Bank of Nigeria (CBN) and the Nigerian Sovereign Investment Authority (NSIA).
- Also, section 84 of the Sheriffs and Civil Processes Act (Cap. S6, LFN 2010) provides that no order for payment may be made attaching monies in the custody or control of a public officer without obtaining the consent of the appropriate officer, who is the Attorney General of the Federation or the Attorney General of the respective component state of Nigeria.
- The Court of Appeal has held that a way of surmounting this archaic provision is to obtain an order of mandamus to compel the relevant Attorney-General to give consent. See CBN v. Hydro Air Property Limited (2014) 16 NWLR 1434.
- Under Nigerian law, a waiver of the immunity granted by statute to state agencies will be against public policy.

Conclusion

- When contracting with state entities, it is left to individual parties to think about and take precautions against the potential impediment of state immunity from execution.

3. Big brother or distant cousin - the future of the court in international arbitration

By: Jonathan Ripley-Evans,

Relevance of State Courts

- Right of access to court.
- Primary tool for administration of justice.
- Certain matters reserved for courts (status, liquidation etc.).
- Effectiveness of Arbitration is also dependent upon state courts.
- Traditionally wide jurisdiction to entertain matters, from which certain powers were carved out and bestowed upon tribunals.

Inconsistent Court Power

- Certain jurisdictions have updated their applicable laws to address the precise role that courts are expected to fulfil.
- Out-dated jurisdictions are often plagued by a wide jurisdiction conferred upon courts to act as upper guardians of the administration of justice, including supervision of arbitration.
- Clear trend away from active court participation in the arbitral process.
- Role and significance of the UNCITRAL Model Law.

Phases of Court Involvement

- Before constitution of the arbitral tribunal
  - gateway jurisdictional issues
  - Interim measures/ relief
- Interim measures after constitution of tribunal.
- Post award proceedings ▪ Review
  - Enforcement
- Widely accepted that courts should support, not monitor arbitral proceedings.
- Debate surrounding concurrent jurisdiction of courts and tribunals.

The Evolution of Interim Measures

- Standardisation of interim measures.
- UNCITRAL Model Law – 2006 edition
  - Working group – effectiveness of arbitration may be compromised under 1985 edition
  - A court ordered interim measure if not incompatible with an arbitration agreement
  - Now addressed under Art 17J of the Model Law
- Purpose of Art 17J – clarify that a competent court is authorised to issue interim measures and to extend such authorisation, extra territorially.
- Art 17J was amended by the WG to explicitly reflect that 17J is an exception to the territorial limitation of the Model Law.

The Evolution of Interim Measures

- Art 17J –

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

- Ensure that interim measures are given the same treatment as those before the court.
- In accordance with own procedures, in consideration of the features of international arbitration.

The Evolution of Interim Measures

• The English courts

  - Clear deference to the tribunal (where appropriate).
  - Tribunal has no power or is unable to act.
  - Intervention in the least disruptive manner.

Interim Relief under the International Arbitration Act 2017 (South Africa)

- Incorporation of the Model Law.
- Restriction of the historical jurisdiction of the court.
- Prescribed court power.
- Interpretation of the Act.
- Finality of the court's decision.

Art 17J

The court, at the request of a party, shall have the same powers in relation to arbitration proceedings, irrespective of whether its juridical seat is in the territory of the Republic, as it has for the purposes of proceedings before that court to make.

International Arbitration Act 2017 (South Africa)

a) orders for the preservation, interim custody or sale of any goods which are the subject matter of the dispute;

b) an order securing the amount in dispute but not an order for security for costs;

c) an order appointing a liquidator;

d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

e) an interim interdict or other interim order.

International Arbitration Act 2017 (South Africa)

(2) The court shall not grant an order in terms of paragraph (1) of this article unless—

a) The arbitral tribunal has not yet been appointed and the matter is urgent;

b) The arbitral tribunal is not competent to grant the order; or

c) The urgency of the matter makes it impractical to seek such order from the arbitral tribunal, and the court shall not grant any such order where the arbitral tribunal, being competent to grant the order, has already determined the matter.

(3) The decision of the court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal.

(4) The court shall have no powers to grant interim measures other than those contained *in this article.*

Conclusion and likely trends

- Movement toward tribunal ordered interim relief.
- Further restriction of court interference but unlikely to be ousted entirely.
- Denial of appeals against court decisions is "positive".
- The evolution of the emergency arbitrator and expedited constitution of tribunals.

Food for thought –

- Are clauses, reserving the right to approach a court for interim relief (where interim relief can be granted by the tribunal) acting as a handbrake to the development of tribunal ordered interim relief?
- Is the debate regarding gateway arbitrability / jurisdiction a red herring? Should the arbitrator not just decide?

4. Legal Challenges to Enforcement under the New York Convention

Introduction

- Kenya ratified the New York Convention ("NYC") on 10th February 1989.
  - The reciprocity reservation: *"In accordance with article I (3) of the said Convention the Government of Kenya declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another contracting state."*
- The Arbitration Act, 1995 adopted the NYC position
  - Section 36 (2) of Kenya's Arbitration Act provides that *'…an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.'*
- Enforcement under the NYC is two pronged:
  - Enforcement of agreements to arbitrate (Article II of the NYC).
  - Recognition and enforcement of foreign Arbitral Awards (Article III of the NYC).

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Recognition of Arbitration Agreements

- Article II (3) of the NYC states that courts of Contracting States, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of Article II, shall, at the request of one of the parties, refer the parties to arbitration.
- The wording of Article II(3) of the NYC is mandatory in character (and only subject to the fulfillment of the requirements specified by the NYC): "*the court ... shall, at the request of one of the parties, refer the parties to arbitration*"
- Section 6 of Kenya's Arbitration Act provides for stay of court proceedings and referral to arbitration where there is an arbitration agreement.
- While Kenyan Courts have in the vast majority of cases readily referred disputes to arbitration, there are a few decisions that raise concern based on the approach taken by the courts. Judicial trends discussed in part 3 below.

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Recognition and Enforcement of foreign Arbitral Awards

- Article III of the NYC opens the provisions relating to the enforcement of arbitral awards falling under the Convention (Articles III-VI). It contains the general obligation for the Contracting States to recognize Convention awards as binding and to enforce them in accordance with their rules of procedure "*under the conditions laid down in* [articles IV to VI]".
- The overall scheme of Articles IV-VI is the facilitation of the enforcement of the award. The scheme reflects a "pro-enforcement bias" as certain courts have said.
- Section 36 of Kenya's Arbitration Act draws from Article 35 of the UNCITRAL Model Law on International Commercial Arbitration.
- Same treatment for domestic and foreign arbitral awards in Kenya (section 36(2) of Kenya's Arbitration Act).
- Limited grounds for refusing enforcement.

Limited grounds for refusing enforcement

- Where a party to the arbitration agreement was under some incapacity (section 37 (1) (a) (i) of Kenya's Arbitration Act).
- Lack of a valid arbitration agreement (Article V(1)(a) NYC and section 37 (a)(1)(ii) of Kenya's Arbitration Act).
- Violation of due process (Article V(1)(b) NYC and section 37 (a)(1)(iii) of Kenya's Arbitration Act).
- Excess of the arbitral tribunal's authority (Article V(1)(c) and section 37 (a)(1)(iv) of Kenya's Arbitration Act).
- Irregularity in the composition of the arbitral tribunal or arbitral procedure (Article V(1)(d) and section 37 (a)(1)(v) of Kenya's Arbitration Act).
- The award "has not yet become binding" or "has been set aside" or "has been suspended" by a court or under the law of the seat of the arbitration (Article V(1)(e) and section 37 (a)(1)(vi) of Kenya's Arbitration Act).
- Fraud, bribery, corruption, undue influence section 37 (a)(1)(vii) of Kenya's Arbitration Act.
- Where the court finds that the subject matter is incapable of settlement or is contrary to public policy limitations (Article V(II) NYC and section 37(1) (b) of the Act).

On recognition and enforcement of Arbitration Agreements

- One of the most remarkable positive support for deference to the parties' choice of Arbitration is to be found in the decision of the Supreme Court of Kenya in the landmark case of *Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others* [Petitions No. 14A, 14B and 14C of 2014 (Consolidated), [2015] eKLR] where the Supreme Court pronounced itself in favour of the principle dubbed 'constitutional avoidance'.
- Other courts have taken positions different from the guidance provided by the Supreme Court:
  - In *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others* [Petition No. 249 of 2016]. The Court declined to refer the matter to the arbitration and observed as follows:-

    '…notwithstanding the principle of constitutional avoidance and settled dispute resolution forums, the court may, depending on how a dispute is framed, still decline to send the parties to another forum
  - Evangelical *Mission for Africa & Another v Kimani Gachuhi & Another* [Misc Civil Application No 479 of 2014] where the court directed parties towards appointing a new tribunal and fresh scope, disregarding party autonomy.

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On Enforcement of Awards

- Kenyan courts have taken pro-enforcement position in numerous cases. This part will only highlight an isolated few decisions of concern.
  - *Evangelical Mission for Africa & Another v Kimani Gachuhi & Another* where the learned Judge stated that the Court has:

    '*…a blank legal cheque and stands on an expansive and firm jurisprudential plateau to ensure that it subjects the decision of the arbitral tribunal to searching test of conformity to all the laws of the land and especially the Constitution itself.'*
  - *Cape Holdings v Synergy Industrial Credit Limited* [Misc. Civil Application No. 114 of 2015] *where a*fter hearing the parties, the learned Judge set aside the Award and gave no directions regarding the fate of the dispute.
- Kenyan courts have also made robust decisions regarding the circumstances in which the public policy limitation to enforcement is justified.
  - See for example the recent case of Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR..

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Conclusions & Proposed Reforms

- Promotion of arbitration is a public policy imperative and should be supported.
- Consider harmonization of "domestic" and "international public policy".
- The question of finality of arbitration should be settled [on whether the law of arbitration gives finality to the arbitral award or the judgment of the court pursuant to an application for setting aside].
  - *Nyutu Agrovet Limited v Airtel Networks Limited*,[Civil Appeal (Application) No. Nai 61 of 2012
  - Thika Coffee Mills Ltd v Rwama Farmers Cooperative Society (Civil Appeal No. 251 of 2013).
- Work towards consistency and certainty of outcomes in respect of national law recognition and enforcement of arbitration agreements and the resulting awards.
- Address legitimacy concerns which erode confidence in and acceptability of international arbitration and the resulting awards.

5. Issues & Developments in the Enforcement of Arbitral Awards

By: Tim Taylor QC

I. THE TREATY BACKGROUND

1. **The New York Convention** is famously the key international instrument in force in over 200 States.

   African States have tended to accede on a reciprocity basis, but the pervasiveness of the Convention means that reciprocity will typically be satisfied. Recent regional accessions include

   - Burundi (23 Jun 2014)
   - Comoros (28 Apr 2015)
   - Angola (6 Mar 2017)
   - Democratic Republic of the Congo (5 Nov 2014)
   - Sudan (26 Mar 2018)
   - Cape Verde (22 Mar 2018)

   Article V of the New York Convention is the cornerstone of enforcement having introduced the key innovations of removing the need for "double exequatur" and placing the onus on the party resisting enforcement to prove a New York Convention Defence.

2. **The Washington Convention** with 154 contracting states is important for Investment Treaty claims as ICSID awards automatically become judgments domestically in ratifying states.

   Most major economies in Africa are signatories including:

   - Botswana (14 Feb 1970)
   - Cote d'Ivoire (14 October 1966)
   - Ghana (14 October 1966)
   - Kenya (02 February 1967)
   - Nigeria (14 October 1966)
   - Senegal (12 May 19967)
   - Tanzania (17 June 1992)

II. EMERGENCY ARBITRATORS

1. The Institutions

There is a copycat movement afoot amongst arbitral institutions trying to fix the unsuitability of a consensual process when urgent injunctions are needed. Listed below are some of the key institutions who have followed the ICC's lead in the last five years (or who are promising they will).

UAE

- DIFC-LCIA Arbitration Rules 2016 – Article 9B "Emergency Arbitrator"
- Dubai International Arbitration Centre ("DIAC")
  At the end of 2017, the DIAC announced its intended publication of new arbitration rules. The proposed new rules were suggested to contain provisions on emergency arbitrators. However, the new rules have not yet been released on the DIAC website.

UK

- LCIA Arbitration Rules (2014) – Article 9B "Emergency Arbitrator" **China**

- China International Economic and Trade Arbitration Commission ("CIETAC") Arbitration Rules 2015 – Appendix III
- Beijing Arbitration Commission Arbitration Rules 2015 – Article 63
- Shenzhen Court of International Arbitration Rules 2016 - Article 24
- Shanghai Arbitration Commission Rules 2018 – Article 69

Japan

- Japan Commercial Arbitration Association ("JCAA") Rules 2014 - Chapter V

India

- Mumbai Center for International Arbitration ("MCIA") Rules 2016 – Article 14
- The Delhi International Arbitration Center Rules 2018 – Article 14

Kenya

- Nairobi Centre for International Arbitration (NCIA) Rules 2015 – Rule 28

Rwanda

- Kigali International Arbitration Centre (KIAC) Rules 2012 – Article 34 and Annex 2

N.B. Cario and Lagos do not have similar arbitration rules.

2. Recent cases

(a) AQZ v ARA[23]

The *AQZ* decision by the Singapore High Court considered the terms of the arbitration agreement against the SIAC terms of Emergency Arbitration. Specifically, the applicant argued that the SIAC provisions for the appointment of a sole arbitrator did not reflect the original arbitration agreement, which provided for arbitration to be undertaken "*in accordance with the rules of… the (SIAC) by three arbitrators*". This, the applicant claimed, deprived the interim order of its status as an arbitral award under Article 34(2)(a)(iv) of the UNCITRAL Model Law. Accordingly, the award should be set aside as "*the composition of the arbitral tribunal … was not in accordance with the agreement of the parties*."

The court ruled against the applicant, finding that the composition of the single arbitrator of the Emergency Tribunal was valid. Significantly, the court gave emphasis to the incorporation of the SIAC rules into the contract, in particular, the rules which specifically give the SIAC president discretion to appoint more than one Emergency Arbitrator where necessary. This, along with a purposive construction of the contract, meant that the commercially sensible approach was that the parties, in referring to the SIAC rules, also implicitly agreed to the discretion of the president in appointing the specific number of arbitrators. Prakash J thus deemed the Emergency Arbitral award enforceable, provided that the discretion was exercised properly.

The court also dismissed the applicant's alternative argument that the non-existence of the SIAC Emergency Arbitration provisions at the time of contracting means the parties cannot be bound retrospectively. However, Prakash J relied upon an existing presumption that references to arbitral rules referred to in a contract are to be construed as the rules applicable from the "date of commencement of arbitration".

[23] *AQZ v ARA [2015] SGHC 49*

(b) HSBC v Avitel[24]

In 2014 the Emergency Arbitration decision was upheld through the interim relief granted by the Bombay High Court in HSBC v. Avitel. The case concerned an arbitration agreement in which the parties had preserved the right to seek interim relief before the national courts of India, even though the arbitration was conducted outside India. One of the parties obtained the order from the Emergency Arbitration seated in Singapore and sought to enforce it under the interim measure's provisions in India. Even though Part II of The Indian Arbitration Act states that only final awards are enforceable, the Bombay High Court granted interim relief in similar terms to the Emergency Arbitration award - it was not trying to obtain a direct enforcement of the interim award, instead, it was independently asking for interim measures against the respondent, by virtue of the parties' agreement set out in the contract. Although the court did not directly enforce the Emergency Arbitration award, this case provides an example of indirect enforceability.

VIH v Assas[25]

In a recent landmark decision by Justice Sir Richard Field held (with respect to an injunction in aid of a DIFC/LCIA Arbitration) that the DIFC Courts have a wide contempt jurisdiction even to punish non-parties who aid and abet disobedience. Arbitrators will never be able to do that.

III. ADOPTING ORPHANED AWARDS

1. Enforcement of Awards Annulled by the Courts at the Seat

1.1. Background

Annulment by the Courts at the seat is a New York Convention defence (Article V (1) (e)).

(a) Some countries have long history of enforcing awards annulled at the seat known as "orphan awards", e.g. France (per Article VII (1) NYC allowing reliance on more favourable local law)

(b) e.g. ***Hilmarton Ltd v Omnium de Traitement et de Valorisation*** case (1994)[26], the Court de Cassation found that a Swiss award was not integrated in the legal system of that state, such that it remained in existence despite being set aside in Switzerland.

(c) Some countries have more deference to courts of seat and generally refuse to enforce orphan awards, e.g. England

(d) Mixed jurisdictions – e.g. Netherlands, US – conflicting cases with mixed enforcement or refusal of same

(e) US is perhaps somewhere in the middle with US courts enforcing orphan awards where the proceedings at the seat were unfair or based upon local public policy reasons or similar but declining to enforce orphan awards when the annulment was on the basis of the NYC C's own grounds for non-enforcement at article V(1)(a) to (d).

(f) ***Chromalloy Aeroservices v. Arab Republic of Egypt***[27], US District Court for the D.C. Circuit enforced an arbitral award that had been set aside at the seat of arbitration.

[24] *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Limited & Ors. [Bombay High Court, Arbitration Petition No. 1062 of 2012, Order dated January 22, 2014]*

[25] *VIH Hotel Management Ltd v Assas Opco Limited & Ors [2017] ARB-005*

[26] *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV) / 92-15.137, France, Cour de cassation*

[27] *Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F.Supp. 907 (D.D.C. 1996)*

(g) ***TermoRio S.A. E.S.P. v. Electranta S.P.***[28], the US Court of Appeals for the DC Circuit framed the relevant inquiry as whether the foreign court's annulment of the award "violated basic notions of justice."

1.2. Recent

(a) ***Nikolay Viktorovich Maximov v Novolipetsky Metallurgichesky Kombinat*** [29] - over £100 million award

- Russian seated award – set aside, went up to Supreme Arbitrazh Court of the Russian Federation (SAC) where set aside upheld in January 2012
- French courts enforced in April 2014
- Netherlands – enforcement refused at first instance and refusal upheld by Court of Appeal on 27 September 2016
- England – enforcement refused by Commercial Court 27 July 2017

(b) ***Yukos Capital s.a.r.l (Luxembourg) v OAO Rosneft (Russian Federation)*** 2006

- Russian seated award – set aside (same judge as NVM v OJSC NMK above)
- Netherlands – enforced at Court of Appeal level in April 2009[30]

(c) ***Corporacion Mexicana de Mantenimiento Integral***[31]

Award seated and annulled in Mexico but enforced in US by - TermoRio standard, the court in COMMISA found the case implicated issues of fundamental fairness and thus permitted the court to exercise its discretion in favour of confirming the award.

IV. ANTI-ARBITRATION INJUNCTIONS

1. *Albon v Naza Motor*[32]

The English Court of Appeal upheld an anti-arbitration injunction where the arbitration agreement was alleged to be forged and it was credibly alleged that this had been done to create a mandatory obligation to stay and this amounted to vexatious oppression, the court could restrain.

2. *Excalibur v Texas Keystone*[33]

Gloster J stressed that the High Court's statutory jurisdiction to grant injunctions should only be exercised with caution and in exceptional cases, e.g. where the existence of the agreement to arbitrate was challenged.

3. *Shell v Crestar*[34]

The Court of Appeal in Lagos held that it had jurisdiction to retrain arbitrations outside Nigeria along parallel lines to the English cases, in contrast to arbitrations in Nigeria where the Article

[28] *Termorio S.a. E.s.p. and Leaseco Group, Llc, Appellants v. Electranta S.p., et al., Appellees, 487 F.3d 928 (D.C. Cir. 2007)*

[29] *Nikolay Viktorovich Maximov v. Open Joint Stock Company [2017] EWHC 1911 (Comm)* and *Dutch Supreme Court 24 November 2017, ECLI:NL:HR:2017:2992, NJB 2017/2296*

[30] *Yukos v Rosneft Dutch Court of Appeal 2009 - Case no. 200.005.269/01*

[31] *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX -Exploracion y Produccion, Case 1:10-cv 00206-AKH, August 27, 2013*

[32] *Albon v Naza Motor Training Sdn Bhd 2008 (1) Lloyds Law Reports 1*.

[33] *Excalibur Venture LLC v Texas Keystone Inc 2011 EWHC 1624 (Comm*).

[34] *Shell Petroleum Development Company of Nigeria v Crestar Integrated Natural Resources Ltd. Appeal No. CA/L/331M/2015*

5 Model Law based prohibition on injunctions in section 34 of the Arbitration and Conciliation Act would not have permitted this.

4. *McDonalds v Vikram Bashi*[35]

The High Court in Delhi stressed the underlying policy in the Indian 1996 Arbitration Act , which enshrined the NYC obligation to refer matters to arbitration unless an agreement appeared to be null and void, inoperative or incapable of being performed. This contrasts with India's earlier notoriety for restraining arbitrations outside India.

V. FORUM SHOPPING

1. The need for in personam jurisdiction: USA and Ireland

1.1. Background

(a) The US is a party to the New York Convention on the Recognition and Enforcement of
Foreign Arbitral Awards (New York Convention), subject to reciprocity and commercial

reservations (21 U.S.T. 2517). Chapter 2 of the Federal Arbitration Act (FAA) (9 U.S.C. §§1-16, 201-208, 301-307) implements the New York Convention and provides federal court jurisdiction for the enforcement of international awards under the Convention (9 U.S.C. § 201).

(b) 9 U.S. Code § 203 - Jurisdiction; amount in controversy

(c) In US courts there must be jurisdiction of the subject matter and over the "person" of the defendant.

(d) US courts have subject matter jurisdiction from 9 USC §203 (Federal Arbitration Act) but personal jurisdiction of US courts depends on limits fixed by the "due process clause" of the US Constitution — more precisely by the jurisprudence of Constitutional due process in regard to the federal judicial power — provided that the defendant, despite its foreign domicile, has standing to invoke rights under the US Constitution

(e) In ***Monegasque de Reassurances S.A.M (Monde Re) v Nak Naftogaz of Ukraine*** ("Monde Re v Naftogaz")[36] the United States Court of Appeals rejected (November 2002) the enforcement of an arbitral award (from May 2000) on the basis of the doctrine of *forum non conveniens*.

(f) As part of their analysis the US Court of Appeals applied a sliding scale of deference to the claimant's choice of forum. This scale included reference to whether the claimant was engaged in "forum shopping", which militated towards less deference being given.

1.2. Recent developments

Yukos Capital S.A.R.L v OAO Tomskneft VNK[37]

(a) Ireland - Yukos appealed enforcement of award obtained in NY; appeal against enforcement granted;

[35] *McDonald's India Pvt Ltd v Vikram Bashi & Ors FAO (OS) 9/2015 and CM No. 326/2015.*

[36] *In the Matter of the Arbitration Between Monegasque De Reassurances S.a.m. (monde Re), Petitioner-appellant, v. Nak Naftogaz of Ukraine and State of Ukraine, Respondents-appellees, 311 F.3d 488 (2d Cir. 2002)*

[37] *Yukos Capital S.A.R.L v OAO Tomskneft VNK [2014] IEHC 115*

(b) Kelly J stated matter was about jurisdiction not enforcement:

"*54. But this application is not concerned with such matters. This is a respondent's application which seeks to persuade me that the exorbitant jurisdiction which has been invoked successfully by the applicant in obtaining the order of Peart J. should not stand.*

55. The applicant contends that in the event of the respondents succeeding on this application, it amounts to nothing more than, in effect, a refusal by this Court to enforce the award on grounds other than those contemplated by s. 9 of the 1980 Act and Article V of the Convention. That, it is said, is to act in a manner which is inconsistent with the entire spirit, purpose and express terms of the Convention. I do not believe this to be correct.

56. If the respondent persuades me that the order of Peart J. ought to be set aside, it is a mischaracterisation of that success to describe it as a refusal to enforce the award. It is merely a finding by the court that there is no proper basis for the court exercising its exorbitant jurisdiction over the respondent."

(c) Kelly J in justifying grant of appeal and refusing jurisdiction (not enforcement per se):

"*141. It is a case with no connection with Ireland. There are no assets within this jurisdiction. There is no real likelihood of assets coming into this jurisdiction. This is the fourth attempt on the part of the applicant to enforce this award. There is little to demonstrate any "solid practical benefit" to be gained by the applicant. The desire or entitlement to obtain an award from a "respectable" court has already been exercised in the courts of France and is underway in the courts of Singapore.*

142. The respondent has already had to undertake a defence of the proceedings in Russia and in France and has been successful to date in so doing. It would be unjust to require the respondent to yet again defend its position. The respondent should not be forced to come into a third state (Ireland) which is foreign to it and reargue its case again. It is not appropriate for this Court to assume jurisdiction."

VI. ESTOPPELS IN ENFORCEMENT

1. Dallah v Pakistan[38]

1.1. The court decisions in Dallah v Pakistan concerned the validity of an ICC arbitration award rendered in Paris. The UK Supreme Court, which also applied French law, declined to enforce the same award, finding that the arbitral tribunal did not have jurisdiction. In contrast, the Paris Court of Appeal rejected Pakistan's application to set aside the award.

1.2. Dallah was a Saudi Arabian company providing services to pilgrims travelling to Saudi Arabia. A Memorandum of Understanding was agreed by which Dallah would build accommodation for Pakistani pilgrims in Mecca. Afterwards, Pakistan established a Trust for the principal purpose of collecting donations from pilgrims, investing such donations and taking measures to facilitate pilgrimages, which was later terminated.

1.3. However, the Trust and Dallah had entered into a Contract for the construction of accommodation in Mecca, to which Pakistan was not a party. The Contract contained a

[38] *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 and Gouvernement du Pakistan, Ministere des Affaires Religieuses v Société Dallah Real Estate & Tourism Holding Company, Cour d'Appel de Paris, No 09-28533*

dispute resolution clause providing for ICC arbitration in Paris. Dallah initiated ICC proceedings against Pakistan and was awarded with favorable decisions by the Tribunal. As such, Dallah sought the enforcement of the award before the UK courts. Pakistan resisted enforcement and applied to the Paris Court of Appeal to have the award annulled.

1.4. The UK Supreme Court held that the parties had no common intention to arbitrate. Lord Mance noted further that: "It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether *there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun.* ***I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see The Sennar (No. 2) [1985] 1 WLR 490)****. But that is a matter for the French courts to decide*."

1.5. However, the Paris Court of Appeal ignored the UK Supreme Court's decision and found that: "*… et que le Gouvernement du Pakistan, Ministère des Affaires Religieuses comme DALLAH en convenait s'est comporté* ***comme la véritable partie pakistanaise lors de l'opération économique***", rejecting Pakistan's application to set aside the award.

2. Yukos v Rosneft[39]

2.1. Brief background

(a) Yukos obtained four Russian-seated arbitral awards against Rosneft. Subsequently Yukos initiated enforcement proceedings in the Netherlands. However, on Rosneft's application the awards were then set aside by Russian courts. The Amsterdam Court of Appeal refused leave to enforce the Russian judgments and determined that the Russian court decisions annulling the awards should not be recognised as they were "the result of a partial and dependent judicial process." Accordingly, the Russian arbitral awards were enforced against Rosneft.

(b) The issue estoppel issue before the English court was whether the decision of the Amsterdam Court of Appeal gave rise to an issue estoppel preventing Rosneft from arguing that the Russian court decisions annulling the awards were not a result of partial and dependent judicial process.

2.2. Public Policy discussion in relation to the Issue estoppel

(c) When the case was heard by the High Court, Hamblen J found that the matter was determined by issue estoppel. In particular at paragraph 94 of Yukos Capital Sarl v OJSC Rosneft Oil Co [2011] EWHC 1461 (Comm), the decision of Amsterdam Court of Appeal that the Annulment Decisions were the result of a partial and dependent legal process was a "factual basis … upon which Dutch public order was engaged", and decision of this issue "in the context of a different legal question (i.e. by reference to Dutch public order) makes no difference". Further at paragraph 104, Hamblen J found that Amsterdam Court of Appeal's decision was "on the merit".

