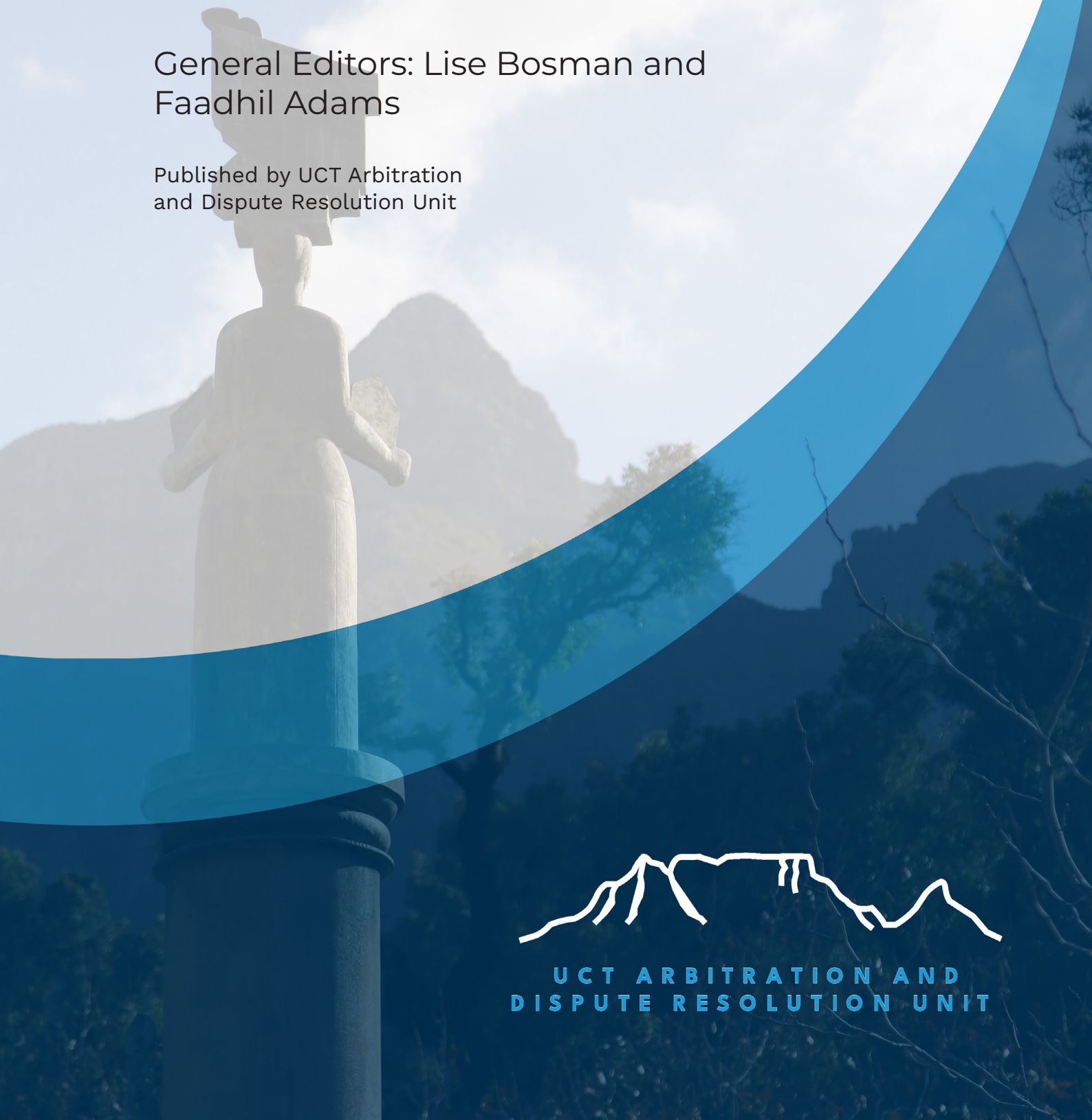
UCT Arbitration and Dispute Resolution Collected Papers

General Editors: Lise Bosman and Faadhil Adams

Published by UCT Arbitration and Dispute Resolution Unit



UCT ARBITRATION AND DISPUTE RESOLUTION UNIT

Foreword to UCT Arbitration and Dispute Resolution Collected Papers Series, Conference Insights (ADRU Collected Papers 2024/01)

February 2024

On behalf of the University of Cape Town's Arbitration and Dispute Resolution Unit (**ADRU**), we are pleased to launch the *UCT Arbitration and Dispute Resolution Collected Papers* (**Collected Papers**). This initiative is dedicated to shining a light on African scholarly research and writing in arbitration and international dispute settlement, as produced or curated by the University of Cape Town's Law Faculty. Our focus is distinct and purposeful: to gather and to amplify scholarly contributions in the field of international dispute settlement emanating from the African continent, curated by an institution anchored on the continent. This Series is more than just a collection of papers; it represents our commitment to enhancing the visibility of African scholarship, furthering access to the rich and diverse academic work produced by scholars on the African continent, and focusing on its unique and varied legal traditions and arbitration landscapes.

The Collected Papers will include three distinct lines of publication:

1. *Conference Insights* (which will compile working papers from conferences held on the African continent, commencing with the annual conferences hosted by the African Arbitration Association, a pan-African arbitration association launched in Abidjan, Cote d'Ivoire in 2018 and headquartered in Rwanda, dedicated to the promotion of African arbitration and African arbitrators, see https://afaa.ngo/);
2. *Working Papers* (which will gather work products by staff and (graduate) students at the University of Cape Town); and
3. *Lecture Series* (which will publish arbitration-related lectures hosted by UCT).

To inaugurate these Collected Papers, we present a compilation of the works and materials from the African Arbitration Association's 4th Annual Conference, hosted in Cape Town from 12-14 October 2023. This conference – held under the banner "International Arbitration in Africa: Transitions and New Perspectives" – provided a platform for discussing the evolving landscape of international arbitration in Africa. It focused on capturing the currents of change, challenge, and transition in the field, highlighting significant and often positive transformations in thought and practice. The Co-Editors for this inaugural volume are Lise Bosman and Courtney Kemp.

This volume (which appears as the first in our *Conference Insights*) consolidates materials from the conference, presented in their authentic form to preserve the original voice and intent of the contributors. The volume includes:

1. Papers from speakers, representing a spectrum of viewpoints and insights;
2. Notes from keynote speeches and other significant presentations, offering a glimpse into the expert perspectives shared at the event; and

3. Abstracts from panel discussions, carefully compiled by panel moderators to encapsulate the core themes and debates explored in each panel.

In order to maintain the integrity of the original contributions, speakers' contributions are largely unedited, providing readers with unfiltered access to the ideas and discussions that shaped the conference. For panel discussions, we have included comprehensive summaries and overviews, designed to provide a cohesive understanding of the dialogue that took place.

We believe that these Collected Papers will be an invaluable resource for practitioners, academics, and students alike, offering fresh perspectives and insights into the ever-evolving field of international dispute resolution, with a focus on the African continent.

For further inquiries or detailed discussions on the content or on the Collected Papers, please feel free to contact the General Editors directly, using the contact details below. Our sincere thanks go to Paula Baldini Miranda Da Cruz (PCA Legal Counsel and ICCA Deputy Executive Director) for her guidance in conceptualizing and establishing this new Series.

We trust that this Series will be a valuable addition to the field of international arbitration and dispute resolution.

With best regards,

Adjunct Professor Lise Bosman (uctarbitration@mac.com)

and

Dr. Faadhil Adams (faadhil.adams@uct.ac.za)

Co-Directors, UCT Arbitration and Dispute Resolution Unit (ADRU)
General Editors, *UCT Arbitration and Dispute Resolution Collected Papers*

with

Courtney Kemp (ckemp@pca-cpa.org)
Co-Editor Working Paper 2024/01

African Arbitration Association

CONFERENCE INSIGHTS

"International Arbitration in Africa: Transitions and New Perspectives"

African Arbitration Association 4th Annual Conference, Cape Town, South Africa, 12-14 October 2023

UCT ADRU Working Paper 2024/01

Editors: Lise Bosman and Courtney Kemp

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https://law.uct.ac.za/department-commercial-law/commercial-arbitration-dispute-resolution

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Programme Committee

Co-Chairs

Lise Bosman

Sylvie Bebohi Ebongo

Members

Clement Mkiva

Dalia Hussein

Daniel Wilmot

Erin Cronjé

Hamid Abdulkareem

Jackwell Feris

Matilda Idun-Donkor

Mouhamed Kebe

Sami Houerbi

Sofia Vale

Suzanne Rattray

Host Committee

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Margaret Combrinck

Vlad Movshovich

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Chairperson

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Lise Bosman

Sami Houerbi

Sylvie Bebohi Ebongo

Thierry Ngoga

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Diamana Diawara (short keynote)

Adewale Olawoyin

Aisha Abdallah

Jonathan Ripley-Evans

Luche Joubert

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Gadi Ndahumba

Natasha Peter

Pierre Burger

Uche Ofodile

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Sami Houerbi (Moderator)

Balla Galma Godana

Dalia Hussein

Datuk Sundra Rajoo

Funmi Iyayi

Lyna Laure Amana Priso

Svetlana Vasileva

Victor Mugabe

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Naomi Tarawali (Moderator)

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Mohamed Shelbaya

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Lerisha Naidu

Madeline Kimei

Ranna Musa

Panel 8: The Users' Perspectives

Clement Mkiva (Moderator)

Benjamin Sanderson

Ijeoma Bassey

Joachim Kuckenburg

Sopi Patricia Kakou

COMMITTEE AND SPEAKER PROFILES

AFAA PRESIDENT

GASTON KENFACK

ASSOCIATION FOR THE PROMOTION OF ARBITRATION IN AFRICA

Gaston Kenfack Douajni is a Magistrate, currently the Director of Legislation at the Ministry of Justice in Cameroon; he holds a Doctorate of International Economic Law, a Certificate on trade, negotiations and settlement of trade disputes and a Habilitation to Direct Researches at the University of Pau in France.

He is the Editor of the "Revue Camerounaise de l'Arbitrage", the President of the Association for the Promotion of Arbitration in Africa, registered on the list of arbitrators and conciliators at ICSID, at the OHADA Commun Court of Justice and Arbitration and Member of the PCA.

In addition, Gaston Kenfack Douajni is a member of the Board of Directors of the Cairo Regional Center for International Commercial Arbitration and of the International Federation of Arbitration Centers and Associations. President of the 49th Session of the United Nations Commission on International Trade Law, he teaches business law at various universities (in Africa and Europe) and has recently been promoted as the Chair of the Management Board of the African Legal Support Facility. Gaston Kenfack Douajni sits as President of Arbitral Tribunal, Arbitrator, co-arbitrator in ICC, ICSID, CCJA and ad hoc arbitrations.

HOST COMMITTEE

IKPEME NKEBEM

AFRICAN ARBITRATION ASSOCIATION

Ikpeme is a Fellow, an approved Tutor, Assessor and Examiner of the Chartered Institute of Arbitrators, United Kingdom and a Past Member of the Executive of the Chartered Institute of Arbitrators, United Kingdom (Nigeria Branch). He is also a Member of the Chartered Institute of Economists of Nigeria, Member of the London Court of International Arbitration (LCIA), and of course, Member of the African Arbitration Association (AfAA).

He has vast knowledge and more than a decade's experience in the teaching and practice of both Domestic and International Arbitration and has acted in several other capacities such as Arbitrator and Registrar. He has also conducted accredited trainings for different stages of Membership for the Chartered Institute of Arbitrators (UK) and organized both Domestic and International Conferences, Seminars, Workshops, Colloquia for the Nigerian Bar and Bench and other Bodies/Organisations too numerous to mention, whilst achieving great success.

His passion for quick resolution of disputes earned him a Certification by Africa International Legal Awareness (AILA), United Kingdom, for Investment Treaty Law and Arbitration. He has attended as well as taken part in numerous Alternative Dispute Resolution (ADR) Symposia, Conferences, Seminars cutting across Nigeria, Africa and the World at large.

VLAD MOVSHOVICH

WEBBER WENTZEL

Vlad Movshovich is a partner and practice leader in the Dispute Resolution Business Unit at Webber Wentzel, Johannesburg. He obtained his BA and LLB degrees (with distinction) from the University of the Witwatersrand, Johannesburg; and his BCL (with distinction) and MLitt (by thesis) from the University of Oxford.

Vlad has acted as lead legal counsel for a variety of public and private sector clients, under a variety of institutional and ad hoc arbitration rules. He has also acted for government, blue chip clients and public interest groups in South Africa in recent years, at all levels of the court system, in specialised regulatory tribunals, and before parliamentary committees and commissions of enquiry.

Vlad has presented papers at numerous international arbitration conferences and has published in the field of international arbitration, comparative, constitutional and international law. Vlad is a director of AfAA, where he heads the Standards Committee, is a member of the AFSA International Advisory Board and is on the Board of Reporters of the Centre for American and International Law. Vlad has lectured extensively on a variety of legal subjects, to business leaders, judges, practitioners and students, on the African continent and beyond. Vlad also regularly acts as a Judge of the High Court of South Africa, in Johannesburg and Pretoria.

Vlad is recognised as an expert in arbitration by Legal 500, Chambers Global and Best Lawyers. He also heads the dispute resolution team at Webber Wentzel which won the Litigation and Dispute Resolution Team of the Year Award at the African Legal Awards in 2020. Vlad is an attorney of the High Court in South Africa and solicitor of the Senior Courts in England and Wales - with Higher Rights of Audience (Civil Advocacy). Vlad speaks English, Afrikaans and Russian.

Programme Committee

Co-Chairs

Lise Bosman

ICCA & Permanent Court of Arbitration

Lise Bosman is based at the Peace Palace in The Hague, as Senior Legal Counsel at the Permanent Court of Arbitration (PCA) and Executive Director of the International Council for Commercial Arbitration (ICCA). She is also an Adjunct Professor at the University of Cape Town, South Africa, and has published and spoken widely in the field of international arbitration.

Lise is the General Editor of the ICCA "International Handbook on Commercial Arbitration" (a seven-volume loose-leaf collection of arbitration-related legislation and commentary on over 85 jurisdictions; Kluwer Law International, published since 1984), and the General Editor and contributing author of "Arbitration in Africa: a Practitioner's Guide" (Kluwer Law International, Second Edition forthcoming 2021). Her areas of specialization are: international commercial arbitration law and practice; the practice and development of international arbitration in Africa; international investment law; investor-State arbitration; and State-State arbitration.

Sylvie Bebohi Ebongo

HBE Avocats

Sylvie Bebohi Ebongo is a qualified Lawyer in Paris and Cameroon Bars. She is the Co-founder and Partner of HBE Avocats a boutique specialized in business law.

She holds a PhD in Private Law. Her Area of practice includes international arbitration, contract law, enforcement and recovery procedures. She acts as counsel, tribunal secretary and sits as arbitrator. She is a member of numerous panels of arbitrators.

Sylvie's other role includes acting as research officer at the Association for the promotion of Arbitration in Africa (APAA). She is a member of the ERA pledge, the IBA Africa Arbitration Network and AfricArb. She is one of the winners of the AYA 50 most promising Young Arbitration Practitioners awards 2020.

PROGRAMME COMMITTEE

CLEMENT MKIVA

BOWMANS

Clement Mkiva is a partner in Bowmans' Johannesburg office. He specialises in commercial litigation and international arbitration. His expertise extends to contractual disputes, damages claims, shareholder disputes, judicial reviews, class actions, employee benefits and mining claims.

Clement advises clients operating in a wide variety of sectors on transnational and domestic dispute resolution. His clientele includes multinational mining houses, financial institutions, product manufacturers, health services companies and parastatals.

He has an LLB from the Nelson Mandela University as well as a Masters in International Dispute Settlement, a joint LLM program of the University of Geneva and the Graduate Institute.

DALIA HUSSEIN

CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION

Dalia Hussein is the Deputy Director of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), an Adjunct Professor at the Law Department, the American University of Cairo and a Lecturer at the Faculty of Law, Zagazig University.

She worked as an Administrative Prosecutor in Egypt for many years. After her resignation, she was a practicing lawyer in an international arbitration law firm based in Cairo where she represented states and private parties in commercial and investment disputes before many institutions including CRCICA, ICC, ICSID and DIAC. She also taught Business and Contract Law at the French and British universities in Egypt, International Arbitration at the French Department of the Faculty of Law, Ain Shams University and worked as an external legal expert for Arab and Islamic Laws at the Swiss Institute of Comparative Law.

Dr. Hussein participated as speaker in many international conferences, and published a number of articles and book chapters in Arabic, English and French. She holds a Maîtrise en Droit from Paris I-Pantheon-Sorbonne University, an LL.B. from Cairo University, an LL.M. in International Law from Paris II-Pantheon-Assas University, an LL.M in Private Law from Cairo University, and a PHD in international arbitration from Cairo University. She also hold an M.A in Arabic Studies from the American University in Cairo.

DANIEL WILMOT

STEWARTS

Dan is Partner in the International Arbitration team at Stewarts. Stewarts is the UK's largest disputes-only law firm. Described as “an exceptional talent” and having "an incredible breadth of knowledge", Dan is ranked and recognised for his practice in international arbitration by Legal 500, Chambers & Partners and GAR's Who's Who Legal.

He specialises in disputes connected with Africa. Fluent in English and French, he has advised on matters involving Nigeria, Cameroon, Kenya, Ghana, Tanzania, Cote d'Ivoire, Equatorial Guinea, Sierra Leone, Botswana and Egypt (amongst many others).

As Stewarts is a conflict-light firm, Dan can act for African corporates and high net worth individuals against multinationals, States and State-owned entities. His experience spans many sectors, with a particular track record in the oil & gas and technology industries. He is a specialist in using litigation technology in aid of dispute resolution and is a regular speaker. Dan is Adjunct Professor of International Commercial Arbitration at Pepperdine University (California).

ERIN CRONJÉ

DE BRAUW BLACKSTONE WESTBROEK

Erin Cronjé is a South African attorney with over 9 years of arbitration and litigation experience in major law firms in South Africa and the Netherlands. She is currently a Senior Associate at De Brauw Blackstone Westbroek (Amsterdam), practicing international arbitration and litigation, and a CEDR-accredited mediator.

Erin has acted as counsel in multiple arbitration proceedings under the Rules of the ICC, ICSID, VIAC, NAI, AFSA and UNCITRAL, and in the South African courts and alternative fora. Erin is the Europe representative of the African Arbitration Association (AfAA) Young Members Committee and a Director of Africa in the Moot.

HAMID ABDULKAREEM

THREE CROWNS LLP

Hamid Abdulkareem is Counsel in the London office of Three Crowns LLP. He is an experienced arbitration practitioner and litigator, whose arbitration work has involved several high-stakes energy and natural resources disputes. He is/has been counsel in arbitrations conducted under the ICSID, UNCITRAL, ICC and LCIA Rules, and he also sits as an arbitrator.

Hamid is an alumnus of the London School of Economics and Political Science and the University of Ilorin, Nigeria, and he is currently co-chair of the IBA’s Insolvency and Arbitration Workgroup, co-chair of the ITA’s Diversity and Inclusion Task Force, as well as a member of the Advisory Board of the Lagos Court of Arbitration’s Young Arbitrators’ Network. Hamid has been recognized by Who’s Who Legal as an “Arbitration Future Leader” and by the Africa Arbitration Academy as one of “Africa’s 30 Most Promising Arbitration Practitioners”.

JACKWELL FERIS

CLIFFE DEKKER HOFMEYR

Jackwell Feris is a partner at Cliffe Dekker Hofmeyr Inc, a leading African law firm. Jackwell is an experienced attorney providing dispute resolution (both domestic and international), risk advisory and regulatory services to clients in South Africa and various other African jurisdictions. He has particular experience in the mining, energy and natural resources sectors acting for both the private sector/investors and the state or state-owned entities as legal counsel. As counsel he has represented clients in various complex arbitrations (whether ad hoc or institutional), various complex court litigation, including providing advice on regulatory changes and the effect of those changes from an international investment law and public international law perspective.

He is an admitted attorney and notary public in South Africa. He holds a LLB (North West University), a LLM in Corporate Law (Witwatersrand), as well as certificates in Economics for Law (Witwatersrand), certificate in International Commercial Arbitration (American University, Washington College of Law), and Certificate in International Investment Treaties and Investor State Arbitration (International Law Institute - Washing DC in cooperation with Georgetown University).

For the past three years he has been a guest lecturer on international arbitration (investor-state and commercial) as part of the LLM: Extractive Industry Law in Africa of the University of Pretoria, Faculty of Law. In respect of the course on Protection of Investment in Africa, he together with Leon Gerber has developed the course content and programme, with the advice and input of the fellow presenters to ensure the course provides a balanced approach on the issues affecting states and investors from an international investment law perspective.

MATILDA IDUN-DONKOR

REINDORF CHAMBERS

Matilda Idun-Donkor provides legal advice and support to both multi-national and local clients with respect to diverse areas of Ghanaian law including dispute resolution, corporate/commercial law, telecommunications, tax and intellectual property rights. She has been representing clients in court, negotiations, mediation and arbitration, and before quasi-judicial bodies such as the National Labour Commission and the Trademarks Registry for the past 14 years.

Matilda has provided satisfactory legal services to major client's challenging legal issues, significant business transactions and critical disputes in mining, insurance, banking, telecommunications, real estate and hotel business. With a deep understanding of client's needs and the complex local landscape, Matilda advises on the suitable corporate structure for the conduct of business in Ghana and the requisite legal/regulatory regime applicable to client's businesses. She also assists clients to establish businesses, coordinates due diligence into the affairs of companies to be acquired or merged, and assists clients seeking to enter into joint ventures.

Matilda was a contributor to the World Bank annual reports titled "Doing Business" which compares business regulations in about 185 economies. Matilda coauthored the International Council for Commercial Arbitration Handbook Country Report for Ghana for 2018 which is edited annually. She contributed a chapter to Chambers and Partners' Anti-corruption Global Practice Guide for 2017.

MOUHAMED KEBE

GENI & KEBE

Mouhamed Kebe is Managing Partner of Geni & Kebe a member of DLA Piper Africa. He is admitted to practice in Cote d'Ivoire and Senegal.

He has over 30 years of experience in the field of commercial arbitration, investment arbitration, and domestic litigation in Africa.

