

The African Promise—redressing the balance in international arbitration

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Arbitration analysis: In a bid to increase the number of Africans appointed as arbitrators and promote diversity and inclusivity in the international arbitration community, Dr Emilia Onyema of SOAS University of London, Dr Stuart Dutson, partner at Simmons and Simmons, and Kamal Shah, partner at Stephenson Harwood LLP London, have produced an ‘African Promise’ (the Promise). Onyema explains how this promise came about and outlines what needs to be done to address the issues at hand.

What is the Promise?

The Promise is to be made by arbitration stakeholders and actors to appoint skilled Africans as arbitrators, tribunal secretaries, etc, in international arbitration references. The Promise severally refers to ‘Africa connected disputes’ for such appointments, but this is our least expectation. Our clear focus and aim is for Africans to be given equal opportunities for arbitral appointments as any other qualified individual.

What was the background to the Promise?

The background to the Promise flows from anecdotal evidence of the very little participation of Africans in international arbitration (as arbitrators, counsel, tribunal secretaries, etc) which our [SOAS Arbitration in Africa Survey](#) report for 2018 empirically confirmed. Prior to the survey report, the issue of diversity of adjudicators in international arbitration became a mainstream topic at conferences and workshops, so the fact that the pool of arbitrators was not diverse (or, even better, not inclusive) was very well known and uncontested. The relevant question was finding a solution for this lack of diversity or inclusivity.

Dr Stuart Dutson and I started exploring various possible solutions to this issue and one of the ‘solutions’ we thought could set us on a remedial track was adopting an African ‘Pledge’. We felt this was workable and so set about drafting one. A few months later, while giving the keynote speech at our [SOAS Arbitration in Africa conference 2018](#) in Kigali (at pg 43), Professor Dr Mohamed Abdel Wahab mentioned as one of the solutions, the need to adopt an ‘African Pledge’. This call by Professor Dr Abdel Wahab convinced us that we were on the right track with our pledge. We engaged with the Equal Representation in Arbitration (ERA) Steering Committee leaders for their support of the draft version of our pledge. We are grateful to ERA for their comments which led to the final text of the now African Promise.

What are the aims of the Promise?

The aims are twofold as stated on the Promise webpage:

- to improve the profile and representation of African arbitrators (in international arbitration), and
- to appoint Africans as arbitrators (especially in arbitrations connected to Africa)

It is our desire that the most qualified individual is appointed for any arbitration, but we particularly felt that Africans should not be left out of Africa-connected disputes—as strongly urged by Professor Dr Mohamed Abdel Wahab in his keynote speech.

Why is it required?

As I mentioned above, this is because of the obvious lack of diversity (or inclusivity) in the pool of international arbitrators, which is not because there are no qualified Africans to be appointed. The second and more critical reason is that the international community and the development of international arbitral practice and jurisprudence should not be left only to individuals espousing a particular world view, crowding out other voices and views from other parts of the world. This, in my opinion, cannot possibly be correct and evidently does not represent the rainbow world we inhabit.

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What other work do you think should be done to address diversity issues in international arbitration?

In addition to actors signing up to Pledges and Promises, we need to put in place a monitoring system that is evidence-led. The evidence we generate will help us understand what the problems are, where the bottlenecks are and help us to design interventions that will answer to these gaps and improve the international arbitration system. Inclusivity heavily facilitates acceptance and legitimacy of the system. This, of course, may need our having a clear understanding of what we mean by diversity (and its degrees or intersections) in international arbitration.

For me, the next phase of work in this regard is putting in place a robust monitoring system. As we request in the Promise, statistics of Africans nominated for appointments onto arbitral panels should also be published by arbitral institutions, etc. Such data will provide us with information of those acting on this Promise and will help us monitor the increase (or decrease) in the number of Africans nominated to be appointed onto arbitral tribunals. It will also enable us to know the numbers of those actually appointed and by whom, and again help us monitor the increase or decrease of such appointments.

The same exercise can be done for women, younger practitioners, etc. Arbitral institutions currently publish statistics on the number of women appointed onto their panels and by whom, but we also need to know the numbers nominated for appointment (and not only those appointed) and by whom. The simple reasoning is that an individual needs to be nominated before they are appointed as arbitrator. For example, if institutions (or parties) are nominating more Africans than those appointed, we then can see where the gap lies. This will inform further research into understanding the behaviour of the actor who refuses or fails to appoint the nominated Africans. The results of this research will form the basis of any remedial actions (such as further training, etc) to be suggested to those Africans desirous of participating in the international arbitration process as arbitrators, tribunal secretaries, counsel, etc.

Do you think there is scope for collaboration between different groups to ensure all aspects of diversity are respected and appropriately promoted in international arbitration? Do you think such collaboration is necessary to achieve their ultimate goals?

To answer the first part of the question, yes, there is scope for collaboration and, if I may add, recognition of the prior work of colleagues in this field is very important. This is why we discussed our text and plan with the ERA Steering Committee leads before we published the Promise. They gave us helpful comments which we implemented in producing the published finalised text. I am also a member of the ERA Steering Committee. Thus, for me, collaboration, transparency and generosity of sharing prior learning with newcomers is very important.

My answer to the second part of the question is also a yes—I think these sorts of collaborations are necessary. The key issue here is what we ultimately want to achieve. We want the provision of equal opportunities for all involved in this business—women, men, young, old, middle-aged, different geographic locations, etc. If our target or goal or destination is the same, we can support each other and share our learning in our journey to getting to our goal. We do not necessarily have to follow the same route but we must be willing to share our learning and support each other. In this spirit, the ERA Steering Committee leads shared their experience with the ERA pledge and their learning with us in our drafting of the Promise. I encourage colleagues to read and sign up to the ERA Pledge and the Promise and more importantly, action the undertakings they make in the Pledge and the Promise.

Interviewed by Jenny Rayner.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

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