(d) Hamblen J's decision was overturned by the Court of Appeal, which held that that issue estoppel did not arise because the issue of whether the Russian courts' Annulment

[39] *Yukos Capital Sarl v OJSC Rosneft Oil Co [2011] EWHC 1461 (Comm)* and *Yukos Capital Sarl v OJSC Rosneft Oil Co [2012] EWCA Civ 855*

Decisions were "partial and dependent" and therefore unenforceable as a matter of English public policy had not been considered by the Dutch court (see paragraph 156 "The point is that English public order is as explained by Lord Collins in AK Investment and the English court must determine the matter by reference to those considerations not by whatever considerations make up Dutch public order.")

3. Diag Human v Czech Republic[40]

This case is the first time that the common law doctrine of issue estoppel has prevented the enforcement of an award under Section 101 of the Arbitration Act 1996.

3.1. Brief background

(e) The arbitration agreement contained provisions allowing for a detailed review process by a second arbitral tribunal following the granting of any award.

(f) After the final award was handed down and before the review process was complete, Diag Human pursued enforcement proceedings in different jurisdictions. Supreme Court of Austria had refused to grant leave to enforce the award under Article V(1)(e) of the New York Convention, which provides that a court may refuse enforcement where an award "has not yet become binding". The enforcement proceedings in England were commenced after the Austrian Supreme Court decision had rendered. This gave rise to the question before English courts as to whether an issue estoppel arose regarding the "binding" status of the award underlying the enforcement application.

3.2. Public Policy discussion in relation to the Issue estoppel

(a) In Diag Human case, the issue estoppel involved no genuine discussion in nature of the public policy issues as in the Yukos case, and as Eder J notes, the Claimant's true position is that "*the decision of the Supreme Court is wrong as a matter of English law if not as a matter of Austrian law*".

(b) In the Diag Human case, Claimant maintained that the claim should not be estopped by the Austrian Supreme Court's decision and submitted that "*just as questions of arbitrability and of public policy may be different in different states, so too there may be different tests applied as to the meaning of "binding" and the meaning of an "autonomous" approach*."

(c) At paragraph 58 of the Diag Human judgement, Eder J notes: "*I also readily accept that questions of arbitrability and of public policy may be different in different states and that a decision in a foreign court refusing to enforce an award under the New York Convention on public policy grounds of that state will not ordinarily give rise to an issue estoppel in England. Indeed, that was the basis of the decision of the Court of Appeal in Yukos Capital v Rosneft Oil [2013] 1 WLR 1329*."

(d) He further distinguished the scenario in the Yukos case with the one in the Diag Human at paragraph 59 that: "*However, in circumstances where a foreign court decides that an award is not "binding", I see no reason in principle why that decision should not give rise to an issue estoppel between the parties provided, of course, that the other conditions referred to above apply. In particular, provided that the issue is the same and that the decision can properly be said to be "on the merits", it does not seem to me that the fact that such decision was made in the context of enforcement proceedings as opposed to any other type of proceedings can, of itself, be material."*

[40] *Diag Human v Czech Republic [2014] EWHC 1639 (Comm)*

Panel 4

The African Continental Free Trade Area Explained

The African Continental Free Trade Area Explained

The primary focus of discussions will be investment, investment arbitration and ADR.

Chair:

Mrs Sola Adegbonmire

Mrs. Adegbonmire is a Legal Practitioner and Partner in the Law Firm of Sola Ajijola and Co. She obtained her Bachelors Degree in Law (LL.B) from the University of Ife in 1984 and a Masters Degree in Law (LL.M) from the University of Lagos 1987. She was called to the Nigerian Bar in 1985. Mrs. Adegbonmire is a practicing arbitrator and has acted at different times as Registrar, Sole Arbitrator, Party Appointed Arbitrator and Arbitration Counsel in various proceedings both domestic and International. she is a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators and she is an Approved Tutor and Assessor of the Institute.

Lead Paper:

Mr. Adetola Onayemi

Mr. Adetola is the Head, Trade Remedies/Assistant Chief Negotiator, Nigerian Office for Trade Negotiations (NOTN). Graduated with LLB & LLM from (Cambridge). He is an international lawyer with expertise in international trade, investment, transactions, technology (specializing in intellectual property) and competition policy. He is currently working closely with the global law firm, King & Spalding, on developing a trade remedy infrastructure to safeguard the Nigerian economy from unfair international trade practices. The collaborative effort of the EBES team helped move Nigeria up 24 ranks within the World Bank's global ranking. Tola's previous professional experience includes the Office of the Legal Adviser, Organisation for the Prohibition of Chemical Weapons (Netherlands) and as Visiting Lecturer at a Nigerian University.

Discussants:

Prof. Idrissa Bachir Talfi

Professeur Agrégé des Facultés de Droit de l'Université Abdou Moumouni de Niamey, Membre du Comité de Médiation et d'Arbitrage du Centre de Médiation et d'Arbitrage de Niamey (Niger)

Ms. Leyou Tameru

Leyou Tameru is a legal consultant and the founder of I-Arb Africa, the online portal for arbitration in Africa. Her expertise is in international Arbitration focused on Africa, she is a Court Member of the International Court of Arbitration at the International Chamber of Commerce (ICC). She is also on the Board of Directors of the newly created African Arbitration Association (AfAA). She regularly consults on international arbitration cases and investment and policy matters concerning different African countries and has worked with a range of institutions and law firms including WilmerHale, Emahizee Global Consulting, World Bank and the International Finance Corporation (IFC). She has also taught law at Addis Ababa University where she received her first degree in Law. She then received a Masters in Law from Georgetown University

Mr. Gerald Alfadani

Gerald has over five years of experience working with presiding magistrates and liaising with litigants and counsels in the administration of justice at the Court of First Instance Tikoas. He is a Member Delegate to the Joint Court Registry Administrative Board and Permanent Disciplinary Council where he participates in the career evaluation and management of over 2,000 colleagues. He also serves as the Chief of the Trade and Personal Property Rights Register where he is responsible for the study, verification, and registration of companies. Gerald holds a master's degree in Business Law, and a law degree in English Private Law, both from the University of Yaoundé II in Soa. Upon completion of the Washington Fellowship program, he plans to extend the use of electronic templates in the incorporation of businesses to the Courts of First Instance. He also plans to advocate for and pilot the use of an integrated court management and business incorporation model. Gerald was one of 100 Fellows competitively selected to participate in an 8-week internship in the United States following the Mandela Washington Fellowship academic institute. He interned at the UN Foundation in August-September 2014.

Articles:

1. Arbitration, Dispute Settlement and the Africa Continental Free Trade Area Agreement (AfCFTA)

By Adetola Onayemi[41]

1.0 Background:

The African Continental Free Trade Area Agreement is intricately tied to historical efforts by African States to integrate trade, promote economic, social and cultural development between African states, integrate African economies in order to increase economic self-reliance and promote self-sustained development, and establish between African states an African Economic Community as a continental framework for the development and mobilisation of human and material resources in Africa. Hence, The Origins of the African Continental Free Trade Area Agreement (AfCFTA) lies in the Abuja Treaty Establishing the African Economic Community ("Abuja Treaty")42, adopted in Abuja on 3rd June 1991 and came into force on 12th May 1994. The Abuja Treaty established the African Economic Community (AEC) as the basis of regional integration in Africa. The AfCFTA principally gives effect to the Abuja Treaty.

The signing of the Agreement establishing the AfCFTA by 44 members of the African Union at the Extraordinary Summit of the African Union held on 21st March, 2018 in Kigali, Rwanda launched the AfCFTA, but is just the beginning of a successive attempt to integrate trade in Africa. An Agreement of this scale and economic implications however has never been attempted in Africa before now, and so throws up very interesting issues.

In this paper, an attempt is made to set out in simple broad strokes, the content and intent of the African Continental Free Trade Agreement. The third part however narrows down on the dispute settlement system designed within the AfCFTA with the fourth part setting out the Arbitration provisions and ambition. The final part attempts to answer some interesting gaps or questions that the present dispute settlement and arbitration infrastructure under the AfCFTA opens up. The hope is that this paper elicits interest on the fundamental issues revolving around dispute settlement and arbitration within the AfCFTA and starts a conversation about the ways to resolve and harmonise those issues.

2.0 The African Continental Free Trade Area Agreement

The mandate to negotiations of the AfCFTA was given in January 2012, in Addis Ababa, at the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union (AU) with the decision to "establish an African Continental Free Trade Area for Africa by 2017, i.e. in five years. The 2012 Summit also endorsed the Action Plan for "Boosting Intra-Africa Trade" (BIAT).43 It was not until 3 years after, in June 2015 at. Johannesburg, that at the 25th Ordinary Session of Assembly of AU Summit of Heads of State and Governments launched the negotiations of the African Continental Free Trade Area. Interesting, no actual work or negotiating activity occur over the 4-year period from 2012 to 2017. The actual negotiating process for the AfCFTA began with Nigeria's assumption of chairmanship of the negotiations in 2017.

The AfCFTA negotiations are scheduled into two stages. Stage one (1) of the negotiations covers Trade in Goods and Services, while stage two (2) covers intellectual property, competition policy and

[41] Serves as Assistant Chief Negotiator & Head, Trade Remedies at the Nigerian Office for Trade Negotiations (NOTN)

[42] The Abuja treaty establishing the African Economic Community was a treaty signed by member nations of the Organisation for African Union - OAU (now African Union - Au) in 1991. The aim was to establish and promote economic, social and cultural development between African states and the integration of African economies in order to increase economic self-reliance and promote self-sustained development, and establish between African states an African Economic Community as a continental framework for the development and mobilisation of human and material resources in Africa. Treaty text can be found at <https://www.wipo.int/edocs/trtdocs/en/aec/trt_aec.pdf>.

43 Decision: Assembly/AU/Dec.394 (XVIII) and Declaration: Assembly/AU/Decl.1 XVIII)

investment. Stage 1 of the negotiations were chaired by Nigeria and concluded at the 10th Negotiating Forum (NF) of 8th March, 2018. The negotiated agreement of the stage 1 agreement were adopted by African Ministers of Trade (AMOT-5) which was also chaired by Nigeria on 9th March, 2018. The negotiated agreement was subsequently forward to the African Union Executive Council of Foreign Ministers of the African Union, chaired by Rwanda. The stage 2 negotiations on Intellectual Property, Competition and Investment will begin in the first quarter of 2019.

The negotiated agreement comprises of a framework agreement establishing the AfCFTA and three protocols namely: (1) Protocol for Trade and Goods, (2) Protocol for Services and (3) Protocol for Rules and Procedures on the settlement of disputes. The Protocol for Trade and Goods has have main annexes namely: (a) Annex on Trade Remedies, (b) Annex on Customs Cooperation, Trade Facilitation and Transit, (c) Annex on Rules of Origin, (d) Annex on Sanitary and Phyto-Sanitary Measures, and (e) Annex on Technical Barriers to Trade and Non-Tariff Barriers.

The Agreement establishing the AfCFTA was adopted and signed by 4444 members of the African Union at the Extraordinary Summit of the African Union held on 21st March, 2018 in Kigali, Rwanda. The attached declaration launching the AfCFTA was signed by 43 African Union members. Five (5) African Union members did not sign the declaration or the AfCFTA agreement.45 By operation of the signing by 44 AU members, the "Single Liberalised Market for Trade in Goods and Services" was launched on the 21st March, 2018.

At November 2018, 49 of the 55 African Union members have signed the AfCFTA. Twelve (12) of the signatories have ratified the agreement - seven (7) 46 have signed, ratified and deposited their instruments of acceptance, while five (5) 47 have ratified and are preparing their instruments of acceptance for deposition.

Article 3 of the Framework Agreement provides as follows:

"*1. The principal objective of this Protocol is to support the objectives of the AfCFTA, as set out in Article 3 of the Agreement, particularly to create a liberalized market for trade in goods.*

2. The specific objective of this Protocol is to boost intra-African trade in goods through:

- *a) progressive elimination of tariffs;*
- *b) progressive elimination of non-tariff barriers;*
- *c) enhanced efficiency of customs procedures, trade facilitation and transit;*
- *d) enhanced cooperation cooperation in the areas of technical barriers to trade and sanitary and physo-sanitary measures;*
- *e) development and promotion of regional and continental value chains; and*
- *f) enhanced socio-economic development, diversification and industrialisation across Africa"*

The text of the AfCFTA provides that the agreement shall enter into force 30 days after the deposition of the 22nd instrument of ratification by AU members. Once the AfCFTA comes into effect, the resulting "African Continental free Trade Area" (AfCTA) will be the largest trade bloc in the global economy since the World Trade Organisation's establishment in 1995. The AfCTA, encompassing about 1.2 billion

44 Niger, Rwanda, Chad, Angola, Central African Republic, Comoros, Congo, Djibouti, Ghana, The Gambia, Gabon, Senegal, Kenya, Mozambique, Saharawi Republic, Sudan, Mauritania, Zimbabwe, Cote d Ivoire, Seychelles, Algeria, Equatorial Guinea, Morocco, Swaziland, Tanzania, Tunisia, Burkina Faso, DRC Congo, Guinea, Liberia, Mali, Somalia, South Sudan, Uganda, Sao Tome and Principe, Togo, Malawi, Cameroun, Cape Verde, Libya, Madagascar, Egypt, Mauritius, Ethiopia.

45 Nigeria, Sierre Leone, Guinée Bissau, Burundi and Eritea

46 Ghana, Kenya, Rwanda, Eswatini, Guinea, Niger and Chad. As at 28 November, 2018

47 South Africa, Uganda, Sierra Leone, Côte d'Ivoire and Mali. As at 28 November, 2018

Africans,48 is projected to have a GDP of more than Three trillion dollars (US$ 3 trillion), making it the largest market in Africa and larger than any individual African market. The AfCFTA is designed to function as a rules-based system for the governance of intra-African trade, providing for rights and obligations which are enforceable under the "Protocol on Rules and Procedures on the Settlement of Disputes". The AfCFTA would serve as a foundation for Africa's integration into the global economy. The AfCFTA is aimed at achieving liberalisation through successive rounds of negotiations49, with a preference for consensus decision-making. The Schedules for tariff concessions for trade in goods50 to be submitted by State Parties under the AfCFTA shall have 10% of tariff lines set-aside in an exclusion list (i.e. tariff lines not subject to liberalisation) and sensitive list (i.e. tariff lines subject to negotiated liberation. A State Party may also request for modification of its schedules of tariff concessions.51

The Protocol of Trade in Goods of the AfCFTA also provides for anti-dumping, 52 countervailing measures53 and global safeguard measures54 as a protection against injurious and unfair trading practices of foreign countries or companies against individual state parties. Annex 9 of the Protocol of Trade in Goods of the AfCFTA provides for clear rules and procedures for trade remedies that are consistent with the World Trade Organisation (WTO) rules on trade remedies and global best practice.

Article 27 of the Framework Agreement establishing the AfCFTA provides that a state party may withdraw after five years of entry into force for that state party. Article 28 Framework Agreement establishing the AfCFTA provides that the AfCFTA is subject to five year reviews, while Article 29 of the same framework agreement allows for provisions for amendment by state parties.

3.0 Dispute Settlement under the AfCFTA

Article 20 of the Framework Agreement Establishing the AfCFTA provides that:

1. A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties.
2. The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures for the Settlement of Disputes.
3. The Protocol on Rules and Procedures on the Settlement of Disputes shall establish inter alia a Dispute Settlement Body."

Article 20 mandates that the dispute settlement mechanism (DSM) established shall apply to dispute settlement between AfCFTA State Parties, as well as provides for the establishment of a Dispute Settlement Body (DSB). The DSB shall be composed of representatives of State Parties55 and have authority to establish dispute settlement panels and an appellate body, adopt panel and appellate body reports, maintain surveillance of implementation of rulings and recommendations of the panels and appellate body, and authorise the suspension of any concessions or obligations under the AfCFTA.56

The DSM of the AfCFTA is positioned as a central element in providing security and predictability to the African regional trading system, and has the function of preserving the rights and obligations of State Parties under the AfCFTA and clarification of the existing provisions of the AfCFTA in accordance with customary rules of interpretation of public international law.57 Hence, the aim of recommendations and rulings of the DSB shall be the satisfactory settlement of disputes in accordance with the rights and

48 This is estimated to double by 2050
49 Article 6 of the Protocol of Trade in Goods of the AfCFTA & Article 18 of the Protocol of Trade in Services.
50 Article 7 of the Protocol of Trade in Goods of the AfCFTA
51 Article 10 of the Protocol of Trade in Goods of the AfCFTA
52 Article 17 of the Protocol of Trade in Goods of the AfCFTA
53 Article 17 of the Protocol of Trade in Goods of the AfCFTA
54 Article 18 of the Protocol of Trade in Goods of the AfCFTA
55 Article 5(2) of Protocol on Rules and Procedures for the Settlement of Disputes
56 Article 5(3) of Protocol on Rules and Procedures for the Settlement of Disputes
57 Article 4(1) of Protocol on Rules and Procedures for the Settlement of Disputes

obligations in the AfCFTA.58 The Protocol on Rules and Procedures for the Settlement of Disputes emphasises that the aim of the DSM shall be the ensuring that the dispute settlement process is transparent, accountable, fair, predictable and consistent with the AfCFTA agreement.59

The DSM envisages a "fork in the road" scenario with dispute settlement, such that once a State Party has invoked dispute settlement under the AfCFTA Protocol on Rules and Procedures for the Settlement of Disputes, the State Party is precluded from invoking another forum for dispute settlement of the same matter.60

3.1. Methods to Dispute Settlement under the AfCFTA

The DSM provides for four (4) paths to the settlement of disputes under the AfCFTA, namely:

(a) "Consultations", as provided for in Article 7 of the Protocol on Rules and Procedures for the Settlement of Disputes,
(b) "Good Offices, Conciliation and Mediation" as provided in Article 8 of the Protocol on Rules and Procedures for the Settlement of Disputes,
(c) "Establishment of Panels", and an accompanying Appellate Body Process, as provided in Article 9 and Article 21 of the Protocol on Rules and Procedures for the Settlement of Disputes, and
(d) "Resort to Arbitration", subject to mutual agreement, as provided in Article 27 of the Protocol on Rules and Procedures for the Settlement of Disputes.

Consultations, as a means of resolving state party disputes is basically negotiations between the parties about compromises to be made in resolving the disputes. A State Party, that has a dispute with another State Party, may request for consultations with the State Party by notifying the DSB in writing, through the Secretariat.61 The notification should contain the reasons for the request, as well as identifications of issues and the legal basis of the complaint. The respondent State Party is expected to reply and enter consultations in good faith, with an aim to both parties reaching a mutually satisfactory solution to the dispute.62 Consultations are confidential and their content do not prejudice the rights of any state party in any future proceedings.63 If any state party does not respond to a request for consultation, or the State Parties do not obtain a satisfactory settlement of the dispute, then the complaining party may refer the matter to the DSB for the establishment of a panel.64 Generally, except the parties agree otherwise, consultations take place at the territory of the party complained against.65 The Protocol on Rules and Procedures for the Settlement of Disputes also makes provisions for expedited consultations in cases that require urgency.

Good Offices, Conciliation and Mediation, generally involves engaging a third party to the dispute to use influence, position and power to intervene and help resolve the dispute between State Parties. For instance, the Director-General of the AfCFTA secretariat may be requested by a State Party to facilitate and offer Good Offices, Conciliation and Mediation.66 Good Offices, Conciliation and Mediation may be voluntarily undertaken by a State Party at any time.67 Just like consultations, proceedings that involve good offices, conciliation and mediation are confidential and do not prejudice the rights of the state parties in any future proceedings. 68 Good Offices, Conciliation and Mediation may begin and be terminated at any time by the State Parties to the dispute.69 However, when a request for Good Offices, Conciliation and Mediation is made after a request for consultations, the complaining party has

58 Article 4(2) of Protocol on Rules and Procedures for the Settlement of Disputes
59 Article 2 of Protocol on Rules and Procedures for the Settlement of Disputes.
60 Article 3(4) of Protocol on Rules and Procedures for the Settlement of Disputes.
61 Article 7(3) of Protocol on Rules and Procedures for the Settlement of Disputes
62 Article 7(4) of Protocol on Rules and Procedures for the Settlement of Disputes
63 Article 7(7) of Protocol on Rules and Procedures for the Settlement of Disputes
64 Article 7(5) & 7(8) of Protocol on Rules and Procedures for the Settlement of Disputes
65 Article 7(8) of Protocol on Rules and Procedures for the Settlement of Disputes
66 Article 8(6) of Protocol on Rules and Procedures for the Settlement of Disputes
67 Article 8(1) of Protocol on Rules and Procedures for the Settlement of Disputes
68 Article 8(1) of Protocol on Rules and Procedures for the Settlement of Disputes
69 Article 8(2) of Protocol on Rules and Procedures for the Settlement of Disputes

to wait for the Good Offices, Conciliation and Mediation to run its 60 days course before requesting the establishment of a panel, except in cases where the parties jointly consider that the Good Offices, Conciliation and Mediation has failed to resolve the dispute.70 In some cases, the State Parties may agree that the procedure for Good Offices, Conciliation and Mediation continue while the panel process proceeds.71

Establishment of Panels may be requested, in writing to the DSB, by a complaining State Party if consultation does not amicably resolve the dispute.72 In the event that the complaining State Party requests the establishment of a panel with terms of reference different to the standard terms, this shall be indicated in the request.73 Once a request is made, the DSB will convene to establish a panel, and such panel must be constituted within ten (10) days after the meeting of the DSB.74 When there are two disputing State Parties, the Panel shall comprise of three (3) members, however when there are more than two disputing State Parties, the Panel shall comprise of five (5) members.75 All Panellists serve in individual capacities and not as government representatives or representatives of any organisation,76 and Panellists must not receive instructions or be influenced by any State Party when considering the issues of the disputes.77 Also nationals of the disputing State Parties shall not serve on a Panel established for the dispute, except the Parties to the dispute agree otherwise.78 In composing a panel, the Secretariat may propose nominations for the Panel to the disputing State Parties.79 However, if the State Parties cannot agree on the composition of the Panel within the stipulated time, at the request of either State Party, the Director-General of the AfCFTA secretariat in consultation with the Chairperson of the DSB, determine the composition of the Panel by appointing Panellists considered to be most appropriate.80

The panel makes an objective assessment of the dispute brought by the State Parties, "including facts of the case and the applicability of and conformity with the relevant provisions of the Agreement and make findings to assist the DSB in making recommendations and rulings".81 The panel is expected to consult widely and with the Parties,82 and also take into account third parties83 to the dispute in developing a mutually satisfactory solution. All deliberations of the panel is confidential,84 as well as information submitted to the panel by another party to the dispute.85 However, a State Party may disclose statement of its own position to the public.86 All opinions express in the Panel report by the individual panellists shall be anonymous.87

The final Panel report will be considered, adopted and signed at a meeting of the DSB convened for that purpose, except in cases where a State Party has notified of a decision to appeal or where the DSB decides by consensus not to adopt the report.88

70 Article 8(3) of Protocol on Rules and Procedures for the Settlement of Disputes
71 Article 8(5) of Protocol on Rules and Procedures for the Settlement of Disputes
72 Article 9(1) of Protocol on Rules and Procedures for the Settlement of Disputes
73 Article 9(3) of Protocol on Rules and Procedures for the Settlement of Disputes
74 Article 9(4)&(5) of Protocol on Rules and Procedures for the Settlement of Disputes
75 Article 10(9) of Protocol on Rules and Procedures for the Settlement of Disputes
76 Article 10(10) of Protocol on Rules and Procedures for the Settlement of Disputes
77 Article 10(11) of Protocol on Rules and Procedures for the Settlement of Disputes
78 Article 10 (5) of Protocol on Rules and Procedures for the Settlement of Disputes
79 Article 10(6) of Protocol on Rules and Procedures for the Settlement of Disputes
80 Article 10 (7) of Protocol on Rules and Procedures for the Settlement of Disputes
81 Article 12(2) of Protocol on Rules and Procedures for the Settlement of Disputes
82 Article 12(3) of Protocol on Rules and Procedures for the Settlement of Disputes
83 Article 13(1) of Protocol on Rules and Procedures for the Settlement of Disputes
84 Article 17(1) of Protocol on Rules and Procedures for the Settlement of Disputes
85 Article 17 (2) of Protocol on Rules and Procedures for the Settlement of Disputes
86 Article 17(3) of Protocol on Rules and Procedures for the Settlement of Disputes
87 Article 17(5) of Protocol on Rules and Procedures for the Settlement of Disputes
88 Article 19(4) of Protocol on Rules and Procedures for the Settlement of Disputes

In the event of an appeal by either State Party, a standing Appellate Body (AB) shall be established by the DSB to hear the appeal from a panel case.89 The DSB appoints person to serve in the AB for a four (4) year term and each person can be reappointed once.90 Persons appointed to the AB shall be "persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the Agreement generally",91 and no affiliation to any government.92 The Appellate Body shall be composed of seven (7) persons with three (3) serving on any case.93 Generally persons serving on the AB serve in rotations.94 Persons serving on the AB will not participate in any disputes that would create a direct or indirect conflict of interest.95 It is important to note that only parties to a dispute may appeal a panel report,96 and all proceedings of the AB are confidential.97

3.2 Indicative List or roster of Individuals

For the purposes of constituting Panels under the DSM, the Secretariat is mandated to establish and maintain an indicative list or roster of individuals who are willing and are able to serve as Panellists.98 Every State Party nominates to the Secretariat two (2) individuals for inclusion in the list, indicating their area of expertise related to the Agreement.99 The Secretariat subsequently submits the indicative list or roster of individuals to the DSB for consideration and approval.100

Article 10 (3) of the Protocol on Rules and Procedures for the Settlement of Disputes provides that:

"Individuals listed on the roster shall:

a) have expertise or experience in law, international trade, other matters covered by the Agreement or the resolution of disputes arising under international trade Agreements;
b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
c) be impartial, independent of, and not be affiliated to or take instructions from, any Party; and
d) comply with a code of conduct to be developed by the DSB and adopted by Council of Ministers."

4.0 Arbitration and the AfCFTA

The fourth path to resolving disputes under the AfCFTA is arbitration.

Article 27(1) of the Protocol on Rules and Procedures for the Settlement of Disputes provides as follows:

> "Parties to a dispute may resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings"

Where the parties to a dispute decide that arbitration is the best and first means of dispute settlement, the parties to the dispute may proceed straight to arbitration.101 However, it is important to note that all resolutions of matters formally raised in line with the DSM, including arbitral awards, must be consistent with the AfCFTA.102

89 Article 20(1) of Protocol on Rules and Procedures for the Settlement of Disputes
90 Article 20(4) of Protocol on Rules and Procedures for the Settlement of Disputes
91 Article 20(7) of Protocol on Rules and Procedures for the Settlement of Disputes
92 Article 20(8) of Protocol on Rules and Procedures for the Settlement of Disputes
93 Article 20(2) of Protocol on Rules and Procedures for the Settlement of Disputes
94 Article 20(3) of Protocol on Rules and Procedures for the Settlement of Disputes
95 Article 20(8) of Protocol on Rules and Procedures for the Settlement of Disputes
96 Article 21(1) of Protocol on Rules and Procedures for the Settlement of Disputes
97 Article 22(2) of Protocol on Rules and Procedures for the Settlement of Disputesw
98 Article 10(1) of Protocol on Rules and Procedures for the Settlement of Disputes
99 Article 10(2) of Protocol on Rules and Procedures for the Settlement of Disputes
100 Article 10(2) of Protocol on Rules and Procedures for the Settlement of Disputes
101 Article 6(6) of Protocol on Rules and Procedures for the Settlement of Disputes
102 Article 4(4) of Protocol on Rules and Procedures for the Settlement of Disputes

Also, when State Parties opt for arbitration, they must agree on the procedural rules that will apply to the arbitration proceedings and also agree to abide with the arbitration award.103 The arbitration award must be notified to the DSB for enforcement.104

Electing to use arbitration to resolve a dispute also means that such matter cannot be simultaneously referred to the DSB.105 However, the agreement by the parties to direct the matter to arbitration must be notified to the DSB.106 However, where a party to the dispute refuses to cooperate with the arbitration, the complaining State Party may refer the matter to the DSB for determination.107

Within the World Trade Organisation Dispute Settlement Understanding (WTO DSU), which is similar to the AfCFTA DSM, Members rarely resort to Arbitration. A notable case of Member States resorting to arbitration is US-Section 110(5) copyright Act (Article 25) (2001), recourse to arbitration under Article 24 of the DSU.108

The AfCFTA also envisages under resort to Arbitration under Article 24(3)(c) and Article 25(8) of the Protocol on Rules and Procedures for the Settlement of Disputes. The similar provisions under the WTO DSU are frequently used by State Parties. Article 24(3)(c) of Protocol on Rules and Procedures for the Settlement of Disputes relates to monitoring compliance of State Parties with the recommendations and rulings of the DSB, and the resort to arbitration in determining reasonable period within which a State Party must comply with the rulings and recommendations of the DSB (especially in instances where a State Party cannot immediately comply). Article 25(8) of the Protocol on Rules and Procedures for the Settlement of Disputes, provides that to an instance where a State Party objects to the level of suspension proposed or that the principle and procedure for suspending concessions and obligations have not been followed, the matter shall be referred to arbitration. Hence, asides initial resort to arbitration to resolve a dispute, arbitration may also be resorted to in determination of the reasonable period for implementation109 as well as in determination of appropriate level of retaliation.110

4.1 Arbitration under the AfCFTA and the AfCFTA Dispute Settlement Mechanism - Emerging Concerns

Given the novelty of the continental free trade agreement, a number of question relating to dispute settlement and arbitration arise, namely:

(a) Can a Non-State Party of the AfCFTA resort to the AfCFTA Dispute Settlement Mechanism?
(b) Is there a nationality requirement for a person to be included in the Indicative List or roster of individuals to serve on AfCFTA DSB panels?
(c) Is there a nationality requirement for a person to serve as an arbitrators in AfCFTA disputes?
(d) What procedures will apply to an arbitration proceedings under the AfCFTA?