He acts for states and their entities, as well as for corporate clients in all types of disputes, focusing on energy and natural resources, infrastructure, telecommunications, banking and finance.

He sits also as arbitrator serving as tribunal chair, sole arbitrator, and co-arbitrator with arbitrator appointments under the rules of ICC, ICSID, UNCITRAL, CCJA.

He has lectured and published extensively on questions dealing with investment treaties, including a recent book on ''the African Continental Free Trade Area and the Future of Investor-State Dispute Settlement in Africa.'' He is also a member of the Court of Arbitration of the ICC, a member of the panel of arbitrators of the Common Court of Justice and Arbitration of OHADA, and a member of the panel of arbitrators of the China International Economic and TradeArbitration Commission (CIETAC).

SOFIA VALE

PROFESSOR AT AGOSTINHO NETO UNIVERSITY

Sofia Vale is an arbitrator and law professor based in Luanda, Angola. She has been acting both as arbitrator and legal expert for foreign and Angolan counsel in several arbitrations that took place in various jurisdictions.

Sofia Vale has been chairing the Commercial Law subject at the Faculty of Law of Agostinho Neto University since 2014, and she developed expertise in company law, commercial law, corporate governance, PPP/PFI, administrative law, banking and finance, dealing with disputes in the just mentioned fields. As of counsel for MG Advogados, Sofia also provides services related to domestic and international arbitrations, and regularly works with other international law firms in dispute resolution.

As consultant for the Centre for Out-of-court Dispute Settlement of the Ministry of Justice and Human Rights of the Republic of Angola, where she worked since its creation in 2014 up to 2021, she was engaged in the promotion and development of private arbitration centres in Angola. She has been appointed as a member of the Commission for the Reform of the Angolan Arbitration Law, created by the Ministry of Justice and Human Rights of the Republic of Angola. She is also in charge of the Arbitration Module inserted in the professional course for attorneys provided by the Angolan Bar Association. Sofia is currently the Angola Representative of IBA (International Bar Association) Africa Arbitration Network and has been appointed by Angola (in 2023) to the ICSID Panel of Arbitrators.

Sofia Vale has organized with the ICC- International Chamber of Commerce two conferences (in 2015 and in 2017) for the promotion of international arbitration in Angola. She is an often speaker at the Arbitration International Conference of Luanda, that occurs every November in Luanda (since 2011), as well as of several other conferences that take place in various countries.

Professor Vale authors several works regarding arbitration, namely the Angolan Arbitration Law- Commented. She is an enthusiastic of new technologies, fostering an innovative approach to the dispute resolution process. You may access her publications at www.sofiavale-arbitration.com

SUZANNE RATTRAY

RANKIN ENGINEERING CONSULTANTS

Mrs. Rattray is a senior engineer with more than 35 years professional experience. She has a Master's degree in Civil Engineering from McGill University in Canada, specializing in structural engineering. She has had lead responsibilities on numerous infrastructure projects, in the transportation, building and energy sectors, in Zambia, Tanzania, Mozambique, DR Congo, Chad and Israel. She is a Director and Partner of Rankin Engineering Consultants, headquartered in Lusaka, Zambia. She is a Chartered Arbitrator, FIDIC Certified Adjudicator and is listed on the FIDIC President's List of Approved Dispute Adjudicators.

Mrs. Rattray is an Approved Faculty Trainer on the Pathway Courses of the Chartered Institute of Arbitrators. She served as Chairperson of the Zambia Branch of the Institute from 2018 - 2020. She is listed on the panels of the Kigali International Arbitration Centre, the Nairobi Centre for International Arbitration and the Cairo Regional Centre for International Commercial Arbitration. She is a member of the Board of Directors for the Lagos Chamber of Commerce International Arbitration Centre. She has been recognised and included on the Africa's 30 Arbitration Powerlist 2020 by the Africa Arbitration Academy. Her experience includes international and domestic arbitration and adjudication, including Dispute Board Experience.

KEYNOTE SPEAKERS

JUDGE MALCOLM WALLIS

The Honourable Mr Justice Malcolm Wallis, FAArb (B Comm, LLB cum laude (Natal, 1972); Ph D (UKZN, 2010)). Barrister (1973), Senior Counsel (1985). Chair, General Council of the Bar of South Africa (1994-1997); co-chair with Frank Clarke SC, Barristers' Forum of the IBA (1998-2002); numerous offices in IBA (1998 to 2008). Honorary member, Australian Bar. Honorary bencher, Honourable Society of Kings' Inns, Dublin. Introduced advocacy training in South Africa in 1996. Active trainer in SA and has trained advocacy internationally in the UK, Singapore and Malaysia. Since his retirement has been an active arbitrator in arbitrations, adjudication boards and chairing enquiries. AFSA arbitrator and international panel member SCIA.

Books on labour (1992) and maritime law (2011); wrote 'Courts' for LAWSA; numerous published articles and spoken at many conferences domestically and internationally. Judge High Court (2009); Labour and Competition Appeal Courts (2010); Supreme Court of Appeal (2011-2022) and Constitutional Court (acting, 2015). Honorary professor (UKZN, since 2011) teaching maritime law and runnning a clerking programme for selected senior students. Professor Extraordinary (UFS, 2014-7). Visitor Law Faculty, Cambridge University (Jesus College, 2013) and visitor to Bonavero Institute of Human Rights, Oxford; visiting fellow Mansfield College and Robert S Campbell Visiting Fellow at Magdalen College, Oxford (2017).

PROFESSOR RAYMOND RANJEVA

Retired Professor of Public Law and Political Science athte University of Antananarivo (Madagascar) (1972-1991), Full Member (1974) Honorary President of the Malagasy Academy (2021).

Member of the Curatorium of the Academy of International Law (the Hague – 1998-2022) ; President of the African Academy of Religious, Social and Political Sciences (Founding Member 2020). Member of the Institute of International Law and the Academy of Overseas Sciences (1994).

Former Judge (1991-2009) and Vice-President (2003-2006) of the International Court of Justice; former Member of the International Court of Arbitration of the International Chamber of Commerce in Paris (1998-2006) ; former Member fo the Tribunal Arbitral du Sport CIO Lausanne) (1998-2022) ; former Member of the Committee responsible for examining the application of conventions and resolutions of the International Labour Bureau (2006-2022); member of the former Pontifical Council Justice and Peace-Vatican (2000-2020).

Diplomatic activities: bilateral and multilateral negotiations; settlement of bilateral or multilateral international disputes; international political or legal conciliations.

SPEAKERS AND MODERATORS

ADEWALE OLAWOYIN

OLAWOYIN & OLAWOYIN

Dr. Adewale Adedamola Olawoyin, SAN, FCIARB is the managing partner in Olawoying & Olawoying. He obtained his Bachelor of Laws degree, with second class honours upper division, in 1987 from the then university of Ile-Ife (now Obafemi Awolowo University). He proceeded to the Nigerian law school, where he again obtained his final bar examination certificate with a second class upper honours degree in June 1988. His one-year NYSC service was in the employment of the Nigerian Merchant Bank Plc, following which he joined our firm for a few months before proceeding on study leave to the United Kingdom for his postgraduate studies.

He attended the London School of Economics & Political Science (University of London) where he obtained his Master of Laws degree with merit in November, 1990.

He proceeded to the University of Bristol in 1991 for his doctorate programme and he consequently obtained his Ph.D. Degree in shipping and admiralty law in 1995. His major area of specialisation is maritime and admiralty law. He also has specific interest in corporate management and governance issues. He is a senior lecturer at the University of Lagos and specializes in shipping and admiralty law, company law, commercial transactions and banking and negotiable instruments. He is particularly adept at structuring international commercial transactions and foreign investment proposals. He has also published a number of research works in international serials such as the journal of African law, the journal of international banking and the journal of maritime law and commerce. He used to be a director of pacific bank limited before the consolidation of banks in 2005.

In September 2014, he was elevated to the rank of senior advocate of Nigeria. He was a member of the governing council of LACIAC court of arbitration and presently the president of the Lagos Court of Arbitration.

AGNIESZKA ZARÓWNA

WHITE & CASE

Agnieszka is an associate in White & Case's International Arbitration group based in London, focusing on international arbitration and public international law. She has particular experience in representing private individuals, companies and States in investment treaty arbitrations under the ICSID, UNCITRAL, and SCC rules, applicable bilateral and multilateral investment treaties and foreign investment laws spanning a variety of sectors, including mining & metals, telecom, and finance. Agnieszka also advises clients on corporate/nationality planning for investment treaty protection. She has experience serving as a secretary and assistant to arbitral tribunals.

Agnieszka is recognised in Legal500 as Rising Star (International Arbitration) and Key Lawyer (Public International Law), Who's Who Legal as Future Leader (International Arbitration), and IFLR1000 as Rising Star (Commercial Arbitration). She regularly speaks and publishes on international arbitration and public international law topics. She has been invited as a speaker at events hosted by GAR Live, ICDR Y&I, DIS, ICC, AfAA and various universities. Agnieszka joined White & Case in 2018 from another leading international law firm based in London.

AISHA ABDALLAH

ANJARWALLA & KHANNA LLP

Aisha is a Partner at ALN Kenya | Anjarwalla & Khanna where she heads the regional Dispute Resolution department based at the Nairobi Head Office. She is dual qualified as an Advocate of the High Court of Kenya and Solicitor of England and Wales. Aisha has substantial experience in complex, high value cross border disputes.

Aisha was nominated by the Kenya National Chamber of Commerce to the board of the Nairobi Centre for International Arbitration in 2021. In December 2022, Aisha was appointed head of the governing council of the Hong Kong International Arbitration Centre and is a member of its Proceeding Committee She is also on the AFSA panel of arbitrators and is a member of the Africa Users Group for the Singapore International Arbitration Centre, the African Arbitration Association and the Delos board of advisors, amongst other bodies. Aisha was also the lead author of the Kenyan chapter of the 6th, 7th, 8th, 9th and 10th editions of the International Arbitration Review.

Aisha has a lot of experience in economic crime. She is a member of the IBA Asset Recovery Committee and was part of an expert team that drafted Anti-Money Laundering, Remittances and Mobile Money Bills for Somaliland. She was the lead author of the Kenya chapter of the 2018 Chambers Anti-Corruption Global Practice Guide. and the ALN Anti-Corruption Guide 2019.

Aisha is passionate about the rule of law and the impact of quality legal training. In 2022 she was nominated as the Law Society of Kenya representative to the Council of Legal Education. She is a director of the ALN Academy, a charity that provides legal training and capacity building to public and private sector lawyers on the continent. She is also the patron of A&Ks Pro Bono Committee and a member of the Trust Law Pro Bono Council.Aisha is rated and recognised by both Chambers Global and Legal 500 for her work. She is the first female and second African lawyer to be admitted to the International Association for Defence Counsel, an invitation-only group of distinguished litigation counsel

BALLA GALMA GODANA

PERMANENT COURT OF ARBITRATION

Balla is the PCA Representative in Mauritius, where she acts as Legal Counsel. Prior to her posting, she served at the Permanent Court of Arbitration in the Hague.

She lectured at Strathmore Law School in Nairobi, Kenya.

Belinda Scriba

Cliffe Dekker Hofmeyr

Belinda Scriba is a Director in Cliffe Dekker Hofmeyr's Dispute Resolution practice. She is a member of its Business Rescue, Restructuring & Insolvency sector.

Her extensive experience includes litigation and arbitration (international and local) in the areas of insolvency and business rescue, corporate and commercial contractual disputes, Companies Act disputes, maritime, and international trade.

Belinda has more recently trained and qualified as a mediator.

Ben Sanderson

DLA Piper

Ben Sanderson is Of Counsel and the Practice Manager responsible for the global International Arbitration practice at DLA Piper. He also sits as an arbitrator and is a Fellow of the Chartered Institute of Arbitrators.

Ben has extensive experience advising clients in international arbitration disputes across a range of sectors including energy, mining and technology. He has represented both States and commercial parties in investment treaty claims.

Bilshan Nursimulu

Orison Legal

Bilshan is a qualified barrister practising in Mauritius and a Fellow of the Chartered Institute of Arbitrators. He read law at the University of Cambridge, Université Paris II (Assas-Panthéon) and Columbia Law School.

Bilshan specialises in commercial and corporate disputes, with particular interest in cross-border matters. He is described in Chambers & Partners' Global 2023 Rankings as "an up-and-coming lawyer who advises clients on commercial arbitration, insolvency and asset recovery matters".

In June 2022, he was shortlisted for the African Arbitration Awards in the category of the Young Arbitration Practitioner of the Year. He also currently serves as a representative of Young ICCA for the African region.

BOBSON COULIBALY

SCP YANOGO BOBSON

Bobson Coulibaly is consistently singled out as one of the top lawyers in Burkina Faso. She is noted for her standout expertise in the mining sector as well as her wide-ranging experience of general commercial transactions and employment law.

She maintains good relationships with a number of leading Canadian law firms, having advised on a range of matters concerning the jurisdiction, and provides services in both English and French.

DAVID UNTERHALTER

JUSTICE OF THE HIGH COURT OF SOUTH AFRICA

Justice David Unterhalter holds degrees from Trinity College, Cambridge, the University of the Witwatersrand, and University College Oxford.

Justice Unterhalter practiced at the Johannesburg Bar 1990 - 2017. Silk was conferred upon him in 2002. He specialised in competition law (and other areas of regulatory law), trade Law, commercial and constitutional Law. In 2009, he was called to the Bar in London and was a tenant at Monckton Chambers. He served on a number of World Trade Organisation panels and was appointed to the WTO Appellate Body and served as its Chairman. As an advocate, he appeared in Courts and Tribunals in South Africa and the UK. He has done extensive international arbitration work under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA) and International Chamber of Commerce (ICC) and was an executive member of The Arbitration Foundation of Southern Africa. He was appointed to the panel of arbitrators for the China-Africa Joint Arbitration Centre (CAJAC), the Shanghai International Arbitration Centre (SHIAC), the Shenzhen Court of International Arbitration (SCIA), the Singapore International Arbitration Centre (SIAC), the Comprehensive Economic & Trade Agreement (CETA) and Department for International Trade UK Free Trade Agreements.

David Unterhalter was a Professor of Law at the University of the Witwatersrand, the Director of the Mandela Institute, and is a Professor of Law in the Faculty of Law at the University of the Cape Town. In 2018 he was appointed to the High Court as a judge. He has since held appointments on the Competition Appeal Court (from June 2020), the Supreme Court of Appeal (2020-2021), the Constitutional Court (Feb – March 2022; May – July 2022) and is currently an acting judge of the Supreme Court of Appeal (December 2022 – March 2023; April – May 2023; August – September 2023).

DIAMANA DIAWARA

INTERNATIONAL CHAMBER OF COMMERCE

Diamana is the International Chamber of Commerce (ICC) Director for Dispute Resolution Services in Africa. She took on this role in January 2021 after leading for 5 years, the case management team of the Secretariat of the ICC Court overseeing disputes involving parties from the Middle East, Africa and Francophone Europe. As Regional Director for Africa, Diamana focuses on strengthening the dispute resolution infrastructure on the African continent by offering capacity building opportunities to practitioners in her region and by leading initiatives aiming at increasing the participation of African practitioners in the international arbitration scene.

Prior to joining the ICC Court, Diamana has been trained in the Arbitration Department of the Paris office of the law firm Dentons. Diamana also acts as a Lecturer in the Diplome Universitaire in Domestic and International Arbitration of Montpellier University.

She is a member of several professional networks. In particular, she is the head of the ICC Young Arbitrators and ADR Forum (YAAF) Africa Chapter, a member the board of the Paris Arbitration Week (PAW), a member of the OHADA group of the Comité français de l'arbitrage, a former member of the IBA Arb40 Steering Committee and a founding member of AfricArb. She holds master degrees in international business law from Paris 1 and Paris Nanterre Universities and is a graduate from the LLM Program of Golden Gate University San Francisco, California.

FUNMI IYAYI

TEMPLARS

Funmi is a Partner in Templars' Disputes Resolution and Corporate Practice Groups.
She is admitted to practice in both Ghana and Nigeria. She holds a Bachelor of Laws (LL.B) degree from the University of Ibadan, Nigeria, and a Master of Laws (LLM) degree in International Commercial Dispute Resolution from the Queen Mary University of London.

Funmi has, at different times, worked as counsel at some of Nigeria's leading Nigerian law firms and at a boutique Dispute Resolution law firm in Ghana. Prior to joining TEMPLARS, she was General Counsel at the Lagos Court of Arbitration. She later transitioned to the role of Chief Executive Officer of the Lagos Chamber of Commerce International Arbitration Centre.

She is a highly regarded dispute resolution expert who has been actively involved in promoting arbitration and alternative dispute resolution across Africa. Funmi also advises clients on the law and policies affecting the operation of businesses, foreign investments in Ghana, company/business laws and regulations. She also provides corporate governance, immigration, labour, employment, and compliance advice to clients in connection with local and international transactions.

GADI NDAHUMBA

AFRICAN LEGAL SUPPORT FACILITY

Gadi Taj is the Head of the Power Sector Division at the African Legal Support Facility (ALSF), an organisation hosted by the African Development Bank which provides transactional support to numerous African governments in the context of power sector projects. He is currently involved in several projects on the continent which aim to solve the energy deficit of Sub-Saharan African countries through conventional and innovative technologies. Through its work, Gadi Taj assists African governments in their understanding and monitoring of the contingent liabilities related to power project sovereign guarantees. He also co-authored the handbook 'Understanding Sovereign Debt – Options and Opportunities for Africa' which provides useful insights on the current landscape of the African sovereign debt sector.

Prior to joining the ALSF, Gadi Taj was a financial services lawyer at McCarthy Tétrault LLP, a top-tier Canadian law firm, where he worked on project finance transactions in the energy and infrastructure sectors. During his time at McCarthy, he advised several leading wind energy developers as the Canadian electricity market gradually diversified its energy sources.

IJEOMA BASSEY

CHEVRON

Ijeoma is General Counsel at Chevron in Nigeria. Prior to this position, she worked as a Senior Attorney and then as a Legal Advisor at Chevron.

JAMSHEED PEEROO

36 STONE

Jamsheed is an arbitrator, an arbitration counsel and a dual-qualified barrister practising at the Bar of England and Wales and the Mauritian Bar.

He has worked on several commercial and investment arbitrations and has been described on Legal 500 as "first-rate" and on Chambers & Partners as "a very well-respected arbitration practitioner internationally". Jamsheed has been involved in high-profile disputes across the African continent. His practice covers various sectors, including energy, mining, infrastructure, fisheries, technology, finance, corporate services, and telecommunications.

Jamsheed holds a PhD from the Sorbonne and teaches arbitration in the International Business Law LLM of University of Paris II Panthéon-Assas.

Jamsheed is bilingual (English and French) and splits his time between London and Mauritius.

JOACHIM KUCKENBURG

K+

Joachim is a partner at K+ in Paris.

He acts as Chair, sole arbitrator or member of the tribunal under various international arbitration rules (ICC, Swiss Rules, DIS and UNCITRAL). As counsel, he has experience in Numerous international arbitration proceedings, institutional (ICC, DIS, Swiss rules, SCC, CMAP) and ad hoc under UNCITRAL Rules (international sales, distribution, engineering, construction incl. FIDC know how transfer, investment matters).

Joachim has published various articles and book chapters on international arbitration and was formerly counsel of the Interntational Court of Arbitration of the ICC from 1992 to 1998. He speakers German, English and French.

JONATHAN RIPLEY-EVANS

HERBERT SMITH FREEHILLS

Jonathan Ripley-Evans is a Partner based in the Johannesburg office and heads up the South African Disputes practice. Jonathan has extensive experience in alternative dispute resolution and general commercial litigation. He has also acted as mediator and as advisor/representative in both mediations and arbitrations, domestic and international.

Jonathan is an AFSA accredited mediator and arbitrator and currently sits on the AFSA Management Committee. He was member of the core drafting committee responsible for the revision of the AFSA International Commercial Arbitration Rules which were launched in 2021. He is currently a member of the AFSA International Court and also sits as a member of the court of the Lagos Chamber of Commerce and International Arbitration Centre (LACIAC).

He is an accredited Fellow of the Chartered Institute of Arbitrators (CIArb) and currently sits on the board of the South African Branch.

His practice is geared towards alternative dispute resolution, in particular arbitration and mediation but is equally placed to administer complex commercial court litigation. He specialises in the resolution of commercial disputes in a wide range of sectors including energy, mining, tourism, hospitality, property, construction and engineering.

Jonathan is ranked by Chambers Global Guide 2022 for Dispute Resolution with clients commenting that, "he is a broad thinker and comes up with different solutions, he's very experienced with court matters and considers risks" and "he gives excellent advice, is incredibly responsive and has incredible knowledge of the market."

LERISHA NAIDU

BAKER MCKENZIE

With over 15 years of legal experience, Lerisha Naidu is the Managing Partner of the Johannesburg office of Baker McKenzie and member of the Antitrust & Competition Practice Group. She specializes in anti-trust and competition law, advising clients on complex and high-profile matters across various sectors and jurisdictions. She has a strong track record of delivering successful outcomes for her clients, thanks to commercial pragmatism, communication, teamwork, and analytical skills.

Lerisha also has a passion for constitutional law, having clerked for the Deputy Chief Justice of South Africa in 2007. She is passionate about advancing the rule of law, promoting diversity and inclusion, people-centric leadership and contributing to the development of the African continent. She has been recognized as one of the most influential and outstanding young lawyers in South Africa, receiving multiple awards and honors for her work.

LUCHE JOUBERT

GENERAL COUNSEL, REMGRO

Luche is a corporate legal executive with a career that spans 27 years. He spent 16 years working for a UK listed multinational FMCG company in numerous legal jurisdictions across Africa, the Middle East and the United Kingdom. He spent the last 8 years heading up legal services for a major listed investment firm.

In 2014 Luche qualified as a civil and commercial mediator in South Africa and in 2023 he qualified as a civil and commercial mediator in the United Kingdom.

LYNA-LAURE AMANA

MEDIATEURE & CAMCO

Lyna-Laure is a Doctor in Business Law (Paris), Corporate Executive, Arbitrator and Certified Mediator with experience of more than 25 years in top management positions including general counsel in renowned multinationals in Africa and at international level. She has successfully led multiple structuring projects and has a holistic understanding of organisations.

