

African Arbitrators Hope To Get Boost From New Pledge

By [Caroline Simson](#)

Law360 (October 16, 2019, 9:17 PM EDT) --

A new pledge unveiled this month aims to increase the number of African arbitrators involved in Africa-related arbitrations, a measure aimed at improving the legitimacy of such proceedings by ensuring that the arbitrators understand the singularities of doing business on the continent.

The African Promise asks counsel, arbitrators and arbitral institutions to strive to increase the representation of African arbitrators. Those who sign commit to ensuring a fair representation of Africans on committees, governing bodies, conference panels and, of course, in arbitrations — especially those with an African component, such as those involving an African party or project. As of Wednesday, it had nearly 200 signatories.

The goal of the promise is to ask counsel and clients "to think twice before they rush off to appoint a QC," said [Stephenson Harwood LLP](#) partner Kamal Shah, who heads the firm's Africa and India groups and who was involved in the drafting of the pledge. "At all the conferences I've attended, someone has always gotten up and asked why aren't there enough Africans sitting on panels."

Modeled on the wildly successful Equal Representation in Arbitration pledge, which was unveiled several years ago to improve the number of female arbitrators appointed in international arbitrations, the African Promise was drafted by Emila Onyema, a reader in international commercial law with the SOAS University of London, along with Shah and [Simmons & Simmons LLP London](#) partner Stuart Dutson, who is his firm's international head of arbitration.

The idea for the promise came about after it became clear through conferences held on the continent that African arbitrators felt underrepresented in African arbitrations.

"As a result of that, there's a lack of credibility in arbitration in Africa," Dutson said. "The number of African arbitrations is increasing ... and yet arbitrations are being conducted by big arbitration centers having a tiny percentage of arbitrators from Africa."

While arbitrators are appointed by the parties in most instances, parties usually rely on

the recommendations of their counsel. Particularly in large disputes, most attorneys are more comfortable going with arbitrators they're familiar with — likely from a place like the U.K. or the U.S. — whom they may have even appointed in the past.

And it's not just parties from outside the continent who might not think to appoint an African arbitrator. African businesses and even governments may turn to well-known foreign arbitrators to resolve their disputes, according to Onyema.

But those arbitrators may not be familiar with the issues particular to disputes with an African component. And that can be a problem, says [Herbert Smith Freehills LLP's Paula Hodges QC](#), head of the firm's global arbitration practice.

Although she was not involved in drafting the African Promise, she told Law360 its goal is an important one.

"Parties want to know that the people determining their disputes understand their culture and their way of doing business," she said. "Doing business in Africa is tough. ... [Businesses need to] always expect the unexpected."

Moreover, people in some parts of Africa may have an anti-colonial perspective, meaning they don't want their disputes being resolved only by American or European arbitrators, Hodges said.

And the promise is not just aimed at commercial arbitration. In fact, there's another perhaps even more important point related to investment arbitration, where arbitrators may be asked to interpret a country's laws.

"They make decisions that are binding, and in that way they interpret what the law is," Onyema said. "So for me, it's not just a question of wanting more different-colored people in the room. It goes way beyond that. ... We need African voices coming through in the revision of laws [since] states review their laws on the back of decisions made by arbitrators."

The promise isn't the only initiative being undertaken by Onyema and her colleagues to promote arbitration in Africa and to increase the number of African arbitrators involved in such proceedings. They've also held a series of conferences in Africa, which has facilitated networking not only among African arbitration professionals, but also those from Europe, the U.S. and elsewhere.

Over the last few years, there has been an increase in the number of arbitrations involving an African component as foreign investors continue putting their money into projects on the continent. There's also been an increase in the number of legal professionals there specializing in arbitration.

But those statistics aren't being reflected in the tribunals overseeing those cases — and that has to change, Dutson says.

"If we want international arbitration to prosper in Africa, we have to deal with that," he said. Arbitrators "have to understand the context, they have to understand the legal culture and the facts on the ground."

--Editing by Breda Lund and Brian Baresch.

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