103 Article 27(5) of Protocol on Rules and Procedures for the Settlement of Disputes
104 Article 27(5) of Protocol on Rules and Procedures for the Settlement of Disputes
105 Article 27(2) of Protocol on Rules and Procedures for the Settlement of Disputes
106 Article 27(3) of Protocol on Rules and Procedures for the Settlement of Disputes
107 Article 27(5) of Protocol on Rules and Procedures for the Settlement of Disputes
108 In 2001, within the WTO DSU, which has similar language with the AfCFTA DSM, the U.S and E.C resorted to arbitration under Article 25 to resolve a dispute on the appropriate level of compensation due to the U.S. after it failed to comply with a panel report in US-Section 110 (5) Copyright Act (2000). See US-Section 110(5) copyright Act (Article 25) (2001), recourse to arbitration under Article 24 of the DSU, WT/DS160/ARB25/1, dated 9 November 2001.
109 Under the WTO DSU, arbitration cases in determining reasonable period implementation include EC - Hormones (1998), US- Gambling (2005), Korea - Alcoholic Beverages (1999), Canada - Pharmaceutical Patents (2000), EC - Tariff Preferences (2004), Indonesia - Autos (1998) and US - COOL (2012).
110 Under the WTO DSU, arbitration cases in determination of appropriate level of retaliation include EC - Bananas III (US) (Article 22.6 - EC) (1999), US - Gambling (2005), and US - Large Civil Aircraft (2nd complaint) (2012) etc.

On the first question, can a non-state party of the AfCFTA resort to the AfCFTA Dispute Settlement Mechanism? This question is important for creating a predictable dispute settlement system given that presently not all African states have signed the AfCFTA. For context, in some international dispute settlement system like the International Court of Justice (ICJ), Non-Members States to the Agreement can submit their disputes to the ICJ.111 This question underlies the issue of whether African states that have not signed the AfCFTA can by agreement submit their dispute before the AfCFTA DSB and whether in disputes between AfCFTA State Party and a non-State Party, the dispute can be submitted to the AfCFTA DSB.

In resolving this question, reliance will be made on the Framework Agreement Establishing the AfCFTA ("Framework Agreement") and the Protocol on Rules and Procedures for the Settlement of Disputes ("DSB Protocol").

The text of the Framework Agreement and DSB Protocol seem to make a distinction between "Member State" and "State Party". Article 1 of the Framework Agreement states that "Member States means the Member States of the African Union"112 while "State Party means a Member State that has ratified or acceded to this Agreement".113 Hence, there is a seeming distinction between a Member State of the African Union and the State Party who has signed and ratified the AfCFTA agreement. This bifurcation creates a different regime between AU Member States and AfCFTA State Parties.

Unlike the Article 93, paragraph 1 of the Charter of the United Nations which provides that all Members of the United Nations are ipso facto parties to the Statute, there is no such provision in the AfCFTA text. It would appear that the Protocol on Rules and Procedures for the Settlement of Disputes and AfCFTA DSM only applies to AfCFTA State Parties.

Interestingly, the Protocol on Rules and Procedures for the Settlement of Disputes defines a "dispute" as "disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations". 114 Furthermore, Protocol on Rules and Procedures for the Settlement of Disputes defines "Party to a dispute or proceedings"115 means "a State Party that is a party to the Agreement and a dispute or proceedings"116 The careful use of the word "State Parties" and not "Member States" even in the Protocol on Rules and Procedures for the Settlement of Disputes, clearly indicates that the AfCFTA DSM is targeted and open at State Parties (i.e. Members of the African Union that have ratified and acceded to the AfCFTA).

Also, Article 3(1) of the Protocol on Rules and Procedures for the Settlement of Disputes states:

> "This Protocol shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of this Agreement"

The only reading of Article 3(1) of the Protocol on Rules and Procedures for the Settlement of Disputes, in the light of the previously stated provisions, is that the DSM applies to disagreement between State Parties who are Parties to the Agreement. No other provisions presently exist within the AfCFTA infrastructure that allows Non-State Parties to either submit disputes to the AfCFTA DSB, even by their agreement.

This however raises a very important question: Since the AfCFTA will have far reaching implications within Africa, what forum has jurisdiction to resolve a dispute relating to the application of the AfCFTA

111 Under the terms of Article 35, paragraph 2, of the ICJ Statute, the Court is also open to other States not parties to its Statute. This Article provides that the relevant conditions shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

112 Article 1 of the Framework Agreement Establishing the AfCFTA

113 Article 1 of the Framework Agreement Establishing the AfCFTA

114 Article 1 of Protocol on Rules and Procedures for the Settlement of Disputes

115 Article 1 of Protocol on Rules and Procedures for the Settlement of Disputes

116 Article 1 of Protocol on Rules and Procedures for the Settlement of Disputes

between a AU Member who has not signed the AfCFTA and a AfCFTA State Party? For practical reasons, I think four (4) dispute settlement paths exist to resolving a dispute of that nature between a AU

Member who has not signed the AfCFTA and a AfCFTA State Party:

1. AfCFTA State Parties affected by the dispute can request the establishment of a panel under the AfCFTA DSM to resolve the dispute, and at least provide some advisory guidance on the interpretations of issues arising from the disputes;
2. In the event that both the AU Member who has not signed the AfCFTA and a AfCFTA State Party are both Members of the World Trade Organisation, the dispute settlement may be requested at the WTO DSU. The challenge with this however is that the this may meet some political challenges, as African States may oppose an attempt to subject the interpretation of a Agreement drafted for the African continent to be subject to interpretation by an external court. Also, it may be tenuous for the WTO panel to even find jurisdiction in such a matter as there is no provision to confer such jurisdiction. Also, bringing such dispute to the WTO may be implied as conferring supremacy to the WTO DSU over the AfCFTA DSM instead of regarding them as parallel systems.
3. Another alternative is a use of the Court of Justice of the African Union. However, the challenge is with expertise given the peculiarity of trade law, which hitherto has not been the speciality of the court.
4. The third and most viable option is to opt for Arbitration between the two parties, as that respect the nuances of the situation, the right of the parties to submit to any dispute settlement of their choosing, without implying that the AfCFTA DSM is hierarchical under another dispute settlement system. Also, Arbitration can be resorted to without affecting any other obligation that a State may have under any other Agreements, as the parties can make all submissions to the arbitral panel, and the arbitrators can carefully navigate the issues in coming to a mutually agreed solution.

On the second question, on whether there is a nationality requirement for a person to be included in the Indicative List or roster of individuals to serve on AfCFTA DSB panels, reliance will simply be made to Article 10 of the Protocol on Rules and Procedures for the Settlement of Disputes. This is important for the purposes of determining whether non-Africans and even nationals of African States who are not State Parties to the AfCFTA can serve and be included in the indicative list or roster of individuals who are willing and able to serve as Panellists.

The Protocol on Rules and Procedures for the Settlement of Disputes states that each State Party to the AfCFTA may annually nominate two (2) individuals for inclusion in the roster, indicating their area (s) of expertise related to the Agreement and that the indicative list or roster of individuals shall be submitted for the Secretariat for consideration and approval by the DSB.117 No reference is made to nationality as a requirement for persons to be nominated by States. This is understandable given the nature of International law and international trade law, where nationals of different countries are retained by states to defend their interests in different international courts and tribunals without any requirement of nationality. In prominent dispute settlement cases globally - even at the World Trade Organisation (WTO), International Centre for the Settlement of Investment Disputes (ICSID), North American Free Trade Agreement (NAFTA) - countries have been known to nominate experts that are sympathetic to their positions and not simply their nationals. Furthermore, nationals of disputing State Parties are not expected to serve on Panels concerned with disputes the States Parties are involved.118 The only

117 Article 10(2) of Protocol on Rules and Procedures for the Settlement of Disputes
118 Article 10 (5) of Protocol on Rules and Procedures for the Settlement of Disputes

requirements for individuals to be nominated by State Parties for inclusion in the indicative list or roster of individuals are:

> *"Individuals listed on the roster shall:*
> *(a) have expertise or experience in law, international trade, other matters covered by the Agreement or the resolution of disputes arising under international trade Agreements;*
> *(b) be chosen strictly on the basis of objectivity, reliability and sound judgement;*
> *(c) be impartial, independent of, and not be affiliated to or take instructions from, any Party; and*
> *(d) comply with a code of conduct to be developed by the DSB and adopted by Council of Ministers."119*

It is expected that nationality would not be a requirement that would prevent nomination, provided the person is an expert. Of course, it would be an easier path to get your country to nominate you than to seek nomination from another state but asides from the politics of the nomination, there is no nationality requirement. This is also restated when one considers that the Protocol on Rules and Procedures for the Settlement of Disputes emphasises that panelist serve in individual capacity, not as government representatives, 120and that panellist shall not receive instructions or be influenced by State party in matter before them.121

On the third question of whether there is a nationality requirement for a person to serve as an arbitrators in AfCFTA disputes, reliance will primarily be made on Article 27 of the Protocol on Rules and Procedures for the Settlement of Disputes. Just like in the case of nomination to be included in the Indicative List or roster of individuals to serve on AfCFTA DSB panels, the treaty text may no reference to any nationality requirement. In fact, it gives flexibility to the parties to the dispute by stating that parties shall "agree on the procedures to be used in the arbitration proceedings".122 It is expected that in determining there procedures to be used in the arbitration proceedings and composition of the arbitration panel, the general rules guiding the forum of arbitration will be relied on. Hence, except for general politics relating to selection of arbitral panel members, such as States preferring persons who sympathise with their interest, no discernible nationality requirement has been stated in the text.

On the question of what procedures will apply to an arbitration proceedings under the AfCFTA, no guidance is provided in the treaty text on this as parties resorting to arbitration are expected to agree on the procedures to be used in the arbitration proceedings.123 The only discernible rules about Arbitration stated within the AfCFTA text are as follows:

1. All resolutions of matters in the arbitration proceeding, including arbitral awards, must be consistent with the AfCFTA.124
2. The State Parties that opt for arbitration must abide with the arbitration award.125
3. The arbitration award must be notified to the DSB for enforcement.126
4. State Parties that opt for arbitration cannot simultaneously refer the same matter to the DSB.127
5. The agreement by the parties to direct the matter to arbitration must be notified to the DSB.128

119 Article 10 (3) of Protocol on Rules and Procedures for the Settlement of Disputes
120 Article 10(10) of Protocol on Rules and Procedures for the Settlement of Disputes
121 Article 10(11) of Protocol on Rules and Procedures for the Settlement of Disputes
122 Article 27(1) of Protocol on Rules and Procedures for the Settlement of Disputes
123 Article 27(1) of Protocol on Rules and Procedures for the Settlement of Disputes
124 Article 4(4) of Protocol on Rules and Procedures for the Settlement of Disputes
125 Article 27(5) of Protocol on Rules and Procedures for the Settlement of Disputes
126 Article 27(5) of Protocol on Rules and Procedures for the Settlement of Disputes
127 Article 27(2) of Protocol on Rules and Procedures for the Settlement of Disputes
128 Article 27(3) of Protocol on Rules and Procedures for the Settlement of Disputes

6. Where a party to the dispute refuses to cooperate with the arbitration, the complaining State Party may refer the matter to the DSB for determination.129

It is general expectation that when State Parties select arbitration, the rules of procedure agreed for that arbitration or for that type of arbitration will apply to the arbitration proceedings to the extent that it does not conflict with AfCFTA text.

5.0 Conclusion:

The AfCFTA is the most recent effort by African States to create continental framework for the development and mobilisation of human and material resources in Africa. The dispute settlement mechanism under the AfCFTA mirrors the WTO DSU, however given that the WTO does not have the burden of a bifurcated regime between Members who subscribe to the DSU and members that do not, the AfCFTA has some slight difference in that AU Member States who are not parties to the AfCFTA are therefore under a different regime from the AfCFTA DSM. This paper attempts to situate this issues and other such related issues and offers an attempt at reflecting on the important place arbitration could play in the evolution of AfCFTA law given that it is entirely by party's election and hence can be resorted to on almost any issue.

129 Article 27(5) of Protocol on Rules and Procedures for the Settlement of Disputes

2. L'Accord de libre-échange continental africain (ZLECAf) et la région OHADA

Par Bachir Talfi Idrissa [130]

Introduction

Les Etats africains se sont lancés, une énième fois, dans la constitution d'un ensemble économique notamment, une zone de libre échange, à l'échelle du continent cette fois-ci.

L'accord établissant la zone de libre échange continental africain (ZLECAf) a été signé par 44 Etats membres de l'Union africaine lors du Sommet extraordinaire de l'Union africaine tenu le 21 mars 2018 à Kigali, au Rwanda. Pour son entrée en vigueur, 22 ratifications sont nécessaires. Ce chiffre n'est pas encore atteint.

Cependant, nous n'allons pas nous étaler plus sur cet aspect, cela ayant été déjà développé par le précédent paneliste.

Le but de la discussion ici, est de présenté l'Accord en regard de la région OHADA. Nous allons pour ce faire nous focaliser spécialement sur le règlement des différends dans le cadre de cet Accord.

Auparavant, nous présenterons succinctement l'OHADA, aussi bien dans son cadre institutionnel que dans son cadre géographique, afin de mieux situer les questions qui seront soulevées.

1.0 Cadre institutionnel de l'OHADA 1.1 Historique

L'OHADA est l'Organisation pour l'harmonisation en Afrique du droit des affaires. Le Traité instituant cette Organisation a été signé à Port-Louis (Ile Maurice), le 17 octobre 1993 et amendé lors du Sommet des Chefs d'Etat à Québec le 17 octobre 2008. L'O.H.A.D.A. a pour objectif de favoriser, au plan économique, le développement et l'intégration régionale ainsi que la sécurité juridique et judiciaire et en particulier de :

- doter les Etats parties d'un même droit des affaires simple, moderne et adapté à la situation de leurs économies,
- promouvoir l'arbitrage comme instrument de règlement des différends contractuels,
- concourir à la formation et assurer la spécialisation des magistrats et des auxiliaires de justice.

1.2 Institutions de l'OHADA

L'O.H.A.DA. est dotée des institutions suivantes :

- la conférence des chefs d'Etat et de gouvernement ;
- le Conseil des Ministres qui constitue l'organe normatif ;
- la Cour Commune de Justice et d'Arbitrage (CCJA), dont le siège est en Côte d'Ivoire (Abidjan) ;
- le Secrétariat Permanent installé au Cameroun (Yaoundé) ;
- l'Ecole Régionale Supérieure de la Magistrature, basée au Bénin (Porto-Novo), administrativement rattachée au Secrétariat Permanent.

[130] Professeur Agrégé des Facultés de Droit de l'Université Abdou Moumouni de Niamey, Membre du Comité de Médiation et d'Arbitrage du Centre de Médiation et d'Arbitrage de Niamey (Niger)

1.3 Instruments de l'OHADA

L'OHADA a choisi la voie de l'uniformisation, contrairement à ce qu'annonce le sigle de l'Organisation. En effet, harmonisation et uniformisation sont des techniques différentes. L'harmonisation est une opération consistant à mettre en accord des dispositions d'origine différente, plus spécialement à modifier des dispositions existantes afin de les mettre en cohérence entre elles ou avec une réforme nouvelle[131]. Quant à l'uniformisation, c'est, selon le Pr ISSA-SAYEGH, une méthode plus radicale de l'intégration juridique puisqu'elle consiste à effacer les différences entre les législations nationales en leur substituant un texte unique, rédigé en des termes identiques pour tous les Etats concernés[132].

C'est ainsi, que l'OHADA, pour atteindre ses objectifs d'uniformisation du droit des affaires, l'OHADA a adopté plusieurs Actes uniformes (une dizaine au total totalisant près de 2980 articles) ainsi que des règlements de procédure (de la CCJA et un règlement d'arbitrage).

De façon notable, et en relation avec nos propos dans le cadre de cette discussion, il faut noter que l'OHADA privilégie le règlement des différends du droit des affaires par la voie de l'arbitrage. Cette dernière matière a fait l'objet de l'adoption d'un nouvel Acte uniforme le 26 novembre 2017 en remplacement du premier Acte uniforme datant de 1999. Cette réforme s'est accompagnée, dans la foulée, de l'adoption d'un Acte uniforme sur la médiation et d'une réforme du règlement de procédure d'arbitrage.

2.0 Espace géographique de l'OHADA

A la date d'aujourd'hui, 17 Etats sont parties à l'O.H.A.DA. : Bénin, Burkina Faso, Cameroun, Centrafrique, Comores, Congo, Côte d'Ivoire, Gabon, Guinée, Guinée Bissau, Guinée Equatoriale, Mali, Niger, RDC, Sénégal, Tchad, Togo. L'Organisation est ouverte à tout Etat, membre ou non de l'Union Africaine (UA), qui voudrait y adhérer. Nombreux sont aujourd'hui les Etats africains qui manifestent un intérêt croissant pour le processus d'unification juridique et d'Etat de droit économique (Plusieurs Etats africains anglophones et du Maghreb dont le Maroc notamment). De plus, le Rayonnement de l'OHADA fait que certaines régions de l'Afrique, sans adhérer à l'Organisation, s'inspirent du droit de l'OHADA. Il en ainsi de Madagascar qui a révisé ses lois en matière de droit des affaires, sur le modèle des Actes uniformes de l'OHADA[133]. De même, dans les caraïbes, et en Amérique latine, le droit OHADA est source d'inspiration et est observé avec beaucoup d'intérêt[134], ce qui a notamment suscité la création de l'OHADAC. Tout récemment, c'est l'Union Européenne qui se lance dans le projet de l'adoption d'une uniformisation du droit européen des affaires par l'adoption d'un Code européen des affaires. Le dernier acte posé dans ce sens est le dépôt du Rapport d'information de deux députés français, MM. Sylvain Waserman et Christophe Naegelen, sur l'avenir de la Zone Euro[135], déposé par la Commission des Affaires étrangères ou encore la Conférence consacrée au projet de Code européen des affaires à l'occasion de la Journée de la Constitution sarroise 2018, tenue le 21 décembre 2018 à Sarrebrück[136][137].

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[131] ISSA-SAYEGH J., « Quelques aspects techniques de l'intégration juridique : l'exemple des actes uniformes de l'OHADA », *Revue de droit uniforme,* 1999-1, p. 5. Unidroit, Rome, ohadata D-02-11.

[132] ISSA-SAYEGH J., op. cit. loc. cit.

[133] Voir notamment PONSOT D., « Le droit de l'OHADA : une source d'inspiration pour les législateurs nationaux ? », communication présentée lors de la Conférence « Le droit des Affaires de l'OHADA, Instrument de promotion et de sécurisation des investissements en Afrique », organisée le 28 janvier 2010 à la Maison du Droit Vietnamo-Française à Hanoi, p. 6 qui annonçait déjà le processus de révision à Madagascar.

[134] PONSOT D., op ; cit., p. 3

[135] Rapport disponible au lien suivant : http://www.assemblee-nationale.fr/15/rap-info/i1453.asp

[136] Voir sur le site ohada.com : http://www.ohada.com/actualite/4585/l-espace-economique-franco-allemand-vers-uncode-europeen-des-affaires-declaration-de-sarrebruck-du-21-decembre-

[137] .html?utm_campaign=newsletters&utm_medium=email&utm_source=newsletter4585&utm_content=linkcomment#commentaires

3.0 Espace géographique de l'OHADA et zones de libre échange

3.1 Région OHADA et zones de libre échange

La zone géographique couverte par l'OHADA est constituée essentiellement par les Etats africains de la zone franc (Afrique de l'ouest et Afrique centrale). Or, il se trouve que ces différents Etats ont chacun, dans leurs zones géographiques respectives, des organisations d'intégration économique, qui ont également créé des zones de libre échange. Certes la zone Afrique de l'ouest est beaucoup plus en avance que la zone Afrique centrale dans l'intégration des économies, mais, il n'en demeure pas moins que même en zone Afrique de l'ouest des difficultés subsistent encore. Ainsi, on peut identifier dans la région de l'OHADA, au moins deux grande zones : Afrique de l'ouest et Afrique centrale. Et à l'intérieur de chacune de ces zones, l'intégration économique par des organisations sous régionales est encore à des balbutiements, car beaucoup reste encore à faire. Par exemple, pour ne parler que de la zone Afrique de l'ouest, on peut identifier l'UEMOA[138] (Union économique et monétaire ouest africaine) et la CEDEAO[139] (Communauté économique des Etats de l'Afrique de l'ouest qui comprend outre les Etats de l'UEMOA, les Etats anglophones et lusophones). Sur ces zones se superpose également la CENSAD (la Communauté Economique des Etats Sahélo-Sahariens qui regroupe le Bénin, le Burkina Faso, les Comores, la République centrafricaine, la Côte d'Ivoire, Djibouti, l'Égypte, l'Érythrée, la Gambie, la Guinée-Bissau, la Libye, le Mali, le Maroc, la Mauritanie, le Niger, le Nigeria, le Sénégal, la Sierra Leone, la Somalie, le Soudan, le Tchad, le Togo et la Tunisie). La CENSAD ne regroupe certes pas tous les Etats de l'OHADA, mais une bonne partie s'y trouve.

La zone OHADA regroupe donc les Etats de l'ouest et du centre africain. Et ces Etats, par contre, se retrouvent dans plusieurs zones de libre échange qui se superposent et qui se chevauchent parfois[140][141].

Et c'est un truisme de dire que le commerce international à l'intérieur de ces zones connait des difficultés, non pas en raison de la faiblesse de la réglementation, mais en raison de la faiblesse de l'effectivité des règles. Plusieurs barrières entravent le développement du commerce intra africain. Ces difficultés n'ont pas été résolues à l'intérieur de zones géographiques encore plus limitées, qu'une nouvelle zone, continentale cette fois-ci, est en création.

3.2 Région OHADA et règlements des litiges ZLECA

L'OHADA, pour sa part, a choisi de privilégier l'arbitrage comme mode de règlement des litiges en application des Actes uniformes. Mais l'arbitrage de l'OHADA, était de l'arbitrage national, même si quelques affaires ont concernés parfois des Etats. C'est à al faveur de la récente modification de l'Acte uniforme relatif au droit de l'arbitrage que l'arbitrage transnational ou arbitrage des investissements a été pris en compte dans l'Acte uniforme. Cependant, les dispositions de l'Acte uniforme consacrés à cet arbitrage sont insuffisantes et ne prennent pas en compte la complexité d'un tel arbitrage140. Autant dire donc, que c'est un nouveau champ de pratique pour l'OHADA141.

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[138] Le Traité de l'UEMOA (succédant à l'UMOA) a été signé le 10 janvier 1994 entre le : Bénin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Sénégal et Togo.

[139] Créée le 28 mai 1975 par le Traité de Lagos, regroupe le : Bénin, Burkina Faso, Cap-Vert, Côte d'Ivoire, Gambie, Ghana, Guinée, Guinée-Bissau, Liberia, Mali, Niger, Nigeria, Sénégal, Sierra Leone et Togo. Il faut signaler que le Maroc, après avoir fait son retour au sein de l'Union africaine après 32 ans d'absence, a formulé une demande d'adhésion à la CÉDÉAO le 27 février 2017. Initialement prévue pour décembre 2017, la décision finale de la CÉDÉAO était attendue pour 2018. Elle n'est toujours pas intervenue. Quant à la Mauritanie, ce pays avait quitté la CÉDÉAO en 2000. Néanmoins, il a signé un accord d'association avec l'organisation le 09 août 2017 : à travers cette alliance, la Mauritanie devient donc officiellement membre associé de l'organisation.

[140] Voir DIEYE C. T., « L'Afrique et le chevauchement des accords régionaux », *Revue Interventions économiques* [En ligne],

[141] | 2016, mis en ligne le 29 juin 2016, consulté le 10 janvier 2019. URL : http://interventionseconomiques.revues.org/2815

[140] Voir notamment TALFI B. « Nouveaux champs de pratique et droit OHADA : l'arbitrage des investissements », *Lexbase édition Ohada* Edition n°15 du 25/10/2018 et J.-B. MOMNOUGUI, « Arbitrage des investissements OHADA : évolution ou révolution ? », *Actualités du Droit, Wolters Kluwer*, 2 juillet 2018, en ligne sur : https://www.actualitesdudroit.fr/browse/afrique/droits-nationaux/14615/arbitrage-des-investissements-ohada-evolutionou-revolution, consulté le 5 juillet 2018 [141] Voir TALFI B. op. cit.

Or, à la lecture des dispositions du Protocole sur les règles et procédures en matière de règlement des différends de l'Accord ZLECA, l'arbitrage est bien prévu comme option pour le règlements des litiges pouvant s'élever. Cependant, les parties à cet arbitrage sont exclusivement les Etats parties à l'Accord. Ce sera donc un arbitrage entre parties étatiques. L'arbitrage OHADA est il possible entre Etats ? L'arbitrage est possible entre particuliers (personnes physiques et personnes morales) et entre particuliers et Etats. Par contre, entre Etats, le cas ne s'était pas encore posé.

Mais dans tous les cas, le règlement des différends prévus par le Protocole sur les règles et procédures en matière de règlement des différends de la ZLECA, s'ajoutera aux divers autres instruments déjà à la disposition des Etats parties. Ce nouvel instrument n'influera pas sur l'arbitrage OHADA qui, au contraire, s'agissant de l'arbitrage des investissements en est encore à ses balbutiements et prendra du temps avant de s'installer définitivement dans le paysage des règlements de différends. De plus, le règlement des différends dans le cadre de la ZLECA mettra également du temps avant de s'imposer.

Il appartient donc aux acteurs, aussi bien de l'OHADA que de la ZLECA, d'œuvrer afin de trouver le point d'équilibre de chacun des deux mécanismes et pouvoir s'imposer face aux différents mécanismes déjà existants.

3. A Comments on Draft Paper: Panel on African Continental Free Trade Area

By: Gerald Afadani

This paper fully explores the breadth and depth of the topic with a clearly traced historical overview. The distinction between State Parties and Member States is particularly elucidating. However, below are some suggestions to further enrich the paper.

1.0 Background:

I think the paper should also highlight the data on the volume of intra-African trade being the rationale for the BIAT programme in the context of the CFTA. In fact, intra-continental trade was/is the lowest in Africa (below 12%) by comparison to intra-Europe (72%), intra-Asia (52%) intra-North America (48%), intra-South and Central America (26%). Thus, the objective of BIAT is to increase intra-African trade to 25% by 2022 and the CFTA is expected to be an enabler.