Lyna-Laure is active in the arbitration community. She is a member of the Permanent Committee at CMAG (the GICAM Arbitration and Mediation Centre), an arbitrator ICC Cameroon and a mediator in France and at CAMCO.

MADELINE KIMEI

IRESOLVE TANZANIA

Madeline is the Founder of iResolve Limited, a boutique corporate, arbitration and dispute resolution firm coupled with offering of alternative legal support services. She is a practicing commercial and corporate lawyer and has acted as counsel, party- appointed arbitrator, commercial mediator and arbitral secretary in both domestic & international arbitrations. Madeline is a renowned Africa -based legal industry futurist adopting tech- legal solutions such as iResolveTM, an ODR system launched in 2015 aimed at realizing her ambition to provide innovative delivery of legal solutions.

She is the current President of Tanzania Institute of Arbitrators (TIArb) and Chairperson of the Africa-Asia Mediation Association (AAMA). She serves as a member of the ICC International Court of Arbitration for Tanzania, the ICC Africa Commission, the ICC Commission on Arbitration & ADR; a newly appointed member of the IBA Africa Arbitration Network, a member of the Pledge Africa Sub- Committee, a member of the Caspian Arbitration Society and also a faculty member of the Bangladesh International Mediation Society.

In 2019 she was awarded the Top 50 Women in Management Award in Tanzania and was a finalist for the Innovation in Arbitration, Africa Arbitration Awards (EAIAC). Recently, Ms. Kimei was awarded Top 50 Most Promising Young Arbitration Practitioner's Award 2020.

MOHAMED SHELBAYA

GAILLARD BANIFATEMI SHELBAYA DISPUTES

Mohamed Shelbaya is a founding partner of Gaillard Banifatemi Shelbaya Disputes. Recognized as "a leading figure in arbitration," he previously was a partner at Shearman & Sterling LLP where he practiced for more than twelve years, focusing on disputes in the oil & gas sector or disputes related to the Middle East.

Mohamed has represented companies, States and State-owned entities in more than 70 commercial and investment treaty matters, including many multibillion-dollar disputes involving novel questions of international law and geopolitical issues.

Mohamed acts as President, Sole arbitrator, or co-arbitrator in commercial and investment treaty arbitrations under the ICSID, UNCITRAL, ICC, LCIA, and CRCICA rules.

He also advises energy companies regarding their contractual portfolio and on how to manage potential liability and mitigate litigation risk through dispute-minded contract drafting and corporate structure optimization. He advises governments and State entities on the restructuring of their respective energy sectors.

Mohamed teaches investment arbitration at Sciences Po Law School. He also serves as a member of the LCIA Court and as President of the LCIA's Arab Users Council.

NANIA OWUSU-ANKOMAH SACKEY

BENTSI-ENCHILL, LETSA & ANKOMAH

Nania is a litigation and arbitration practitioner and a Partner at Bentsi-Enchill, Letsa & Ankomah, a first tier lawfirm in Ghana. She regularly advises and represents clients in a range of high value litigation and arbitration disputes and is particularly noted for her innovative approach to solving complex legal issues. She sits as an arbitrator and is on CPR's Panels of Distinguished Neutrals and the Ghana ADR Hub List of Arbitrators. She formerly served as a Member of the Electronic Communications Tribunal of Ghana, quasi-judicial body with a three-member panel that hears appeals in respect of the regulation and licensing of telecommunications companies, television and radio stations, and internet service providers in Ghana.

She is a Member of the London Court of International Arbitration (LCIA) Court and President of the LCIA Africa Users' Council. She is Co-Chair of the Africa Arbitration Group of the IBA Arbitration Committee and was formerly Editor of the IBA Arbitration Committee Newsletter. Nania is also Chair of the Ghana Chapter of the Chartered Institute of Arbitrators Nania has been recognised by Who's Who Legal as a Future Leader - Arbitration 2023 in its global guide.

She has been recognized as one of Africa's 30 Most Promising Arbitration Practitioners (2022) and one of Africa's 50 Most Promising Young Arbitration Practitioners (2020) by the Africa Arbitration Academy. She has also been featured as a 'Woman to Watch' by the African Institute of Women in Law and was part of the Task Force for the Commonwealth International Arbitration Study commissioned by the Commonwealth Secretariat. She has authored a number of articles on arbitration and regularly speaks at conferences and training programmes.Nania is a lecturer in Alternative Dispute Resolution at the Ghana School of Law. She is called to the bar in England and Wales and in Ghana.

NAOMI TARAWALI

CLEARY GOTTLIEB

Naomi Tarawali is a partner at Cleary Gottlieb. Her practice focuses on international dispute resolution. She has represented corporates and high net worth individuals in commercial arbitration, investor-state arbitration and international litigation proceedings, as well as in mediation and ADR processes.

Naomi joined the firm in 2017 and became partner in 2023.

NATASHA PETER

TRINITY INTERNATIONAL

Natasha Peter is a dual-qualified English barrister and French avocat, and is a partner in the arbitration team of Trinity International in Paris as well as a member of the London barristers' chambers, Cornerstone Barristers. She has over 20 years' experience in international arbitration, litigation and dispute management.

Natasha focuses on disputes in the energy (including renewables), joint venture/ M&A, infrastructure, construction, natural resources, transport, finance and telecommunications sectors. She represents multinational and domestic companies, states and individuals in high-value disputes, in particular those with a link to Anglophone and/or Francophone Africa.

Natasha is a Fellow of the Chartered Institute of Arbitrators and sits as both an arbitrator and an adjudicator. She is a visiting lecturer at the Paris II Panthéon-Assas University, where she teaches drafting and written advocacy skills. She regularly publishes articles and gives seminars on topics relating to international arbitration, commercial/ contract law and alternative dispute resolution.

She has been listed in the category "Best Lawyers: Arbitration and Mediation" by Best Lawyers since 2023.

NJERI KARIUKI

NJERI KARIUKI ADVOCATE

Njeri is an Advocate of the High Court of Kenya of over 32 years turned alternative dispute resolver with qualifications such as Chartered Arbitrator & Accredited Mediator.

Njeri has practised in the field of alternative dispute resolution over a span of 24 years as an arbitrator, mediator, tutor and trainer and has gained experience, mainly in the domestic arena, sitting as sole arbitrator as well as on 3-arbitrator panels, in the construction, petroleum, real estate, insurance, corporate/commercial industries, amongst others, as well as chairing a DAB that mid-wifed an international geothermal project into operation with minimum disruption. Njeri is the current Kenya Rep. at the ICC-ICA.

PIERRE BURGER

WERKSMANS

Pierre Burger practices in the Dispute Resolution department of Werksmans Attorneys, dealing with complex and high-quantum commercial disputes across a range of sectors. Pierre is a dual-qualified lawyer, admitted to practice in South Africa and in England and Wales. He is also a certified arbitrator with the FCIArb accreditation. Pierre currently serves on the Management Committee of the South African Branch of CIArb and of the International directorate of the Arbitration Foundation of Southern Africa (AFSA), and the ICC Commission on Arbitration and ADR. He has addressed arbitration workshops and seminars both internationally and domestically. Pierre is fascinated by the intersection of law and technology, driving his passion for the field of technology law. He is particularly interested in the legal challenges that arise in our increasingly digitised world. As technology continues to evolve at an unprecedented pace, he finds himself drawn to the complex legal issues it raises, including those arising from emerging technologies like artificial intelligence and blockchain. His interest in technology law is rooted in a desire to navigate these intricate legal landscapes, advocate for responsible innovation, and ensure that the legal framework evolves in harmony with technological advancements, promoting a more secure and equitable digital future.

RANNA MUSA

STEPHENSON HARWOOD

Ranna is a bilingual dispute resolution specialist, renowned for her extensive knowledge of GCC laws and regulations, particularly in the UAE. With a focus on complex cross-jurisdiction litigation and arbitration disputes, Ranna handles a wide range of cases across the Middle East, covering civil and criminal fraud, shareholders disputes, commercial agencies, insolvency, regulatory compliance, white-collar crimes, and cybersecurity related matters.

ROSE RAMEAU

VISITING PROFESSOR AT GEORGIA STATE UNIVERSITY

Rose Rameau has over 20 years of experience in international law, investment law, trade, arbitration, cross border disputes, and white-collar defense investigations (FCPA, UK Bribery Act and French anticorruption laws.) She is currently a Visiting Professor at Georgia State University College of Law (GSU) where she teaches International Business Transactions and International Law. Prior to joining GSU, she founded and managed Rameau International Law, a boutique firm specializing in public and private international law and white-collar defense investigations. She has advised and represented sovereign states and companies on cross-border disputes. In addition, she has been appointed Sole Arbitrator, Co-Arbitrator and President of Tribunal by investors and sovereign states respectively.

Professor Rameau continues to speak on international law matters worldwide and consults on trade matters with foreign states. Professor Rameau has been a forerunner in every area of her life. Born in Haiti, every step of her transcontinental career required her to pioneer a path forward. As a result, she was the first to graduate college in her family and the first to become a lawyer. It was her own experiences overcoming economic, cultural, and linguistic barriers that first inspired her to pursue a career in international law. Professor Rameau has practiced law in Europe, Africa, and the United States.

Her experience navigating the landscape of public and private international law has allowed her to realize the importance of mentoring younger practitioners, especially women, who have been excluded from the practice of public international law and international arbitration. As a result of her mentorship and her commitment to breaking the glass ceiling, she was awarded, the Global Law and Practice Award, the Multilateral Peace Keeping Award and the 2020 ABA (SIL) Mayre Rasmusen Award for the Advancement of Women in International Law.

SALMA ELNASHAR

KHODEIR & PARTNERS

Salma studied law and received her LLB from Alexandria University, Egypt, and from the University of Paris 1 Panthéon-Sorbonne (Ecole de Droit de la Sorbonne au Caire – Institut de Droit des Affaires Internationales IDAI). She obtained her master's degree in International Relations from Science Po Grenoble, France, with a dissertation titled 'Reforms of International Investment Agreements consistent with Sustainable Development Goals'. She studied Public International Law at the Hague Academy of International Law and obtained her Legal Business French Diploma from the Chamber of Commerce and Industry of Paris (CCIP).

She is a member of the Cairo Bar, admitted before the Courts of Appeal, and member of the International Bar Association. She was appointed, in January 2022, as Middle East Liaison Officer in the IBA Poverty and Social Development Committee. She is specialized in litigation and arbitration, both domestically and internationally, in several industries such as construction, real estate, infrastructure, foreign investments disputes and employment. She has served as counsel and tribunal secretary in arbitral procedures, both ad hoc and before the most prominent arbitral institutions.

SAMI HOUERBI

HOUERBI LAW FIRM

Sami Houerbi started his legal career in 1992 with French and German law firms in Munich and Paris. From 2005 to 2021, Sami Houerbi acted as the Arbitration and ADR Director of the ICC International Court of Arbitration for Middle East and Africa. He was entrusted with promoting ICC arbitration and presence in the region.

Since 2006, Sami Houerbi has regularly acted as counsel and arbitrator in ad hoc and institutional international arbitrations mainly under the rules of ICC, DIAC, ACIC, ADCCAC, CRCICA and SWISS. In 2008, he founded Houerbi Law Firm, where he developed a recognized Arbitration and ADR practice in energy and construction law disputes, with proven expertise in the enforcement procedures of arbitral awards.

Sami Houerbi is a Court Member at the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), a Board Member of the the African Arbitration Association (AfAA) and of the Tehran Regional Arbitration Center (TRAC), and a Member of the Panel of Arbitrators of Hong Kong Arbitration Center (HKIAC) and Shanghai Arbitration Center (SHIAC).

Sami is also Member of the International Bar Association (IBA), the German Institution of Arbitration (DIS), the International Arbitration Institute of the French Committee of Arbitration, the Swiss Arbitration Association ("ASA").

SOPI PATRICIA KAKOU

AHEAD

Sopi Patricia KAKOU, is a Barrister (Avocat à la Cour), Founder of AHEAD, a PanAfrican law practice based in Abidjan (West Africa hub), and in Douala (Central Africa hub), dedicated to international companies, in particular those active in the energy sector.

Sopi Patricia has developed expertise in OHADA law and in the local law of OHADA member countries, mainly in the field of energy and investments.

She acts as legal counsel for major international groups in the field of energy, particularly renewable energy. She also acts as counsel in arbitration, and is active in the field of alternative dispute resolution methods. Since 2007, she has acquired experience in renowned international law firms (Hogan Lovells, Aramis, CMS Bureau Francis Lefebvre, Cabinet Marie-Andrée NGWE) as well as in major international groups (Rio Tinto, BNP Paribas, Saint Gobain), prior to founding AHEAD in 2015.

She holds a Master II degree in Business Law and a Master II degree in Political Science from University of Paris X Nanterre, France. She also holds a Certificate of studies from New York University, USA and a Certificate of studies from Skidmore College, New York State, USA. Sopi Patricia is very fluent in French and English.

SUNDRA RAJOO

ASIAN INTERNATIONAL ARBITRATION CENTRE

Datuk Sundra Rajoo is the current Director of the Asian International Arbitration Centre (AIAC) and President of the Asian Institute of Alternative Dispute Resolution (AIADR). He is a Certified International ADR Practitioner (AIADR) and Chartered Arbitrator.

He played an active role in transforming the AIAC into a sought-after arbitration centre in the Asian region where the AIAC's caseload grew massively from a mere 22 arbitration cases in 2010 to an accumulative total of 2761 arbitration, adjudication and mediation cases in 2019.

He was also the past President of the Chartered Institute of Arbitrators (2016) and past Chairman of the Asian Domain Name Dispute Resolution Centre (ADNDRC). He has a number of tertiary degrees in law, architecture and town planning with Hon LLD. He is the Founding President of the Sports Law Association of Malaysia, Founding President of the Society of Construction Law, Malaysia and the Malaysian Society of Adjudicators; and Past President of the Asia Pacific Regional Arbitration Grouping (APRAG). Datuk Sundra is an Advocate & Solicitor of the High Court of Malaya, Registered Professional Architect, Registered Town Planner, and Fellow of the Royal Institution of Surveyors. He has had over 310 appointments in international and domestic arbitrations across numerous international arbitral institutions.

He was an Adjunct Professor, Law Faculty of University of Malaya, past Visiting Professor at the Faculty of Built Environment, University of Technology and the Law Faculty, National University of Malaysia. He was a pioneer member in the Monetary Penalty Review Committee set up under the Malaysian Financial Services Act 2013 for two terms. Datuk Sundra is a former Deputy Chairman of the Adjudicatory Chamber of the Ethics Committee by the FIFA Council.

Datuk Sundra has authored, co-authored and edited Law, Practice and Procedure of Arbitration, 2nd Ed, 2016, Lexis Nexis (LN); Arbitration in Malaysia: A Practical Guide, 2016, (S&M); Construction Law in Malaysia, 2012, S&M; The Malaysian Arbitration Act 2005 (Amended 2011) – An Annotation, 2013, LN; The PAM 2006 Form, 2010, LN; The Arbitration Act 2005 – UNCITRAL Model Law as Applied in Malaysia, 2007, S&M; The

Malaysian Standard Form of Building Contract (The PAM 1998 Form), 1999, Malayan Law Journal. In 2015, he was conferred an Honorary Doctorate in Laws from the Leeds Beckett University, UK. He recently published the Law, Practice and Procedure of Arbitration in India (Thomson Reuters) and Standard Form of Building Contracts Compared (LexisNexis).

SVETLANA VASILEVA

ARBITRATION FOUNDATION OF SOUTHERN AFRICA

Ms Vasileva is the Secretary General of AFSA International. She is an international commercial and investment arbitration specialist with extensive experience in legal and institutional development, international policy and governance, and a legal expert on international trade and investment. She brings over 20 years of extensive experience as counsel, spanning various jurisdictions and legal traditions.

With expertise in common law, civil law, and mixed legal systems, with full fluency in English, Russian, and Bulgarian, Ms Vasileva acted in complex domestic and international litigations and commercial mediation, setting legal precedents in a few jurisdictions.

A former advocate at the Bulgarian Bar, she is a certified Mediator with the Professional Association of Mediators Bulgaria (PAMB) and the Sofia Regional Court Settlement Centre (accredited by the European Parliament Resolution 2011/2016 (INF)). She is also an International Bar Association, International Law Association, and American Bar Association member.

TAREK BADAWY

MEYSAN PARTNERS

Tarek Badawy is a partner with Meysan Partners. He specializes in dispute resolution and represents clients in trade, competition, commercial, media, and investment disputes before international tribunals and commissions, as well as Egyptian courts and administrative authorities. He also sits as an arbitrator under various institutional rules (e.g., ICC, DIAC, CRCICA) and in ad hoc proceedings, and regularly serves as an expert witness before courts and international tribunals.

Tarek also advises clients on day-to-day business matters in the aviation, shipping & transportation, banking & finance, energy, oil & gas, insurance & financial services, pharmaceuticals, and TMT industries. He represents and counsels some of the leading players in the TMT sector, ranging from global IT and telecommunications companies to the largest regional and global media companies and news agencies, and has acted as counsel for sports associations and marketing agencies before the COMESA Competition Commission in all investigations involving the sponsorship and broadcasting of sports events within the Common Market for Eastern and Southern Africa.

Tarek's experience is recognized by the leading legal directories, which consistently rank him as a leading practitioner of arbitration, TMT, and blockchain.

Tarek speaks Arabic, English, French, Spanish, and Portuguese.

TOCHUKWU ANAENUGWU

ALUKO & OYEBODE

Tochukwu Anaenugwu is a dual-qualified lawyer, in Nigeria and New York, United States. He is a senior associate at Aoluko & Oyebode and was a Visiting Foreign Lawyer in the International Arbitration Practice Group of Wilmer Cutler Pickering Hale and Dorr LLP, London, United Kingdom ("WilmerHale").

He has also been involved in international arbitration reform projects under the auspices of the Asian Development Bank and in coordination with UNCITRAL for certain countries, including Papua New Guinea, Samoa, and Palau, and the Commonwealth Secretariat study on international commercial arbitration in the Commonwealth.

He was recognized as the Best Runner Up for the Rising Star Award by the British Nigeria Law Forum in 2019. Tochukwu has spoken on a number of arbitration conferences and events. He has written academic research papers and articles on international arbitration and has provided research assistance to arbitrators.

TUMISANG MONGAE

DLA PIPER

Tumisang Mongae is a partner at DLA Piper South Africa. He specialises in dispute resolution arising out of infrastructure projects. Tumisang has acted in various disputes based on a variety of standard form contracts including FIDIC (Yellow and Red Books), NEC3 (ECC, PSC, TSC), NEC4 ECC, JBCC Principal Building Agreement, JBC (Kenya) and various bespoke contracts.

Tumisang regularly acts in disputes relating to earthworks, building works, road infrastructure, rail infrastructure, coal-fired power stations, a nuclear power stations, a hydro-pumped storage scheme, sub-stations and mines.

TUNDE FAGBOHUNLU

ALUKO & OYEBODE

Babatunde Fagbohunlu, SAN is a senior partner in Aluko & Oyebode, Nigeria. He heads the firm's litigation, arbitration and ADR practice group. Tunde is a barrister and solicitor of the Supreme Court of Nigeria (admitted 1988). In December 2008, he was conferred with the rank of senior advocate of Nigeria (SAN), a Nigerian equivalent of the English Queen's Counsel. Tunde specialises in commercial litigation and has litigated an extensive range of issues, including those pertaining to oil and gas, maritime, intellectual property, telecommunications, taxation, finance and banking, construction contracts, receiverships and insolvency, commercial law transactions and general litigation both at trial and appellate levels. Tunde has represented various multinational companies, telecommunication companies and banks in litigations, arbitrations, including ad hoc arbitrations and arbitrations administered by arbitral institutions. He has also been appointed arbitrator in several arbitration proceedings.

Tunde was named in the 2021 Global Arbitration Review 100 Rankings. In Chambers Global 2022 legal rankings, he was described as 'one of the best lawyers in the country' and as having 'a great legal mind'. Tunde's expertise has also been recognised in publications such as Who's Who Legal and The Legal 500.

UCHE EWELUKWA OFODILE

EJ PROFESSOR OF LAW AT UNIVERSITY OF ARKANSAS SCHOOL OF LAW

Professor Uche Ewelukwa Ofodile is the E.J. Ball Professor of Law at the University of Arkansas School of Law and was previously the Arkansas Bar Foundation Professor of Law at the same institution. She is also an Affiliated Professor of the Department of Political Science and of African and African American Studies at the University of Arkansas' J. William Fulbright College of Arts and Sciences. She is a Senior Fellow of the Harvard Kennedy School's Mossavar-Rahmani Center for Business and Government and an Honorary Fellow of the Asian Institute of Financial Law in Hong Kong. In 2021, Professor Ofodile was elected to the Council on Foreign Relations. In 2023 she was elected a member of the American Law Institute.

Professor Ofodile has taught, spoken and/or lectured at many universities around the world including Columbia University, Tufts University, the American University of Armenia, the University of Puerto Rico School of Law, and the Trade Policy Training Center in Africa based in Tanzania. She is the recipient of numerous prestigious awards including the British hevening Scholarship as well as awards from the Carnegie Council on Ethics and International Affairs, the American Bar Association Section of International Law, the Academy on Human Rights and Humanitarian Law at American University Washington College of Law, the Albert Einstein Institution, and the International Federation of Women Lawyers (FIDA–Nigeria).

Passionate about demystifying the law and making it more accessible to ordinary folks, Professor Ofodile is the founder and convenor of 'Patent Bootcamp for Women and Minorities in STEM.'

Professor Ofodile holds an LL.B. from the University of Nigeria, Nsukka, an LL.M. (in International Business Law) from the University College London, an LL.M. from Harvard Law School, and an SJD from Harvard Law School.

VICTOR MUGABE

KIGALI INTERNATIONAL ARBITRATION CENTRE

Victor Mugabe is a professional lawyer with extensive experience in legal and institutional development, international arbitration and other ADR mechanisms.

Since January 2021 to date, Victor MUGABE is the Secretary General of Kigali International Arbitration Centre (KIAC), the premier and sole arbitration Institution in Rwanda. In his Secretary General's capacity, Victor Mugabe serves as the head and Registrar of the Centre and supervises the administration of arbitration, mediation and other ADR cases filed at the Centre.

He previously served as the Executive Director of the Rwanda Bar Association since April 2012 to December 2020 and the the Coordinator of the Justice, Reconciliation, Law and Order Sector Secretariat in the Ministry of Justice of Rwanda since 2010 to 2012.

YASMINE LAHLOU

CHAFFETZ LINDSEY

A partner at international disputes boutique Chaffetz Lindsey in New York, fluent in English, French and Italian, and proficient in Portuguese, Yasmine Lahlou has over 20 years of experience in international arbitration and litigation.

Initially trained in Paris and admitted in New York, Yasmine is experienced in civil and common law systems. Yasmine has represented clients in international arbitration proceedings conducted under all major institutional rules and in ad hoc proceedings. Her practice spans a broad range of industries and sectors, including construction, energy, mining, food and beverage and pharmaceuticals. She has acted as a presiding, sole co-and emergency arbitrator in ICC, SCC, ICDR/AAA CRCICA (in Cairo) and LCIA arbitrations. Yasmine also has extensive award and judgment enforcement experience.

Yasmine has been named one of 17 “Global Elite Thought Leaders” in North America & the Caribbean— a title reserved for the top 2.5% of ranked practitioners considered the “very best by peers and clients, achieving the highest number of recommendations in the research”— by Who’s Who Legal 2023 Arbitration report.

CONFERENCE OPENING

INTRODUCTORY REMARKS

Lise Bosman

As co-chair of the 4th Annual African Arbitration Association Conference Programme Committee, with my co-chair Sylvie Bebohi Ebongi, we extend a warm welcome to all, and thank our Cape Town hosts and our sponsors for arranging and supporting this exciting event. Welcome also to our special guests Mr Justice Malcolm Wallis and Professor Raymond Ranjeva, to South African practitioners, to visitors from abroad, and a special shout-out to my LLM students from this year's University of Cape Town commercial arbitration class.

In putting together this programme, Sylvie and I have aimed to pull together the threads of movement, change, challenge and transition that we see in our field. We are conscious of profound (and often positive) shifts in thinking and practice in our field. Much of what makes the (arbitration press) headlines is of course to do with investor-State dispute settlement (ISDS), and we will pick up on some of those issues in panels 3 (on the evolution of new kinds of disputes) and panel 5 (on the implementation of the African Continental Free Trade Agreement and ISDS).

But commercial arbitration practice is not immune to shifts in thinking and practice. The pandemic accelerated a shift to more online interactions, and even more use of already quite sophisticated practices around electronic sharing of documents and pleadings. Arbitral institutes, arbitrators, parties and their counsel have been challenged to find ever-better ways to increase efficiency, save time, cut costs and provide solutions tailored to the needs of the parties. Some of those mechanisms are of course familiar to you, in the form of provisions for use of emergency arbitrators, expedited proceedings, and increased scrutiny of costs. Panels 4 (looking at developing best practices for arbitral institutes based on the African continent), and Panel 6 (examining the enforcement of arbitral awards on the continent) take a hard look at some of these practices. And of course we will also create some background and context in this morning's first panel, take a look at new forms of dispute resolution (in Panel 2) and new categories of disputes (in Panel 3).

A huge thank you to our programme committee, who have all worked hard on putting together these sessions for you. They are:

- Hamid Abdulkareem
- Erin Cronjé
- Jackwell Feris
- Dalia Hussein
- Matilda Idun-Donkor
- Mouhamed Kebe
- Clement Mkiva
- Suzanne Rattray
- Sofia Vale and
- Daniel Wilmot

We hope that you will go away on Saturday evening having asked yourselves questions like:

- Are our current practices fit for purpose?
- Are African arbitration institutes future-proof?
- Will we be able to meet the expectations of clients confronted with new kinds of disputes? and
- How can we collectively ensure that African arbitral practice meets the challenges of the 21st century.

CONFERENCE OPENING

INTRODUCTORY REMARKS

Sylvie Bebohi Ebongo

Mesdames et Messieurs les Délégués, à la suite de Lise, Permettez-moi, en ma qualité de co-présidente du Programme de cette 4ème Conférence annuelle de l'Association Africaine pour l'Arbitrage (AfAA) de vous souhaiter une chaleureuse bienvenue à Cape Town, tant pour ceux qui ont pu faire le déplacement, que pour ceux qui nous suivent en ligne, en vue de commencer nos échanges sur le thème de notre 4ème conférence annuelle de cette année qui s'intitule "Arbitrage international en Afrique : transitions et nouvelles perspectives."

Ce thème, nous l'avons voulu transversal, comme Lise l'a déjà si bien expliqué, pour nous permettre de mettre le doigt sur les transformations, les défis, mais surtout les transitions que nous observons dans notre domaine. Je ne reviendrai pas en détails sur le programme que vous avez et que Lise a résumé dans son speech précédemment. J'ajouterai simplement un aspect qui me paraît essentiel et dont nous parlons depuis des années, qui a d'ailleurs occupé une partie de nos débats hier lors de l'Assemblée Générale annuelle : Il s'agit de la diversité et de l'inclusivité. Au-delà des constats que nous connaissons tous, qui consistent notamment à dire que les praticiens africains sont moins, représentés, l'arbitrage est dominé par la gent masculine, les jeunes praticiens ont du mal à trouver leur place, l'un des sujets de réflexion que nous avons mettre sur la table concerne l'implémentation de

Ladies and Gentlemen Delegates, following Lise, allow me, as co-chair of this 4th Annual Conference of the African Arbitration Association (AfAA), to extend a warm welcome to Cape Town, both to those who have made the journey and to those joining us online, as we begin our discussions on the theme of our 4th annual conference this year titled "International Arbitration in Africa: Transitions and New Perspectives."

As Lise has already eloquently explained, we chose this theme to be cross-cutting, allowing us to pinpoint the transformations, challenges, and most importantly, the transitions that we observe in our field. I won't go into detail about the programme that you have, as Lise summarised it in her previous speech. I would just like to add an aspect that seems essential to me and has been the subject of discussion for years, which also occupied a part of our debates yesterday during the Annual General Assembly: diversity and inclusivity. Beyond the facts that we all know, including the underrepresentation of African practitioners, the dominance of men in arbitration, and the struggle of young practitioners to find their place, one of the topics for consideration that we are putting on the table is the implementation of this diversity: Do we think about it from the very beginning? Are the methods used to enable this diversity to truly take flight the right ones?

A profound introspection on diversity is necessary to prepare African practitioners for the present and future transitions.

cette diversité : Y pensons-nous dès la base ? Les méthodes utilisées pour permettre à cette diversité de pendre véritablement son envol sont-elles les bonnes ?

Une introspection profonde sur la diversité est nécessaire, afin de permettre aux praticiens africains d'être prêts pour les transitions présentes et à venir. La diversité nous devons y penser dès la fondation, à l'intérieur même du système : nous l'avons longuement abordé hier, elle est l'essence même de notre Association commune (Article 2.3), mais nous devons faire plus d'efforts pour la rendre effective, le débat que nous avons eu hier au cours de l'assemblée générale en est la preuve.

Mais nous devons apprécier les efforts fournis, car au-delà des critiques, il faut pouvoir se féliciter du chemin accompli, ma présence, moi en tant que praticienne africaine d'obédience francophone et elle en tant que praticienne africaine d'obédience anglophone en sont la preuve. Nous aurons aujourd'hui deux propos introductifs, l'un en anglais avec le juge Wallis et l'autre en français avec le Professeur Ranjeva, pour marquer cette diversité linguistique que nous n'avons pas choisi, mais que nous devons assumer.

Nous espérons donc que même pendant les débats que nous espérons nourris, cette diversité éclatera véritablement, pour montrer que l'Africanisation de l'arbitrage est en marche et s'exprime à travers sa diversité culturelle, juridique, juridictionnelle, géographique, raciale, linguistique.

Bonne conférence à tous et à toutes.

Diversity should be considered from the very foundation, within the system itself. We discussed it at length yesterday; it is the very essence of our common Association (Article 2.3). Still, we must make more efforts to make it effective, as evidenced by the debate we had yesterday during the General Assembly.

But we must also acknowledge the efforts made because, beyond criticism, we must be able to celebrate the progress made. My presence, as an African practitioner of Francophone origin, and hers as an African practitioner of Anglophone origin, are proof of this. Today, we will have two introductory speeches, one in English by Judge Wallis and the other in French by Professor Ranjeva, to emphasize this linguistic diversity that we did not choose but must embrace.

Therefore, we hope that even during the discussions that we expect to be enriching, this diversity will truly shine to demonstrate that the Africanization of arbitration is underway and is expressed through its cultural, legal, jurisdictional, geographical, racial, and linguistic diversity.

A successful conference to all.

INTRODUCTORY REMARKS

KEYNOTE ADDRESS

Vlad Movshovich

Vlad Movshovich, Conference Host Committee member, welcomed the Conference guests to Cape Town and introduced Judge Wallis, a pre-eminent jurist in South Africa, to commence the first keynote address. Judge Wallis was a highly sought-after advocate in his early career before being appointed to the bench, traversing every level of the judiciary and serving in the Supreme Court of Appeal of South Africa in the period 2011-2021. He has penned significant judgments, published numerous scholarly articles and is a prodigious writer, lecturer and speaker. Judge Wallis joins the conference to share his insights into arbitral practice from his experience on the bench.

KEYNOTE ADDRESS

BREAKING THE SHACKLES OF LITIGATION

Judge Malcolm Wallis

Thank you for those kind words of introduction and for inviting me to address this distinguished gathering. Rather mischievously, my tech-savvy son suggested that I should make use of his current enthusiasm for ChatGPT to prepare a first draft of this address. He typed in African Arbitration Conference address and it duly churned out 30 pages commencing with 'Hi everyone" and ending with 'Together we can make arbitration work for us, for Africa and for the world'. While there is nothing wrong with the final sentiment, save that it sounds a little like Donald Trump, I said that the opening was too informal, so he typed in: 'Can you do it in the style of Malcolm Wallis?' The response was 'I'm sorry but I cannot do it in the style of Malcolm Wallis … I do not have the expertise or the authority to imitate his style'. I don't know whether that's a criticism of my style, or a victory for human intelligence over AI, but one way or the other I'm on my own this morning.

In most African jurisdictions until about thirty years ago litigation in the courts was the chosen dispute resolution method for most disputes, while arbitration played a relatively limited role. It tended to operate in a few fairly niche areas, such as construction and engineering and a limited number of commercial contractual disputes. Maritime arbitrations were a well-recognised institution, but were generally heard in major centres such as London, Rotterdam and New York. In South Africa and elsewhere there was a move to arbitration and other forms of ADR in labour matters. Fast forward thirty years and there has been a seismic shift internationally with a massive expansion of commercial arbitration that has not left this continent untouched. In Africa and elsewhere this shift has spawned a plethora of arbitral institutions, described by a bewildering array of acronyms. The first thing a newcomer to arbitration must do is decipher and memorise the acronyms so that you can understand what people are talking about. My limited research suggests that the CRCICA (for those who are not yet initiates in acronym world that is the Cairo Regional Centre for International Commercial Arbitration) and the Association of Arbitrators Southern Africa (AASA), both of which trace their foundation to 1979, were among the earliest on this continent. Since then arbitration centres have been established and flourished to a greater or lesser extent in a number of African jurisdictions. The SOAS 2020 Arbitration in Africa Survey Report identified no less than 91 arbitral centres or organisations operating on the continent, offering various services. Not all of these involved administered arbitrations, under their own bespoke rules, but provide arbitration facilities, appointment and training services and some like the CCMA in South Africa are statutory bodies operating in specific fields, in that case labour disputes. The survey identified nine major centres in various countries administering both international and domestic arbitrations. But, apart from administered arbitrations, there is a substantial body of arbitrations that are conducted *ad hoc*, either in terms of arbitration clauses in commercial agreements, or in terms of arbitration agreements concluded after a dispute has arisen.

The exponential growth of arbitration has generated a range of issues that are well reflected in your programme. While the conference title is 'International Arbitration in Africa: Transitions and New Perspectives', it is right that the topics under discussion cover both international and domestic arbitration. On the international front there is increasing application and use of the UNCITRAL Model Law. This is in force, either with or without the 2006 amendments, in a number of African countries that are major arbitration centres, although the busiest jurisdiction, South Africa, only brought it into law in December 2017.[1] Notwithstanding that slow start, reports suggest that it has generated a considerable body of work through AFSA, the largest arbitration institution in this country, and that seems to have been the case elsewhere.[2] Perhaps the slow process of repatriating African arbitrations to Africa is at last underway.

The growth in arbitration is attributable to many things some familiar and others less so. Traditionally the parties are looking for greater control over the process than they get in a court room. They have the advantage of confidentiality; can choose the arbitration panel and, provided that they co-operate with one another, can achieve greater flexibility, less formality, a quicker hearing and a quicker decision. The pandemic illustrated the scope for flexibility as arbitrations not only continued but increased in number because of the rapid adoption of online hearings. While some jurisdictions fared better than others in that regard, reports from across the world suggest that courts are still trying to work off backlogs that arose during national lockdowns. In this country, for example, only one court, the Supreme Court of Appeal managed to continue its work virtually without interruption by way of remote hearings.

The advantages of arbitration I have mentioned are not necessarily achieved in every case in this country. Partly that is because, far too often, the default model for arbitration practitioners and most arbitrators is a litigation model. Even where the arbitrator wishes to pursue matters on a more flexible basis, they can find their hands tied by the terms of the arbitration agreement. Thus it is commonplace to find provisions in arbitration agreements, even ones invoking the Model Law, saying that a choice of South African law includes the law of evidence and the principles of *stare decisis*; that the issues are as defined in the pleadings; that the Uniform Rules of Court will apply and that the arbitrator shall have the powers of a single judge of the high court. Provisions for appeals from a single arbitrator to a panel of three are frequently encountered. Timetables for hearings traverse discovery, requests for particulars, expert witnesses, evidential hearings and the like as if in a trial. All of these restrict the ability of an arbitrator to play a proactive role in bringing the proceedings to an expeditious conclusion. But the fault lies also with arbitrators, because they are concerned that any departure from the tried and tested path may result in the award being challenged on the grounds of procedural unfairness. The international trend towards expedited arbitration and dispute adjudication in construction disputes, should be pointing us towards releasing the shackles of blindly following the way that courts do things. There are reasons for courts to conduct their proceedings as they do – not necessarily good reasons, but reasons nonetheless – but commercial arbitration is usually chosen with a view to circumventing the disadvantages of delay, expense, point taking and uncertainty that courts involve. If it does that, the additional costs that arbitration brings in its wake can readily be saved.

That brings me to the approach of the courts to arbitration. Here there is a symbiotic relationship. However much the parties and their advisers may wish to escape from the clutches of the courts, they need them. It is to courts that parties must go to enforce awards and to set them aside. The former is essential because the successful party is trying to invoke the coercive powers of the State to procure enforcement. The latter is a corollary of the former. If the State

[1] International Arbitration Act 15 of 2017.
[2] See for example the 2019 blogpost by Gregory Travaini '*Arbitration Centres in Africa: Too Many Cooks'* available at https://arbitrationblog.kluwerarbitration.com/2019/10/01/arbitration-centres-in-africa-too-many-cooks/.

via the court is to be asked to assist in enforcing the award, it is inevitable that it will set standards establishing when and whether it will lend a hand. There is a certain irony to this, especially when the reason for avoiding the court in the first instance might have been a sense of disillusionment with the courts as primary adjudicators. That is a particular problem in this country, and I believe elsewhere in Africa, in consequence of inefficiencies in the functioning of courts, delays in having matters heard; delays in the handing-down of judgments; and concerns about the skills and experience of the judiciary.

There is also a question of whether, what I might call the philosophy of the courts, is attuned to the promotion of arbitration. Let me speak here from the South African experience and invite those of you from other countries to compare it with your own. While there are some resounding assertions by both the Constitutional Court and the SCA of the importance of commercial arbitration,[3] as well as a judgment enforcing a 'Kompetenz-kompetenz' clause,[4] some of our leading judgments seem less supportive.[5] The only reported judgment on the International Arbitration Act held that the provisions of the Admiralty Jurisdiction Regulation Act permitting a South African court to decline jurisdiction or stay an action brought in the exercise of its admiralty jurisdiction constituted 'any other law of the Republic' for the purpose of Article 1(5) of the Model Law. It is not wholly clear on what basis those provisions meant that the dispute under a contract for the sale of coal 'may be submitted to arbitration *only* according to provisions other than those of the' Model Law.[6] After all the provisions to which the court referred were those that permit an admiralty court to refuse to exercise its jurisdiction or stay proceedings, which is largely the same as what Article 8 does.

One particular area of concern with courts is their approach to the construction of the scope of the arbitration clause or agreement in proceedings to set aside an award. This is a problem in this country. In one case where the arbitration agreement provided that the dispute was defined in the pleadings and that the arbitrator had the powers of a judge – which include both the power to grant amendments to the pleadings and to decide issues where an issue not referred to in the pleadings is fully canvassed – the court held that it was not open to the arbitrator to determine an issue not mentioned in the pleadings but addressed in cross-examination.[7] A more recent decision has retreated somewhat from that position,[8] but this kind of literalist parsing of arbitration agreements is inconsistent with current approaches to contractual interpretation in this country and inconsistent with the purpose of an arbitration agreement. The English courts have held that it is absurd to construe an arbitration clause in a contract as conferring the power to decide whether the contract (including the arbitration agreement) has been terminated, but not as conferring the power to decide whether the contract is *ab initio* void because of a fundamental defect attendant upon its conclusion. In general there is no reason why the parties

[3] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) esp in paras 195 to 236; *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 4.

[4] *Zhongi Development Construction Engineering Company Ltd v Kamoto Copper Company Sarl* [2014] ZASCA 160; 2015 (1) SA 345 (SCA) paras 53-55.

[5] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) in declining to adopt the approach to construction of an arbitration clause in *Fiona Trust Holding Corpn and others v Privalov and others* [2007] UKHL 40; [2007] 4 All ER 951 (HL).

[6] *Atakas Tikaret ve Nakliyat AS v Glencore International Ag* 2019 (5) SA 379 (SCA). The Court did not refer to s 3(1) of the Carriage of Goods by Sea Act 1 of 1986, which was specifically amended to take account of Article 8 of the Model Law.

[7] *Hos+Med Medical Aid Scheme v Thebe ya Bopelo Helathcare and others* 2008 (2) SA 608 (SCA) para 30. See also *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd* [2012] ZASCA 4, para 18(c).

[8] *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) paras 12 - 15. With all due respect I find the reasoning in paras 31 to 35 on the construction of the agreement unconvincing. A dispute is as much 'raised in the proceedings' as any dispute formally articulated in the pleadings, if the parties canvas it fully as part of the case. That is the essence of the decision in *Shill v Milner* 1937 AD 101 at 105.

should have agreed to arbitrate the question of the agreement's cancellation or termination, but not its invalidity from inception. It is equally absurd in my view to say that an arbitrator faced with a dispute defined in pleadings, but vested with a power to amend those pleadings – thereby expanding the scope of the dispute and the extent of the issues that may be decided – lacks the power to determine an issue fully and fairly canvassed by the parties without a formal amendment to the pleadings.[9]

The lesson to be learned from this is that those who practice in the field of arbitration should not be unduly parsimonious in defining the issue in dispute once a dispute arises falling within the arbitration clause. The arbitrator's obligation of fair adjudication and alertness by both parties to the possibility that a new case is being raised seem to offer adequate protection against being taken by surprise. This is not an invitation to a free for all approach to the conduct of arbitrations. But in this country and I suspect others in the common law tradition, there has historically been a suspicious approach, if not outright hostility, to arbitration. So when formulating arbitration clauses and arbitration agreements parties should from the outset seek to insulate themselves as far as possible from judicial interference on technical grounds. One technique for doing this that one sees increasingly is a provision in arbitration clauses in commercial contracts that the arbitration clause survives the invalidity of the contract, effectively severing the arbitration clause from the commercial agreement. This kind of drafting that seeks to give the fullest possible effect to the parties' intention to have disputes of any character arising from their relationship determined by arbitration is to be commended. And where there is judicial suspicion of arbitration there is a need for bodies like this one to engage with judges to show that we are not infringing on their work but rather engaged in a joint activity of efficient dispute resolution. You could always point out to more senior members of the judiciary approaching what Lord Bridge described as the age where 'the statutory presumption of judicial incompetence arises',[10] that they may wish to bear in mind that retirement may give rise to a non-statutory presumption of arbitral competence in their declining years.

May I make three more points very quickly. The first is that in this country and in a number of others we are faced with a two-stream approach to arbitration in legislation dealing with arbitration. International arbitration is covered by the International Arbitration Act 15 of 2017 while domestic arbitrations are dealt with under the Arbitration Act 42 of 1965. This is not entirely satisfactory given the extent to which courts can interfere in arbitration proceedings at various stages under the latter statute. Some convergence between the two regimes in the direction of the Model Law seems to me desirable.[11]

The second arises from a concern that I have long had about arbitration. If arbitration runs alongside the ordinary courts as it does in many jurisdictions, there is little concern about the ability of courts to engage in the gradual development of the law that is at the heart of our and many other legal systems. Increasingly in this country that is no longer the position. The rise of commercial arbitration has been paralleled by a corresponding decline in judicial decision-making in crucial areas of commercial law. In the eleven years I spent in the Supreme Court of Appeal the number of significant commercial cases that came to the court was extremely limited and declining. The result is that the complex cases where the law needs to be explored, reconsidered and taken forward are now being dealt with outside the formal litigation system and outside the system of precedent on which much of the development of our jurisprudence rests. Knowledge of the process of interpreting complex commercial cases and the technique

[9] *Holford v Carleo Enterprises (Pty) Ltd and Others* [2014] ZASCA 195 para 9.
[10] *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268 (HL) at 271g-h.
[11] See Gerhard Rudolph and Michelle Porter-Wright 'South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration' available at http://arbitrationblog.practicallaw.com/south-africas-adoption-of-the-uncitral-model-law-evolution-in-the-practice-and-procedure-of-arbitration/.

of doing so is not widely available. Even interpretation of important statutes bearing upon commercial dealings and relationships may take place without anyone other than the parties and their lawyers being aware of it. This is not conducive to providing a legal environment displaying the kind of commercial certainty that business wants from lawyers. It is not conducive to the development of the law or the education of the next generation of lawyers. We need to address this in some way without sacrificing the confidentiality that is foundational to arbitration. There are examples of how this can be done in tax cases and family matters and competition cases. It is a task that must be addressed in the interests of the wider legal system and those who use it.