Equally, a status report on the ratification will be helpful to understand the momentum and arouse optimism in the readers or audience. According to a tweet by the Commissioner for Trade and Industry (Ambassador Albert Muchanga), 14 countries have ratified and only eight more ratifications are needed for the AfCFTA to enter its operational phase.[142]

2.0 African Continental Free Trade Area:

In terms of progressive liberalisation, the paper discloses at page 3 that, 10% of tariff lines (exclusive and sensitive list) are not subject to liberalisation. This percentage might come across as absolute – implying that all State Parties shall automatically make 90% concessions once the AfCFTA enters into force whereas, LDCs like Sudan, Djibouti, Madagascar may be subjected to lesser liberalisation ambitions in accordance with the Special and Differential Treatment clause.[143]

The relevant provisions on anti-dumping and countervailing measures and global safeguard measures are **Articles 17** and **18** respectively, not *Article 16 and 17 as indicated in footnotes 12, 13 and 14.* It might be necessary to also mention **preferential safeguards** (as an applicable remedy) notably in cases where trading practices threaten or cause serious harm to **domestic industries.**[144]

4.1 Emerging Concerns: Arbitration and DSM under the AfCFTA

In my opinion, the third and most viable option needs clarification: is it about **the right of parties** (of the AfCFTA presumably) and/or **the right of members** (of the AU) to submit to any dispute settlement [mechanism] of their choosing? If the latter is the case, is 'arbitration without privity' (especially for a trade agreement) workable in the African context? Will this not contradict the reciprocity principle enshrined in the Agreement establishing the AfCFTA?

In the paragraph before the conclusion at page 13, the paper notes: '*the general expectation is that when State Parties select an arbitration centre…'* This implies, Article 27 (1) on the Protocol on DSM is construed to mean recourse to an independent arbitral tribunal whereas, the WTO experience suggests the contrary. In the E.C case cited in *footnote 8*, the arbitrators included one member of the panel that

[142] See tweet of December 20, 2018: https://twitter.com/AmbMuchanga/status/1075680039172231169 There is a discrepancy between this number and the official ratification status list with a count of seven ratifications. A likely explanation is the process interval between ratification at the national level and the deposit of instrument of ratification at the Office of the Legal Counsel as the Depository of OUA/AU Treaties.

[143] Article 6 of the Protocol on Trade in Goods).

[144] Article 19 of the Protocol on Trade in Goods as read with Article 4 of Annex 9 on Trade Remedies.

had issued the report and two others appointed by the [WTO] Director-General because the other two original panellists were unavailable.[145] Furthermore, all other arbitration especially under Article 21.3 (c) of the WTO DSU 'has been conducted by an Appellate Body Member acting in his individual capacity'.[146] It is therefore my understanding that, like the WTO DSU, except otherwise provided for, arbitration will be done under the auspices of the DSM/Secretariat of the AfCFTA with arbitrators drawn from the indicative lists of panellists.

This paper reveals some gaps and raise very pertinent issues in the current Agreement establishing the AfCFTA and the Protocol on the DSM such as the ambiguity of Article 27 of the Protocol on DSM. If my reasoning in the preceding paragraph is right but divergent from the one expressed in this paper, it will be a valuable addition to have a section in the paper on recommendations/policy implications. In light of the above, I will suggest the inclusion of a clause in the AfCFTA crafted as follows:

> *Any dispute between State Parties as to the interpretation or application of this Agreement not satisfactorily settled through consultations, good offices, conciliation, and mediation, may be referred for decision to either:*
>
> *(i) an arbitral tribunal constituted under the Court of Justice of the African Union in accordance with Article 19 (e) of the Protocol of the Court of Justice of the African Union (CJAU); or*
> *(ii) an independent arbitral tribunal; or*
> *(iii) the African Court of Justice and Human Rights sitting as a court […]*

[145] See paragraph 1.3, page 2 of Arbitration Decision WT/DS160/ARB25/1 accessible at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=WT/DS160/ARB25/1&Language=English&Context=ScriptedSearches&languageUIChanged=true [146] See https://www.wto.org/english/tratop_e/dispu_e/arbitrations_e.htm

Panel 5

African States, Foreign and Domestic Investments

African States, Foreign and Domestic Investments

This panel will discuss the experience of African states and their push to attract foreign investments. It will discuss the role of domestic investors and how they can be better incentivized and protected; and finally discuss what will attract foreign investors to African States.

Chair:

Ambassador Sani Mohammed

Ambassador Sani, Rector, African Institute of International Law, Arusha, Tanzania, is a former Nigerian Federal Permanent Secretary and the Nigerian Ambassador to Egypt, Eritrea and the Palestinian Authority and earlier Nigerian Consul General, Johannesburg, South Africa. He holds an LLB, LLM and a Barrister of Law (BL) Certificate and attended the Senior Executive Course of the Nigerian Institute for Policy and Strategic Studies. Ambassador Mohammed served in various Nigerian Missions abroad; Director African Union / NEPAD Division in the Ministry of Foreign Affairs; Legal Adviser of the UN Observer Mission in Iraq and Kuwait; Civil Affairs Officer with the UN Mission in Bosnia and State Counsel, Ministry of Justice, Kano State, Nigeria. He authored several conference papers, articles and scholarly publications including a Commentary on the UNESCO Governing Board Rules of Procedure and a Chapter on Pan African Parliament in the AU Manual. He is a member of the Nigerian Bar Association and a Solicitor and Advocate of the Supreme Court of Nigeria. Ambassador Mohammed founded and was first Executive Director, International Law Institute, Nigeria and Chairman Board of Trustee, Foundation for the Advancement of Ethics and Values in Nigeria. Ambassador Mohammed was at one time the Chairman the UN Commission for International Trade Law and the Chairman of the UN Decade for International Law Committee.

Speakers:

Mr. Bobby Banson

Bobby Banson has been described as a very dynamic, focused and result oriented legal practitioner. He was educated at the Ghana School of Law in Accra for his BL, where he graduated as the best student in the Law of Taxation. He has attended courses at the Harvard University. As an active member of CIArb, Mr. Banson has spoken at various conferences organized by CIArb and AILA. He has acted as Counsel in both Domestic and International Arbitration matters. He is the Founding Partner of Robert Smith & Adelaide Law, a boutique law firm located Accra, Ghana. He also has several legal articles published in his name.

Dr. Achille Ngwanza

on the experience of the OHADA region

Ms. Xander Meise

Alexandra (Xander) A.K. Meise represents and advises sovereign governments, state-owned enterprises, and private entities in the prevention and resolution of international private and public law disputes. This work has included representing parties before U.S. federal courts, the International Court of Justice, and international investment and commercial arbitration panels, as well as in negotiations between sovereign States and/or with international organizations, NGOs, and private entities. In addition, she has advised governments and multinational corporations on best practices for adhering to international human rights norms and social responsibility standards and has counseled governments on investment and sustainable development-related legal reforms.

Articles:

4. The African Continental Free Trade Agreement: Much Ado About Nothing?

By Bobby Banson Esq. FCIArb

1. Introduction

In recent times, the economies of African States have shown promise and growth particularly in SubSaharan Africa. For the economies in Sub-Saharan Africa, the World Bank predicts a growth of 3.1% for the year 2018 from the 2.6% growth experienced in 2017. [146] This is largely attributable to an increment in investment, both foreign and domestic. The relationship between the two is thus important to the economic development of the continent as a whole. Attempts to increase investments in the region is now complemented by the creation of the African Continental Free Trade Agreement (ACFTA); an Agreement with the objective of boosting intra-African trade development across the continent and regional integration.

The objective of this paper among others is to discuss the experience of African States in respect of foreign investments, measures taken to increase said investments and the implications of the African Continental Free Trade Agreement on the economy of the continent.

2. Increasing Foreign Investment in Africa, Experiences and Measures Taken

2.1. What is Foreign Investment

The term "Foreign Investment" most often loosely refers to Foreign Direct Investment (FDI). The Organisation for Economic Co-operation and Development (OECD) defines FDI as the category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy.[147] The term FDI is also defined in the fourth edition of the Balance of Payments Manual (BPM5) by the International Monetary Fund (IMF) as a category of international investment made by a resident entity in one economy (direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (direct investment enterprise).[148] To establish a direct investment link between the investor and the enterprise, the investor must own at least 10% of the ordinary shares or voting power of the enterprise.[149]

2.2. History of Foreign Investments in Africa

Understandably Africa has had quite the history with FDI. Much skepticism has been displayed by foreign investors in regards to Africa. This skepticism is rooted in the history, ideology, and the politics of the post-independence period of Africa.

As history has it, the arrival of Europeans in Africa in the 15th century for the purposes of trade is considered a pre-cursor to slavery and colonialism. Due to this, the immediate post-colonial era showed high levels of distrust in foreign investors by African States; this resulted in a poor reception of foreign investors. In light of the distrust in foreign investors, FDI inflow into the region was at an alltime low.

Additionally, the post-independence era for the ideology of majority of African States leaned towards socialism, an ideological prejudice against Western capital; complemented by the concept of

[146] http://www.worldbank.org/en/publication/global-economic-prospects

[147] Benchmark Definition of Foreign Direct Investment 2008 (BD4), 2008 pg 234

[148] https://www.imf.org/external/np/sta/di/glossary.pdf

[149] Benchmark Definition of Foreign Direct Investment 2008 (BD4), 2008 pg 234

neoimperialism. The theory of neo-imperialism stated that support or capital from Western states could be classified as a means of control or influence over African States since foreign investment comes with its own terms and conditions. Also, the high incidence of nationalism and expropriation of foreign companies with little or no compensation at all resulted in poor investor confidence in Africa.

The continent also suffered a high incidence of political instability, poor human infrastructure and limited technology. For these reasons and more, Africa until recently was a poor choice for FDI. However, the narrative is changing as African States have begun to take active measures to attract FDI into the continent.

2.3.Policy & Economic Reforms

2.3.1. Anti-Nationalisation Policies

In order to encourage FDI, many African States have undertaken economic reforms through the implementation of policies aimed at reducing the risk of nationalisation. In "**The International Law on Foreign Investment**" by M. Somarajah, the author notes that the foreign investor's greatest threat is the expropriation of investments by the host country.[150]

Nationalisation could be a great tool and opportunity for economic growth in Africa. However, policies and laws on nationalisation are often so poorly drafted and implemented that it does more harm than good. One common policy that cuts across is the privatisation of State-owned enterprises. In a research paper conducted by Arijit Mukherjee and Kullapat Suetrong on the correlation between privatisation and FDI, evidence is led to show that developing countries and transition economies are increasingly privatising their public firms and at the same time experiencing rapid growth of inward foreign direct investment.[151] The authors of the paper state in the abstract, "…privatisation increases the incentive for FDI….". In 1992 the Privatisation Agency (Technical Committee on Privatisation and Commercialisation, TCPC) of Nigeria scheduled the sale of government shares in eight commercial banks and six merchant banks in which the Federal Government had an ownership stake.[152] Similarly in 2008, Ghana privatised the Ghana Telecommunication Company, partnering with Vodafone Group Plc, a global telecommunications company incorporated and first established in the United Kingdom.[153]

2.3.2. Investment Treaty Agreements and Double Taxation Agreements

Another measure taken by African countries to attract FDI is the establishment of Double Taxation Treaties (DTTs) as well as Bilateral Treaties (BITs) between the African States and other countries. As at 2014, there were approximately over 854 BITs signed across and within Africa.[154] The record shows that in 2014 over 400 DTTs had been signed by African States.[155] The double taxation agreements aim to attract investors by eliminating the possibility of taxation by both the host country and the country the investor belongs to. An illustration of how this arrangement works may be seen under the Income Revenue Act of Ghana 2015, Act 896 which inter alia allows residents to claim foreign tax credits for income tax paid by that person in another country to the extent which that income tax is paid.[156] The

[150] "The International Law on Foreign Investment" by M. Somarajah, pg 99

[151] "Privatisation, Strategic Foreign Direct Investment And The Host Country Welfare"

[152] "Bank Privatization and Performance, Empirical Evidence from Nigeria" Thorsten Beck, Robert Cull and Afeikhena Jerome

[153] Reported on https://tech.africa/ghana-telecom-and-onetouch-are-now-vodafone-ghana/
See also http://www.vodafone.com/content/index/media/vodafone-group-releases/2008/acquisition_of_a_70.html

[154] Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration by the Economic Commission for Africa page 4
The intra-African BITs were approximately 157 intra-African while BITs with countries beyond Africa were approximately 696

[155] Supra.

[156] Section 112, Income Tax Act 2015, Act 896 Ghana

Act also exempts the income of residents employed by foreign companies from tax. Another example is the double taxation treaty between Seychelles and Cyprus which exempts dividends[157], business profits[158] and royalties[159] derived from Seychelles by offshore entities from tax in the absence of the existence of a permanent establishment in Seychelles.

2.3.3. Arbitration Regimes for Settlement of Investment Disputes

Most foreign investors have little or no confidence in the African system of Justice. This is largely attributable to the high levels of bribery and corruption across Africa and also due to the slow pace at which matters brought before African courts take. In the Ghanaian case of AGYEMANG (SUBSTITUTED BY) BANAHENE & OTHERS V. ANANE [2013-2014] 1 SGCLR 241, it took forty years for judgment to be delivered in the case prompting the Chief Justice of Ghana at that time to remark that "Regrettably, it has taken forty long years, a whole generation, for this case to finally find its way into this court; the court of last appeal. We hope court business shall always be managed in ways that will not occasion a repeat of this parody of justice…"

Due to this lack of confidence in the African Judicial system, most foreign investors prefer a more stable and neutral forum for the resolution of disputes, a forum guaranteed under the ICSID and other international forums. African States have also resorted to the adoption of international arbitration rules established by the United Nations Commission on International Trade (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID) as part of taking measures to encourage foreign investments in the region.

The Nigerian Investment Promotion Commission (NIPC) Act N0. 16 of 1995, provides inter alia that where a dispute exists unresolved through amicable means between a foreign investor and the State, recourse to arbitration can take place either via the settlement mechanisms of the bilateral or multilateral investment protection agreement of which they are parties, or via other national or international dispute settlement mechanisms, as mutually agreed and in which case the ICSID may be a suitable forum.

In a similar manner, Zambia ratified the ICSID rules under the Investment Disputes Convention Act, 1970 (Act No. 18 of 1970). The Act among others, gives recognition to awards given by the ICSID.

2.3.4. Intellectual Property Protection

Last but not least is the adoption of regulations and policies that guarantee intellectual protection of products. One of the ills of Africa lies in the high presence of counterfeit products on the markets. Intellectual property protection is a necessary concern for most foreign investors. The more lax a country's intellectual property laws, the less likely the investor's interest in the host country. The stronger a country's intellectual property laws on the other hand, the lower presence of imitation products on the market; a highly desirable trait for countries seeking to strengthen FDI.

Intellectual property rights by nature are territorial and thus differ across national boundaries. As such, a foreign investor is more than likely to invest in a country which has a protection regime similar to the regime of his country of origin, in which case, the host country may need to step up its policies on intellectual property rights to attract FDI. Currently over 40 African States are signatories to the

[157] Article 10, Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Seychelles for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.

[158] Article 7, Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Seychelles for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital

[159] Article 12, Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Seychelles for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.

TradeRelated Aspects of Intellectual Property Right (TRIPS), by reason of their membership to the World Trade Organisation (WTO) which guarantees a minimum level of protection for all intellectual property and related rights.[160]

Results from a survey conducted by Schneider Electric indicated that the counterfeiting of electrical products occurred in 40% to 80% of African markets.[161] Tracy Garner, the Anti-Counterfeiting Global Manager at Schneider stated that, a bulk of the locally manufactured counterfeits emerged from Tanzania, Nigeria and the Ivory Coast.

According to the "Ownership-Location-Internalisation Theory" (OLI) proposed by John H. Duming, any foreign firm must first consider if there exists a location advantage in setting up camp in the host country.[162]

3. Problems with Existing Measures to Attract Foreign Investment

Despite measures taken by African States to increase the influx of FDI in the region, the region is rife with challenges that threaten the success of these measures.

3.1. Bureaucracy

Firstly, foreign investors have to deal with the high levels of bureaucracy that exists in the public sector in order to benefit from the policies aforementioned. Foreign investors have to wade through a sea of red tape to acquire the necessary certification and documentation to set up camp in the host country. At each stage, the process is not only long but tiring, this for many potential investors is a problem which is better avoided by investing in another country with low levels of bureaucracy and effective administration. The processes are further hindered by the dearth in adequate personnel and effective work ethics displayed by Africans in the public sector.

3.2. Bribery & Corruption

Secondly, due to the high levels of corruption and bribery in Africa, some of the aforementioned measures to attract FDI have become almost ineffective. Corruption is defined by Transparency International, an anti-corruption organisation, as "the abuse of entrusted power for private gain".[163] According to the data recorded by Transparency International, the worst performing region for 2017 was Sub-Saharan Africa with an average score of 32.[164] The phenomenon reduces investor confidence in the host country and is directly linked to low foreign investment levels. As corruption increases, economic development decreases. In a live Q & A session, the World Bank noted that it sees corruption as one of the single largest obstacles to economic and social development.[165] Before the necessary documentation is acquired, money must change hands, and at almost every stage of the process; this affects the pockets of would-be investors and discourages FDI.

[160] https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

[161] http://www.apo-mail.org/150322.pdf

[162] OXFORD BULL. ECON. & STAT. 269, 275 (1979) [hereinafter Dunning, Eclectic Theory]; John H. Dunning, Explaining the International Direct Investment Position of Countries: Towards a Dynamic or Developmental Approach, 117 REV. WORLD ECON. 30, 30-33 (1981) [hereinafter Dunning, Developmental Approach].

[163] https://www.transparency.org/glossary/term/corruption

[164] https://www.transparency.org/news/feature/corruption_perceptions_index_2017

[165] World Bank Live, Q&A: AntiCorruption", 2012

3.3. Inadequate Infrastructure

Last but not least, the scarcity of adequate infrastructure in the continent. The absence of adequate supporting infrastructure such as transport, round-the-clock power supply and skilled labour, discourage foreign investment because it increases the cost of investment. According to the State of Electricity Access Report (SEAR) 2017, conducted by World Bank over 50% of the world's electricity deficit is concentrated in Sub-Saharan Africa. Poor infrastructure reduces productivity hence discouraging the influx of FDI into the region. Asiedu (2002)[166] and Morrisset (2000)[167] stipulate that there is a direct relationship between good infrastructure and FDI inflows. They theorise that good infrastructure has a positive impact on the inflow of FDI in the region.

4. The Implementation of the African Continental Free Trade Area Agreement (Acftaa); Existing Multilateral Treaties and Domestic Laws

On 21st March 2018, an Agreement to establish a free trade area in Africa was signed during the 10th Ordinary Session of African Union Heads of State summit in hopes that not only would intra-African trade increase but also that regional integration would be deepened. According to the IntraContinental trade statistics provided by the United Nations, in 2010, intra-continental trade between African States made up a measly 10.2% of total trade.[168] The figure increased to 18% by 2014, a performance still deemed unsatisfactory especially when contrasted with regional trade in other continents. Trade between European states alone accounted for 69% in 2014.[169] The Agreement titled the African Free Trade Area Agreement (ACFTAA) has been described as the world's biggest trade agreement since the World Trade Organisation was formed in 1995. [170] The current number of signatories to the Agreement is 49, with South Africa, Sierra Leone, Namibia, Lesotho and Burundi as the latest additions. [171] The UN Economic Commission for Africa (UNECA) has estimated the agreement's implementation could increase intra-African trade by 52 percent by 2022, compared with the low trade levels in 2010 as reported by Aljazeera.[172] The ACFTAA comes into force after twentytwo countries have ratified the Agreement.[173]

4.1. Framework of Agreement

The Agreement at present comprises an overall framework agreement, protocols, annexes and appendices inclusive.[174] So far, the areas agreed on under the ACFTAA are in respect of objectives and principles of the Agreement, institutions involved and a work-plan for the completion of the negotiation process which is divided into Phase 1 and Phase 2.[175]

Phase 1 is currently in play, the Framework Agreement presently consists of a protocol on trade in goods, a protocol on trade in services, and a protocol on dispute settlement. Once the Phase 1

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[166] Asiedu, E. (2002). Aggressive trade reform and infrastructure development: a solution to Africa's foreign direct investment woes. Mimeo, Department of Economics, University of Kansas

[167] Morrisset, P. (2000). Foreign direct investment to Africa: policies also matter. Transnational Corporation 9, 107-25

[168] http://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf

[169] https://www.wto.org/english/res_e/statis_e/world_region_export_14_e.pdf
See also https://www.weforum.org/agenda/2016/04/africa-needs-to-trade-with-itself/

[170] Supra

[171] http://www.theeastafrican.co.ke/business/African-free-trade-area-agreement-signing/2560-4644458-nutmsnz/index.html

[172] https://www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta-180317191954318.html

[173] Article 23, Agreement Establishing the African Continental Free Trade Agreement

[174] Article 8(2) of the AfCFTA Agreement: "*The Protocols on Trade in Goods, Trade in services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices shall form part of the single undertaking, subject to entry into force*"

[175] https://www.tralac.org/news/article/13349-tradescape-the-afcfta-agreement-is-set-to-enter-into-force-by-early-2019.html

negotiations are complete, Phase 2 would begin the negotiations on the protocols on investment, intellectual property rights, and competition policies.[176]

The Protocol on Trade in Goods is divided into 10 parts. Part I deals with definitions, the objectives of the protocol and the scope of the protocol. The specific objectives of the Protocol are as follows: a) Progressive elimination of tariffs;

b) Progressive elimination of non-tariff barriers;
c) Enhanced efficiency of customs procedures, trade facilitation and transit;
d) Enhanced cooperation in the areas of technical barriers to trade and sanitary and phytosanitary measures;
e) Development and promotion of regional and continental value chains; and
f) Enhanced socio-economic development, diversification and industrialisation across Africa;

Part II adopts measures against discrimination among African States; under Article 4 of the Protocol, all States must treat their trading partners equally under the most favoured nation principle. Part II also dictates that imported goods be given the same treatment as domestic goods and grants States the authority to make special concessions and arrangements based on the varying levels of development across the continent.[177] Part III deals with Trade liberalisation; Article 9 of the Protocol prohibits Member States from imposing quantitative restrictions on imports from or exports to other State Parties except as otherwise provided for in the Protocol, its Annexes, Article XI of GATT (General Agreement on Tariffs and Trade) 1994 and other relevant WTO Agreements. Member States under the Protocol are also afforded the opportunity to take steps and measures that would protect infant industries, such steps and measures must however be implemented on a non-discriminatory basis.

Parts IV, V and VI deal with customs cooperation, trade facilitation and transit; trade remedies and Products standards and regulations. The other areas addressed under the protocol are complementary policies, Exceptions, Technical Assistance, Capacity Building and cooperation and Institutional provisions relating to dispute settlement and implementation of the Agreement.

The key features under the Protocols on Trade in Services are, transparency of service regulations, mutual recognition of standards, licensing and certification of services suppliers, progressive liberalisation of services sectors, favourable treatment of service suppliers, and general and security exceptions.178 The Protocol is divided into 6 Parts, Part I is in respect of definitions, Part II in respect of the scope of the Protocol under the ACFTAA while Part III touches on the objectives of the Protocol. The objectives under the Protocol include:

a. To enhance competitiveness of services through: economies of scale, reduced business costs, enhanced continental market access, and an improved allocation of resources including the development of trade-related infrastructure
b. To foster domestic and foreign investment;
c. To progressively liberalise trade in services across the African continent on the basis of equity, balance and mutual benefit, by eliminating barriers to trade in services; and
d. To ensure consistency and complementarity between liberalisation of trade in services and the various Annexes in specific services sectors.

Part IV of the Protocol sets out the obligations and disciplines of Member states and addresses inter alia transparency, non-discrimination among member state parties, confidential information, monopolies and anti-competitive policies. Article 6 of the Protocol grants Member States the right to refuse to disclose confidential information and data which could impede law enforcement, be against public interest, or prejudice the legitimate commercial interests of particular enterprises-public and

[176] Article 7, Agreement Establishing the African Continental Free Trade Area

[177] Article 5 & 6, Agreement Establishing the African Continental Free Trade Area

[178] https://au.int/sites/default/files/documents/33984-doc-qa_cfta_en_rev15march.pdf

private. Under Part II, Member States may also regulate services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations under the Protocol. Member States may also subsidise localised services in pursuance of air development policies. Parts V and VI make provisions on progressive liberalisation of services and institutional policies respectively.

The Protocol on Dispute Settlement unlike the first two protocols is not divided into parts, and consists of 31 Articles. The objective of the Protocol as stipulated, is to ensure the dispute settlement process is transparent, accountable, fair, predictable and consistent with the provisions of the ACFTAA. Under the Protocol, where a Member party has already invoked the rules and procedures under it with regards to a specific matter, the said member State is prohibited from invoking the jurisdiction of another forum for resolution of the matter.179 The Protocol further stipulates that in the event of a dispute, recourse must first be made to consultations between the disputing parties, alternatively the parties may decide on arbitration as an initial response to resolving the matter. If the parties are unable to reach an amicable resolution, then any party may, after notifying the other parties to the dispute, refer the issue to the Dispute Settlement Board (DSB) and request for the establishment of a Dispute Settlement Panel for purposes of settling the dispute. Where parties are not satisfied with the decision of the panel, they may appeal to an Appellate Body set up by the DSB. The decision of the DSB is final and binding on member parties.

4.2. Objectives of ACFTAA

Some of the objectives of the ACFTAA as stipulated in the Agreement are:180

i. To create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063;
ii. To create a liberalised market for goods and services through successive rounds of negotiations;
iii. To contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;
iv. And to lay the foundation for the establishment of a Continental Customs Union at a later stage.

4.3. Benefits of ACFTAA

Some of the benefits the ACFTAA Agreement promises to signatories include:

i. Sustainable growth: Under the ACFTA, industrial exports between African States are expected to rise. The Agreement seeks to promote diversification, encouraging a shift from the export of extractive products like gold and oil to industrial products largely since extractive products are exhaustible in nature. An additional reason for this shift lies in the volatility of extractive products leading to a less stable economic and fiscal environment; thus the need for the increase in the industrial market which is guaranteed under the ACFTA.
ii. Creation of employment avenues: If the policies under the ACFTA are realised, the shift to an industrial based economy as mentioned earlier leads to a more labour-intensive regime; hence, the creation jobs for the unemployed youth of Africa. Furthermore, through liberalisation of services under the ACFTA, service suppliers can look forward to a larger market, as their market would transcend local boundaries. This in turn would lead to the need to employ more workers both from the investors's country and in the host country, thus creating opportunities for the unemployed populace.

[179] Article 3 , Agreement Establishing the African Continental Free Trade Area
[180] Article 3, Agreement Establishing the African Continental Free Trade Area

iii. Lower Tariffs for intra-African Trade: The average tariffs on intra-African trade are 6.1% presumably due to a preference for inter-regional trade as compared to intra-regional trade. The ACFTA proposes to eliminate tariffs on intra-African trade to boost intra-regional trade in Africa. This would ensure international comity and regional integration among African States. In the words of Jean-Louis Billon[181], "There (are) too many barriers within the African continent and the only way for us to get to real development in the future is to boost trade and industry relations". [182] The Economic Commission for Africa (ECA) estimates that ACFTA has the potential to raise intra-African trade by 52.3 per cent by eliminating import duties and reducing non-tariff barriers.

4.4. Expected Difficulties in Implementation

The Agreement is bound to face a fair amount of difficulties in implementation, some of which are discussed below:

i. Short term losses: A research undertaken by UNCTAD shows that the elimination of all tariffs between African countries would take an annual $4.1 billion out of the coffers of trading States, but would create an overall annual welfare gain of $16.1 billion in the long run.[183] The short term losses may discourage African States from formulating favourable inter-regional trade policies to make up for the funds and resources lost, particularly in States that have a less diversified and flexible economy. Additionally, due to the short term losses, policies and programs formulated to implement the Agreement may be met with opposition from citizens and even more so if there is a dearth in the education of the masses on the African Free Trade Agreement.

ii. Uneven distribution of wealth: A perception held by some scholars like Sylvester Bagooroo[184] and Mukhisa Kituyi[185], is that the Agreement places more focus on the elimination and reduction of tariffs without much consideration for the varying production capabilities of countries in the continent. In light of this, it is highly possible that while implementation of the Agreement may cause significant economic growth in countries with a high productive capacity, countries on the other side of the coin may suffer substantial fiscal revenue losses and threats to local industries. In a statement by Muhammed Buhari on why Nigeria declined to sign the Agreement as mentioned earlier, the underlying fear was that the country could be turned into a dumping ground contrary to the purpose and spirit of the Agreement. Advanced African countries have an edge as a result of their more strongly developed manufacturing capabilities; granting them the license to sell their goods and services to the continent's less developed countries could undercut industrial development in such countries while enriching the former.

iii. Language barriers: The continent is highly linguistically diverse, there are approximately over 2,000 languages in the continent alone, though most nations identify as either Anglophone, Francophone, Lusophone or Arabic for convenience[186]. Northern Africa alone has about 200 recognised languages. Multilingualism has been described by Zeleza as the bane of Africa.[187] The phenomena affects the ease of communication to enhance investments and facilitate the implementation of the Agreement. One major feature of the ACFTAA is the fact that Member

[181] Vice President of AfroChampions Ltd

[182] https://edition.cnn.com/2018/03/22/africa/african-trade-agreement-world/index.html

[183] http://unctad.org/en/PublicationsLibrary/ser-rp-2017d15_en.pdf

[184] Sylvester Bagooro is a programme officer at Third World Network Africa

[185] UNCTAD Secretary-General

[186] https://www.nationsonline.org/oneworld/african_languages.htm

[187] Zeleza, P.T. 2006. *The inventions of African Identities and Languages: The Discursive and Developmental Implications. Selected Proceedings of the 36th Conference on African Linguistics, pp. 14–26. Somerville, MA: Cascadilla Proceedings Project.*

states have to negotiate on the terms of the Protocols and accompanying Annexes. With this in mind, a communication barrier due to the multilingual nature of the continent could not only lengthen the process but also result in disputes arising due to miscommunication; undermining effective implementation of the Agreement.

4.5. Resistance to Agreement

The Agreement still meets opposition from some African states, the lead of which is Nigeria. Nigeria's president Muhammadu Buhari justified the country's refusal to sign the agreement, stating that the agreement would undermine local manufacturers and entrepreneurs. He was quoted as saying, "We will not agree to anything that will undermine local manufacturers and entrepreneurs, or that may lead to Nigeria becoming a dumping ground for finished goods".[188] This decision was reached as Nigeria conducted various consultations with local trade associations, think tanks and trade expert groups.[189]

5. Relationship between Acftaa and Other Investment Regimes

The ACFTAA is meant to be complimentary to existing bilateral or multilateral treaties and the domestic laws of Member States on Investments. According to the preamble to the ACFTAA, the Agreement recognises the existing rights of Member States under other agreements to which they belong. These rights and duties, including those signed under the World Trade Organisation (WTO) under Article 19 remain protected, although they may be at variance with the provisions of ACFTAA.[190]

However, the general rule is that where there are conflicts between the ACFTAA and other existing agreements, the provisions of the ACFTAA shall prevail. As the protocols and annexes to the ACFTAA are based on negotiations between Member States, the provisions of said protocols and annexes are more complementary in nature and often mirrors provisions in existing treaties, international law and domestic investment codes. For instance, both the Protocol on trade in goods and the Protocol on trade in services, enshrine the Most Favoured Nation Principle and the National Treatment Principle; principles developed in international trade law and ratified by most African States belonging to the WTO. Another instance of the complementary nature of the ACFTAA is seen in Article 27 of the Protocol on Rules and Procedures on the Settlement of Disputes which allows parties to resort to any form of arbitration of their pleasure outside the Dispute Settlement Body (DSB) as established under the ACFTAA. Where the parties resort to this form of dispute settlement, the matter must remain in the forum under which it was initiated, and parties cannot thereafter simultaneously bring the same matter before the DSB. Parties are further bound by the award of that arbitration which would be enforced by the DSB.

6. Implementation of the Acftaa: Implications For The Protection Of Local Businesses

The role of local business in an economy cannot be undermined. One major concern about the ACFTAA is its impact on local businesses. In justifying Nigeria's delay in signing the Agreement as mentioned earlier, President Muhammadu Buhari stated that consultations with the local stakeholders had to be made prior to the signing of the agreement following concerns that the ACFTAA would undermine local businesses. The Multi-Stakeholder Consultation held by the Third World Network (TWN)-Africa, has mentioned there is a need for inputs from local stakeholders and all parties likely to be affected by the

[188] https://twitter.com/NGRPresident/status/976519030726103040

[189] https://theconversation.com/why-nigeria-had-good-reasons-to-delay-signing-africas-free-trade-deal-100203

[190] Article 19, Agreement Establishing the African Continental Free Trade Agreement, "***In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement…Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.***"

agreement as the Agreement has the potential of silencing local industries, contrary to its objectives to boost trade in Africa.[191]

There are however, some provisions in the ACFTAA that protect local industries, though somewhat inadequate.

Firstly, the Agreement recognises the need for infant industries to be sheltered in order to grow. To this end, Article 24 of the Protocol on Trade in Goods stipulates, "For the purposes of protecting an infant industry having strategic importance at the national level, a State Party may, provided that it has taken reasonable steps to overcome the difficulties related to such infant industry, impose measures for protecting such an industry. Such measures shall be applied on a non-discriminatory basis and for a specified period of time." The protection however lasts insofar as the industry remains an infant one. Thus local industries remain unprotected as soon as they become established which may have a negative impact on the domestic development of the concerned country's local trade.

Secondly, under the ACFTAA, Member States may grant subsidies to their local industries in relation to their development programs.[192] Where another party is adversely affected, the said party may request for further consultations on the subsidies granted to the local industries. However, these requests are merely sympathetic in nature, and the host country is not mandated to oblige the requesting party.

Lastly, the ACFTAA allows Member parties to apply policies and regulations aimed at safeguarding local industries where there is a surge in the influx of a product in its territory such that it adversely affects or is likely to cause harm to its domestic producers. This is stipulated in Article 19 of the Protocol on Trade in Goods which reads, "State Parties may apply safeguard measures to situations where there is a sudden surge of a product imported into a State Party, under conditions which cause or threaten to cause serious injury to domestic producers…"

These provisions though commendable, offer little protection to local industries and it is important that all stakeholders local and foreign be consulted in respect of the remaining negotiations to ensure that the Agreement is effective in its implementation across the continent.

7. Is the Acftaa the Solution to Africa's Development Problem?

The ACFTAA while commendable cannot be the sole driving force for economic growth across Africa. While intra-African trade would significantly increase economic growth in the regions as stated by the UNECA, there are other factors the continent must focus on in order to ensure that economic growth and independence are not only achievable but sustainable. African integration is important but without a corresponding growth in other sectors like technology and political stability, the growth of the continent would be severely hindered and the ACFTAA greatly undermined.

Firstly, Member States must aim at ensuring political stability. Political instability is a menace that has plagued many African countries. Between 1956 and 1984, Sub-Saharan Africa alone has suffered 56 coup d'etats[193]; to date some African States are yet to recover from the devastating effects of the political instability. Political instability often results in wars, unrest, uncertainty and destruction. Such an environment leads to a more frequent change in policies, creating volatility which is highly not recommended for effective implementation of policies and measures aimed at economic growth. Political instability raises the government expenditure and increases inflation, both of which inhibit socio-economic growth. In a recent study by Jong-a-Pin, R. (2009) it was shown that, higher degrees of political instability resulted in lower economic growth.[194] After the end of the Sierra Leone Civil War,

[191] http://www.twnafrica.org/summary%20discussions%20and%20conclusions-Fin.pdf

[192] Article 17, Protocol on the Trade in Services

[193] Patrick Mcgowan & Thomas Johnson, "Military Coup d'Etats and Under-development: A Quantitative Historical Analysis" Journal of Modern African Studies Vol 22 (December 1984) 633-666

[194] Jong-a-Pin, R. (2009). "*On the measurement of political instability and its impact on economic growth." European Journal of Political Economy 25, 15–29*

the State has seen a significant rise in its GDP from 1.25 Billion USD in 2002 reaching a peak of 5.015 Billion USD in 2014 and currently lies at 3.77 Billion USD.[195]

Similarly, Rwanda's economy has shown tremendous growth from 1993 till date. [196] World Bank statistics show that as at 2015, Libya (currently under political unrest) suffered a reduction in GDP by 10% since the beginning of the Libyan civil war in 2011.[197] Per capita income in Libya since fell to less than US$ 4,500 in 2015 from the US$ 13,000 in 2012. The relationship between political stability and economic development is thus an important one which cannot be overlooked.

Secondly, African States must put measures in place to tackle illiteracy in the region. According to statistics, in 2016, there were approximately 263 million children, adolescents and youth were out of school.[198] Out of this number, 96 million were from Sub-Saharan Africa and 18 million from North Africa and Asia, together, the numbers of out-of-school children in Africa are approximately about 114 million. Education, skills, and acquisition of knowledge are recognised as markers of a person's and in turn a nation's productivity. To increase productivity levels, a country must of necessity increase its education and knowledge acquisition levels, to do otherwise spells doom for the concerned country. For every dollar invested in an additional year of schooling, particularly for females, earnings and health benefits of $10 in low-income countries and nearly $4 in lower middle-income countries is to be generated.[199] An increase in education thus translates into an increase in earnings which is a key determinant of the GDP and socio-economic development of any country. In the words of Plato, "If a man neglects education, he walks lame to the end of his life".

In order to complement the positive impact of the ACFTAA on economic growth, Africa must also ensure that there is adequate infrastructure in the region. Infrastructure is widely recognised as an essential contributor to economic development. A country cannot develop if the very institutions, framework, structures and facilities needed for growth are absent. Unfortunately, most infrastructural facilities cannot be imported, instead, they must be built in the domestic economy. Availability of adequate infrastructure raises infrastructure, increases levels of productivity and reduces the longterm costs of the concerned country. Provision of adequate infrastructure in the form of power supply, ports, road highways, railways and buildings also aids in the expansion of trade, foreign and local within a country. Kalilou Traoré, the Economic Community of West African States' (ECOWAS) Commissioner for Industry and Private Sector Promotion recently stated in an interview that Africa's biggest challenge was the dearth in adequate infrastructure. [200] According to International Centre for Trade and Sustainable Development (ICTSD), the success of Africa in respect of its development ambition requires that the necessary "hard" and "soft" infrastructure be placed at the very top of African policymakers' priorities.[201]

Lastly the continent must also adopt environmentally friendly policies in order as a means of furthering development in the region. The natural environment as a factor contributing to economic growth is responsible for the provision of essential, to the provision of resources and services particularly for countries dominated by extractive industries as is the case in Africa. Examples of extractive industries are oil and gas extraction, mining, dredging and quarrying. Africa alone is home to approximately 30% of the world's mineral reserves, 10% of the world's oil, and 8% of the world's natural gas.[202] Economic growth involves the combination of four major types of capital to produce goods and services. These are (a) produced capital, such as machinery, buildings and roads; (b) human capital, such as skills and knowledge; (c) natural capital, such as minerals, oil, carbon sequestration services provided by forests

[195] https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=SL

[196] http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml
See also, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=RW

[197] https://www.worldbank.org/en/country/libya/overvi1ew

[198] http://uis.unesco.org/sites/default/files/documents/fs48-one-five-children-adolescents-youth-out-school-2018-en.pdf

[199] http://report.educationcommission.org/report/

[200] https://www.ictsd.org/sites/default/files/bridges_africa_march_2017.pdf

[201] https://www.ictsd.org/bridges-news/bridges-africa/news/is-infrastructure-the-key-to-africas-economic-transformation

[202] http://www.worldbank.org/en/topic/extractiveindustries/overview

and soils; and (d) social capital, including institutions and ties within communities. Natural capital differs from the other types because it is finite, prone to irreversible changes, and has impacts that extend across generations. It goes without saying that, natural capital must be used sustainably and efficiently in order to secure growth and sustainable development. The concept of sustainable development defines sustainable development as "development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs”. [203] Theoretically, it integrates international environmental law, international human rights law and international economic law. It is hence impossible to speak of socio-economic development without taking into consideration environmental law.

8. Conclusion

In summary, the ACFTAA is a laudable effort of African States to promote economic development across the continent. The ACFTAA, which is yet to come into force promises great returns on its implementation. Nonetheless, the region must complement the efforts of the ACFTAA with domestic policies aimed at socio-economic growth taking into account the concerns of all stakeholders: local and foreign.

[203] Report of the World Commission on Environment and Development (WCED), Our Common Future (the Brundtland Report) of 1987

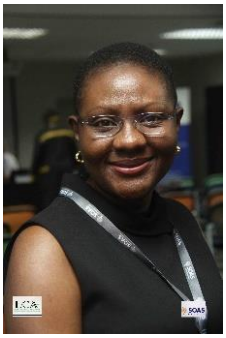
Panel 6

Africa's Engagement with Investor State Dispute Settlement (ISDS)

Africa's Engagement with Investor State Dispute Settlement (ISDS)

This panel will discuss the cases African states and investors have been involved in ISDS to determine a trend and suggest how their success rates can improve; and explore other dispute resolution mechanisms that may serve these parties better especially where all parties are African. It will also engage with the Pan-African Investment Code.

Chair:



Dr. Emilia Onyema

Dr Emilia Onyema is a Reader (Associate Professor) in International Commercial Law at SOAS, University of London. She is a Fellow of the Chartered Institute of Arbitrators; qualified to practice law in Nigeria; a non-practising Solicitor in England; and the Alternate Tribunal Secretary of the Commonwealth Secretariat Arbitral Tribunal (London).

She is listed on various arbitrator-selection panels including OHADA CCJA, Asian International Arbitration Centre, Kuala Lumpur, Kigali IAC, LCIA and the Abu Dhabi CCAC. She is a member of the court of the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), and member of the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

She has acted as arbitrator under the rules of Kigali IAC and Abu Dhabi CCAC. She convenes the "SOAS Arbitration in Africa" conference series. She has published widely in arbitration related issues and her latest book published by Kluwer Law International is an edited collection on, Rethinking the Role of African National Courts in Arbitration (2018).

Speakers:

Dr. Chrispas Nyombi

Dr. Nyombi is the Director of Research in Law at Canterbury Christ Church University. His research has featured in prominent international law journals and his book "Principles of Company Law in Uganda" is the main reference point for Company Law in Uganda.

He is part of a Panel appointed by the General Assembly of IGAD tasked with creating an International Arbitration and Mediation Centre in Djibouti. (IGAD) and Academic/Legal Advisor at The World Health Organisation (WHO), United Nations.

Prof. Paul Idornigie, SAN

Professor Paul, a university scholar, holds a doctorate degree in International Commercial Arbitration, is a fellow of the Institute of Chartered Secretaries and Administrators (London), a Member of the Chartered Institute of Arbitrators(UK), Member, London court of International Arbitration, a Barrister and Solicitor of the Supreme Court of Nigeria, Member, International Bar Association and Commonwealth Lawyers Association.

He is a Resource Person to the United Nations Institute for Training and Research (UNITAR) on Arbitration and Alternative Dispute Resolution (ADR). He is on the panel of Neutrals at the Abuja and Lagos Multi Door Courthouses, Nigeria and the panel of Arbitrators at the Lagos Regional Centre for International Commercial Arbitration, Lagos, Nigeria and Nigerian Communications Commission, Abuja, Nigeria. He is a Consultant to the Infrastructure Concession Regulatory Commission, Abuja, Nigeria. He is a Notary Public for Nigeria.

Articles:

1. The Nigeria-Morocco BIT – The Innovations

By: Prof Paul Obo IDORNIGIE, SAN

Introduction

- First Generation BITs, eg Nigeria-Netherlands – capital exporting countries 'dumped' Model BITs on capital importing countries. See also BITs concluded by Morocco with Mali, GuineaBissau, Rwanda and Ethiopia
- Second Generation BITs eg Nigeria-Morocco – sustainable development-oriented IIA reform – right to regulate; provide for labour, human rights and environment; balancing of interests, obligations imposed on the investor, etc
- We have witnessed a migration from popularity of BITs in the 90s 20s to their hostility, reform of ISDS at the core
- The World Investment Reports (WIRs) of 2012-2018 especially that of 2016 and 2017 focussed on reforms
- UNCTAD Road Map in WIR of 2016 set out five action areas including safeguarding the right to regulate while providing protection and reforming ISDS
- All these developments, the 2012 SADC Model BIT, the UNDP IIA (APEC) Handbook, 2012, the IISD Model International Agreement on Sustainable Development, 2006, the Supplementary Act of ECOWAS, 2008, Brazil's CFIA, among others, informed the drafting of the Nigeria's Model BIT in 2015 that shaped the Nigeria-Morocco BIT 2016.
- The Nigeria-Morocco BIT has several innovations and improvements
- It is noteworthy that the first intra-African BIT was signed between Egypt and Somalia in 1982
- The concern has always been how to balance private law with public law, balance the interest of the parties and reconcile the conflicts between the parties.
- Have the BITs delivered on their promises?
- Reform has become imperative.

The Innovations

- Preamble – the starting point of reforms – sustainability is overarching theme – mentioned thrice in the Preamble; right to regulate and balance of interests of the parties, investors, etc
- **Recognizing** the important contribution investment can make to the **sustainable development** of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;
- **Seeking to promote, encourage and increase** investment opportunities that enhance **sustainable development** within the territories of the State Parties;
- **Understanding** that **sustainable development** requires the fulfillment of the economic, social and environmental pillars that are embedded within the concept;
- **Reaffirming** the **right of the State Parties to regulate** and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right;
- **Seeking** an **overall balance of the rights and obligations** among the State Parties, the investors, and the investments under this Agreement (See the contributions by Dr Taslim Elias at the

Consultative Meeting of Legal Experts held at Addis Ababa: 16-20 April, 1964 - Summary of Proceedings - *History of the ICSID Convention* Vol.II, Part 1, Documents 1-43 p 244 available at <https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf>).

Definitions – Art 1

- Expanded Definitions of Investors and Investment excluding portfolio investment (Arts 1 and 24(1))
- It is expected that the investment shall contribute to **sustainable development** while investors are obliged to make feasible contributions to **sustainable development** of the host state and local community

Institutional Governance – Art 4

- Establishment of a Joint Committee
- The Joint Committee shall have the following responsibilities:
  i. Monitor the implementation and execution of the Agreement;
  ii. Debate and share opportunities for the expansion of mutual investment;
  iii. Request and welcome the participation of the private sector and civil society, when applicable, on specific issues related to the work of the Joint Committee;
  iv. Seek to resolve any issues or disputes concerning Parties' investment in an amicable manner.

  See also Comprehensive Economic and Trade Agreement (CETA) – EU-Canada

Standards of Protection – Art 6

- To avoid issues of interpretation usually associated with national treatment and most favoured nation treatment, the definitions of these contingent standards have been expanded in relation to customary international law and 'in like circumstances.
- For greater certainty, references to "like circumstances" requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia:
  (a) its effect on third parties and the local community;
  (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
  (c) the sector the investor is in;
  (d) the aim of the measure concerned;
  (e) the regulatory process generally applied in relation to the measure concerned; and
  (f) other factors directly relating to the Investment and Investor in relation to the measure concerned. (Art 6)

- Similarly Fair and equitable treatment and Full Protection and Security have been given expanded definitions. (Art 7)
- Each Party shall accord to investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
- For greater certainty, the above prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. Furthermore,

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of a Party; and
(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

Transparency

- In line with the principles of the Agreement, each Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with its legal system.
- Each Party shall ensure that its laws and regulations related to any matter covered by this Agreement, in particular regarding qualification, licensing and certification, are published without undue delay and, when possible, in electronic format..
- The Parties shall give due publicity of this Agreement to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment in the territory of the other Party.
- Parties to consult periodically on ways to improve transparency and when there is resort to arbitration, arbitral proceedings to be transparent (Art 10)

Investment and Environment – Art 13

- The Parties recognise that their respective environmental laws, policies and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.
- *The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.*
- The Parties recognize that each Party undertakes to respect and observe the social responsibility owed to the other Party. (See also Art 12 of the US Model BIT 2012).

Obligations on Investors, State Parties and Investments

In order to balance the rights and obligations among the State Parties, the investors and their investments, the BIT departs from more traditional IIAs in imposing obligations on investors as well as the host States including:

- Art 14 – compliance with environmental impact screening and assessment. Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question. On all occasions, the investor or investment shall comply with the minimum standards on environmental impact assessment and screening that the Parties shall adopt at the first meeting of the Parties, to the extent these are applicable to the investment in question.
- Art 15 – Protection of labour and human rights in accordance with international instruments
- All Parties shall have, as a soon as practicable, a domestic social impact assessment law and policy that meet the minimum standards adopted by the Parties on these matters.
- All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and, at a minimum, as soon as practicable with the list of human rights obligations and agreements to be adopted by the first meeting of the Parties.

- Art 17 provides for anti-corruption before and during the investment. Non-compliance with this obligation would amount to a breach of the domestic law of the host State and the investor shall be prosecuted accordingly.
- Art 18 - Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.
- Art 19 - Maintenance of good corporate governance practices. The investments must meet or exceed nationally and internationally accepted standards of corporate governance
- Art 20 - Investors Liability - Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.
- Art 24 - Corporate Social Responsibility - In addition to the obligation to comply with all applicable laws and regulations of the host state and the obligations and taking into account the development plans and priorities of the host state and the Sustainable Development Goals of the UN, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices.
  (See also the 2008 Supplementary Act of ECOWAS. Note also that the bulk of IIAs impose obligations only upon States – *Roussalis v Romania* [ICSID Case no ARB/06/1)

Regulatory Powers – Arts 13 and 23

- The Parties recognize that each Party retains the right to exercise discretion *with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.* (Art 13)
- In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives
- Except where the rights of a Host State are expressly stated as an exception to the obligations of the Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in the Agreement.
- For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement. (See *CMS v Argentina* [ICSID Case No. ARB/01/8] and *Parkerings v Lithuania* [ICSID Case No ARB/05/8] – addressing the issues of investor's legitimate expectations of stability of the legal framework and host State's right to determine its own legal and economic order – right to regulate is not absolute. This Article aims to balance the rights of the host State and that of the investor.

Procedural Provisions

- Art 26 – Before initiating an eventual arbitration procedure, *any dispute between the Parties* (disputes between the parties [Morocco and Nigeria] or disputes between an investor and the host state?) shall be assessed through consultations and negotiations by the Joint Committee.

- Dispute Prevention – Before resorting to arbitration, disputes assessed through consultations and negotiations by the Joint Committee upon a written request by the State of the Investor, specifying the name of the interested investor and the encountered challenges and difficulties
- If dispute is not resolved within six months from the date of the written request, the investor may resort to international arbitration after exhausting domestic remedies
- Art 27 – Investor-State Dispute Settlement – can resort to ICSID, UNCITRAL or any other tribunal
- Art 28 – State-State Dispute Settlement – states to constitute a three-member arbitral tribunal for disputes concerning the BIT if not settled in good faith

Concluding Remarks

- In conclusion, there may be imperfections in the Model BIT and indeed the Nigeria-Morocco BIT, for example a) the role of the Joint Committee, reference to SSDS instead of ISDS b) the clause on dispute prevention is a bit inelegant as the position of the investor is not every clear, c) the clause on powers to regulate (Art 13) is also inelegant, etc.
- However despite the imperfections, the Nigeria-Morocco BIT has been innovative and a road map for developing countries.
- It would seem that the campaigns by UNCTAD, ECOWAS, etc to reform IIAs are yielding fruits
- After all, IIAs are not necessarily treacherous – depends on the substantive and procedural provisions.
- Commentaries on the BIT include:
  - A move towards the next generation of BITs – Tarcisio Gazzini (https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-ofbilateral-investment-treaties/),
  - A new breed of investment treaty – Thomas Kendra & Others of Hogan Lovells (http://arbitrationblog.practicallaw.com/the-morocco-nigeria-bit-a-new-breed-ofinvestment-treaty/),
  - A departure or move of the same? – Busola Bayo-Ojo (http://www.mondaq.com/Nigeria/x/765460/Inward+Foreign+Investment/MoroccoNigeria+BIT+A+departure+or+more+of+the+same+by+Busola+BayoOjo),
  - A bold step in the right direction? Uncertain!! - Stanley Nweke-Eze (http://arbitrationblog.kluwerarbitration.com/2017/06/22/bit-morocco-nigeria-boldstep-right-direction/),
  - See the mapping of the Nigeria-Morocco BIT by UNCTAD (available at htts://investmentpolicyhub.unctad.org/IIA/treaty/3711).
- All the comments received so far have helped the Government of Nigeria in revising the Model BIT to take care of the imperfections and inelegance.

Panel 7

Culture of Arbitration and Institution Building in Africa

Culture of Arbitration and Institution Building in Africa

This panel will discuss the cases African states and investors have been involved in ISDS to determine a trend and suggest how their success rates can improve; and explore other dispute resolution mechanisms that may serve these parties better especially where all parties are African. It will also engage with the Pan-African Investment Code.

Chair:

Mr. Thierry Gakuba Ngoga,

Thierry (ArbP) is a lawyer specialised in international arbitration, commercial litigation, business advisory, risk and compliance. He acted as counsel and has been appointed as co-arbitrator, sole arbitrator and chairman in KIAC, ICC and ad hoc arbitration under Rwandan, English, Nigerian and Swiss law with seats in Kigali, London and Paris. Over the past 16 years he has held senior positions including serving as first registrar for the Kigali International Arbitration Centre (KIAC) where he participated in the business development strategy and co-administered the KIAC's arbitration proceedings (appointing tribunals, advising tribunals and sharing best practice with parties), serving as CEO of the Rwanda Bar Association and as in-house lawyer at the Rwandan Ministry of Justice.

Lead Paper:

Mr. Olisa Agbakoba, SAN

Mr. Agbakoba is the president of the Nigerian Bar Association (NBA) with a membership of about 100,000 lawyers. In 1987, at the height of Military Dictatorship in Nigeria, he co-founded the Civil

Liberties Organization (CLO), rated as Nigeria's and Africa's premier human rights organization. In 1998, he was admitted to the Inner Bar as Senior Advocate of Nigeria (SAN). In 2000, he was conferred with Nigeria's National Honour in the rank of Officer of the Order of the Niger (OON).

He was the founding President of the Nigerian Chamber of Shipping. He is a member of the presidential Electoral Reform Committee, reviewing Nigeria's electoral processes. He is also a member of the National Steering Committee on "Vision 2020" aimed at making Nigeria the twentieth most industrialized nation by 2020.

Discussants:

Mr. Edward Luke Fashole III

Edward W. Fashole-Luke, II is a leading lawyer and Barrister in Botswana. He is a Barrister of the Honourable Society of the Middle Temple since 1986. He is listed in the Global Arbitration Review directory of the World's Leading Arbitration experts. He has acted as arbitrator in construction, commercial, oil and gas, and energy disputes and he is a trained sports arbitrator. He has spoken at several conferences on international arbitration around the world and he is a Fellow of the Chartered Institute of Arbitrators. He is listed on the several panels including: CIETAC, AFSA, BANI, SIAC, SHIAC, LCIA, LCA.

Ms. Eunice Shang-Simpson

Eunice is a Solicitor-Advocate. A former Specialist Crown Prosecutor and Senior Policy Advisor, she recently re-trained in International Arbitration. She holds dual British and Ghanaian nationality and is a member of the Ghana Bar. Eunice is a Council Member and a Member of the International Committee of the Law Society of England and Wales. An Executive Committee Member of the Association of Women Solicitors, London (AWSL) she is editor of the AWSL Newsletter. In her spare time, Eunice is a Cherie Blair Foundation Mentor and a Director of Golden Age International School, Ghana.