My last thought arises from a conversation I had last night with one of the delegates, to whom I mentioned that I am going to Vietnam at the end of November to help with a training programme for potential arbitrators and arbitration practitioners. Her response was rightly: 'Why not do that here?' That is a question we all need to be asking and answering if arbitration is to flourish in Africa.

I hope that one or two of those thoughts may prove to be of interest. Thank you again for inviting me to address you and I wish you well in your deliberations. Having said that, like Andrew Wiles when completing the lecture in which he revealed his proof of Fermat's Last Theorem,[12] I think I'll stop here.

Thank you very much.

[12] In the equation a to the power of n + b to the power of n = c to the power of n is not true for any integer value of n equal to or greater than 3.

KEYNOTE ADDRESS

ARBITRAGE INTERNATIONAL, ORDRE INTERNATIONAL ET AFRIQUE

INTERNATIONAL ARBITRATION, INTERNATIONAL ORDER AND AFRICA

Prof. Raymond Ranjeva

Dans la tradition malgache, les remerciements ressemblent aux rayons du Soleil Levant ; ils s'adressent d'abord à ceux qui sont au sommet des collines et aux cimes des grands arbres. J'ai nommé Gaston Kenfack. Je lui dois l'honneur et le privilège de m'adresser à votre auguste Aréopage que je salue avec respect. J'associe à ces salutations et remerciements mes amis associés dans l'aventure de l'arbitrage, Lise Bosman et ceux qui nous permis de nous retrouver à cette grande messe.

En doyen en séniorité, j'accomplirai la mission que notre Roi Andriamasinavalona (1675-1710) a assignée aux Parents et Aînés dans ces termes "*L'honneur du souverain résulte de l'aptitude des sujets à porter haut l'honneur et la sainteté du souverain; l'honneur des parents se mesure dans l'aptitude des enfants à vivre dignement et leur capacité à être des hommes de bien.*" Mon ambition est que mes souhaits soient.

Je ne vous ferai pas l'affront de vous parler des mérites et avantages de l'arbitrage international. Mais comme enseignant je ne peux me limiter à vous délivrer des informations encyclopédiques que vous trouverez ailleurs grâce aux nouvelles technologies de communication

In the Malagasy tradition, expressions of gratitude are like the rays of the rising sun; they are first directed towards those who are on the hilltops and the tops of the tall trees. I'm referring to Gaston Kenfack. I owe him the honour and privilege of addressing your esteemed assembly, which I greet with respect. I extend these greetings and thanks to my friends who have joined me in the adventure of arbitration, Lise Bosman, and those who made it possible for us to gather at this great event.

I will simply share some reflections drawn from my personal experience and refrain from being overly critical. As a senior and a dean, I will fulfil the mission that our King Andriamasinavalona (1675-1710) assigned to Parents and Elders in these terms: "The honour of the sovereign results from the ability of the subjects to uphold the honour and sanctity of the sovereign; the honour of parents is measured by the ability of children to live dignified lives and their capacity to be virtuous." My ambition is that my wishes are fulfilled.

I won't insult your intelligence by discussing the merits and advantages of international arbitration. However, as a teacher, I cannot limit myself to delivering encyclopaedic information that you can

sociale. Tout au plus, dois je vous dire qu'après 45 ans je dois vous avouer qu' à la base du même droit, il y a une différence de nature entre les missions juridictionnelles et l'activité académique ou universitaire : aux premières il revient de trancher un différend et aux les secondes il faut traiter toute décision comme une jachère pour l'analyse critique et la recherche. Je souhaiterais ce jour briser la logique formelle, tentation naturelle du juriste, pour parler de mon aventure dans l'arbitrage et vous conduire à revenir à la réalité des faits.

Pourquoi ce titre ? Il y a une méconnaissance des fondements de l'arbitrage international institutionnalisé pour le monde des affaires. Il faut remonter à la création, en 1919, de la Chambre de Commerce internationale au sein de laquelle a été placée en 1923 la Cour internationale d'arbitrage. "*La CCI est une organisation patronale commercialisant notamment des services d'arbitrage aux entreprises via sa Cour internationale d'arbitrage. Il s'agit de la principale institution mondiale de règlement des différends commerciaux*". Trois éléments sont déterminants pour comprendre l'économie générale de l'arbitrage international.

La C.C.I. et la CIA ensuite s'inscrivent dans l'esprit internationaliste des Traités de Versailles de 1919. Le triomphe de la pensée libérale en politique, en économie et social avec notamment la Société des Nations, l'Organisation internationale du Travail pour la paix et la justice sociale. La C.C.I. représentait l'organisation internationale patronale pour la promotion de la paix dans les relations d'affaires marquées par la compétitivité.

Ensuite la foi en l'avènement d'un monde de Paix avec le développement progressif du droit des relations internationales et l'institutionnalisation d'un mécanisme permanent de règlement des différends représente le second pilier de la C.I.A., une véritable juridiction à base consensuelle de compétence.

find elsewhere through modern communication technologies. At most, I must tell you that, after 45 years, I must admit that there is a fundamental difference in nature between the judicial missions and academic or university activities, even though they are based on the same law. The former is responsible for settling disputes, while the latter treats every decision as fallow ground for critical analysis and research. Today, I wish to break away from formal logic, the natural temptation of lawyers, and share my experiences in arbitration, bringing you back to the reality of facts.

Why this title? There is a lack of understanding of the foundations of institutionalised international arbitration for business in the world. We must go back to the establishment in 1919 of the International Chamber of Commerce (ICC), within which the International Court of Arbitration was placed in 1923. "The ICC is a business organisation that commercializes services such as arbitration for companies through its International Court of Arbitration. It is the world's leading institution for settling commercial disputes." Three elements are crucial for understanding the overall economy of international arbitration.

First, the ICC and the International Court of Arbitration are in line with the internationalist spirit of the Treaties of Versailles of 1919. The triumph of liberal thought in politics, economics, and society, including the League of Nations and the International Labour Organization for peace and social justice. The ICC represented the international business organisation promoting peace in competitive business relations.

Second, the belief in the advent of a peaceful world with the progressive development of international relations law and the institutionalisation of a permanent dispute settlement mechanism represents the second pillar of the International Court of Arbitration, a true consensual jurisdiction.

Enfin le caractère patronal de la C.C.I. signifie qu'elle n'est pas une organisation internationale gouvernementale. Elle est spécifique au monde patronal et offre des services à ceux qui la sollicitent contre rémunération, dans une approche de marchandisation. L'arbitrage international dans les relations d'affaires doit s'inscrire dans cette économie structurelle institutionnelle : le libéralisme en général.

Les mêmes paradigmes se retrouvent dans la genèse de l'arbitrage international en Afrique. La création de l'OHADA et de son système de règlement des différends commerciaux et relatifs aux investissements s'inscrit dans le mouvement de libéralisation économique sur le continent et de démocratisation de l'exercice du pouvoir politique. La double libéralisation économique et politique était scellée par le recours à la voie conventionnelle intergouvernementale pour la consécration et l'adoption de l'acte constitutif de l'OHADA. Ainsi est confirmé le caractère privé de l'arbitrage international des affaires et des investissements. De son côté la Chambre de Commerce internationale a porté sur les fonds baptismaux l'OHADA en assurant un partage de connaissances, d'expérience pour assurer au filleul les meilleures conditions de lancement. A l'analyse, cette relation particulière des deux institutions illustre le développement sinon l'effectivité de la mondialisation de l'idéologie, des normes, des pratiques et des usages dans les relations et le droit des affaires.

Cette mondialisation universelle dans l'ordre international contemporain, notamment sur le continent africain pose la question de la confiance à l'égard de l'arbitrage international.

La confiance à l'égard de l'arbitrage international ne se décrète pas sans une appropriation par les acteurs dans les relations d'affaires et d'investissements et aussi par les gouvernements de ce mode de règlement des différends. Deux critères peuvent être utilisés pour apprécier la confiance à l'égard de l'arbitrage international africain : la base

Third, the business nature of the ICC means that it is not a government international organisation. It is specific to the business world and provides services to those who seek them for compensation, within a market-oriented approach. International arbitration in business relations must be understood within this structural institutional economy: liberalism in general.

The same paradigms can be found in the genesis of international arbitration in Africa. The creation of OHADA (Organisation for the Harmonisation of Business Law in Africa) and its system for settling commercial and investment disputes is part of the economic liberalisation movement on the continent and the democratisation of political power. The dual economic and political liberalisation was sealed by the use of intergovernmental conventional means to establish OHADA's founding act. Thus, the private nature of international business and investment arbitration is confirmed. The International Chamber of Commerce played a role in OHADA's establishment by sharing knowledge and experience to ensure the best possible launch for the protégé. Upon examination, this unique relationship between the two institutions illustrates the globalisation of ideology, norms, practices, and customs in business relations and law.

This universal globalisation in contemporary international order, especially in Africa, raises the question of trust in international arbitration.

Trust in international arbitration cannot be decreed without ownership by business and investment stakeholders, as well as by governments of this dispute resolution mechanism. Two criteria can be used to assess trust in African international arbitration: the consensual basis of competence and openness to African imperatives.

The consensual basis of competence is the first element of the success of the institution and trust in arbitration. The triple globalisation of capital, institutions, norms, practices, and usage has also

consensuelle de compétence et la porosité aux impératifs de l'Afrique.

La base consensuelle de compétence représente le premier élément du succès de l'institution et de la confiance à l'égard de l'arbitrage. La triple mondialisation du mouvement général des fonds, des institutions et des normes ainsi des pratiques a aussi gagné l'Afrique. L'attractivité des espaces africains pour les investisseurs internationaux est liée à la sécurité des activités et des résultats. Or le mécanisme de l'arbitrage international est un élément clé du régime d'investissement mondialisé. A ces considérations stratégiques s'ajoutent des facteurs qui ont justifié l'utilisation de cette voie : les difficultés financières des Etats, la marchandisation du recours à l'arbitrage liée à la multiplication parfois abusives de différends parfois artificiels. Ces données affectent l'image et la confiance à l'endroit de l'institution elle-même. L'arbitrage est présentée comme une activité commerciale dans l'intérêt principal des investisseurs internationaux. Le développement des attaques idéologiques contre l'arbitrage international n'est plus à écarter. En 2011, l'Australie a initié la contestation en annonçant l'exclusion les dispositions relatives au règlement des différends dans les traités d'investissement. Elle a été suivie par notamment la Bolivie, l'Equateur, le Venezuela et l'Argentine.

En Afrique, la remise en cause de la confiance a été initiée par notre Pays Hôte. L'Afrique du Sud a proposé une solution de continuité et annoncé la révision de la politique antérieure des investissements. Une telle déclaration de principe ne peut qu'avoir des répercussions directes sur la confiance à l'endroit de l'arbitrage international. En effet dans ces revendications de l'Afrique du Sud l'attention de l'observateur dans la mesure où on voit s'y formuler une requête pour la porosité de l'arbitrage.

Ces différentes attitudes doivent être inscrites dans le projet des BRICS dont l'objectif principal est "*la contestation de la gouvernance économique d'un monde*

reached Africa. The attractiveness of African spaces for international investors is linked to the security of activities and outcomes. The international arbitration mechanism is a key element of the globalised investment regime. These strategic considerations are compounded by factors that have justified the use of this path: financial difficulties faced by states, the commercialisation of arbitration resulting from the sometimes excessive multiplication of sometimes artificial disputes. These factors affect the image and trust in the institution itself. Arbitration is presented as a commercial activity primarily for international investors. The development of ideological attacks against international arbitration can no longer be dismissed. In 2011, Australia initiated the challenge by announcing the exclusion of provisions related to dispute settlement in investment treaties. It was followed by Bolivia, Ecuador, Venezuela, and Argentina, among others.

In Africa, the challenge to trust was initiated by our Host Country. South Africa proposed a break with the past and announced a revision of its previous investment policy. Such a statement of principle can only have direct repercussions on trust in international arbitration. Indeed, in South Africa's claims, there is a request for the permeability of arbitration.

These different attitudes must be seen within the BRICS project, whose main objective is "the challenge to the economic governance of a unipolar world," in other words, aligning geopolitics with geo-economics. The significant questioning of trust in arbitration has already been manifested by Argentina through the refusal to pay costs related to arbitral awards. These destabilising discourses must be addressed effectively.

Given the challenges faced by societies, businesses, and states on the continent, Africa must contribute to the credibility of arbitration in three key areas: the image of arbitration, normative dimensions, and practice.

unipolaire", en un mot la mise en cohérence de la géopolitique et de la géoéconomie. La répercussion de la mise en cause conséquente de la confiance en l'arbitrage a déjà été concrétisée par l'Argentine par le refus de paiement des coûts liés aux sentences arbitrales. Ces discours déstabilisateurs doivent être traités de manière pertinente.

Compte tenu des enjeux auxquels sont confrontés les sociétés, les entreprises et les Etats sur le continent, l'Afrique doit apporter sa contribution pour la crédibilité de l'arbitrage dans un triple domaine : image de l'arbitrage, dimension normative et la pratique.

Sur le plan de la représentation, il est urgent en Afrique que soit clarifiés les rapports consubstantiels entre l'institution de l'arbitrage et le libéralisme économique dont les institutions patronales sont les chantres zélés. Le dépassement de la polémique idéologique signifie pour ma part le traitement de la question en justice et vérité de la notion de service assuré officiellement par l'arbitrage dans le règlement des différends. Il s'agit des coûts liés à l'évaluation et de la prise en charge des coûts de la prise en considération de ce que l'Afrique du Sud a appelé le prix du développement ou plus globalement la porosité aux soufflés du monde africain, pour parodier Senghor et Césaire. Cette révision a une dimension comptable et mercantile ; mais celle-ci ne suffit plus pour définir le profit légal et licite. Le droit des relations d'affaires implique l'élimination de tous les éléments moraux, philosophiques ce qui signifie l'exclusion de ce qui n'est pas le droit positif. Cette perspective technicienne du droit et le confort consécutif à l'approche purement technicienne du droit amène naturellement les praticiens du droit à s'enfermer dans leur seule discipline.

Cette vision restrictive ne permet pas de maîtriser les dimensions humaines et sociales du monde des affaires. En effet les conditions actuelles imposent une transformation des mentalités et des structures pour permettre l'avènement

In terms of representation, it is urgent in Africa to clarify the inherent relationship between the institution of arbitration and economic liberalism, with business organisations being its zealous advocates. Overcoming ideological debates means, for me, addressing the issue of the official service provided by arbitration in dispute resolution with justice and truth. This involves the costs associated with evaluation and the consideration of what South Africa has called the price of development, or more broadly, the permeability to the winds of the African world, to paraphrase Senghor and Césaire. This revision has an accounting and mercantile dimension, but it is no longer sufficient to define legal and lawful profit. Business law involves the elimination of all moral and philosophical elements, meaning the exclusion of what is not positive law. This technical perspective of law and the subsequent comfort of the purely technical approach to law naturally lead legal practitioners to confine themselves to their discipline.

This narrow view does not allow for an understanding of the human and social dimensions of the business world. Current conditions require a transformation of mindsets and structures to usher in a revolution that creates fair profit in an equitable globalisation that enjoys broad consensus. At our level, this is not political agitation or propaganda but a reevaluation of the interrelationships between capital, production, labour, and trade when evaluating and settling damages caused by disputes.

The process of unveiling is in its initiation phase when corruption, subject to an agreement, is considered in an arbitration case. In Africa, there is no shortage of issues: in addition to corruption, we can mention climate change, migration, social justice, decent work, environmental issues and more. All these issues have a cost. They can also become causes of disputes and generators of damages. To illustrate my point, I would like to mention a concrete case. In a contract, the parties conventionally stipulate obligations that one party fails to fulfill. Naturally, the legal temptation is to proceed with

d'une révolution créatrice d'un profit juste dans une mondialisation équitable qui fait l'objet d'un large consensus. A notre niveau, il ne s'agit ni d'une agitation ni d'une propagande politique mais d'un ré-examen des inter-rapports entre le capital, la production, le travail, et les échanges lors de l'évaluation et de la liquidation des préjudices liés au différend.

L'opération du percement du voile est à sa phase d'initiation lorsque dans une affaire d'arbitrage a été prise en considération la corruption qui a fait l'objet d'un pacte. En Afrique ce ne sont pas les enjeux qui manquent: en plus du problème de la corruption, on peut citer le changement climatique, les migrations, la justice sociale , le travail décent , les questions d'environnement etc... Tous ces enjeux ont un coût. Ils peuvent constituer alors des causes de différends et générateurs de préjudices. Pour illustrer mes propos, je voudrai évoquer un cas concret. Dans un contrat les parties conventionnellement stipulent des obligations de faire que le co-contractant n'exécute pas. Naturellement la tentation légale est de procéder à la compensation. Pour ma part, j'ai un doute sur le bienfondé de cette compensation si on se situe dans une perspective juridique africaine. L'option préférentielle en faveur de l'obligation de faire convenue s'inscrit dans la situation de l'économie africaine: le déficit en infrastructures et la priorisation des investissements structurants. L'application de la compensation risque d'apparaître comme une solution de facilité.

Sur le plan normatif et institutionnel, la difficulté principale est relative à l'indépendance des arbitres. Sur le plan éthique, les règles de procédure définissent avec soin les conditions susceptibles d'affecter cette indépendance avec l'obligation de révéler les liens avec les intérêts des parties. Le décalage entre l'intention de la loi et une réalité qui ne reflète pas fidèlement cette prescription agit sur l'opinion dans le sens de la déconsidération de l'institution arbitrale elle-même.

compensation. For me, there is doubt about the legitimacy of this compensation from an African legal perspective. The preferrential option for the agreed-upon obligation to perform is consistent with the African economic landscape: the infrastructure deficit and the prioritisation of essential investments. The application of compensation may appear as an easy solution.

On the normative and institutional front, the main challenge concerns the independence of arbitrators. Ethically, procedural rules carefully define conditions that may affect this independence, with an obligation to disclose any links with the interests of the parties. The gap between the intention of the law and a reality that does not faithfully reflect this requirement affects public opinion and leads to the disrepute of the arbitral institution itself.

Disclosing any circumstances that may affect judgment and raise reasonable doubts about the arbitrator's impartiality and independence is indispensable but challenging when the arbitrator declares their independence. The personal journey and social conditions of the arbitrator are also relevant. We must exercise discernment in the face of the proliferation of "fake news". In my experience at the International Court of Justice (ICJ), civil law systems have procedural mechanisms to ensure independence, while common law systems leave the initiative for assessing independence to the arbitrator.

The integration of international arbitration into financialisation increases the risk of its growing commodification, i.e., its transformation into a commercial product. A map of the structural interrelationships between major legal and fiscal consulting firms, renowned arbitration practices, and scientific arbitration creation companies and institutions specialised in gaining a share of the arbitrable dispute market. Ultimately, a meager portion is left for African legal professionals. Upon examination, it is less a question of scientific competence than a commercial strategy for capturing the African market. The limited African market for African

Révéler toute circonstance de nature à affecter le jugement et à provoquer un doute raisonnable sur les qualités d'impartialité et d'indépendance de l'arbitre est indispensable mais difficile lorsque le juge déclare son indépendance. Sont concernés le parcours personnel et les conditions sociales de l'arbitre lui-même. Il y a lieu de faire montre de discernement face au développement des "*fake news*". Selon mon expérience à la C.I.J., diffèrent d'une part les droits de tradition romano germanique aménagent des mécanismes procéduraux pour assurer l'indépendance et de l'autre le système de Common Law laisse à l'arbitre l'initiative de l'examen de l'aptitude à pouvoir trancher en toute indépendance.

L'intégration de l'arbitrage international dans la financiarisation augmente les risques de sa marchandisation croissante, c'est-à-dire sa transformation en produit commercial. Un tableau des interrelations structurelles entre les grosses firmes de conseil juridique et fiscal, les cabinets réputés dans la pratique de l'arbitrage et les entreprises de création scientifique dans l'arbitrage et les institutions spécialisées dans la conquête du marché des différends arbitrables. En définitive, la portion plus que congrue est concédée au monde juridique africain. A l'examen, c'est moins une question de compétence scientifique que de stratégie commerciale offensive pour la conquête du marché africain. L'étroitesse du marché africain pour les juristes africains explique l'expatriation des juristes africains dans les pays du Nord sans une contraction de la prise de part des cabinets internationaux dans la prise de parts sur ce dit marché.

Il est intéressant de relever l'intéressement progressif des gouvernants africains aux compétences juridiques africaines de haut niveau dans l'espace du droit public, dans le rapatriement sur le continent des cas d'arbitrage international. Les sociétés savantes africaines sont aussi présentes sur le marché de l'offre de services dans l'arbitrage. La clé d'entrée reste la

lawyers explains the expatriation of African lawyers to Northern countries without a reduction in the share of international firms in that market.

It is interesting to note the gradual interest of African governments in high-level African legal expertise in the field of public law, in bringing international arbitration cases back to the continent. African scholarly societies are also present in the arbitration service offering market. The key to entry remains the permeability to African issues. The difficulty faced by African legal professionals lies in the inequality of resources for market capture.

These considerations justify the urgent need to establish a high-level arbitration training strategy. Technical and economic information, arbitration training as a dispute resolution mechanism, and the development of communication in this field for the dissemination of best practices must continue. This promotion of arbitration, in my opinion, involves an administrative or purely bureaucratic approach to training and information. The question is not about what should be done but about morally establishing the legitimacy of international arbitration. Mentioning the intrinsic and erga omnes legitimacy of arbitration leads us beyond mere scientific truth into a vision of the world. The conquest of the place of arbitration implies a broad horizontal examination of the philosophy of arbitration, a realisation of the postulates underlying the rules. The consideration of ethics is inevitable in the sense that we must not forget ethics, which examines human behaviour and the values that guide it. Law is not a mere speculative principle reduced to formal logic but sanctioned by effectiveness.

Cape Town, South Africa, Friday, October 13, 2023

porosité aux enjeux du continent africain. La difficulté à laquelle l'univers des juristes africains se heurte réside dans l'inégalité des armes pour la conquête des marchés.