Mr. Abdallah El Nokaly

El Nokaly is an Associate in the Dispute Resolution department of Al Tamimi and Co in Cairo having a particular interest in both litigation and arbitration. Abdallah obtained his "Licence en Droit" from Paris 1 Pantheon Sorbonne, and LLB from Cairo University and an LLM degree in International and European Business Law from Paris 1 Pantheon Sorbonne.Being a polyglot lawyer speaking five languages, and having an international cultural exposure, Abdallah has *a particular interest in Egyptian judicial courts, and commercial arbitration, as well as experience in civil, commercial and criminal law*

Articles:

1. Culture of Arbitration and Institution Building in Africa

By: Dr. Olisa Agbakoba, SAN

1. Introduction

The consensus on the Judicial Systems in Africa is that it is extremely inefficient at processing cases or enforcing decisions. The courts are slow and outdated. The courts are not well funded, have poor physical facilities, suffer staff shortages, are congested and receive no training etc. The average duration for the resolution of cases in Nigerian courts is between 10 – 20 years. This is evidently unsustainable to grow any economy.

The enforcement of commercial contracts or settlement of disputes continues to be a primary concern for entrepreneurs and investors. Economic reforms and investment growth are hardly achieved and barely successful in face of dispute resolution constraints. The reason is that Litigation has become such a major bottleneck to business that it is no longer seen as an effective mechanism for timely resolution of commercial disputes. Consequently, reliable alternative methods to resolve commercial disputes are overdue. This is why Alternative Dispute Resolution (ADR) processes or mechanisms is gaining wide acceptance.

Arbitration has proven to be a viable alternative means of dispute resolution. It is flexible, fast and efficient and supports economic development and investment. The reason is simple; an adequate and effective dispute resolution system, settles the mind of investors to resolve disputes efficiently. Investors are assured of expertise, speed, transparency, certainty and finality in the resolution of disputes.

This is why Arbitration is the favoured choice of the prudent businessman. Now, let's look at Arbitration institutions in Africa.

2. Arbitration - Globally Preffered Dispute Resolution Option

It is clear that Arbitration has become the established method of resolving international commercial disputes. As a result, many countries have modernized their arbitration laws. In a recent survey by White and Case, with Queen Mary University, School of International Arbitration on Improvements and Innovations in International Arbitration, 90% of respondents say that international arbitration is their preferred choice in resolution of disputes.

The attraction is that international arbitration is conducted in different countries and against different legal, cultural backgrounds with a striking lack of formality but upon certain acceptable international standards, norms and ethics.

International institutions driving arbitration include the ICC in Paris, SIAC in Singapore, LCIA in London, HKIAC in Hong Kong, KIAC in Kigali, LCA in Lagos. In addition to arbitration services, these institutions set rules and other procedural requirements which attract users universally.

3. Arbitration in Africa – Work In Progress

The concept of arbitration has been firmly established in so-called 'first world countries'. On the other hand, it would appear that arbitration is still on its way to becoming accepted in Africa and therefore remains work in progress. This position is not helped as a significant number of arbitration cases involving African countries appear to be determined in Jurisdictions outside Africa. It is important to probe why Arbitration culture in Africa, is taken for granted.

The culture of arbitration in Africa has great potential, but this is meaningless unless harnessed and utilized. In comparison with international standards, the development of arbitration culture in Africa

has been very slow. This is ironic because Africa has recently been referred to as the "New frontier" of economic activities. In a recent survey by the IMF's World Economic Outlook, Africa was ranked as the fastest growing continental economy in the world. This undoubtedly places Africa in a very good position to attract investments. Factors like improved governance, stable and improving macroeconomic conditions, investment3 friendly policies, dynamic and growing population and urbanization, and abundant natural resource endowments, have made Africa a hot-bed for Foreign Direct Investments (FDI). The realization that FDI has an appreciable and far reaching effect on Africa's economic growth has led many African governments to implement policies to attract foreign investors, especially Bilateral Investment Treaties (BITs). Significantly, most BITs with African countries as signatories, contain clauses for dispute settlement by arbitration to be conducted outside Africa, for example, the International Centre for the Settlement of Disputes (ICSID). This has meant that many arbitration cases involving African parties and disputes arising within Africa, are settled outside Africa. In 2015, the Registrar of the London Court of International Arbitration (LCIA) reported that 6 per cent of the cases registered with the LCIA involved African parties, while 125 cases involving Africans were registered with the International Chamber of Commerce (ICC) in Paris. This position has an impact on the slow development of the culture of arbitration in Africa. So, we must ask – what can we do?

4. Challenges Confronting Growth of Arbitration in Africa

4.1 Lack of Belief in Neutrality of African Arbitration Mechanisms

The issue of neutrality appears to be a strong reason why most disputes arising from BITs are determined outside Africa. Foreign investor parties to African BITs feel that our arbitral panels may not be neutral. It is claimed that the arbitral panel, possibly composed of African arbitrators, might be sympathetic to the African state party in the BIT. But this is not the full story, as parties can always nominate arbitrators of choice.

4.2 Investors Power to Dictate Seat of Arbitration

FDI is viewed as a means of economic growth and new investments funds, so foreign investors are in a strong position to decide that disputes with African 4 countries are determined by international arbitration mechanisms. Heavy dependence of African governments on FDI inflows has allowed disputes to be determined at an international arbitration mechanism not situate in Africa.

4.3 International Preference for Foreign Seats of Arbitration

Unfortunately, there has been continued preference for foreign seats of arbitration. The report of the 2018 International Arbitration Survey reflected that the most preferred seats of arbitration are London, Paris, Singapore, Honk Kong and Geneva. The preferences for these seats were primarily determined by factors such as, general reputation and recognition, users' perception of the seat's formal legal infrastructure, impartiality and neutrality of the seat's legal system, the seat's national arbitration law, and the track record in enforcing arbitral awards. Unfortunately, there is no African seat of arbitration that appears to fulfill these requirements. This projects arbitrators in Africa as lacking expertise, knowledge, experience and pedigree to handle international arbitration. We need to deal with these perceptions to build a culture of Arbitration and Institutions in Africa.

4.4 Failure to Adopt Universal Convention

The reality that not all African countries have adopted and domesticated the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958, poses a serious challenge to building arbitration institutions in Africa. This impediment has meant that parties to any arbitration agreement will be concerned about the prospects of enforcing arbitral awards in Africa, and issues around neutrality etc.

4.5 Negative Perception of Africa

Endemic corruption, terrorist attacks, wars, unfriendly business environment, insecurity of lives and property are the familiar African story. Unfortunately, there is a major negative perception about Africa. For instance, Nigeria is bedeviled by 5 attacks from 'Boko Haram' terrorists. All these have impacted negatively. Africa is not seen as favourable for arbitration. But the story is not all doom and gloom.

5. Advancing Arbitration in Africa – Way Forward

5.1 Development and Promotion of African Arbitration Mechanisms

Africa has witnessed the creation and development of many arbitration mechanisms. Commendably, Rwanda, with the establishment of the LCIAbacked Kigali International Arbitration Centre, alongside Morocco with the Casablanca International Mediation and Arbitration Centre (CIMAC) in Casablanca, as well as notable arbitration centers in Nigeria, Mauritius, and Kenya amongst others, Africa has shown that not all hope is lost after all. While these arbitration mechanisms are good choices for African arbitral seats, it must be said that more work is needed.

The development of arbitration in Africa with the creation of more arbitration institutions and the development of the existing ones is a continuing process and in order to offer true competition to the established arbitral centres around the world, Africa has to demonstrate, that it has what it takes to offer a reliable and efficient arbitration process for Africans and Foreigners alike.

Also, strong advocacy for the creation of arbitration institutions in Africa, and more important, seats of arbitration remaining in Africa is crucial. This would invariably promote the growth of arbitration and also encourage investments, drive economic development and improve Arbitration practice and culture among Arbitrators and relevant professionals in Africa.

5.2 Development of National, Regional and African Arbitration Policy

We must start by being pro-Africa in the determination of the seat of arbitration. We must all be advocates of an Arbitration Policy for Africa! It is crucial that this policy have roots at national, regional and continental level. A national policy will represent the crucial entry and start point. Then the national policy should feed into regional and continent wide mechanisms.

It is important that we encourage all African nations to develop a strong national policy. For example, Nigeria generates a significant volume of commercial transactions (both domestic and international with about 80 percent of these transactions originating or terminating in Lagos). Unfortunately, disputes arising from these transactions are ultimately arbitrated in foreign jurisdictions. This situation has been attributed to inadequacy and efficacy of Nigeria's legal and institutional framework for Arbitration. Against this backdrop, a Nigerian national policy can be developed with the vital objective that the seat for arbitration of disputes should be in Nigeria. To strengthen such a national arbitration policy, the Nigerian government could create a policy requiring that arbitration agreements in respect of all disputes arising from governmental contracts with foreign entities will have Nigeria as the seat of arbitration.

It is rather striking that the absence of an arbitration policy in Nigeria as shown above is the story in most African countries. The "flight" of "domestic" (i.e. purely African) arbitration cases to arbitral venues outside Africa is unhelpful to our economic development as a continent, and also to arbitration practitioners. This misnomer accounts for the loss of revenue on both levels and requires an African arbitration policy to reverse the trend.

Undoubtedly, the need for high commitment and affirmative action to actualize an "African Arbitration Policy" "AAP" (the policy) cannot be over emphasized. This policy should address the underdevelopment of the African Arbitration Culture. It is in this light that strong advocacy by African arbitration practitioners will help. We must make representations to the African Union to create a conducive environment for arbitration in Africa. We will have to establish a Task Force or Workgroup

to develop an African arbitration policy. This is very urgent. But to go back to the roots, we need task forces at national and regional levels also.

A leading example of a policy that has driven the growth and culture of arbitration in Nigeria is the Lagos Arbitration Law 2009. Lagos remains the commercial hub in Nigeria with the potential of becoming an international financial and investment center in Africa. However, there is still a lot of room to build an efficient arbitration institution founded on good legal and institutional frameworks.

5.3 Governmental Support and Advocacy of Arbitration Policy

It is trite that arbitration cannot grow without cooperation from the government. Government creates the enabling environment and should lead advocacy for strong Arbitration institutions in Africa. African governments can and must do more. In the United Kingdom, the London Court of International Arbitration (LCIA) in London gets tremendous support from the London City Corporation, with the London Chamber of Commerce as one of the core drivers. Business managers (or their legal advisers) who have to decide on Africa as an arbitration forum will be interested in seeing that appropriate frameworks are in place. A continental culture of Arbitration is very vital, if work will stay in Africa. A continental culture or policy on arbitration will galvanize the improvement of domestic arbitration and provide the platform for development and standardization of Ad hoc Arbitration process. We can emulate successful jurisdictions like Singapore or Malaysia, which have strategically positioned themselves in their regions as arbitration hubs, by generating enough referrals to act as a catalyst in the development of their respective economies by a national policy and culture of arbitration.

It should however be noted that this is not to push for the proliferation of arbitration centers across the continent. So this continental policy must work to strengthen regional arbitration centers. Ditto National centers.

In addition to the AAP, development of African arbitration can be achieved on another front. There should be a systematic approach by the arbitration community to work with the commercial sector in particular, Trade Unions or Chambers of Commerce, businesses and Non-Governmental Organisations etc.

Overburdened court systems with an estimated resolution period of 15-20 years leads to loss of revenue in billions, to investors who have their assets trapped within overworked court systems. Now, more than ever, there is need for an institutionally backed policy to promote arbitration as the preferred means of dispute resolution in commercial transactions.

6. Conclusion

African Arbitration bodies should encourage and implement capacity building programmes that will assist with the development of arbitration in Africa by providing educational outreach, extensive training and programmes, Conferences and workshops. With increased attention and improvement on the legal framework underpinning Arbitration in Africa, as well as better resourcing and training, Africa can secure for itself, a place on the global arbitration sphere. We, African Arbitrators should rise from this conference, resolved to promote and establish a culture of Arbitration in Africa. I strongly recommend we set up a workgroup at National, Regional and Continental levels. The outcomes will be policy documents we will use as advocacy tools to lay a culture of arbitration in and for Africa.

Panel 8

The Modernisation of other ADR Processes in Africa

The Modernisation of other ADR Processes in Africa

This panel will engage with mediation and negotiation in dispute resolution.

Chair:

Ms. Suzanne Rattray,

Rankin Engineering Consultants, Lusaka

Mrs. Rattray is a senior engineer with more than 30 years professional experience. She has a Master's degree in Civil Engineering from McGill University in Canada. She has had lead responsibilities on numerous infrastructure projects, in the transportation, building and energy sectors, in Zambia, Tanzania, Mozambique and DR Congo. She has been practising Arbitrator since 2008 and was admitted as a Member of the Chartered Institute of Arbitrators in 2012. She qualified to Fellow Status in 2017. She is on the panel for FIDIC Adjudicators in Zambia. Her ADR experience includes projects in the environmental, construction and energy sectors.

Speakers:

Prof. Hiro Aragaki

Hiro scholarly interests cluster around the intersection of contract and procedure. He has written extensively on federal arbitration law and on interest-based dispute resolution in the public sphere. His work has appeared in the University of Pennsylvania Law Review, the UCLA Law Review, and the Yale Law Journal Online, among others. His most recent work, Equal Opportunity for Arbitration, was selected for presentation in the Civil Litigation & Dispute Resolution category at the Stanford/Yale Junior Faculty Forum. In 2011, he traveled to Dhaka, Bangladesh, to train judges and lawyers in mediation and to provide advice on the design of an effective court-connected ADR program. Before coming to Loyola, Professor Aragaki was an Assistant Professor of Law & Ethics at Fordham University Graduate School of Business Administration in New York, where he taught courses on business law. Prior to that, he practiced law with international law firms, served as an arbitrator and mediator, and clerked for the Hon. Fern M. Smith, U.S. District Court (N.D. Cal.). Professor Aragaki is a member of the Roll of Solicitors in England & Wales. He is also a member of the State Bar of California, the District of Columbia and New York

Mrs. Caroline Etuk

Caroline Etuk (Mrs.) holds a Masters Degree in Law from Kings College, University of London and is an Accredited Mediator of the Centre for Effective Dispute Resolution (CEDR). She was the Director of the Lagos Multi-Door Courthouse from 2008 – 2018, and is currently Director of the just inaugurated Enugu State Multi-Door Courthouse, Nigeria. She is an executive member of the Association of Multi-Door Courthouses of Nigeria. Caroline is keenly interested the development of ADR institutions on the African Continent and will like to see emerging trends in ADR effectively incorporated into Court Systems

s. Madeline Kimei

Ms. Kimei is a corporate and commercial lawyer and dispute resolution professional who specializes in providing corporate and commercial legal support, domestic and international arbitration, commercial mediation and dispute management. She established a boutique corporate & dispute resolution firm and is currently the CEO responsible for the management, operations, strategy and business development of the company. She currently serves as a member of the Governing Council of the Tanganyika Law Society, Vice Chair of the Tanzania Institute of Arbitrators and Board member for MMG Gold Limited. Madeline also served as the in-house counsel and company secretary to the boards of Stanbic Bank Tanzania (2010-2012) and National Bank of Commerce Ltd (2013-2015), guiding and advising the board on corporate governance related issues and legal matters pertaining to the corporation.

Articles:

1. A Primer on Mediation Law Reform in Africa

By: Prof. Hiro N. Aragaki

I. Introduction

Why should those of us interested in arbitration law reform in Africa likewise be interested in mediation law reform? I wish to suggest it is because there is a benefit to taking a step back and considering what Prime Minister Modi of India recently referred to as arbitration's "ecosystem."[1] Mediation is part of that ecosystem because mediation can help support arbitration, and *vice versa*. In the U.S., for example, it is estimated that upwards of 50% of all arbitration cases settle before the evidentiary hearing,[2] which suggests at the very least that there would be some demand for mediation services offered in tandem with arbitration. Many leading arbitration jurisdictions from New York to London to Singapore have developed a sophisticated mediation services sector. In the race to become an international arbitration hub, jurisdictions that can boast top notch arbitration *and* mediation infrastructures will outperform those that can have only the former.

For the past few years I have been researching the state of mediation law globally. I am also interested in how mediation is developing on the ground, particularly in Asia and Africa—regions in which I have also had the fortune to participate in ADR reform efforts. In this paper, I will draw on my research and experience to provide a brief survey of mediation law in Africa, and then raise some broader policy considerations for further discussion. Because I do not consider myself an Africa expert, I welcome your critical feedback on aspects that I may have overlooked.

It is worth noting that several African states have vibrant mediation institutions and practitioners, including some very sophisticated court- connected mediation programs. My paper will not do justice to them, however, because its focus is on mediation law rather than practice. In addition, although many court-connected programs have elaborate rules of court that regulate the mediation process, the subject of my paper is limited to national mediation legislation. One reason for this limitation is in order to capture the way that states regulate not just court-based mediation but also private mediation—that is, mediation undertaken as a prelude to or in the course of arbitration, or outside the confines of judge- referred or court-connected mediation.

II. The Current State of Mediation Legislation In Africa

In this Part, I provide a broad overview of national mediation legislation in Africa, subject to the following caveats. First, I am not including rules of court, such as the Mauritius Supreme Court Mediation Rules, that apply only to cases pending in a particular court or courts and that restrict the choice of mediators to judges of the court or mediators of a court panel. Second, for the most part I have included as a "mediation" law any law that used the older "conciliation" terminology, unless it appeared to contemplate a quasi-adjudicative process as opposed to a third-party facilitated negotiation.[3] Third, I have included only commercial or omnibus mediation laws and excluded subject-specific mediation laws, such as labor mediation legislation. Fourth, the fact that a particular jurisdiction does or does not have a national mediation law has no necessary implication for how widespread or sophisticated the practice of mediation is in that jurisdiction.

As set forth in Table 1 below, twenty-seven of the fifty-four African States (or 50%) currently have a mediation statute.[4]

Table 1: African Jurisdictions with National Mediation Laws

	Jurisdiction	Date of Enactment
1.	Algeria	2008
2.	Angola	2016
3.	Benin (OHADA)	2017
4.	Burkina Faso (OHADA)	2017
5.	Cameroon (OHADA)	2017
6.	Cape Verde	2005
7.	Central African Republic (OHADA)	2017
8.	Chad (OHADA)	2017
9.	Comoros (OHADA)	2017
10.	Congo (OHADA)	2017
11.	Cote d'Ivoire (OHADA)	2017
12.	Democratic Republic of Congo (OHADA)	2017
13.	Equatorial Guinea (OHADA)	2017
14.	Gabon (OHADA)	2017
15.	Gambia	2015
16.	Ghana	2010
17.	Guinea (OHADA)	2017
18.	Guinea Bissau (OHADA)	2017
19.	Mali (OHADA)	2017
20.	Morocco	2017
21.	Mozambique	1999
22.	Niger (OHADA)	2017
23.	Nigeria	1988
24.	Rwanda	2008
25.	Senegal (OHADA)	2017
26.	Togo (OHADA)	2017
27.	Uganda	2000

As is readily apparent, nineteen states are Francophone (the OHADA states, Algeria, and Morocco); four are Anglophone (Gambia, Ghana, Nigeria, Uganda), three are Lusophone (Angola, Cape Verde, and Mozambique), and one is mixed (Rwanda).

It is difficult to generalize about a Francophone versus an Anglophone approach to mediation law in Africa. The main differences appear to be rather more a function of geography. For example, the OHADA states share more in common with their neighbors Gambia, Ghana, and Nigeria than they do with Morocco or Algeria. The OHADA Uniform Mediation Act, 2017 (the "UMA") is based on the UNCITRAL Model Law on International Commercial Conciliation, 2002 (the "Model Mediation Law").[5] Although Gambia, Ghana, and Nigeria are not officially Model Mediation Law jurisdictions as of this writing, their mediation laws are substantially based on the older UNCITRAL Conciliation Rules, 2008 (the "UCR"), which shares many similarities with the Model Mediation Law. The same is also true of their East African neighbors, Rwanda and Uganda.[6] By contrast, the mediation laws of the two Francophone jurisdictions to the north—Morocco and Algeria—are not based on the Model Mediation Law. Between them they also share similar provisions, such as with regard to the scope of mediation confidentiality and by imposing a three month maximum period for completion of the

mediation, that do not exist in the UMA. Finally, there little if any common thread among the mediation laws of Angola, Cape Verde, and Mozambique, and none of them appears to be based on the Model Mediation Law.

Compared to arbitration legislation, which has been in continuous existence in some African jurisdictions since as far back as the nineteenth century, mediation legislation is a relatively new development dating from the turn of the twenty-first century. This is partly explained by the fact that modern mediation as we currently know it was not recognized as a field of law practice until the latter half of the twentieth century, and the Model Mediation Law—the first model mediation law designed for widespread adoption internationally—did not appear until 2002.[7] Prior to 2002, only three African jurisdictions had a mediation law: Nigeria (1988), Mozambique (1999), and Uganda (2000). The relatively underdeveloped mediation law landscape in Africa pre-2002 was roughly comparable to the predicament in other regions of the world. Since then, not only are there more mediation laws across the globe, the rate at which they are begin enacted appears to be steadily increasing.

Interestingly, although there are only about half the number of mediation laws in Africa as there are arbitration laws, African mediation laws are far more likely to be based on the Model Mediation Law than their arbitration law counterparts. As of this writing, only eleven of the fifty-three African jurisdictions with arbitration laws (or 21%) have followed the Model Arbitration Law.[8] By contrast, seventeen of the twenty-seven African states with mediation laws (or 63%) have adopted the Model Mediation Law. Moreover, there is currently no overlap between Model Mediation Law jurisdictions and Model Arbitration Law jurisdictions: the two are mutually exclusive. This is all set to change, however, when the Nigerian Senate passes a pending bill to re-enact the Arbitration and Conciliation Act, 2018.[9] At that point Nigeria will become the eighteenth Model Mediation Law jurisdiction in Africa, as well as the only African state to also claim the status of a Model Arbitration Law jurisdiction.

III. Discussion Questions

Based on the above, I offer the following four discussion questions around the topic of mediation law reform in Africa:

1. How important is it for a state to adopt national mediation legislation if it wishes to see an appreciable uptick in mediation use?
2. If national legislation is the chosen route, how important is it for a state to be recognized as an Model Mediation Law jurisdiction?
3. Is there is a danger of mediation regulation being fashioned too much in arbitration's image?
4. Is there the opposite danger of mediation law and arbitration law being placed in separate siloes and not being considered holistically?

First, how important is it for a state to adopt national mediation legislation if it wishes to see an appreciable uptick in mediation use? On the one hand, it is not clear to me that centralized legislation from the top down is either necessary or sufficient in order for mediation to take root and thrive. A good example here is the UK, which has no national mediation legislation (other than for cross-border matters) but is arguably the most robust and sophisticated mediation market in Europe. The upshot is that localized reforms or reforms from the bottom-up, such as mediation pilot programs affiliated with the courts or with trade associations (already well-established in many African jurisdictions) may be equally or even more effective.

On the other hand, centralized lawmaking can send a powerful signal that mediation has become not just a local but a national priority. The imprimatur of the state imbues mediation with institutional legitimacy, which in turn can help change ingrained mindsets and cultivate buy-in from critical stakeholders such as lawyers and judges. Legislation can also perform an educative role, by describing the mediation process to those unfamiliar with it and by highlighting best practices.

Second, if national legislation is the chosen route, how important is it for a state to be recognized as a Model Mediation Law jurisdiction? Because there is a certain premium attached to being a Model Arbitration Law jurisdiction, it may be tempting to think that the same premium should apply in the mediation context.[10] I don't believe there is, in large part because of the fundamental differences between arbitration and mediation procedure.

Arbitration is primarily a binding process (albeit with consensual aspects). If one party does not like the way things are going, that party cannot simply exit the process otherwise it would defeat the entire point of arbitration. This is why the arbitral process requires the enforcement power of national courts in a wide variety of contexts, ranging from the selection of arbitrators to interim measures and award enforcement. The need for a Model Arbitration Law arose from the fact that, as international arbitration grew in popularity, there were institutional reasons to harmonize the rules that enable national courts to both support and intervene in the arbitral process in these and other ways.

By contrast, mediation is an essentially voluntary process that depends on continuing party agreement. If one party believes that the mediator is biased or that other side is not participating in good faith, that party has the absolute right to exit the process at any time. The consensual nature of mediation would be entirely vitiated if one party's continuing participation in the process could be compelled by national courts. Thus, other than in connection with a very narrow range of matters that affect legal entitlements *incident to* the mediation process, such as the admissibility of mediation evidence in subsequent adjudicative proceedings, there is very little occasion to seek the support or intervention of the courts. In theory, only those narrow matters would benefit from cross-border harmonization. That harmonization can be achieved without adopting the Model Mediation Law wholesale, either because the Model Mediation Law's provisions relating to these particular subjects are sub-optimal, or because the Model Mediation Law regulates many other issues having to do with the conduct of mediation that do not require *legal* harmonization.

Third, is there is a danger of mediation regulation being fashioned too much in arbitration's image? I think there is, particularly when states adopt the Model Mediation Law. Unlike other mediation law models such as the Uniform Mediation Act (USA)[11] and the EU Directive[12]—both of which are sometimes consulted by drafters of mediation legislation even outside the U.S. and Europe—the Model Mediation Law has a tendency to regulate details internal to the mediation process that do not actually require regulation. This can cause ambiguities and open up the potential for lawyers to rely on legal technicalities for strategic gain. These problems are directly traceable, in my view, to the Model Mediation Law's occasional (but surprising) tendency to confuse mediation with arbitration.

Take, for example, the Model Mediation Law's elaborate provisions defining the commencement and termination of mediation. Now, in the arbitration context such provisions are quite important both because (i) the respondent needs notice that proceedings have been initiated against it, and (ii) the end-point of the arbitration needs to be made clear in order to know when the arbitrators are *functus officio*.[13] In the mediation context, however, the utility of such provisions is questionable because it is impossible to begin a mediation process without the knowing participation of both sides, and because the mediator has no authority to bind the parties in the first place.

Nonetheless, several African jurisdictions with mediation laws based at least in part on the Model Mediation Law—notably the OHADA states, Gambia, Ghana, Nigeria, Rwanda, and Uganda—have adopted such provisions. Consider Article 4 of the UMA (OHADA), which provides that:

The mediation procedure shall start on the date when the most diligent party implements a written or oral mediation agreement.

Article 12 provides that the mediation procedure shall terminate by:

c) The written statement by the parties addressed to the mediator stating that they are ending the mediation process, on the date of the statement; [or]

d) The written statement by a party sent to the other party or parties and, when a mediator has been appointed, to the mediator, stating that the mediation procedure is ended, on the date of the statement.

These provisions are strictly unnecessary and arguably raise more questions than they answer. For example, what does it mean to "implement[]" (*mettre en oeuvre*) a mediation agreement, and if that act is not properly executed, is it possible that the processes followed will not count as a mediation (and thus fail to receive the protections of the UMA, such as with regard to confidentiality)?[14] Why does Article 12(c) provide for termination via written statement of *both* parties when notice only by one party is sufficient under Article 12(d)?

Here it might be argued that these provisions are necessary because they help determine when the statute of limitations should be tolled during a pre-litigation mediation attempt.[15] The Model Mediation Law provides "suggested" text for states wishing to include a provision suspending the limitations period.[16] The UMA (OHADA) has adopted such a provision, pursuant to which the limitations period is suspended when the mediation commences under Article 4, and starts to run again when it terminates without agreement under Article 12.[17] But consider what happens when the parties orally agree to abandon the mediation yet a written record of the termination under Article 12(d) was never perfected (for example, because a copy was never "sent . . . to the mediator"). Can the plaintiff file a lawsuit years later, claiming that limitations period did not begin running again because the mediation was not properly terminated under Article 12?[18] As this example illustrates, unnecessary provisions like these—while perhaps superficially harmless—can create the potential for abuse in unexpected ways.

Fourth, is there the opposite danger of mediation law and arbitration law being placed in separate siloes and not being considered holistically? Here, too, I think the answer is yes. Mediation law has a role to play in ensuring that arbitration and mediation support each other rather than work at cross purposes. Consider a case where parties in arbitration have determined that they would both be better off if they could settle the dispute rather than continue in arbitration. Because the arbitrator is already familiar with the dispute, they ask her to mediate the case. During the mediation, the arbitrator meets with each party in separate caucuses. Unfortunately, the mediation does not result in a settlement. Should the arbitrator (now mediator) be allowed to resume her role as the arbitrator and make a binding decision? Arguably not, since it is possible that the arbitrator's award will be influenced by *ex parte* information she received in caucus, thus resulting in a denial of due process to the adversely affected party. This, in turn, could expose the award to being set aside or refused enforcement.

Yet arbitration laws in most jurisdictions do not protect against this danger, even when their mediation laws sometimes do. Consider Ghana's ADR Act. Part I (Arbitration) gives arbitrators the unilateral right to "use mediation or other procedures at any time during the arbitral proceedings,"[19] implying that the arbitrator in my above example would be entitled to resume her role after attempting mediation, even over the objection of one party. Part I therefore fails to anticipate the problems raised by my example above. This already betrays a tendency to consider arbitration and mediation separately, since the danger of mediators subsequently acting as arbitrators in the same dispute has traditionally been a concern within mediation circles. But the impulse to cabin arbitration and mediation is even more heightened in Ghana because Part II (Mediation) of the ADR Act specifically provides that [u]nless otherwise agreed by the parties or required by law, the mediator shall not act as an arbitrator . . . in any arbitral or judicial proceeding in respect of a dispute that is the subject of the mediation proceedings [20]

The upshot is that there was an opportunity to address the scenario posed in my example during the drafting of the ADR Act. As it stands, however, it is not evident whether and how Part I and Part II can be harmonized in order effectively to do so. For example, does Part II even apply to processes that did

not originate as a mediation?[21] Even if it does, does the broad discretion given in Part I trump the requirement of party consent in Part II? Or does Part I merely give arbitrators the unilateral right to commence mediation, whereupon Part II requires party consent to resume arbitration if the mediation fails? The basic uncertainties that have been left unaddressed by these provisions is again, in my view, a function of the common assumption that mediation and arbitration are separate processes that do not need to be coordinated. This coordination could easily have been achieved in the case of the Ghanaian Act because Part II flags the underlying issue.

By contrast, jurisdictions that have emerged as international commercial arbitration hubs in recent decades have paid greater attention to harmonizing their mediation and arbitration laws to address situations where mediation midstream during an arbitration process fails. Hong Kong and Singapore, which have enacted legislation and developed provider rules on the subject of "ArbMed-Arb," have been leaders in this respect.[2]

Note: Due to formatting issues, footnotes have been stripped from this article

2. THE MULTI-DOOR COURTHOUSE CONCEPT.

By: Mrs. Caroline Etuk Introduction

The initiative of a multi-door courthouse was introduced into legal thinking by Professor Frank Sander of the Harvard Law School in 1976.[204] Sander's proposed that the solution to the dissatisfaction with the administration of justice was a dispute resolution center offering an assortment of dispute resolution services. His idea was to explore alternative ways of resolving disputes outside the traditional, adversarial, litigious procedure and to institutionalize these alternative dispute resolution processes in a single dispute resolution center.

Sanders claimed to have come to the multi-door courthouse idea almost accidentally.[205] In his words, "I think that was a typical example of being at the right place at the right time because things started to take off from there."[206][207]

As a place of convergence of diverse ADR processes referred to as Doors, typically a multi-door courthouse will have on its menu a parade of alternative processes to the mono-door of litigation such as Arbitration, Mediation, Conciliation, Negotiation, Early Neutral Evaluation and Hybrid processes like Arb-Med (Arbitration and Mediation) or Med-Arb (Mediation and Arbitration). The predominant feature of this dispute resolution methodology is the taxonomy of disputes to ensure that disputes are channeled into the most appropriate door for resolution and that disputants or litigants have an enhanced opportunity and the option of exploring the most effective mode of resolving their disputes[208].

The Multi-Door Courthouse (MDC) Concept in Nigeria.

The first MDC experiment in Africa was the Lagos Multi-Door Courthouse (LMDC) in Lagos, Nigeria. The initiative was introduced by the Negotiations and Conflict Management Group (NCMG). Its founder, Kehinde Aina wrote:[208]

> "In a justice system characterised by congested court dockets ... a reform initiative with the high potential of increasing access to justice and boost public confidence in the judicial system was a welcome development".

However, it was not an easy sell as the buy-in of the Judiciary of Lagos State[209] had to be secured. Finally, in 2002 the LMDC was established by a Practice Direction (PD) of the Hon. Chief Judge[211] of

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[204] The seminal event that led to the birth of modern dispute resolution systems was the 1976 Pound Conference in St Paul, MN, USA**.** Named in honour of Roscoe Pound, the Dean of Harvard Law School from 1916 to 1936, the theme of the original Pound Conference was: *Agenda for 2000AD - The Need for Systematic Anticipation*. At National Conference in honour of Roscoe Pound. www.globalpound.org/about/976-poundconference.

[205] With a background in Mathematics, Taxation and Family Law he had been on sabbatical with his family in Sweden in 1975, and while rationalizing his lifework, he was struck by how unsatisfactory the courts were for resolving certain types of disputes and how much better they could be resolved by ADR methods. So he penned down some thoughts which he sent to colleagues in the Harvard Law School for comments. Quite unknown to him the information reached the U.S. Chief Justice, Warren Burger, and he was invited to present a paper at the upcoming Pound Conference in St. Paul, Minnesota in 1976. He claimed at first that he thought it was ridiculous because he did not have much experience in the field and did not consider himself an expert, but having been persuaded to take up the task, he under-went a three months education and gave his talk "Varieties of Dispute Processing."

Hernandez-Crespo, Mariana D., "A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the
Multi-Door Courthouse" (Part One) (2008). Available at SSRN: https://ssrn.com/abstract=1265221 or http://dx.doi.org/10.2139/ssrn.1265221

[206] Frank E.A. Sander & Stephen B. Goldberg, "Fitting the Forum to the Fuss: A User- Friendly Guide to Selecting an ADR Procedure", 10 NEGOTIATION J. 49 (1994).

[207] . Frank E.A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User- Friendly Guide to Selecting an ADR Procedure, 10 NEGOTIATION J. 49 (1994).

[208] Commercial Dispute Resolution

[209] Lagos State is a state in the southwestern geopolitical zone of Nigeria. The smallest in area of Nigeria's 36 states, Lagos State is arguably the most economically important state of the country, containing Lagos, the nation's largest urban area. It is a major financial

the State enabling the referral of cases from the Courts to the LMDC for resolution by ADR methods. The PD also allowed walk-in cases, cases which had not previously entered the court system, to be filed by disputants for ADR intervention and lastly cases which were within the public domain and which the LMDC could intervene by an invitation to the disputing parties.

In 2007 the LMDC law was promulgated, and later amended in 2015. The law gave added impetus to the operations of the LMDC and defined its objectives as follows, to:

a) Enhance access to justice by providing alternative mechanisms to supplement litigation in the resolution of disputes;
b) Minimize citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through Alternative Dispute Resolution (ADR);
c) Serve as the focal point for the promotion of Alternative Dispute Resolution in Lagos State; and
d) Promote the growth and effective functioning of the justice system through Alternative Dispute Resolution methods.

A key function of the LMDC is to provide enhanced access to justice through ADR methods, and enhance justice delivery through the decongestion of the dockets of the court. It gives extra-jurisdictional powers to the LMDC to attract referrals from courts outside the Lagos State, from courts of other jurisdictions and federal courts. By this the operational scope of the LMDC is enlarged and the centre has the potential of dealing with matters beyond the purview of the court. While retaining oversight functions of the programme, the Hon. Chief Judge is required by the law to appoint a Governing Council with responsibilities for the growth and development of the LMDC. The composition of the Council is meant to achieve certain strategic objectives. The Council comprises a Chairman, two ADR Judges (an office created by the Law to ensure a more direct liaison between the programme and the court with responsibility for the promotion of ADR within the court); the Attorney General and Commissioner for Justice of Lagos State. The legal community is represented on Council through the Nigerian Bar Association to facilitate a buy-in of lawyers; the NCMG, a private sector group to ensure the buy-in of the sector of choice; a person with the knowledge and skills in ADR, and lastly the Director of the MultiDoor Courthouse. The Law also provides for a Panel of Neutrals comprising Mediators, Arbitrators, Conciliators and Neutral Evaluators.

The LMDC Commercial Intervention Strategy (CIS)

In pursuance of its overriding objectives and to promote awareness of alternatives to litigation within the financial services sector, the LMDC initiated the Commercial Intervention Strategy (CIS) in January 20I0. The aim of the programme was to create effective inroads into the commercial sector with a view to taking its unique dispute resolution services to the doorstep of commercial organizations in a proactive manner. The first area of focus of the CIS initiative was the banking sector which was categorized into four distinct but interconnected strategic modules:

Module 1: Conducting a Dispute Resolution System Audit Exercise for interested banks;

Module 2: The deployment of information technology to facilitate the referral of cases and the dispute management process between the banks and the LMDC;

Module 3: Providing training on Dispute Resolution Audit and Case Management practices;

Module 4: Instituting Dispute Resolution System Audit Standards for the banking and financial services industry.

centre and would be the fifth largest economy in Africa, if it were a country. [211] Hon Justice I. A. Sotiminu , Chief Judge of Lagos State. 2001 – 2004

The Banking Track (BT) was a product of this initiative to facilitate referrals of commercial disputes to the LMDC for resolution through Alternative Dispute Resolution. The Banking Track kicked off with the Dispute Resolution Survey exercise in which 25 banks were required to complete questionnaires which revealed what dispute resolution mechanisms were currently used by these organizations and to rate the effectiveness of each of these mechanisms on a scale of 1 to 5. Eventually, the Dispute Resolution Audit (DRA) (Module One) was conducted for 3 banks which indicated interest in the Programme. The LMDC engaged consultants to implement the DRA exercise. Subsequently, the recommendations of the Audit exercise were approved by the management of the pilot banks.

At this stage of the intervention, the major challenge faced by the programme was the inability of the LMDC to secure the co-operation of the Bank's external counsel. Despite requests from the banks to their external counsel to initiate referrals to the LMDC, not much progress was made in that regard. However, two years later, Ecobank[210] became actively involved in referring cases to the Banking Track. Some of the cases resolved through the Banking Track either had a long litigation history or the potential for such.

At a meeting with the Head of Legal Ecobank, on April 9th 2014, the Bank's representatives expressed their satisfaction with the BT programme and enumerated the benefits to the bank as including the enhancement of the Ecobank Brand Perception. He said that the speedy and cost-effective programme had not only saved the bank money and time but that its relationship with its customers and even external counsel had been preserved and enhanced. On its own volition the bank recommended the programme highly to other banks in the industry and pledged its commitment to providing endorsements for the programme whenever required to do so. It also reported changes in the conduct of external counsel who, when required by clients to take out writs against the bank, notify their clients that the bank will rather negotiate a settlement at mediation and that the process produces more beneficial outcomes.

The eventual outcome of this initiative is that many financial institutions became aware of the LMDC programme and began to patronize it, particularly the settlement week programme which provides mediation services at no cost to the parties and has contributed immensely to the use of ADR mechanisms for the resolution of bank-customer disputes and the recovery of debts.

The Lagos Settlement Week (LSW)

The Lagos Settlement Week (LSW) is a week designated by the Chief Judge of Lagos State when disputants, lawyers and neutrals engage in the settlement of disputes referred from the courts through the deployment of Alternative Dispute Resolution (ADR) Mechanisms. The maiden edition of the LSW was held in 2009 and was implemented with technical support from the World Bank sponsored project on "Expanding Commercial ADR Institutions and Mechanisms in Nigeria". This project was hosted by the Nigerian Investment Promotion Commission and jointly implemented by the ADR Centre Italy and the Negotiation & Conflict Management Group (NCMG). The objectives of the LSW are articulated as follows, to:

- Record a discernible positive impact on the dockets of participating Judges by the reduction of the court's docket through ADR.
- Demonstrate the effectiveness of mediation in accelerating the resolution of disputes and hence promote the adoption of ADR especially within the legal community; moving them from knowledge to understanding, from understanding to commitment, and from commitment to engagement

[210] **Ecobank**, is a pan-African banking conglomerate, with banking operations in 36 African countries. It is the leading independent regional banking group in West Africa and Central Africa, serving wholesale and retail customers. It also maintains subsidiaries in Eastern and Southern Africa. ETI has representative offices in Angola, China, Dubai, France, South Africa, and the United Kingdom.

- Create the opportunity for disputants to experience mediation, in the expectation that they will appreciate its benefits and seek ADR solutions in their future disputes
- Provide the platform to raise public awareness of ADR, and showcase the services of LMDC

The Lagos Settlement Week (LSW) Programme has succeeded in creating awareness of Alternative Dispute Resolution (especially mediation); increased user acceptance of the processes; contributed to cost and time savings per case; contributed to the recovery of monetary claims and therefore promoted business growth. The LSW has attested to the viability of mediation as a dispute resolution mechanism of choice in a wide range of cases, however, an appreciable level of decongestion of the docket of the court is yet to be achieved although progress is being made in that direction on a gradual but incremental basis.

The 2009 edition of the LSW which was held from November 2 to 6, 2009 won the Centre for Effective Dispute Resolution (CEDR) International Awards 2010. The Excellence Awards was a recognition of significant contributions made in the field of Alternative Dispute Resolution and Conflict Management in the UK and internationally. The LMDC, which was one of seven nominees under the category of Awards for significant achievement in the field of dispute resolution, won under this category for the creation of ADR awareness through the LSW programme.

The peculiar and special promise of the LSW Programme lies in its ability through its screening procedure to identify long standing cases which have clogged the Court System and resolve them in the settlement conferences. The nature of cases resolved in the LSW Programme range from Breach of Contract, Telecom, Insurance, Oil and Gas, Landlord and Tenant, Land, Banking, Matrimonial, Property, Estate, Defamation, Nuisance, Human Rights etc. The referral of Criminal Cases from the Magistrate Court involving misdemeanours and the subsequent creation of the District Settlement Week programme[211] further enlarged the scope of the programme.

The LSW has contributed to savings in legal fees, management time (for corporate litigants), court time, court resources to the litigant, counsel and the Judicial system. With regards the benefits accruing to parties from the avoidance of contingent liability risk, reputational risks and the sheer inconveniences associated with servicing a litigation, it can only be deduced that if computed in financial terms they will amount to a colossal amount of savings.

LSW Programme is slowly but gradually changing the dispute resolution landscape of Lagos State from a focus on litigation as the only viable means of dispute resolution, to the more congenial and no adversarial forms of dispute resolution like mediation, conciliation and other hybrid processes.

High Court of Lagos State (Civil Procedure) Rules 2012- ADR Track.

In 2012 the LMDC facilitated the inclusion of robust provisions for the referral of cases through the ADR Track, thus mainstreaming ADR into Civil Justice Administration in Lagos State in a way that was novel to the court system. The new innovation involved the screening of all civil matters filed in the High Court of Lagos State for ADR amenability. ADR amenable cases undergo all preliminary processes relevant to the litigation process, as the ADR Judge takes any applications for substituted service, applications for preliminary objections, applications for judgment in default of appearance, etc. and when the matter is ripe for mediation, the ADR session is scheduled. If the matter is settled, the ADR Judge adopts the settlement as a judgment of court, but if not, the matter returns to the litigation track to be assigned to a Trial Judge for immediate determination. The LMDC also recommended the adoption of pre-action protocols before the filing of a civil action, and sanctions for refusal to explore ADR options.

[211] The District Settlement Week is a counterpart programme for the magistracy of Lagos State . The programme is organized in a circuit around the 7 magisterial districts of the Lagos State Judiciary.

In December 2012 the new Rules became operational with the LMDC as the official operators of the ADR Track. Despite its challenges[212] the ADR Track has largely effected the growth of ADR within the court system and channeled cases which would otherwise have been assigned to the litigation docket of the courts to the ADR Track to be disposed of through ADR methods thus decongesting the court and freeing up Judges time.

In the years 2016 to 2018 the LMDC mediated 1285, 1155 and 2596 matters and settled 835, 710 and 1110 matters with a settlement rate of 65%, 64% and 43% respectively.

Replication of the Multi-Door Courthouse Concept

The Multi-Door Courthouse model has been replicated in several jurisdictions of the Nigerian legal system.[213] The Enugu State Multi-Door Courthouse was inaugurated on Dec 17, 2018 and Anambra State is likely to follow suit within the first quarter of 20I9. The thrust for the establishment of MDCs across the nation came with the Judicial Policy pronouncements of the Chief Justices of Nigeria requiring all judiciaries in the Federation to introduce ADR into their court systems through the Multi-Door Courthouse concept. While the Lagos model and its law and processes have largely been adopted by many States, the structures of the MDCs vary. Some States have retained capacity from within the court system to administer their centers, others have engaged external resources to constitute their panel of neutrals. Again, the predominance of case types vary from one jurisdiction to another. In Lagos, which is a cosmopolitan and commercial centre for instance, the docket of the MDC has a predominance of commercial matters while others have less commercial interests in dispute. Some Multi-Door Courthouses have a governing board, which is separate from the administration of the Court, but which is accountable to the Chief Judge of the State, while others are managed directly by the Court.

Association of Multi-Door Courthouses of Nigeria (AMDCN)

With the background of a myriad of challenges facing the MDCs including underutilization of their services often caused by the recalcitrance of many in the legal profession and refusal to accept their relevance; policy obstacles from the judiciary and the legal profession; unavailability of appropriate infrastructure; low level of knowledge of their existence and functionality; and insufficient dissemination of their result amongst others, the MDCs were at different stages of development and had little capacity individually to withstand the challenges facing them. Therefore, the Network was established in 2008 with the support of the Security, Justice and Growth Programme (SJG) as a unifying organization for MDCs. The objectives of the network were to:

- Promote the MDC concept and create an enabling environment for the establishment of more MDCs in states across Nigeria;
- Promote best practice in MDC operations; ensuring that rules or procedure are harmonised and national standards are set and maintained;
- Promote the concept of ADR through the MDCs to relieve the pressure on the justice system
- Enable information sharing between MDCs, including comparing experiences and learning from each other.

Despite the great potential of the Association, various factors have militated against its effectiveness. Some of these factors include the paucity of funds and the need for a strong leadership to promote the benefits of the Association and galvanize the judiciaries of various States into action. A plan is

[212] A prime challenge is the obvious carry–over of the attitude of "zealous advocacy" of counsel into the programme from the litigation track. A definitive re-orientation of the legal community is required to address this perennial problem of recalcitrance.

[213] After the Lagos experience in 2002 a Multi -Door Courthouse was opened in Abuja, the Federal Capital Territory, followed by Kano, Kaduna, Cross River, Akwa Ibom, Delta, Abia, Edo, Bayelsa, Oyo, Ogun, Bornu states

being mooted for a Regional Conference of the Southern MDCs to set the tone for the reorganisation of the Association.

ADR Institutions

From the inception of the multi-door courthouse programme, ADR has continued to grow within both the formal and informal sectors. The justice ministries in many States of the Federation have established Citizen Mediation Centres[214] that handle a myriad of mediations annually for indigent persons. Private Arbitral institutions like the Lagos Court of Arbitration and the Chartered Institute of Arbitrators, UK are now offering mediation services and training. Within the court system, ADR has been introduced at the appellate court levels. The Court of Appeal Mediation Programme (CAMP) and the Supreme Court Mediation Programme was inaugurated in 20I8.

However, these developments have not been without their challenges. Funding of MDCs for instance has been a major burden for State Courts and this problem is further aggravated by improper planning for the set of these institutions. Furthermore, ADR training institutions do not address the capacity requirements of Court ADR Programmes and because settlement rates are largely dependent on the expertise of mediators, the standard 40-hour skill-based trainings must as of necessity be more practical than academic. Other factors to be considered include the notion by lawyers that the referral of cases to ADR will impact negatively on their livelihood.

Adapting the Multi-Door Concept

It has been repeatedly affirmed that ADR methods are not alien to African dispute resolution practices which existed before the introduction of the adversarial form of dispute resolution in the form of the litigation process. The informal sector, as represented by traditional African institutions, still resolve a large number of cases and these indigenous systems enjoy the trust and respect of a large segment of the society. These realities have formed the bases of proposals for the adaptation of cultural norms into modern dispute resolution practice. The practice of the Enugu State Multi-Door Courthouse supports the view that the traditional structure of the 'Umunna' has a definitive impact on the process of mediation as the parties often would request the input of this institution in the settlements that they reach at the mediation and sometimes require the presence of the mediator at community meetings convened by the family head to deliberate on the issues in dispute.

Gender issues like the role of the women as parties in land disputes also impact mediation outcomes. Where culturally a woman is not expected to inherit property or must be represented by a male in a property dispute, the dynamics of the mediation is affected.

As a deeply religious people, the fact that a parishioner has been sued by a priest[215] can elicit mixed emotions. One such party reasoned, 'I have no quarrel with the priest, I only have issues with his actions.'

Conclusion

Given the importance of ADR and the multi-door courthouse concept in the enhancement of access to justice, the promotion of a more efficient court system, attracting direct foreign investment and building a peaceable society, the practice of court based ADR Systems across the African Continent and the development of models that best address the African dispute resolution needs are imperative. It is hoped that the SOAS Arbitration and ADR Conference will provide a platform for interested participants to put in place a framework for discussions on these matters.

[214] Citizens Mediation Centre, Lagos State, Citizens Rights and Mediation Centres, Enugu State, Kano State …

[215] The priest is held in reverence as one representing Christ on the earth

3. ODR4Africa

By: Madeline Kimei

Introductory Note

1. The African internet penetration as at 31st December 2017 was 35.2% of the population2. The 2016 Africa-Mobile Infrastructure and Mobile Broadband annual report provided that more than three quarters of mobile subscribers on the continent are expected to subscribe to broadband services by 2020, compared to about a fifth in early 2016.3 Moreover, a 2018 Singapore -Africa Business Forum highlighted 3 things to know about for Africa's digital economy, notably that Africa's e-commerce market will be worth $75 billion comparable to $88 billion anticipated in Asia.
2. Ideally, ODR providers create platforms for disputants and neutral 3rd parties to communicate. These platforms can employ different communication technologies which mirror the traditional process or protocols. It is evident that the choice of technology can change how parties approach a dispute, and a dispute systems design should consider how the technologies change the way parties communicate and otherwise approach the dispute resolution process.
3. The iResolve platform was developed in 2015 with an aim to spearhead the revolutionary use of electronic assistance in conducting ADR services. The idea was to create a dispute resolution and management platform for smart businesses. iResolve is customer-centric and being the case has evolved over the past 3 years to accommodate the users by introducing document sharing, direct written communication (closed chatrooms), tasking and status alerts to its end users. The portal has gone further to also providing for payment of the ADR services online.

Online Dispute Resolution

1. In international Legislation, there is no official universal definition and understanding of the term "online dispute resolution" the other version of the term is "electronic dispute resolution". However, for the purposes of the Technical Notes 2017, para. 24 defines ODR as a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". The Technical Notes further clarify that "ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others)" (para. 2)4.
2. In general, ODR is seen as "an important new tool, a new system, a new way of doing business that is more efficient, more cost effective and much more flexible than traditional approaches. It combines the efficiency of alternative dispute resolution with the power of the Internet to save businesses money, time, and frustration. However, the changing nature and technologies of ODR have made a clear definition of the term elusive. Broadly, ODR uses technology to support or fully facilitate one or more traditional ADR methods.

Why ODR4Africa?

1. As mentioned earlier, Africa, which already has 50% of the world's internet and cell phone users, is quickly increasing its information and communication technology connectivity, making ODR increasingly importance to the region. From the statistics, the issue of narrowing the connectivity gap is no longer an obstacle to the spread of ODR. ODR is therefore very feasible for any emerging economy because there are notable improvements in technological internet infrastructure but we are lagging behind on the regulatory and legal frameworks to support it.
2. This legal infrastructure is essential for the development of the region's nascent information economy.
3. In the African context, ODR is still in its early stages and has several challenges to face, but it has great potential strengths, some of which it has already began to realize, including: (i) its adaptability

to local context; (ii) its efficiency; and (iii) its capacity to contribute to the development of emerging economies. This last strength should be emphasized, that ODR development in Africa is its capacity to contribute to the development of the emerging regional economies. In purely economic terms, "the internet creates the potential for these nations to leapfrog certain steps of development and facilitate faster entry and participation in the global economy".

4. The consensus is that coordinated regional development of an internet-based mediation, arbitration and dispute resolution platform would not only slash the cost of settling disputes, but would settle them much more speedily, transparently and securely.
5. The question remains however, as to how can we build a continent-wide ODR system that navigates the complex cultural, jurisdictional, and linguistic differences internationally, all while keeping costs manageable and scaling to handle the enormous global volume of cases that are out there looking to be resolved?

What impact will it have on Arbitration in the Continent?

1. Perhaps the greatest impact of ODR will be the simplest and most obvious- by presenting disputants with yet another alternative to litigation and an extremely convenient, inexpensive and appealing one. ODR will further privatize the landscape of dispute resolution.
2. Based on the experience with iResolve, it is evidence that the future of ODR is assured, but the shape it takes will reflect the choices we make about the larger issues and challenges presented by the digital age. ODR will never replace the traditional ADR, but it will continue to co-exist with it.
3. One can envision a hybrid form of dispute resolution incorporating components of both traditional and online dispute resolution. The big question that remains now is whether the pace will match the expectations. Challenges
4. The characteristics of the internet economy present challenges, as well as opportunities. Notwithstanding its existing potential strengths, ODR has a long way to go before it reaches an advanced stage of development in Africa. The challenges associated with the introduction of ODR services include;

    (i) Conceptual Cultural challenge – 'the distinctive ideas, customs, social behavior, products or way of life of a particular nation, society, people or period'. The cultural challenge is mainly grounded by lack of knowledge and computer illiteracy (especially the older generation).

    (ii) ICT infrastructure challenge – Despite evidence that this gap is narrowing down, there is still fear of poor data protection and security of confidential information.

    (iii) Regulatory challenge – There is no hard law specifically regulating ODR in Africa. This being the case we have to turn to regulations on the conventional ADR mechanisms and assess if they are also applicable to ODR proceedings. From this perspective, facing the regulatory challenge.

would require, first, conducting a study on the feasibility of enacting special hard law and second, in the case of only adhering to existing ADR regulations, encouraging judicial construction with a positive attitude towards ODR. It is noteworthy, that from the iResolve experience, the issue of lack of regulation may be due to the resistance of the legal

Fraternity/jurists to change, but the new generation of legal leaders are far more open to technology than their predecessors.

14. An underlying ingredient permeates the 3 above challenges: a lack of trust. Hence, building trust for online and mobile e-commerce, and therefore ODR systems, is a major undertaking in which all the stakeholders should be involved, including governments, businesses, e-consumers and ODR providers each have their own share of the responsibility in generating confidence. This task is one of particular relevance in the African context.

Proposals

15. From the iResolve experience we see that it is necessary to effectuate change through education, advocacy, awareness, outreach or marketing, increasing the profile of ODR as a means for resolving disputes.

(i) Data/Research: There is a need to conduct research for the African users in order to find out what they need and want from an ODR platform, what could work and how best to roll out.

(ii) Policies, Guidelines and Standards: Besides the European legal framework, i.e. the Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and the Directive 2013/11/EU on alternative dispute resolution for consumer disputes, the Technical Notes now present another valuable legal instrument of an international organization specifically dealing with ODR. Africa needs to tackle the issues of guidelines, ethics and standards to align to the requirements of the continent.

(iii) ODR Institutional Rules: In looking at the arbitration institutions currently present in Africa, none have adopted ODR institutional rules to date. There is therefore need for procedural rules template to be developed and used if parties wish to use ODR technology in an arbitration governed by any of the institutions across the region.

(iv) New Tech: Leveraging mobile-based platforms, such as mobile internet and SMS, as well as integrating mobile-based ODR with face-to-face dispute resolution mechanisms.

(v) Institutional Support: To form partnerships and create a regional/continent wide ODR system with African based arbitration practices, institutions and training providers and create a “one - stop shop" to advance the use of ODR.

(vi) Capacity Building and Awareness: To roll out capacity building/education and awareness programs across the continent/regionally. For an ODR process to take place fairly, both parties as well as the neutral third party, in the cases where there is one, should have adequate level of digital literacy or, in its absence, qualified assistance. Otherwise, a web-savvy defendant would be able to take advantage of all the features of the ODR platform, while a claimant who is not comfortable in an online environment would be at a disadvantage from the outset.