Ces considérations justifient le caractère urgent de la mise en place d'une stratégie de formation de haut niveau en matière d'arbitrage. L'information technique et économique, la formation à l'arbitrage comme mode de règlement des différends et le développement de la communication en la matière pour la diffusion des bonnes pratiques doivent être poursuivies. Cette action de promotion de l'arbitrage, à mon avis, concerne l'approche administrative voire purement bureaucratique de la formation et de l'information. La question n'est pas d'indiquer ce qu'il y a lieu de faire mais de conquérir presque moralement la légitimité de l'arbitrage international. L'évocation de la légitimité intrinsèque et *erga omnes* de l'arbitrage nous conduit à dépasser la simple vérité scientifique pour plonger dans une option sur une vision du monde. La conquête de la place de l'arbitrage signifie alors un examen horizontal le plus large de la philosophie de l'arbitrage, c'est-à-dire la prise de conscience des postulats qui sous-tendent les règles. La prise en considération de l'éthique est inéluctable en ce sens qu'il y a lieu de ne pas oublier l'éthique qui s'intéresse à l'examen des conduites humaines et des valeurs qui les guident. Le droit n'est pas simple spéculation de principe se réduisant à la logique formelle mais sanctionné par l'effectivité.

Le Cap Afrique du Sud, vendredi 13 Octobre 2023

PANEL 1

AN INTROSPECTIVE INTO AFRICAN ARBITRATION

Where do we stand today and what may be the transitions and new perspectives of tomorrow?

MODERATORS' SUMMARY

Daniel Wilmot and Hamid Abdulkareem

Panel 1 entitled "An introspective into African arbitration: where do we stand today and what may be the transitions and new perspectives of tomorrow?" inaugurated the two-day event and was framed as a taster for the theme of the Conference. To assess the possibilities of tomorrow, one first needs a baseline for today, and so the Panel opened with a keynote speech exploring the roots of African arbitration and the immense progress it has seen and achieved to date. Five speakers then contributed their thoughts on that baseline, touching upon topics including African institutional caseloads and trends, arbitrator appointments, the ongoing barriers to arbitrating on the Continent and the factors pointing to arbitrating in Africa. Thereafter, the Panel moved to considering the future, sharing contributions on what might be needed to modernise arbitration on the Continent, whether African arbitration institutions should emulate successful centres elsewhere or innovate, whether more cooperation is needed across Africa, the roles of other forms of ADR and the youth in achieving tomorrow's objectives and the importance of thought leadership in the field.

PANEL KEYNOTE ADDRESS

AN INTROSPECTIVE INTO AFRICAN ARBITRATION: WHERE DO WE STAND TODAY AND WHAT MAY BE THE TRANSITIONS AND NEW PERSPECTIVES OF TOMORROW?

Diamana Diawara

The present and new perspectives of African arbitration must be informed by looking back into its roots and understanding the immense progress that has been made for an African arbitration industry to emerge. This retrospective exercise allows to derive the following three important lessons: while African parties and legal frameworks have a long history in international arbitration (i), the elements of an African arbitration industry have historically been lacking (ii). The very recent past luckily allows to foresee a brighter future, as African arbitration has fast-forwarded and is progressively catching-up (iii).

African Parties and Legal Frameworks Have a Long History in International Arbitration

International arbitration, purporting to be a safe, neutral and efficient platform for international commercial and investment dispute resolution has long been in use by those trading or investing in Africa.

As early as 1959, Morocco and then Egypt were among the first countries ratifying the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards ("the Convention"). A pool of ten additional African ratifications closely followed in the 1960s and 1970s, all the way to the years 2020s when Ethiopia, Malawi, Sao Tome and Principe, the Seychelles and Sierra Leone have ratified the Convention, bringing the total number of African signatories to 42 countries.

Similarly, long before the UNCITRAL Model Law on International Commercial Arbitration was first adopted in 1985, many African countries including Ghana, Sierra Leone or South Africa in the early 1960s or Morocco in the 1970s had arbitration laws in force. Not to mention the OHADA[13] which in 1999 introduced the uniform act on arbitration[14] providing the 15 member states of the time, with one single arbitration law.

[13] OHADA is the Organisation for Harmonization of Business Law in Africa created by the Port Louis, Mauritius treaty on 17 October 1993.
[14] The OHADA Uniform Act on arbitration was first adopted on 11 March 1999 and subsequently revised on 15 March 2018 with the version currently in force.

The long history of international arbitration in Africa also transpires through the presence of African parties in the caseload of institutions such as the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court"). Back in 1926 the ICC Court registered its very first arbitration case involving a party from the African continent, an Egyptian party. The ICC Court was at the time only three years in existence and out of the 1055 cases it administered from that time to 1959, just short of 4% involved African parties.

African public and private sector operators have since steadily increased their use of international arbitration under ICC Rules to reach now in 2022 close to 9% of the caseload of the institution.

Historical Absence of Elements Constituting an Arbitration Industry in Africa

By contrast, with the steadily increasing presence of African parties in international arbitration, the development of an industrial practice of international arbitration in Africa has for long been absent.

While African laws have consistently been chosen by parties as the substantive laws to govern their contracts in relation to the continent and by ricochet their disputes, the domestic arbitration scene in most African countries was dramatically lagging behind, with non-existing or non-operational local institutions.

Similarly, there are historically very few arbitrations seated in Africa. Although the ICC Court, currently administers arbitrations seated in more than 100 cities out of over 60 countries, African cities only represent around 12% of the seats of arbitration in cases involving an African party.

The obvious corollary of the low number of African seats is that African courts have only scarcely had the opportunity to develop a jurisprudence on enforcement of foreign arbitral awards and that African academics have only marginally contributed to the development of the prominent theories of international arbitration.

Other major elements that speak to the historical absence of an African arbitration industry are, *inter alia*, the limited number of African arbitrators involved in the resolution of international disputes; the fact that African lawyers as counsel for African parties involved in arbitrations were more often than not the exception; and finally the fact that there was only anecdotal representation of African practitioners within international arbitral institutions administering disputes in relation with the region.

African Arbitration Has Since Fast Forwarded and is "Catching Up"

Arbitration presents a true opportunity to promote the rule of law and enable access to justice for those who chose it in Africa. That, combined with the fact that it is an intellectually fascinating area of the law and financially quite lucrative, have opened the door for African practitioners to claim their rightful ambition and expectation to play a leading role in it, at the very least when the parties or issues in dispute find rooting in their jurisdictions or better yet regardless of the geographical anchor of arbitrations.

Over the past five years, African arbitration has gone through a particles' accelerator. This acceleration can be attributed to the commendable efforts spread by organisations such as the AFAA[15], the APAA[16] and others, not only raising awareness and promoting arbitration among African legal practitioners, but also structuring these practitioners into a community, training them when needed and spotlighting them through international platforms.

[15] AFAA is the Association for African Arbitration.
[16] APAA is the Association for the Promotion of Arbitration in Africa.

The efforts of international arbitration institutions such as the ICC Court have also contributed to the acceleration. In 2018 first and subsequently in 2021 the ICC Court opened its ranks to include 29 African court members and vice-presidents, thus breaking with the historically anecdotal participation of a handful of African members in the ICC Court. ICC has further embraced its role of driver for change on the international arbitration market by implementing a strict policy of diversification of its appointments thus going from a painful 1% of its arbitrators coming from Africa before 2020 to close to 5% today while limiting repeat appointments of the same individuals.

The key role of local and regional arbitration centres should also be praised on that front. Over the past few years these local institutions have modernized their processes, became more transparent and contributed to spread the culture of arbitration within local businesses, thus contributing to the necessary condition for an African arbitration “industry” to emerge: a local market.

SPEAKER PAPER

ARBITRATION IN AFRICA: EMBRACING TRENDS FOR FUTURE DEVELOPMENT

Aisha Abdalla & Moses Murugi

Introduction

Arbitration in Africa is a dynamic field that plays a critical role in shaping the continent's future. As Africa continues to experience economic growth and international trade, the focus on trade becomes imperative as it is the driving force behind the region's development. The African Continental Free Trade Area (AfCFTA) represents a significant game-changer, creating opportunities for increased intra-African trade. However, uncertainties surrounding the dispute resolution mechanism within AfCFTA raise concerns about its effectiveness. Establishing an AfCFTA arbitration centre could provide a viable solution to handle disputes arising from the framework, thereby signifying Africa's commitment to creating a conducive business environment and ensuring smooth trade operations.

Ratifying the Malabo Protocol is another crucial step in Africa's arbitration landscape. Kenya's commitment to ratifying the protocol by September 2023 opens doors for the establishment of the Pan African Parliament. This unified parliament could pave the way for a continent-wide Arbitration Act, promoting legal harmonization, regional cooperation, and bolstering effective and efficient dispute resolution across Africa. Additionally, regional blocs like the East African Community (EAC) should consider harmonizing arbitration and trade laws following the successful example of OHADA. Such efforts will further increase trade and investment on the continent, inevitably leading to a rise in dispute cases.

Mediation is poised to play a pivotal role in African dispute resolution. Encouraging more African countries to ratify the Singapore Convention on Mediation, even with reservations, will unlock the potential of mediation to alleviate burdens on overloaded courts and facilitate faster and cost-effective settlements.

Furthermore, for African countries to become a viable alternative to established Western arbitration centres, embracing technology is crucial. Virtual arbitration, online case management platforms, and video conferencing tools offer cost-effective dispute resolution mechanisms. By leveraging technology, African nations can bridge the gap, enhance access to justice, and create an attractive environment to repatriate international arbitrations to the continent.

The following points will be discussed in the panel.

The Significance of Trade and AfCFTA Arbitration Centre

Trade is a key driver of Africa's economic development, and the AfCFTA represents a milestone in promoting intra-African trade. With the elimination of tariffs and barriers, African countries are expected to witness increased trade and investment opportunities. However, the absence of a robust dispute resolution mechanism poses challenges. Disputes are an inevitable part of international trade, and a reliable and effective arbitration centre is essential to instil confidence in investors and businesses. Establishing an AfCFTA arbitration centre dedicated to handling disputes arising from the framework will create a stable and predictable environment for trade operations. Such a centre would signify Africa's commitment to creating a conducive business environment and ensuring smooth trade operations across the continent.

The Role of the Pan African Parliament and Harmonization Efforts

Ratifying the Malabo Protocol is a significant step towards strengthening Africa's arbitration infrastructure. Once the Pan African Parliament is established, it could create a unified Arbitration Act for the entire continent. A harmonized legal framework for arbitration will facilitate legal harmonization and streamline the resolution of cross-border disputes. This would make the arbitration process more efficient, accessible, and attractive to investors, ultimately promoting regional cooperation and integration. Following the successful model of OHADA, regional economic blocs like the EAC can further promote legal uniformity and attract more investments by harmonizing arbitration and trade laws within their jurisdictions.

Embracing Mediation for Efficient Dispute Resolution

Mediation offers a promising alternative to traditional arbitration and litigation. By providing a collaborative and flexible approach to dispute resolution, mediation can lead to faster and more cost-effective settlements. Encouraging more African countries to ratify the Singapore Convention on Mediation will promote its adoption as a preferred dispute resolution method. Kenya's consideration of ratifying the convention, albeit with some reservations, shows a willingness to explore mediation as an effective means of resolving disputes. Mediation can play a pivotal role in alleviating the burden on overloaded African courts and promoting a more amicable approach to resolving disputes.

Leveraging Technology for Advancing Arbitration in Africa

To become a viable alternative to established Western centres, African countries must embrace technological advancements in dispute resolution. Virtual arbitration, online case management platforms, and video conferencing tools offer efficient and cost-effective ways to resolve disputes. By adopting these technologies, African nations can enhance access to justice, reduce costs, and attract more international arbitrations to the continent. Embracing technology will also improve efficiency and streamline dispute resolution processes, bolstering Africa's position in the global arbitration landscape.

Conclusion

Arbitration in Africa is on the cusp of transformation, with various trends shaping its future development. To capitalize on Africa's economic growth and international trade, a focus on effective dispute resolution mechanisms becomes essential. The establishment of an AfCFTA arbitration centre and ratification of the Malabo Protocol for the Pan African Parliament are vital steps towards enhancing legal harmonization, promoting regional cooperation, and fostering efficient resolution of disputes.

Furthermore, promoting mediation and leveraging technology will create a conducive environment for resolving disputes in a cost-effective and timely manner. By embracing these opportunities and addressing challenges, Africa can position itself as a formidable player in the global arbitration landscape, attracting international investors, and fostering sustainable economic growth across the continent. Through collective efforts and a commitment to arbitration excellence, Africa's arbitration landscape can reach new heights, contributing significantly to the continent's overall development and prosperity.

SPEECH

ARBITRATION IN AFRICA: EMBRACING TRENDS FOR FUTURE DEVELOPMENT

Luche Joubert

My name is Luche Joubert. I am a South African corporate legal executive with a career that spans 27 years. I spent 16 years working for a UK listed multinational FMCG company in numerous legal jurisdictions across Africa, the Middle East and the United Kingdom. For the last 8 years I have been heading up legal services for a major listed investment firm in South Africa. In 2014 I qualified as a civil and commercial mediator in South Africa and in 2023 I qualified as a civil and commercial mediator in the United Kingdom.

I was asked to participate as a panellist at the AFAA conference in Cape Town during October 2023. The request was to give a view from an in-house counsel perspective on a number of issues relating to arbitration in Africa. Below I summarise my views according to the questions that were posed to me:

Is there adequate infrastructure (including technology) in place on the continent to support arbitration?

My immediate instinct is to think about digital hearings when reference is made to infrastructure. By now, and courtesy of COVID, we have all experienced online meetings, negotiations and hearings. While we have different levels of comfort with this mode of engagement, there can be no doubt that it is more efficient, cheaper and is broadly accessible. These benefits also translate to dispute resolution and more specifically, arbitration. The accessibility of the online mode means that the question on the availability of infrastructure is largely replaced by a question relating to our ability (and willingness) to optimise the technology. My experience is that the senior counsel we brief are still somewhat uncomfortable with the online mode. Their ambition seems to be to *cope* with the technology. Younger counsel (senior counsel of tomorrow) seems to have worked out that *mastering* the technology can give you an advantage in interrogating evidence, examining witnesses and even managing a presiding officer. It's a new game and mastering the mechanics gives you an advantage. My conclusion is that the technology and infrastructure is available and developing faster than we anticipated. The challenge lies in developing the confidence and skill in optimising these features for the benefit of arbitration as a process.

What are the factors that go into choosing: (i) if you arbitrate; and if so (ii) where you arbitrate? What are the considerations presently for you in deciding whether to arbitrate in Africa?

Most commercial companies operating in a developing economy manages and reports on their overheads in local currency. Within that overheads budget you will find that legal cost is most often regarded as a grudge purchase. In that context the cost of arbitration is often a

disproportionate consideration in dispute resolution strategies. With that in mind I believe the following are factors for consideration in the election to arbitrate:

- Costs and risk of cost order
- Merits
- Strategic importance of dispute and quantum
- Potential duration of arbitration
- Relationship between parties

The seat is a matter of logistical convenience if the arbitrator is agreed.

Arbitration becomes a convenient solution in instances where the local judiciary is not trusted equally by both parties or where one of the parties do not feel confident that it will receive an impartial hearing in a specific jurisdictional context. In the African context we regularly see counter parties from first world economies who do not trust the judiciary of their African counterparts.

What needs to change to make African arbitration even more successful? Has the proliferation of arbitration institutions helped or hindered the growth of international arbitration on the continent?

It's a difficult one, because from a client (commercial) perspective the ambition is to get better at contracting so that we have less disputes. I think that the proliferation of arbitration institutions certainly made arbitration more accessible, but it remains something that commercial parties aim to avoid if at all possible. An improvement in the cost of logistics and the duration of the process will always be welcomed. There is also still a perception that arbitrators are somewhat more lenient with counsel appearing before them when it comes to procedural matters. This often leads to frustration from disputing parties as it can lead to prolonged processes or complicated procedures.

Is it all about arbitration or will other forms of dispute resolution or will ADR be a key ingredient in this predicted tomorrow?

I am a big supporter of mediation, but I think it is a mistake to see it as an alternative to arbitration. It should be a critical step in the mitigation of the damage caused by a conflict. As a general counsel my job is to make the problem goes away with as little business disruption as possible. This implies a dispute resolution strategy. There may be cases where the dispute is so binary that no negotiation for a middle ground is possible, but in many instances, there is a scenario where parties pursue an arbitration and then end up settling just before the hearing. This is bad risk management and bad strategy. Mediation allows for a safe space (a confidential process without prejudice) to negotiate through a process run and controlled by an impartial facilitator. It is relatively cost friendly, quick and the parties have nothing to lose. If the mediation fails, then the arbitration continues and the parties can confidently report to their respective boards and shareholders that the grudge purchase represented by legal fees and management preparation time was indeed unavoidable.

I find that boards and shareholders are becoming much more critical of the cost, business focus and public relations damage implied by the management of conflict. Even if you are successful in an arbitration or litigation, the question remains whether a similar result could have been achieved earlier and with less disruption. There is mounting pressure on in-house legal counsel (and by extension their external counsel) to manage this better.

SPEECH

WHAT WILL BE THE ROLE OF THE YOUTH IN THE FUTURE OF INTERNATIONAL ARBITRATION IN AFRICA? HOW CAN THEY BE EMPOWERED TO CARRY THE FLAG INTO THE FUTURE?

Nania Owusu-Ankomah

I perceive the youth in this context as those international arbitration practitioners of African origin/descent who are currently 45 years and under and are positioned to be the arbitration future leaders on the continent. They are an important group because they have career longevity and therefore have time to potentially become key influential figures on the continent. They will therefore play a key role in flying the continent's 'flag' in terms of:

- Being representatives of the continent, i.e., because of their visibility, they will be the easiest reference point for how African international arbitration practitioners are perceived in the international space.
- Being strategically positioned to influence the growth and trajectory of the field on the continent.
- Being role models for subsequent generations of African international arbitration practitioners.

Three areas for empowerment:

- Training and Mentorship – Ensuring that they are building the relevant technical skills and receiving guidance from senior practitioners on tried and tested ways of navigating the field successfully.
- Equipping them to take up leadership roles or positions of responsibility in the field, so that they can influence decision-making at a global level and make a distinct impact.
- Grooming them into global thought-leaders to ensure that African perspectives are represented on the global stage and that there are African voices contributing to the development of the field and shaping the theory and practice of international arbitration.

What role will thought-leadership play in promoting Africa as a preferred destination for arbitration. Are Africans making a real play for space?

Promoting Africa as a preferred destination for arbitration (seat and/or venue) will only be effective where we have created an ecosystem on the continent that is conducive for arbitration: a) modern arbitration laws, b) supportive judiciary, c) ease of enforcement, d) physical infrastructure to support the conduct of arbitration proceedings, e) easy access to the

jurisdiction of choice, f) qualified personnel to provide support during arbitration proceedings (transcribers, etc.), g) government non-interference, and h) political and legal stability.

It is only where this conducive environment has been achieved that we can effectively leverage on thought-leadership to promote Africa as a preferred destination for arbitration. We should look at thought-leadership in terms of using academic writings, speaking engagement, etc. to position Africa and African arbitral institutions as reliable, efficient and cost-effective alternatives to established jurisdictions or arbitral institutions around the world.

Avenues:

- Using conferences as a platform to showcase the opportunities for arbitration on the continent, share strengths and also share experiences. Examples are the ICCA Conference in Mauritius in 2016 which was focused on arbitration in Africa and the third SOAS Conference which took place at the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in April 2017 with a focus on the role of African states and governments in creating a viable legal and regulatory environment for arbitration to grow. Also, the AfAA Conference has become a platform for all things Africa arbitration and is playing a critical role in showcasing the continent globally.
- Using quantitative and qualitative surveys, research reports and academic writings to educate and showcase arbitration on the continent (eg. SOAS Africa Arbitration Survey Reports – 2020 Report focused on identifying the top arbitral institutions on the continent and top cities for the conduct of arbitration.)
- Thought-Leadership projects which produce Guidelines, Toolkits and Soft Law Instruments to enhance the practice of arbitration – Africa Arbitration Academy Protocol on Virtual Hearings in Africa (a suite of guidelines for arbitrators, parties and counsel to consider when preparing for and attending a virtual hearing), and Africa Arbitration Academy Model BIT
- The field of arbitration relies on ‘word of mouth’ and therefore we should place ourselves in positions where we can spread the word and be heard. Each arbitration practitioner on the continent should become an integral part of the global conversation on international arbitration and use that opportunity to share the strengths of arbitrating on the continent, especially on platforms such as ICCA Conference. The field of arbitration heavily relies on ‘word of mouth’ and therefore we should place ourselves in positions where we can spread the word and be heard.
- These are all thought-leadership avenues that can be leveraged to project Africa as an integral player in the arbitration space and to showcase Africa on the global stage.

What are you currently seeing in terms of (i) caseload, and (ii) case types, of the institutions to which you are affiliated? Are there signs of real growth? Is (more) collaboration between institutions on the continent required?

Caseload

- In 2022, the LCIA received a total of 333 referrals for its services, including 293 referrals for LCIA Arbitration in 2022 (compared with 387 overall referrals and 322 LCIA Arbitration referrals in 2021).
- 2018 (317), 2019 (395), 2020 (440), 2021 (377), 2022 (327).
- The 2019 caseload for the LCIA shows that African parties were involved in slightly more than 10% of the cases (up from 8% in 2018). Low, steady rise in the Africa-related caseload of arbitral institutions.

Africa Caseload

Africa	2022	2021
	4%	7%
Nigeria	0.7%	0.5%
Mauritius	0.6%	0.7%
South Africa	0.6%	0.7%
Djibouti	0.3%	0.0%
Other Africa	1.4%	4.7%

Case types of the institutions to which you are affiliated?

LCIA

- Three leading industry sectors in LCIA Arbitrations, Transport and Commodities, Banking and Finance and Energy and Resources have dominated in 2021 and 2022.
- Transport and commodities cases dominated the LCIA's caseload (37%) in 2022 and the LCIA expects to see this trend continue in 2023. Global developments have profoundly impacted energy prices, resulting in an increase in transport and commodities cases.
- Banking and Finance (15%)
- Energy and Resources (11%)
- Professional Services (9%) has steadily increased over the past three years.