(vii) Pilot Project: To develop and administer pilot projects involving ODR so as to demonstrate its viability as an alternative to the courts. As stakeholders, together we can help convene local partners and provide service design expertise to execute the pilot.

Conclusion

In concluding, in order to advance, although there is need to form a unified ODR regulatory and legal infrastructure initiative for the African continent, the solutions are readily available. It is my opinion that there is also plenty of room for soft law rules resulting from self-regulation by different private stakeholders in ODR. It is precisely in the online environment for dispute resolution that best practices and codes of conduct are generated. From this perspective, addressing the regulatory challenge requires that African actors interested in ODR, not only sovereign states, but also private players should gradually create their own set of soft-law rules, best practices and codes of conduct. There is features that have worked elsewhere in the world which we can borrow from and hence there is no need to reinvent the wheel.

Note: Due to formatting issues, footnotes have been stripped from this article

Summary Remarks

By:

Ms Eunice Shang-Simpson

&

Ms Kesly Kayiteshonga

Summary Remarks

By Ms Eunice Shang-Simpson and Ms Kesly Kayiteshonga

Summary of the Discussions in SOAS Best Practices in Arbitration & ADR in Africa Conference, 12-14 February 2019, Arusha, Tanzania

The conference started with a dinner at African Tulip Hotel, Arusha, attended by about 70 people and sponsored by Rankin Engineering Consultants of Zambia. Mr Abdallah El Nokaly of Al Tamimi LP Cairo, serenaded the guests with his skills on the Egyptian Lute.

The first day of the conference proper started on the morning of 13 February with delegates welcomed by Ms Ilham Kabbouri, the conference compere. This was followed by some welcome addresses. Dr Emilia Onyema reminded delegates of the questions from the research project which led to the conference series, and a recap on the past conferences held in Addis Ababa, Lagos, Cairo and Kigali. She recognised Dr Nagla Nassar's offer of an internship to an African young arbitration practitioner as one of the outcomes of the Cairo conference. She noted the two publications from the Addis (Kluwer book on African Arbitral Institutions) and Lagos conferences (Kluwer book on African courts and arbitration). She also noted that one of the outcomes of the Kigali conference is the Arbitration Fund for African Students (AFAS) which will be launched at this conference. Finally, Dr Onyema thanked the Tanzanians for registering en masse to attend this conference but encouraged them to open their borders to other Africans to visit their country. Dr Onyema also thanked Amb. Sani Mohammed and the African Institute of International Law (AIIL) our hosts in Arusha following the relocation of the 2019 conference from Khartoum because of the social unrest ongoing in Sudan. She thanked Mr Ahmed Bannaga for working tirelessly to ensure the success of this conference. She reminded delegates to engage in the discussions and make the most of the networking opportunities the conference gives to them.

Mr Ahmed Bannaga welcomed the delegates and apologised for the confusion and Sudan's inability to host the conference as scheduled. He noted that he had been able to visit many African countries due to this series of conferences, and the need for us the private sector to connect with each other, network and learn from each other. He urged African law firms and arbitral centres to seriously consider offering internships to younger colleagues. Finally, he thanked his team, father, wife and son for all their support.

Ambassador Sani Mohammed of AIIL welcomed all delegates. He gave a brief history of the Institute and how the Institute can support African states and businesses to train and equip advisers. He also informed the conference of their training program for the year.

H.E. Prof Dr. Kennedy Gastorn, the Secretary General of Asia-Africa Legal Consultative Organisation (AALCO) welcomed the delegates and commended Dr Onyema for convening this conference series. He mentioned briefly the role AALCO has played in promoting arbitration in Asia and Africa and the need for Africans to continue to engage in international arbitral discourse. He gave the current discourse on the review of the ISDS system as an example.

Mrs Olufunke Adekoya, SAN gave her keynote address to the conference on the 'Business Case for Arbitration in Africa'. She gave various examples of how arbitration related decisions by Africans can be taken from the view point of a cost-benefits analysis. She noted that arbitration is a business and not just a legal exercise. She stated that African judiciaries need to ensure an arbitration friendly disposition and that though African countries have done a lot to make themselves attractive venues for arbitration, more needs to be done onshore. She referred to an 'African economy' and not 'African economies', to give us a pan-African view of her paper. She referred to the ease of doing business in African countries including ease of obtaining visas and the financial costs of those decisions to the

African economy. She referred to the Natural Wealth and Resources Act by Tanzanian government and its impact on the development of ADR in Tanzania and the wider region. She relied on statistics from ICSID and Turkey to conclude that there indeed is a business case for encouraging onshore arbitration in Africa. She also briefly mentioned the recently launched Commonwealth arbitration initiative and invited delegates to participate through completion of the survey questions. She finally reminded delegates that arbitration is a marathon and that charity must begin at home.

The first Panel was chaired by Ms Esine Okudzeto. Mr Kizito Beyou explored why Ghana did not adopt the Model Law. He concluded that the Ghana ADRA 2010 was heavily influenced by the English Arbitration Act 1996 and suggested that it was perhaps no coincidence that about the same time as the ADRA was being discussed, the drafters of the English law decided not to adopt the Model Law.

Ms Njeri Kariuki, on the Arbitration Act of Kenya was unable to gauge why Kenya copied the UNCITRAL Model Law wholesale. While on the reforms of the Nigerian Arbitration and Conciliation Act, Mr Hamid Abdulkareem discussed some of the innovative provisions in the draft law. Mr Tayeb Hassabo explored the changes to the Arbitration Act in Sudan while Dr Sylvie Bebohi discussed the changes to the Arbitration Act under OHADA (via Skype). The papers from the speakers are in the conference booklet.

The second panel was chaired by Mr Babajide Ogundipe. Dr Ismail Selim discussed the complexity of constituting the arbitral tribunal in multiparty cases. Dr Fidele Masengo gave a summary of the work of KIAC as outlined in his slides; and Dr Marie-Andree Ngwe discussed salient points from the rules of GICAM which are very similar to the ICC Rules. The panellists also gave tips to participants on what they look for when appointing arbitrators.

The third panel was chaired by Dr Nagla Nassar. Mr Jonathan Ripley-Evans discussed interim measures applications and their grant by South African courts. Mr Ahmed Bannaga discussed the arbitration regime under Sudanese law while Mr Ken Melly explored the role of the Kenyan courts in enforcing awards. Mr Tim Taylor explored certain issues, laws and cases relevant to enforcement of arbitration awards.

The fourth panel was chaired by Mrs Sola Adegbonmire. Mr Tola Onayemi discussed the AfCFTA and its dispute settlement mechanism. His paper was discussed by Ms Leyou Tameru who focused her comments on the current negotiation of the investment, competition and IP protocols to the AfCFTA. She concluded with a call for ring-fencing commercial disputes to a select group of arbitration centres in Africa. Mr Gerald Afadani focused his comments on the state-to-state nature of the DSM under the AfCFTA; while Prof Idrissa Bachir Talfi focused on OHADA and the need to put aside our differences and speak with one voice about one Africa.

Panel five was chaired by Amb Sani Mohammed. Mr Bobby Banson spoke on the experience of Ghana and its investors and the role of BITs in attracting such investors. Dr Achille Ngwanza noted that investors do take notice of the rules that apply to them; while Ms Xander Meise focused on the human rights obligations of investors and she gave examples of investors' social licence to operate.

Panel six was chaired by Dr Emilia Onyema. Prof Paul Idornigie discussed the Nigeria-Morocco 2016 draft BIT and its innovative provisions; while Dr Chrispas Nyombi focused on the need for a Pan-African Investment court following the example of the European Commission.

Panel seven was chaired by Mr Thierry Gakuba Ngoga. Ms Eunice Shang-Simpson explored the definition of culture in arbitration and drew some examples from Prof Won Kidane's Culture in International Arbitration text. Mr Edward Fashole-Luke, II explored some themes on promoting Africans in arbitration; and Mr Abdallah El Nokaly explored the same theme of culture (legal and social) through interaction with the delegates.

The last panel was chaired by Ms Suzanne Rattray. Prof Hiro Aragaki Presented his research into African jurisdictions with mediation laws in comparison with other regions of the world. Mrs Caroline Etuk

explored the regime for court annexed mediation through the activities of the multidoor court house. Ms Madeline Kimei discussed online dispute resolution drawing from her own experience with ODR4Africa and I-Resolve platforms.

The conference attendees asked engaging questions and made insightful comments to each panel. Dr Emilia Onyema, Dr Chrispas Nyombi and Ms Eunice Shang-Simpson introduced and launched AFAS to the conference delegates. Dr Marie-Andree Ngwe personally invited all delegates to the 2020 SOAS Arbitration in Africa Conference which will be hosted primarily by GICAM and APAA in Douala, Cameroon in March 2020.

The President of the East Africa Community Court, Justice Emmanuel Ugirashebuja in his closing remarks recognised the women who work to project arbitration in Africa. He mentioned Dr Emilia Onyema, Ms Leyou Tameru, Ms Madeline Kimei and Mrs Olufunke Adekoya, among others. His speech can be found in the conference booklet. The conference concluded with a dinner held at Mount Meru hotel.

Closing Remarks

By:

Hon. Judge Dr. Emmanuel Ugirashebuja

The President of the East African Court of Justice

Justice Dr Emmanuel Ugirashebuja
Judge President, EACJ

Justice Dr Emmanuel Ugirashebuja is the current and 4th President of the East African Court of Justice (EACJ). He was appointed Judge of Appeal by the Summit of the EAC Heads of State in November 2013 and subsequently, appointed the Judge President of the EACJ in June 2014. His Lordship was appointed for seven years tenure.

Justice Ugirashebuja focuses on the role of the Court to ensure the adherence to law in the interpretation and application of and compliance with the Treaty. His Lordship aims at achieving the Vision and Mission of the Court as well as its Core Values.

Previously, Justice Ugirashebuja was a Dean of the Law School, University of Rwanda; Member of the Superior Council of Judiciary; Member of the Supreme Council of Prosecution; Senior Lecturer at the National University of Rwanda; Member of Team of Experts in the East African Community on Fears, Challenges and Concerns towards the East African Political Federation; Legal Advisor at the Rwanda Environment Authority; and Legal Advisor at the Rwandan Constitution Commission. He has given lectures at the University of Edinburgh, the University of Dar es Salaam, to the Rwanda Senior Command and Staff and at the Rwanda National Police College.

His Lordship is an expert and arbitrator in both national and international arbitrations. He is also an author of several academic and conference papers.

Closing Remarks

By Hon. Judge Dr. Emmanuel Ugirashebuja.
The President of the East African Court of Justice

Let me take this opportunity to profoundly thank SOAS University of London, the African Institution of International Law and the Bannaga & Fadlabi LLP for inviting me as a speaker to address you on the closure of this auspicious occasion of the 5th SOAS Arbitration in Africa Conference Series as well as for accommodating Justices of the EACJ some of who partially participated in the Series. Distinguished participants, in the quest to turn my thoughts to what I will speak on today with which I will usefully engage your attention for the next minutes, the question not unnaturally presented itself, what is the purpose of these annual gatherings? Why do we put aside our customary employment and recreation in order to attend these annual series? Why did we decide to spend our Valentine Day in this fashion? A close scrutiny of this year's and preceding years themes of the SOAS series reveal that as the Arbitration Community in Africa you do not come together for the mere intellectual pleasure of listening presentations and speeches such as the present closing remarks as an end in itself. Nor would the sensational pleasure of cocktails, dinners and entertainments be a sufficient inducement to attend these annual series in such great numbers. If we examine ourselves closely, we will find that what brings us together is the influence of the aspiration of ameliorating the practice of arbitration in this region of Africa through a largely knowledge-sharing venture and deepening a shared understanding of the best practice in Arbitration and ADR.

These SOAS series are evidence of increasing thirst for the betterment of ADR practice in this region and I am delighted that SOAS University of London and the African Institute of International Law have taken upon themselves the commitment of bringing together the ADR community in our region to discuss the development of this critically important area. We have been reminded in series after series of these conferences that there are three cardinal virtues which will help grow and sustain ADR and especially Arbitration practice in Africa and in any part of the world for that matter. And those triple I virtues are: integrity, impartiality and independence. These are the foundational principles upon which a strong arbitration practice can be built, developed and sustained. They form the bedrock of foundation of ADR practice. They are ours to nurture and guard jealously if we are to begin building, developing and sustaining a respectable ADR practice in this region of ours. These series have also reminded us that beyond the cardinal virtues, the ecosystem of arbitration is complex and it requires constant and never ending improvement in the best practices in Arbitration and ADR practice. This is what this year's theme of the SOAS series has successfully captured.

These series of Conference remind us that it is axiomatic that the ADR profession landscape has largely changed due to both endogenous and exogenous factors. For any actor in the ADR profession in this region to continue seeking to argue that the ADR practice in this region can continue to function unaffected by, and without response to prevailing changes in the practice would be to consign oneself to irrelevance in this area. It is reckless to deny that certain trends such as African regional integration, globalization of the practice, liberalization of Arbitration practice services and technology will have influence in the way arbitration is and will be practiced in future. Regional integration and the global outlook of arbitration will continue witnessing the shift in the marketplace and an increase in international trade in Arbitration services and practices operating in a borderless environment.

Where once the arbitration practice was constrained nationally and to very few arbitrators, today the opportunities are truly global. This naturally means that the overall arbitration industry in this region will be facing a complex and compelling set of challenges in the coming years in the quest to remain competitive, viable and relevant in the face of irresistible winds of fundamental change. Regionalization through outfits such as the East African Community, Common Market for East and Southern Africa

Countries, The African Continental Free Trade Area as well as well as globalized commerce and the rapid spread of the use of technology will have significant effects on the Arbitration industry in Africa.

This year's SOAS series is a wake up call to all of us who are in the Arbitration practice community that the Arbitration Industry is not immune to the emerging trends that are transforming each and every industry in Africa and the whole world for that matter. Report after report of the World Economic Forum have indicated that the fourth industrial revolution is already here. In a nutshell, the Fourth Industrial Revolution includes developments in previously disjointed fields such as artificial intelligence and machine-learning, robotics, nanotechnology, 3-D printing, and genetics and biotechnology, which will cause widespread disruption not only to business models but also to labour markets over the next five years, with enormous change predicted in the skill sets needed to thrive in the new landscape. How will the skill sets needed to thrive in arbitration practice change as a result of the Fourth Industrial Revolution? I believe that these are some of the challenges that we need to interrogate further.

According to the World Economic Forum Report in 2016, the 10 skills that will be required in order to thrive in the Fourth Industrial Revolution are:

1. Complex problem solving;
2. Critical thinking;
3. Creativity;
4. People management;
5. Coordinating with others;
6. Emotional Intelligence;
7. Judgment and decision making;
8. Service orientation; 9. Negotiation;
10. Cognitive flexibility.

I believe that all 10 skills mentioned in the Report are worth looking at by the educators of ADR.

There is undoubtedly ongoing pressure on a variety of fronts for institutional evolution and change in the area of arbitration. It is important that we African arbitration practitioners are responsive to those pressures. We certainly need new and improved business practices in the Arbitration profession, but in changing times like these, attention to timeless fundamentals of integrity, impartiality and independence are even more important. That being said, I expect that there will be in our professional lifetime substantial changes in the way in which Arbitration is practiced and the range of people who can practice it.

This year's series presenters, who I have noted are from the Cape to Cairo meeting at the centre of Africa, have all challenged us to reflect on what important decisions as African arbitration practitioners should make in order to remain relevant in the realm of arbitration. The decisions to be made may seem daunting, but they also present an opportunity for the arbitration practitioners to reinvent themselves in order to ensure dynamism and confidence. This SOAS series and the ones that have preceded it have endeavored to provide all of us the requisite tools to make proper decisions as arbitration practitioners in the space of arbitration.

The future is not what it used to be in the area of Arbitration in Africa. It bristles with new challenges. This generation with all its energy, questioning, new perspectives and potential for innovation is well placed to meet those challenges. It is gratifying that in our generation we have gallant daughters of Africa who have decided to create initiatives vital to the growth of arbitration in Africa and of great benefit to African arbitration practitioners. Let me single out Dr. Emilia Onyema who is the mind behind these SOAS series which have created a forum that fosters cooperation, collaboration and effective interchange of ideas amongst the African arbitration practitioners and even those beyond Africa. Miss Leyou Tameru whose brilliant idea of establishing an I-Arb portal which furnishes us with up to date

news on Arbitration in Africa and helps showcase the capabilities of African Arbitrators in the form of a directory among other things.Madeline Kimei of I-Resolve, ODR-Platform which challenges us to look at different ways of dispute settlement. Miss Agnes Gitau who together with Leyou and Elizabeth Karanja, have established the annual East African International Arbitration Conference which is another vital forum for the promotion of Arbitration scholarship and networking amongst African Arbitrators. It would be remiss of me if I do not salute Senior Advocate of Nigeria and an Astute Arbitrator Mrs. Olufunke Adekoya who has broken all the glass ceilings in the area of Arbitration that even men have not dared to. You are an inspiration to not only young aspiring female arbitrators but to all of us African arbitration practitioners male or female of any age. I beseech all of you in the arbitration practice to support the initiatives started by these gallant ladies because their ultimate goal is that we as African arbitrators as well as African Arbitration Institutions are a force to reckon with in the field of Arbitration.

Let me also applaud what His Excellency Amb. Sani Mohammed and his team at the African Institute of International Law our host, have achieved in shaping and improving legal education and scholarship in very pertinent areas in Africa including arbitration among others. Your vision of having a legal training institute that evolves into a powerful force, capable of forming self-motivated, independent thinking, self-reliant contributing members of the society who are capable and ready to work in a complex world is impressive. It is a great endeavor that you undertake and wish to congratulate you and your team.

Despite the tribulations that some of you went through at the immigration, please take time to interact. The Arusha Clock Tower has a historical significance. The tower was built by a Greek named Galanos and marked the site of the first German headquarters in Tanganyika in the late 1800s. Currently the Clock Tower marks the midpoint from Cairo to Cape Town.

With these remarks it is my singular honour to declare this fifth series of the SOAS Arbitration in Africa Conference officially closed.

Registered Participants

No	First Name	Last Name	Nationality
1.	Ilham	Kabbouri	Belgium
2.	Edward	Fashole-Luke, II	Botswana
3.	Sanji	Monageng	Botswana
4.	Befeh	Promise	Cameroon
5.	Cynthia	Akueya	Cameroon
6.	Datchoua T.	Tchwaket	Cameroon
7.	Femshang C.	Muanze	Cameroon
8.	Achille	Ngwanza	Cameroon
9.	Sylvie	Bebohi	Cameroon
10.	Julia	Zhang	China
11.	Abdallah	El Nokaly	Egypt
12.	Nagla	Nassar	Egypt
13.	Ismail	Salim	Egypt
14.	Sameh Kamal	Abdelaziz	Egypt
15.	Leyou	Tameru	Ethiopia
16.	Marie-Andree	Ngwe	France
17.	Bernadette	Uwicyeza	France
18.	Anne-marie	Ayanty	Ghana
19.	Bobby	Banson	Ghana
20.	Emily	Short	Ghana
21.	Esine	Okudzeto	Ghana
22.	Victoria Nana Ama	Barth	Ghana
23.	Vincent	Beyuo	Ghana
24.	Suzanne	Rattray-Alavian	Jamaica
25.	Alex	Mwaniki	Kenya
26.	Anne	Njoroge	Kenya
27.	Austin	Ondaba	Kenya
28.	Brian	Wanjiku	Kenya
29.	Charity	Njeri	Kenya
30.	Daudi	Lairumbe	Tanzania
31.	Dorothy Kavindu	King'oo	Kenya
32.	Eddah	Majala	Kenya
33.	Eunice	Lumallas	Kenya
34.	Faith Nekoye	Wamocho	Kenya
35.	Francis Mwaura	Muroki	Kenya
36.	Hassan	Sharif	Kenya
37.	Imran	Dhanji	Kenya
38.	Jemimah	Keli	Kenya
39.	John	Ohaga	Kenya
40.	Joyce Olago	ALUOCH	Kenya
41.	Joy Ann	Makena	Kenya
42.	Karori	Kamau	Kenya
43.	Ken	Melly	Kenya
44.	Kelvin	Onkendi	Kenya

45.	Kerubo	Nyamweya	Kenya
46.	Leah	Kiarie	Kenya
47.	Lyn	Kinyua	Kenya
48.	Marion	Kariuki	Kenya
49.	Njeri	Kariuki	Kenya
50.	Mecha	Jared	Kenya
51.	Mercy	Epiche	Kenya
52.	Mercy	Okiro	Kenya
53.	David	Sigano	Kenya
54.	Mmuka	Valence	Kenya
55.	Nyambura	Kigera	Kenya
56.	Patricia	Kinoti	Kenya
57.	Pauline	Mcharo	Kenya
58.	Phyllis	Wangwe	Kenya
59.	Prudence	Lang'at	Kenya
60.	Sharon Wangechi	Muriuki	Kenya
61.	Sylvia I.	Chitech	Kenya
62.	Sylvia	Kasanga	Kenya
63.	Victoria	Kariithi	Kenya
64.	Wilfred	Mutubwa	Kenya
65.	Noel	Chalamanda	Malawi
66.	Anand	Juddoo	Mauritius
67.	Adelayo	L'Oriekun	Nigeria
68.	Adetola	Onayemi	Nigeria
69.	Agada	Elachi	Nigeria
70.	Akinwale	Akinlabi	Nigeria
71.	Alewo	Etuk	Nigeria
72.	Ayotunde	Phillips	Nigeria
73.	Babajide	Ogundipe	Nigeria
74.	Babatunde	Ajibade	Nigeria
75.	Bashman	Mohammed	Nigeria
76.	Caroline	Etuk	Nigeria
77.	Damilola	Odewumi	Nigeria
78.	Demilade	Elemo	Nigeria
79.	Folashade	Alli	Nigeria
80.	FOLUKE	AKINMOLADUN	Nigeria
81.	Hamid	Abdulkareem	Nigeria
82.	Ikani	Agabi	Nigeria
83.	Kashifah	Olayiwola	Nigeria
84.	Lilian	Agbakoba	Nigeria
85.	Olaronke	Famuyiwa	Nigeria
86.	Olasinmibo	Zubair	Nigeria
87.	Olisa	Agbakoba	Nigeria
88.	Omoniyi	Odeyemi	Nigeria
89.	Olufunke	Adekoya	Nigeria
90.	Olusola	Adegbonmire	Nigeria

91.	Paul Idornigie,	SAN	Nigeria
92.	Paul O.	Idornigie	Nigeria
93.	Sani	Mohammed	Nigeria
94.	Philomena Chinwe	Uwandu	Nigeria
95.	Tolu	Olatunji	Nigeria
96.	Assoumane Abdou	Chérifatou	Niger
97.	Talfi Idrissa	Bachir	Niger
98.	Zakari	Abdou	Niger
99.	Faustin	Ntezilyayo	Rwanda
100.	Kesly	Kayiteshonga	Rwanda
101.	Mbarushimana	Aime	Rwanda
102.	Thierry	Ngoga	Rwanda
103.	Fidele	Masengo	Rwanda
104.	Mouhamed	Kebe	Senegal
105.	Maurice	Garber	Sierra Leone
106.	David	Butler	South Africa
107.	Deline	Beukes	South Africa
108.	Jonathan	Ripley-Evans	South Africa
109.	Maat	Wawo	South Sudan
110.	Ahmed	Bannaga	Sudan
111.	Azhari Traifi	Awadelkarim	Sudan
112.	Tayeb	Hassabo	Sudan
113.	Osama	Ombada	Sudan
114.	Abdillah	Mohamed	Tanzania
115.	Adam Anosisye Elly	Mwambene	Tanzania
116.	Adronicus Kembuga	Byamungu	Tanzania
117.	Albert Sylvester	Nkuhi	Tanzania
118.	Ally	Kileo	Tanzania
119.	Aluy	Salim	Tanzania
120.	Anna Dustan	Msangi	Tanzania
121.	Anthony Oswald	Kazikold	Tanzania
122.	Asha	Hassan	Tanzania
123.	Ayoub	Sanga	Tanzania
124.	Baraka	Sulus	Tanzania
125.	Bernard	Luttashaba	Tanzania
126.	David	Massami	Tanzania
127.	Bob	Jones	Tanzania
128.	Christina	Ilumba	Tanzania
129.	Cornel	Tryphone	Tanzania
130.	Cyprian Herbert	Mwaimu	Tanzania
131.	Deogratias	Kimaro	Tanzania
132.	Dismas Isaac	Mallya	Tanzania
133.	Elisa	Mndeme	Tanzania
134.	Emmanuel	Sood	Tanzania
135.	Esther	Ernest	Tanzania
136.	Fayaz	Bhojani	Tanzania

137.	Frederick	Ringo	Tanzania
138.	Fortunata	Mdachi	Tanzania
139.	Gasper	Mwakanyemba	Tanzania
140.	Gaudiosus	Ishengoma	Tanzania
141.	George	Mtengeti	Tanzania
142.	Goodluck	Chuwa	Tanzania
143.	Guojia	Liang	Tanzania
144.	Theophil	Kimaro	Tanzania
145.	Theresine	Mjengwa	Tanzania
146.	Thobias	Mnyasenga	Tanzania
147.	Hotay Massong'	Gehheri	Tanzania
148.	Highness Queen	Kitteni	Tanzania
149.	Hussein I.	Lukeha	Tanzania
150.	Irfan	Dinani	Tanzania
151.	Jally Willy	Mongo	Tanzania
152.	Joseph Onaukiro	Ngiloi	Tanzania
153.	Joseph Samaali	Shoo	Tanzania
154.	Judith	Maleko	Tanzania
155.	Julius	Sabuni	Tanzania
156.	Juvenalis	Ngowi	Tanzania
157.	Peter	Kefa	Tanzania
158.	Kennedy	Edward	Tanzania
159.	Kennedy	Gastorn	Tanzania
160.	Levina Sikujua	Vedasto	Tanzania
161.	Madeline	Kimei	Tanzania
162.	Magori	Cosmas	Tanzania
163.	Menye David	Manga	Tanzania
164.	Milton	Kereti	Tanzania
165.	Mosses	Kiondo	Tanzania
166.	Nancy	Mrema	Tanzania
167.	Nassar	Mohammed	Tanzania
168.	Othman	Kalulu	Tanzania
169.	Reginald	Raby	Tanzania
170.	Saddy	Rashid	Tanzania
171.	Sakina	Mdaki	Tanzania
172.	Salmin	Mmwiry	Tanzania
173.	Usaje	Mwambene	Tanzania
174.	Upendo	Mulazi	Tanzania
175.	Upendo	Mjengwa	Tanzania
176.	Vallensi Fidelis	Wambali	Tanzania
177.	Vicky	Rumisha	Tanzania
178.	Emmanuel	Ugirashebuja	Tanzania
179.	William	Mang'ena	Tanzania
180.	Liboire	Nkurunziza	Tanzania
181.	Edward	Rutakangwa	Tanzania
182.	Aaron	Ringera	Tanzania

183.	Geoffrey Kiryabwire	Kiryabwire	Tanzania
184.	Christine	Mutimura	Tanzania
185.	Brenda	Ntuhinyurwa	Tanzania
186.	Jimmy	Muyanja	Uganda
187.	Monica	Kyamazima	Uganda
188.	Emilia	Onyema	UK
189.	Eunice	Shang-Simpson	UK
190.	Chrispas	Nyombi	UK
191.	Julius	Nkafu	UK
192.	Yasmin	Sebah	UK
193.	Tim	Taylor	UK
194.	Gerald	Afadani	UK
195.	Alexandra	Meise	USA
196.	Angeret	Diana	U.S
197.	Hiro	Aragaki	USA
198.	Diana	Angeret	USA
199.	Joyce	Williams	U.S
200.	Mwaka	Namukonda	Zambia
201.	Bwala	Lumbwe	Zambia
202.	Paulman	Chungu	Zambia

Douala, Cameroun

The next 6th SOAS Arbitration Conference in Africa,
March 2020