Signs of real growth

- In 2022, 88% of parties in LCIA Arbitrations came from 90 countries other than the United Kingdom.
- According to ICC, 130 parties from sub-Saharan Africa accounted for approximately 5% of all parties in its 2019 caseload, with Nigerian (19), South African (13) and Mauritian (10) parties taking the lead.
- CRCICA had administered a total of 1,385 cases at the end of 2019, including 82 new cases in 2019 alone.[17] AFSA also had a caseload of approximately 60 international matters in addition to its domestic caseload of about 500 matters in 2019.[18]
- The increase in the number of cases administered by top African arbitral institutions may be a sign that these institutions are developing their reputations. Growth, even if slow, of these institutions, shows that users are having good experiences with them.

[17] https://globalarbitrationreview.com/article/1226853/cairo-centre-unveils-case-figures-and-new-advisers
[18] https://globalarbitrationreview.com/article/1226853/cairo-centre-unveils-case-figures-and-new-advisers

Collaboration between institutions on the continent

Nearly 100 arbitration institutions of various sizes and areas of focus exist across Africa. Of course, not all of these institutions will earn strong global or even regional reputations.

For the moment, the ICC and the LCIA continue to dominate international arbitration in Africa, as they do international arbitration worldwide. Most African users appear to continue to prefer to resolve their disputes primarily under the auspices of the ICC and LCIA.

It is imperative for African arbitral centres to collaborate, and play a complimentary role rather than competitive role vis-à-vis each other.

For example, Lagos Chamber of Commerce International Arbitration Centre (LACIAC) has shown keen interest in collaborating with other arbitral institutions across Africa. It has signed MOUs with Lagos Court of Arbitration, Mauritius International Arbitration Centre (MIAC) and Tanzania Institute of Arbitrators (TIArb) with respect to Africa-related arbitration.

What are the factors that go into choosing: (i) if you arbitrate; and if so (ii) where you arbitrate? What are the considerations presently for you in deciding whether to arbitrate in Africa?

Three Areas for Consideration: Seat, Venue, Arbitral Institution and the decision is mainly driven by clients with guidance from counsel.

Seat

- Political and legal stability
- Modern arbitration laws
- Supportive judiciary
- Ease of enforcement

Venue

- Infrastructure to support arbitration proceedings (hotels, conference facilities).
- Ease of accessing the jurisdiction.

Institutions

- Well-designed, user-friendly rules which helps demonstrate an institution's credentials as a market leader. The top arbitration institutions in Africa use substantially the same sets of rules as those of the LCIA and the ICC, and they reflect most, if not all, of the latest trends.
- Reasonable predictability of costs.
- Cost-effective redress options – Emergency Arbitrator and Expedited arbitration procedure.

QUESTION & ANSWER

ARBITRATION IN AFRICA: EMBRACING TRENDS FOR FUTURE DEVELOPMENT

Adewale Olawoyin

What are you currently seeing in terms of (i) caseload, and (ii) case types, of the institutions to which you are affiliated? Are there signs of real growth? Is (more) collaboration between institutions on the continent required?

As a starting point, it is important to recognize that requests for arbitration are on gradual and steady rise in Nigeria in recent times. The LCA, for example, has seen its fair share of this phenomenon. So, after a year on year decrease in 2021. And 2022, in 2023, the LCA saw about a 16% increase in arbitration cases.

That said, for proper perspective, a distinction needs to be made between caseload stemming from institutional references and those arising from providing a venue for arbitral proceedings. Administering arbitral references continues to be a challenge for the LCA for the simple reason that domestic agreements hardly contain an LCA recommended arbitration clause. The caseload remains low and poor. The challenge to change the mindset of the drafters of these agreements remains a difficult one. While the resistance in the context of international commercial arbitration is reluctantly understood given the general preference of Multinationals to arbitrate even ”domestic” disputes under internationally recognized arbitration rules, the genuflection of big domestics to international rules such as ICC or LCIA is a source of concern.

As regards simply providing a venue for the resolution of ad-hoc disputes, we have seen an upward trajectory in the case load in that limited sense. This is testament to the fast-growing interest in adopting arbitration in resolving disputes.

There has been an increase in the use of arbitration as a means of settling diverse types of disputes in Nigeria. A necessary corollary is the diversity of case types. In Nigeria, we see more disputes in the M&A and construction space. Perhaps the fastest growing area is real estate disputes given the explosion of property developments across the commercial hubs in Nigeria.

There are signs of real growth in this area, if only in a domestic context. Growth of arbitration in an international context remains stagnant given the obvious challenges identified above with the drafting of dispute resolution clauses at the outset.

Indubitably, more collaboration and cooperation is required at various levels in the value chain and we see various collaborative efforts in terms of training and enlightenment programs and also dispute resolution schemes. A good example is the CIArb-LCA MSME dispute resolution scheme in 2021 and the recently concluded 3rd edition of the regional training on dispute management in Africa infrastructure projects (DIMAP) which held in November 2022 in Accra, Ghana by LACIAC and Ghana Arbitration Center. That said, there will always be a quest for

more collaboration especially as we have a significant number of arbitration institutions on the continent.

The barriers to arbitration on the continent are well known. Is there clear evidence that the challenges are being progressively resolved?

Arbitration is a key tool in Africa's economic and trade development. If States, legal institutions and arbitration stakeholders work together the challenges facing arbitration in Africa will be significantly reduced. The big major challenge facing arbitration in Africa is how to change the direction of travel regarding the seats of arbitration from places in Europe and South East Asia to places in the African continent. The default argument against African seats about the delay in recognizing and enforcing arbitral awards, and interference by the courts is no longer a strong one. Current statistics demonstrate that most national courts in African countries have become arbitration friendly. Nigeria is one example where the scope for interference by the courts in arbitration will become narrower with recently enacted arbitration laws and the hope is that as the bench, bar and arbitration stakeholders continue to work together, these challenges will be progressively resolved. Better communication and image laundering is needed from the Governments, judiciaries, and the arbitration community across Africa. Even without the recent legislative intervention across Africa, statistics suggest that courts' support of arbitration in the enforcement of arbitration agreements and ensuing awards has tremendously improved. Reference Bozimoh & Co study on enforcement of arbitral awards in Nigeria.

It is imperative that the principle of finality of arbitral awards is promoted and protected across all jurisdictions to ensure that Africa is recognized as arbitration friendly and an attractive seat for arbitration.

What is needed to modernise arbitration on the continent? Should other countries follow Nigeria in permitting third party funding? What role should climate change and the energy transition play in any modernisation efforts?

Modernization of arbitration laws is always welcomed for every jurisdiction. However, the focus should not just be on modernization but also on adapting modern trends/principles to the unique situation of each jurisdiction. Utility of modern principles over blind adoption is preferred.

Speaking specifically about third-party funding ("TPF"), recent developments in Nigeria highlight the global rise of TPF. These developments emphasize how TPF is now an integral part of arbitration proceedings across the world. Claimants are increasingly seeking recourse to TPF to assist their quest for justice. Arbitration is now expensive, truth be told. Even in the context of domestic arbitration, we see challenges with parties being unable to meet their obligations regarding arbitration costs and fees. A significant number of references end or are suspended after the preliminary meeting due to parties' failure to deposit against costs of arbitration. There is still an attitudinal problem in this regard. It against this background that TPF is most welcome in principle.

In May 2023, the new Arbitration and Mediation Act in Nigeria expressly permitted TPF in arbitration proceedings. Nigeria is one of the few jurisdictions that have directly adopted legislation in relation to TPF, following Singapore and Hong Kong in 2017. Countries such as India and China are beginning to embrace the concept as well and there are calls for the reform of the English Arbitration Act to provide for TPF more explicitly. I believe countries should follow Nigeria in permitting third party funding and importantly enacting provisions which serves as prescriptive guidelines on same to prevent the potential abuse that exists. However, the adoption of this concept should be tailored to the realities of each jurisdiction.

SPEAKER PAPER

AFRICAN ARBITRATION ON THE RISE: TACKLING THE CHALLENGES, SEIZING THE OPPORTUNITIES, AND CONTRIBUTING TO POSITIVE CHANGE

Jonathan Ripley-Evans

African arbitration is on the rise, but it still faces several challenges, including the underrepresentation of African arbitrators. This is due to a number of factors, including perception bias, barriers to entry, and a lack of support for young practitioners.

Many people still perceive African arbitrators as being less experienced or less qualified than their counterparts from developed countries. This is often due to a lack of awareness of the African arbitration community and the high quality of African arbitrators.

In addition, African arbitrators are faced with barriers to entry. In some jurisdictions, it can be difficult and expensive to become an arbitrator. This is often due to high training and qualification requirements. Moreover, some arbitral institutions have strict appointment criteria that can make it difficult for new arbitrators to be appointed.

Furthermore, there is a definite lack of support for young practitioners. They often lack access to training and mentorship opportunities and find it difficult to get their first arbitration appointment.

These challenges are having a negative impact on the development of African arbitration. The underrepresentation of African arbitrators is making it difficult to build trust in the African arbitration process and thus promote the use of arbitration in Africa.

However, by acknowledging and understanding these challenges there are also ways we can overcome them and positively contribute to arbitral progress across the continent.

Underrepresentation of African Arbitrators: Is Perception Bias at Play?

Our greatest biases are the ones we are unaware of.

All too often, we are confronted with disputants who openly support the development of arbitration on the continent but never seem to appoint African arbitrators. The hollow phrase, "next appointment, I promise," rings all too loudly.

The next appointment often becomes the tomorrow that never comes, a clear example of the inherent bias that persists in both developed and developing regions.

While I am certainly encouraged that there is a growing recognition of the importance of diversity in arbitration, and the topic of appointing African arbitrators is now a regular item on

the agenda of major arbitration gatherings, a clear sign that the international arbitration community is aware of the problem and the need for change. Unfortunately, change is slow.

Almost all of the leading international institutions have committed to diversifying their appointments, with a particular focus on appointing African arbitrators. However, there is still a very real perception bias against African arbitrators, which makes it difficult for them to obtain appointments. While these programs have led to improved statistics, it is important to note that we are still dealing with relatively small numbers.

By way of example, in 2017, the LCIA made a total of 412 appointments, and of these appointments 11 were African nationals (Ghanaian, Nigerian, South African, Ugandan, Egyptian).[19] In 2018, out of the total of 449 appointments by LCIA, 9 were the nationals of Nigerian and South African.[20]

From 2019, one can observe a slight increase in numbers. In 2019, a total of 566 appointments were made by LCIA, and out of these appointments, 26 were African nationals (South African, Nigerian, Egyptian, Ugandan, Ethiopian, Mauritian).[21] In 2020, the LCIA made a total of 533 appointments, and of these appointments, 14 were the nationals of Nigeria, Egypt, Uganda, Mauritius and Kenya.[22] Another example is illustrated by the arbitrator appointments by the ICSID. In 2019, a total of 171 appointments were made to ICSID tribunals, only four constituted appointment of African and Middle East arbitrators, marking 2.3%.[23] However, in 2021, out of a total of 228 appointments, 4% and 3% constituted arbitrators from Sub-Saharan African and Middle East and North Africa, respectively.[24]

But is it fair to blame offshore operators for the underrepresentation of African arbitrators?

Most arbitrations are still administered from traditional arbitral centres, which may explain why change is slow. In an environment where bias is prevalent, it is harder to detect. But we are also part of the problem. We often defer to non-African arbitrators, even when specialist skills are not required. Every time we do this, we contribute to and perpetuate the problem.

Until we see our own arbitrators as equals to those from developed regions, we will continue to struggle with the challenge of inherent bias in appointments.

Overcoming the Barriers to Arbitration in Africa: Is Progress Being Made and How Can We be a Force for Change?

Perception bias is one of the biggest roadblocks to arbitration development in Africa. Perceptions are difficult to manage and are often only corrected after an extended period of demonstrable success.

However, we also cannot ignore the fact that many, more tangible barriers to development are evident on the continent. Although Africa has a long history of extra-curial dispute resolution, international arbitration is not as prevalent in all regions. This may be traced back to a lack of grassroots training at learning institutions leaving the development of arbitral skills to time in

[19] Page 8 of the LCIA 2017 Annual Casework Report.
[20] Page 7 of the LCIA 2018 Annual Casework Report.
[21] Page 8 of the LCIA 2019 Annual Casework Report.
[22] Page 10 of the LCIA 2020 Annual Casework Report.
[23] Page 31 of the ICSID Annual Report 2019.
[24] Page 34 of the ICSID Annual Report 2021.

practice. There is certainly more to be done in this regard, and both industry and government must support the development of arbitration skills.

Government has a significant role to play and can do more to assist. An obvious issue falling within the purview of government is the arbitral regime itself, both in the form of legislation as well as support for arbitration. This support must be both in the form of court support (i.e non-interference) and the support for the development of local institutions.

Where the court is performing a supervisory role, all too often we see the courts exercise their inherent powers to steer the parties one way or the other. This undermines the finality of arbitration awards and discourages parties from using arbitration to resolve their disputes.

One of the other key functions of the court (after declining jurisdiction in arbitral matters) is arguably at the enforcement stage. Courts need to decisively deal with spurious challenges in both the tribunal and the award. It is evident that this is one area that needs improvement.

Positively, we as practitioners can help breakdown barriers and promote positive change by sharing our knowledge. Those of us who have been fortunate enough to obtain training in arbitration have a responsibility to share their invaluable learnings with those that need it. By building an arbitration community on the foundations of access to the equal knowledge and skills development, we can begin to level the playing field and ensure we start to address the inherent bias that persists and inhibits meaningful progress across the continent.

Furthermore, we should embrace arbitral practice in the spirit in which it was intended: an efficient method of resolving disputes. Unfortunately, efficiency often gives way to an over cautious attempt to afford each party every possible opportunity to advance, amend and often reinvent one's case, against the implied threat of review. We need to more mindful of the time and costs involved in arbitration proceedings and being less willing to entertain unnecessary delays and tactics.

Lastly and most importantly, we need to trust each other and be bolder in our decisions regarding arbitral seats and appointments. We have the power and the opportunity to give more young arbitrators their first appointment which as we all know, is the hardest appointment to receive.

The Future of African Arbitration: Should South African Institutions Emulate or Innovate?

My grandfather always said, "Learn the rules before you try to break the rules." Although said in the context of cricket, it aptly applies to arbitration.

Established institutions have had decades to draft, develop and refine their chosen rules of procedure. While not all old things are superior, we should respect the process of development. For this reason, I believe that any developing institution should seek to learn from those who came before it.

As we all know, nothing scares off a disputant more than a lack of predictability. This was one of the main driving principles behind the 2021 revision of the AFSA International Arbitration Rules, which sought to benefit from key developments around the world while providing consistency and predictability to users. Interestingly, it emerged during the extensive consultation process that innovation was not the key to broader adoption of the revised rules. Further highlighting that for disputants and the arbitration community at large seek predictability, consistency, and familiarity above all else.

While innovation often drives development, without a solid support base, even the most innovative (and perhaps brilliant) ideas may not find favour with users.

Empowering the Next Generation of African Arbitrators

Despite the best efforts of institutions worldwide, arbitral appointments continue to favour more senior gentlemen. This is due to a few factors, some of which are understandable, but the overall effect is that these individuals often act as gatekeepers to the profession, making it difficult for young practitioners to enter the market.

These older professionals are often retired judges or senior practitioners with years of experience in civil court practice. However, the imposition of high court rules on arbitration can often lead to inefficient processes.

While it is understandable that parties may want to appoint an experienced arbitrator for a high-stakes dispute, this is not necessary for smaller disputes. In fact, many smaller disputes are not pursued due to the exorbitant costs associated with arbitration.

This is where arbitral institutions, particularly in Africa, are failing to capitalise on an opportunity. Expedited arbitrations, many of which are relatively low value, should be used for the appointment of new (perhaps young) arbitrators seeking to enter the market. This would serve two purposes: it would provide an opportunity to resolve smaller disputes in a cost-effective manner, and it would give young practitioners their first arbitration appointment.

Such a process would ensure that more arbitrators enter the market, increasing competition and helping to eradicate the plague of perception bias.

Another underutilised tool is the appointment of young practitioners as tribunal secretaries. This would give them the necessary first-hand experience of the arbitration process without the associated risk. This would provide necessary training and help to build confidence when they are eventually appointed as arbitrators for the first time.

Africa is blessed with an enthusiastic, intellectually driven, and youthful population. Tapping into and developing this resource will go a long way to driving the development of arbitral practice on the continent.

Conclusion

We all have the opportunity and the responsibility to address the key challenges that are preventing meaningful and swift progress for African Arbitration.

The challenges we face are not insurmountable. By taking steps to:

- acknowledge inherent bias;
- share our knowledge;
- learn from developed institutions to shape the future;
- raise awareness of the African arbitration community and the high quality of African arbitrators; and
- better support young practitioners

we can help to create a vibrant and inclusive African arbitration community that is well-positioned to meet the needs of the continent in the years to come.

PANEL 2

NEW FORMS OF DISPUTE RESOLUTION IN AFRICA

Where do we go from here?

MODERATOR'S SUMMARY

Suzanne Rattray

This panel took a comprehensive look at dispute management. It may sometimes seem that dispute resolution practitioners operate in the aftermath of what may have started out as such promising transactions. African practitioners resolve disputes against the background of pressing developmental needs to which they urgently need to apply their minds. Africa is in many ways a young continent, with dynamic and creative human resources. As such, it has the possibility to avoid some of the harmful development trajectories of more industrialised continents in order to build the Africa we want.

That said, we operate in a globalised world, whose confines used to be this planet, and now extend even beyond it. For the various domains in which African dispute resolution practitioners work, their dispute management skills must be brought to bear in a variety of ways. Whether in construction, banking, mining, energy, or any other sector, whether involving public sector or only private enterprises, the expertise of African practitioners is needed throughout the project lifecycle.

Looking through a risk analysis perspective, the most effective intervention to be made is in dispute avoidance. The speakers on this panel shared their experiences and best practice suggestions on how, in the many roles dispute resolution practitioners play, dispute avoidance techniques can be implemented. First, the panel explored construction contracts and the use of Dispute Avoidance and Adjudication Boards ("DAAB's") as an effective tool for reducing the cost, time and resources needed for resolving construction disputes. Second, noting that the professional practice area of mediation is often given short shrift at international arbitration conferences and treated as a "poor relation", the panel explored the use of mediation in commercial sectors such as banking and mining, for high-value disputes. In addition, the panel also explored the impact of the Singapore Convention on the legislative landscape in Africa, including in the OHADA region.

Finally, the panel addressed investor state dispute settlement systems, so contentious in parts of Africa and elsewhere in the world, which demands of us deep introspection, and requires the building of robust systems that serve our inter-generational needs and aspirations. The panel explored the need to ensure cross-government policy coordination in order to avoid in the first place and then effectively manage disputes as they arise. In addition, examples were shared of legislative and structural changes in several African jurisdictions, aimed at improving dispute management in the investor-state context.

SPEAKER PAPER

NEW FORMS OF DISPUTE RESOLUTION IN AFRICA – WHERE DO WE GO FROM HERE?

Tumisang Mongae*

Introduction

As a construction litigator, I have obviously approached this discussion from my experience in infrastructure disputes and I have reflected on the question: How best, or how different, can we resolve disputes that arise in infrastructure projects in the African continent?

It is important to reflect on this topic from an African perspective. Infrastructure development can be a critical driver for economic growth across the African continent. Several countries have adopted ambitious infrastructure development programmes that are intended to boost their respective economies, particularly post the Covid-19 pandemic. Just to name a few:

South Africa: South Africa has a National Infrastructure Plan 2050, which sets out a broad vision for infrastructure development in the country, with great focus on energy, water, digital infrastructure and freight transport infrastructure.[25]

Namibia: According to the latest Nambia Infrastructure Report, the Namibian economy is set to grow in the next 10 years, as large-scale transport and energy infrastructure projects enter active construction stages.[26]

Angola: Angola has an ambitious plan to achieve its targeted 9.9 GW of installed generation capacity and 60% electrification rate by 2025.[27]

As matters currently stand, inadequate infrastructure is a major obstacle towards Africa achieving its full economic growth potential. Meeting the demand for key infrastructure is a priority for Africa. If properly and timeously executed, infrastructure development will contribute immensely to economic growth in the African continent.

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[25] https://www.gov.za/sites/default/files/gcis_document/202203/46033gon1874.pdf (19 October 2023).

[26] https://store.fitchsolutions.com/infrastructure/namibia-infrastructure-report (19 October 2023).

[27] https://energycapitalpower.com/angolan-infrastructure-to-spur-growth/ (19 October 2023).

Disputes in Infrastructure Projects

On the other hand, due to the nature of infrastructure development works, disputes are the norm rather than the exception, and the likelihood of disputes arising is quite high. In a recent survey conducted, 89% of participants noted that disputes in the construction and infrastructure sector in Africa were on the rise.

We also know that the resolution of complex construction disputes does take time. In the 2022 Global Construction Disputes Report, it was reported that the global average length of dispute resolution processes for construction disputes was 15.4 months.[28] It is a reality that infrastructure disputes often result in significant delays in the completion of the much-needed infrastructure in Africa. It follows that such delays also have a significant impact on capital projects costs.

There are several projects across the continent which have been affected by disputes that arose between the stakeholders. One such project is the construction of the Mtentu River Bridge in South Africa. A dispute arose between the employer and the contractor back in 2019, which resulted in termination of the contract.[29] A replacement contractor is only scheduled to commence construction works in the last few months of the year 2023. The project has accordingly been delayed by 4 years, primarily as a result of a dispute.

The High Court in South Africa remarked, in the matter of Rodpaul Construction v MEC for Public Works in Kwa-Zulu Natal, that due to the tight deadlines in construction projects, it was not feasible to stall the project while attempting to resolve disputes.[30]

The concept of resolving construction disputes expeditiously was an initiative that began in the 1970s in a Project in the United States of America. Fast forward to the year 2023 and in the context of African infrastructure projects, as stakeholders in the construction industry we need to consider what we can do differently, firstly, to resolve impasses at the earliest opportunity, and secondly, where matters escalate to disputes, to resolve such disputes expeditiously.

Considering Africa's dire need for critical infrastructure in Africa, I am of the view that priority for all the stakeholders in the construction and engineering sector should be adopting innovative measures that will hopefully ensure the expeditious resolution of disputes. The expeditious resolution of disputes will ultimately contribute to the expeditious or timeous completion of African infrastructure projects.

Different Approaches to Dispute Resolution

In keeping with the topic of this panel discussion, one may argue that all forms of dispute resolution processes have been tried and tested before, and that there are no new ones to

[28] <https://images.connect.arcadis.com/Web/Arcadis/%7Bcb063f2c-be31-410c-9807-d7a9bf16f666%7D_2022_Global_Construction_Disputes_Report_-_Successfully_navigating_through_turbulent_times.pdf> (12 September 2023).
[29] *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd and Another* 2021 (2) SA 137 (SCA).
[30] *Rodpaul Construction (Pty) Ltd t/a Rods Construction v MEC: KwaZulu-Natal Provincial Department of Public Works* (599/2023P) [2023] ZAKZPHC 84, at para 16.

explore. There may be some truth to this notion. However, I am of the view that we can be intentional about adopting alternative and innovative approaches to:

- handling issues that arise between the parties before they escalate into disputes;
- implementing effective dispute avoidance mechanisms; and
- for disputes that cannot be avoided, crystallizing the issues in disputes earlier, followed by an expeditious resolution of such disputes.

What we often find to be lacking, and what is required across any such alternative or innovative approaches, is the need for proactive management, with all stakeholders focusing on resolving issues at the earliest opportunity, in the interest of the completion of Projects. How the parties give effect to it may vary from one Project to the next.

Timing is critical

The timing of the parties' endeavours to address issues that arise on projects is critical to their potential resolution. There is a common trend that claims in construction projects (particularly for extensions of time and / or additional costs) are notified by a party, and then lie dormant for lengthy periods of time without action by either party and more specifically, without any investigation on the merits in real-time. By the time such claims are revived later on (which, in some instances, may be years later), the projects would have lost some key personnel with knowledge of the relevant facts due to the usual staff turnover in projects. More importantly, at that point the parties may not be able to ascertain or verify the facts, as the projects would have progressed beyond the subject-matter of the claims. Absent common cause facts which should be readily ascertained from the relevant area(s), the likelihood of the parties simply retaining their respective adverse positions, instead of resolving their differences, is quite high. Such matters eventually escalate into disputes.

One initiative that may be of assistance in an early resolution of claims or disputes is that at the earliest opportunity after an issue has arisen (be it the occurrence of an event or incident, receipt of an early warning notice or the notification of a claim), the parties should jointly record in real-time the relevant facts, conduct joint inspections of the area(s) in question and jointly collect evidence in any possible format. This will assist greatly in narrowing down the factual issues. Chief Justice Menon of the Supreme Court of Singapore speaks about containing a dispute before it becomes too large and complex to handle, and I think that this is precisely what the construction industry needs to do.[31] Even if the parties cannot resolve the matter at that stage, the earlier investigations and the agreed common cause facts will assist greatly in the future resolution of a matter.

[31] Goff Lecture 2021 by Chief Justice Sundaresh Menon titled "The Complexification of Disputes in the Digital Age".

Dispute Avoidance

This brings me to the topic of dispute avoidance.

Dispute avoidance has had demonstrable success in the resolution of disputes in the construction and engineering sector. One of the most prominent projects where dispute avoidance was successfully implemented was the construction of infrastructure for the 2012 London Olympic and Paralympic games, where an independent dispute avoidance panel was established with a specific task to find pragmatic solutions before issues could escalate into disputes that may take long to resolve.[32]

A proactive management of risk avoidance should be encouraged. Dispute avoidance need not be introduced as a formal or formalised process. Instead, at any stage of the parties' engagements, the representatives should always be on the lookout for opportunities to resolve the dispute expeditiously.

Conclusion

I am of the view that there is opportunity for the construction sector to adopt new or refined approaches to resolving disputes. This will go a long way to ensure that the much-needed infrastructure projects are completed timeously and can be utilized to serve the continent.

Disputes need not impact the successful implementation of projects and can and should be managed better.

[32] <https://www.designingbuildings.co.uk/wiki/Dispute_avoidance#Dispute_avoidance_rather_than_ADR> (12 September 2023).

SPEAKER PAPER

ALTERNATIVE DISPUTE RESOLUTION IN SOUTHERN AFRICA – MEDIATION AND MORE…

Belinda Scriba*

There are a few mechanisms rearing their heads as alternatives to arbitration and litigation. Mediation is the most well-known and prevalent of these.

Historically, one of the main reasons for parties' hesitation to mediation is that its main objective is to create a platform for parties to work together to find a solution to the impasse between them. As disputes tend to escalate to points of conflict quite quickly, the suggestion of a collaborative approach to finding a solution seems counter-intuitive. However, the new reality is that there are ever increasing reasons, including in the corporate world, to explore finding answers to disputes in this way and outside of the whelm of arbitration or litigation.

Parties are finding that they have to try resolve conflicts which allows them to continue their relationship. For example, parties to a tender process; or when bespoke services or goods are required to complete project that have already been initiated.

Even if these pressures do not exist there is an appetite, across the board, to find ways to avoid, if possible, formal traditional dispute resolution. There is a myriad of different reasons for this, some of the main ones being the time it takes to complete; cost (in money, emotions and time); the delay to projects; and the adversarial nature of the proceedings. New contracts are incorporating clauses which require upper management, even at CEO level, to hold meetings to try resolve disputes before proceeding to arbitration or litigation. This, in itself, is sending a message that parties are looking for alternatives to the conventional, adversarial manner in which disputes are resolved.

At the 2023 AfAA conference our opening speaker, retired Judge Wallis, reiterated that parties are looking for quicker, less costly, less procedurally cumbersome and more flexible mechanism of dispute resolution. As this sentiment gains popularity the most natural fit seems to be exploring the flexible and orthogonal space created through facilitative mediation.

Governments too are realizing the value in finding alternative dispute resolution ("ADR") mechanisms. Again, there are many reasons behind this, ranging from relieving the courts of their caseloads to an understanding that many disputes are capable of resolution in ways that do not require fault to be laid at the door of one party.

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In Southern Africa alone this change in approach is evidenced by the fact that South Africa, Lesotho, Namibia, and Zambia have all introduced court rules and other legislation encouraging or even enforcing mediation or other forms of ADR before litigation is pursued. In other South African jurisdictions, with no mediation court rules, there are certain pieces of legislation which incorporate and/or encourage some form of ADR, mostly mediation.

South Africa saw the introduction of Rule 41A to the High Court Rules, requiring parties to consider mediation. Certain statutes also encourage ADR. For example, the Companies Act and the Labour Relations Act.

In Lesotho there are a separate set of High Court Rules for mediation. Like in South Africa, the parties have to consider mediation when launching new proceedings and defending or opposing same.

In Namibia the Court Rules speak about settlement discussions through ADR mechanisms. A judge can also refer the matter, or certain issues in the matter, to ADR. The Labour Relations Act too provides for *inter alia* mediation to be considered.

Botswana's High Court Rules require the parties to at least have considered settlement or mediation as part of the case management process. In terms of labour disputes the Trade Disputes Act further encourages mediation, at times making it compulsory.

The Zambian Court Rules also authorise a judge to order mandatory mediation, save for certain exceptions. Those exceptions being cases involving constitutional issues, the liberty of an individual, an injunction, or where the trial judge does not consider mediation suitable. The labour statutes also cater for mediation.

In Eswatini, Mozambique and Zimbabwe, where there are no specific rules of court for mediation or ADR, they too have certain statutes which encourage and/or make mediation compulsory, mostly also pertaining to labour disputes.

It is clear that mediation is gaining traction and is a recognised viable alternative to litigation and arbitration. This is not only so in Southern Africa but across the globe.

It is difficult to get statistics on the success of mediation due to the nature of the process. However, the best statistics published in relation to the success of ADR mechanisms in Southern Africa come out of Namibia. Between 2015 – 2022 (i) the lowest success rate recorded for court annexed ADR was 40%, with the highest being 67%; (ii) least number of court days saved through the success of ADR was 1328, the most being 2636; and (iii) in terms of monetary legal cost saving, the year with the least savings recorded a saving of NAD$33,200,000.00 (approximately US$1,747,370.00), and the year with the most savings NAD$65,300,000.00 (approximately US$3,436,842). While this does not seem too significant, consider the percentages achieved rather than the numbers and then apportion that to the numbers in other more litigious countries.

One of the other major obstacles regarding hesitation to mediation is that any settlement reached is not immediately enforceable via an execution process. In local disputes this is being addressed through the court annexed mediation rules, directing that mediated settlements can be made orders of court. In terms of international disputes there is now the United Nations Convention on International Settlement Agreements Resulting from Mediation (commonly known as "Singapore Convention on Mediation").

This Convention provides a framework for the recognition and enforcement of mediated settlement agreements in international commercial disputes. It is important to note that the Convention does not cover personal, employment, inheritance or family disputes, nor household

transactional disputes. The terms of the Convention are of course only enforceable once the Convention has ratified in participating countries. At the moment, in Southern Africa, only Eswatini has signed up to ratify its participation. There are many other African countries that have signed up to the Convention but, like in Eswatini, the Convention has yet to be incorporated / ratified into those countries' legislation.

What is also significant regarding the Convention is that, even if the countries relevant to the mediation for enforcement purposes have ratified the Convention, the parties still have to agree to the application of the Convention. It is therefore advisable that when parties agree to mediation they include the implementation of the Convention in their mediation agreement.

In summary parties are starting to recognise that ADR, especially mediation, are becoming viable alternatives to arbitration and litigation. Even if matters are not resolved through mediation, the process creates an opportunity to whittle issues down, allowing for a more smooth and limited litigation or arbitration process, reducing the time and cost it would take to finalise the matter.

Some of the other advantages to ADR, especially mediation: it's a non-binding, confidential and without prejudice platform. Unless a settlement agreement is reached everything that occurs in the mediation space is subject to strict non-disclosure rules. This allows for a much wider and open space for orthogonal solution orientated discussions. They enable a collaborate solution-based process, avoiding deliberations on fault. This means that all parties either part ways more amicably and satisfied, and, if necessary, are able to continue their relationship going forward. The process is introduced early, before conflict escalates. It generally requires less time to complete. If resolutions are found it resolves the delay issue. Cost spend is generally minimal compared to preparing for and presenting the matter before a court or an arbitrator.

Notwithstanding the above parties will more willingly embrace mediation if the process has the buy-in from their trusted legal team. As litigation lawyers were are inherently suspicious and dismissive of mediation. This is for the very reasons set out in the paragraph above. An issue raised during the AfAA conference this year was that mediators do not do reality checks with parties – informing them of their prospects of success or failure. Therein lies the crux of a litigation lawyer's resistance to mediation – we are trained to have fault assigned to one party, absolving the other (hopefully our client).

However, the beauty about mediation is that, if done properly, it avoids assigning fault, creates a platform for parties to explore more collaborative resolutions, allowing parties to possibly continue with their relationship. Commercially a continued relationship is becoming a factor pushing parties to explore other ADR options. Mediation allows a space where parties can (on a non-binding basis) "lay down their weapons" without prejudicing their case and just deal with what the real issues are, finding ways to absolve them without declaring all out war.

Furthermore, if parties feel like they are being judged in the mediation process without the issues having been properly ventilated through evidence, they are going to immediately be (i) distrustful of the mediation process and the mediator; and (ii) walk away from the process entirely. This defeats the object of mediation, as underlined above.

Mediation is not a replacement for arbitration or litigation, but rather a mechanism which allows for a quick, collaborative resolution where appropriate, in turn freeing up the entire legal system to concentrate resources on those disputes that are not able to be resolved through ADR. If lawyers are able to introduce their clients to a mechanism which allows for easy, cost effective and collaborative resolution, clients are going to be ever grateful and trusting of not only their lawyers by the ADR process. The demand is obvious, as is the solution.

SPEAKER PAPER

MEDIATION: AN EFFECTIVE DISPUTE RESOLUTION MECHANISM IN THE OHADA AREA

Bobson Coulibaly*

The Treaty on the Harmonization of Business Law in Africa, which aims to strengthen legal and judicial security, promoted the use of arbitration for the settlement of disputes.[33] After 25 years of existence, the 17-member states of OHADA[34] have expanded alternative dispute resolution options by adopting the Uniform Act relating to Mediation.[35] This UAM fills the legal void that existed in most OHADA member states which did not have legislation to secure agreements resulting from judicial or conventional mediation.[36]

The UAM has made it possible to encourage this alternative justice by enacting legal bases which allow mediation to become multidisciplinary[37], applicable to all areas of business law[38] and to any natural or legal person including public entities or States.[39] The UAM gives great freedom and flexibility to the parties only limited by public order rules.[40] The guiding principles that govern mediation are respect for the will of the parties, moral integrity, the independence and impartiality of the mediator, confidentiality and the effectiveness of the mediation process.[41] The process is confidential and evidence obtained during mediation cannot be used in

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[33] Article 1, Treaty on the Harmonization of Business Law in Africa ("OHADA") adopted on October 17, 1993 in Port-Louis (Mauritius), as revised on October 17, 2008 in Quebec (Canada) ("OHADA Treaty").

[34] Benin, Burkina Faso, Cameroun, Comores, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Tchad, Togo, Central African Republic (CAR), Democratic Republic du of Congo ("DRC").

[35] Uniform Act relating to Mediation ("UAM"), adopted on November 23, 2017 in Conakry (Guinea).

[36] Certain States: Benin (Law n° 2020-08 of April 23, 2020 on the Modernization of Justice having supplemented article 38 of the Law on Judicial Organization), Burkina Faso (Law n° 052-2012/AN of December 17 2012 relating to Mediation in Civil and Commercial Matters in Burkina Faso), Côte d'Ivoire (Law n° 2014-189 of June 20, 2014 relating to Judicial and Conventional Mediation in Côte d'Ivoire) and Senegal (Decree n° 2014-1653 of December 24, 2014 relating to Mediation and Conciliation) already had specific texts dealing with mediation.

[37] Ismael Wilfried Pierrot D'ALMEIDA, *Le charme de la médiation en droit des affaires OHADA*, Ohadata D-23-14, https://www.ohada.com/documentation/doctrine/ohadata/D-23-14.html?download=pdf

[38] As the term business law is defined in Article 2 of the OHADA Treaty. For an example of provisions encouraging the use of mediation, see Article 21, paragraph 2, Uniform Act relating to General Commercial Law adopted on December 15, 2010 in Lome (Togo).

[39] Article 1, UAM.

[40] Article 1, UAM. Mediation can therefore be conventional, judicial, institutional or ad hoc.

[41] Article 8, UAM.

arbitration or legal proceedings, under penalty of inadmissibility.[42] As for the mediator, he must be competent, independent, impartial and available.[43] The mediator must treat the parties fairly[44] and act diligently while ensuring not to impose a solution to the parties.[45] To guarantee his neutrality and loyalty, the mediator is prohibited from acting as arbitrator, expert or advisor in a dispute arising from the same legal relationship or linked to it. The mediation agreement binds the parties and is subject to compulsory execution.[46] The agreement may be subject to approval or exequatur which can only be refused if it is contrary to public order.[47] The decision is not subject to any appeal. If the request is rejected, the decision can only be appealed before the Common Court of Justice and Arbitration.[48]

There are very few statistics on ad hoc mediation. But, since the adoption of the UAM, conventional mediation has experienced significant growth in Burkina Faso. Thus, the CAMCO[49] located in Burkina Faso has received since its beginnings 255 arbitration requests and 342 mediation requests.[50] A form of confidential justice, faster and less expensive, mediation allows the parties to control the process and to be more involved as they take full part in identifying the solution to their dispute. It is these characteristics which make for the current success of mediation, which is used by several sectors of activity: banks and financial institutions, buildings and public works, services, commerce, insurance and real estate.[51]

A sustained enthusiasm for mediation on the part of the business community and the States is expected. Indeed, as an alternative method of dispute resolution, mediation ultimately allows the parties involved to reclaim the justice process, obtain solutions more quickly and preserve the business relationship, very frequently undermined during long, costly arbitration or legal proceedings, which are often disconnected from the realities of the case. To support mediation as an alternative dispute resolution, raising awareness of decision makers about the benefits of mediation, training mediators and having more country ratify the Singapore Convention are the venues to explore.

[42] Article 11, UAM. It should be noted that the ban on the production of evidence does not extend to elements pre-existing the mediation procedure or obtained independently.
[43] Article 5, UAM. According to the provisions of Article 6 UAM, the mediator must confirm in a written declaration his independence and impartiality and keep the parties informed without delay of any circumstances likely to raise legitimate doubts about his impartiality or independence.
[44] Fairness takes into account the circumstances of the case.
[45] Article 7, UAM.
[46] Article 16, UAM.
[47] Id.
[48] The Common Court of Justice and Arbitration (CCJA) was established by Article 14 of the OHADA Treaty. The CCJA which must rule within a maximum period of six months.
[49] The Centre d'Arbitrage, de Médiation et de Conciliation de Ougadougou (CAMCO) was created on January 11, 2005 in Ouagadougou (Burkina Faso). https://www.camco.bf/a-propos/ (11 September 2023).
[50] We can see a clear increase in mediation requests since 2018: arbitration (2019: 29 cases; 2020: 16 cases; 2021: 14 cases; 2023 (1st half): 9 cases) and mediation (2019: 8 cases; 2020: 9 files; 2021: 10 files; 2023 (1st semester): 10 files).
https://www.camco.bf/?s=statistiques (11 September 2023).
[51] Total dispute amounts can reach nearly US$8 million. https://www.camco.bf/?s=statistiques (11 September 2023). Exchange rate: 1 USD = 610,95801 XOF.

SPEAKER PAPER

IMPLICATIONS OF ARBITRATION ON ISDS

Salma ElNashar

The growing number of 'arbitration' claims brought by foreign investors against host states, mostly under the auspice of the ICSID, have caused significant political, economic, and legal issues, for which reason a number of States have identified critical gaps in the investment dispute settlement mechanisms and have suggested significant investor-state dispute settlement (ISDS) reforms. The arbitral issues were related several aspects, for instance the admissibility of counterclaims filed by host states, the high financial cost of arbitration whether linked to arbitrator's fees or legal ones, which are also very significant. For instance, in an ICSID case filed by Plama Consortium Limited against the Republic of Bulgaria[52], Bulgaria reported legal costs of 13.2 million US dollars and the claimant reported 4.7 million US dollars. This is in addition to the high sums of compensation awarded to foreign investors, in some cases, some states have had to pay hundreds of millions of US dollars in compensation for a single investor. For instance, in 2019, Pakistan was ordered to pay 6 billion US dollars in compensation to a foreign investor, which is a sum equal to the total amount the country had received in an International Monetary Fund (IMF) bailout the same year[53]. Additionally, the contradictory findings reached by tribunals in many investor-state arbitration cases raised concerns regarding the inconsistency and incoherence of arbitral awards and the sufficiency of the current ISDS mechanisms, since tribunals are not bound to follow precedent decisions even when dealing with 'the same or similar legal or factual' issues. This, along with the very lengthy procedures of ICSID and UNCITRAL arbitrations. The average investor-state tribunal takes approximately 4.5 years for ICSID cases and 4.2 years for UNCITRAL cases to handing down an award.

Furthermore, we consider it of paramount importance to take a look at the ICSID caseload report issued on March 17, 2022, which highlights the number and the status of ICSID cases, arising mostly out of BITs, involving State parties in the Middle East and North Africa (MENA) region as of December 31, 2021. The list shows that thirty-eight (38) cases out of ninety-seven (97), with a percentage of 39%, was filed against the Arab Republic of Egypt from claimants of different nationalities. A quite high number of cases that denotes an issue of serious concern in a developing country.

Tackling the need to resort to new forms of dispute resolution in Africa particularly in investment disputes, while giving examples:

For such, dispute prevention and mitigation tools, as well as mediation has been introduced by several organisations, and has been included as an element of reform in submissions made by several States before the UNCITRAL Working Group III, when preparing its initial drafts on ISDS reforms options.

[52] ICSID Case No. ARB/03/24.

[53] *Tethyan Copper Company Pty Limited v Pakistan,* ICSID Case No. ARB/12/1, Award, 12 July 2019.

One of the good practices that may be taken into consideration, in this context, is the case of Peru, where the increasing number of investment arbitration cases led the country to design and implement dispute prevention policies in the period from 2006 to 2009. Alongside other preventive measures and promotion policies, Peru has established the State Coordination and Response System for International Investment Disputes ('Response System') that aimed to solve disagreements with investors at early stages. The Response System also entailed specific elements to be included in IIAs' dispute settlement provisions, among which is the requirement of (i) mandatory negotiations for a period of six months prior to the initiation of arbitration procedures and (ii) the use of neutral dispute settlement systems. The Response System outlined, as well, (iii) the importance of the existence of a single standard ISDS clause in investment agreements, and (iv) the use of alternative dispute methods other than arbitration for settling investment disputes. Such important guidelines shall be taken into consideration, when tackling ISDS reform mechanisms that assist in preventing the escalation of disputes and the withdrawal of foreign investments. It is worth mentioning that, according to recent statistics, Peru has become one of the biggest markets for FDI in South America and the fourth recipient of FDI after Brazil, Colombia, and Chile[54], with a $80.8 billion FDI stock in the period from 2010 and 2019, according to the country's Central Bank[55].

Other pilot projects are currently taking place, such as the Systemic Investment Response Mechanism (SIRM), the early warning tool developed by the World Bank that enables a lead agency to identify, monitor, track, and resolve, in a timely manner, investor-state grievances arising from government(s) conduct. This mechanism depends basically, on means of direct 'negotiations', among other problem-solving techniques, between the lead governmental agency and officials of other competent agencies to address the grievances at a very early stage. Likewise, the Energy Charter Secretariat (ECS) has developed, in 2018, a Model Instrument for Management of Investment Disputes that aimed to establish a responsible body, *i.e.,* a public entity in charge of managing and resolving international investment disputes in the energy sector, whether arising out of international contracts or IIAs. Such a responsible body has also a crucial role in coordinating and cooperating with public agencies that become aware of the existence of any emerging investment conflict and to solve it at an early stage before its escalation into a legal dispute.

These early warning tools may assist the host state, and play a crucial role, in retaining foreign investments.

[54] *How Peru became one of the biggest markets for FDI in South America,* Gulf Business, March 7, 2022. Available at: https://gulfbusiness.com/how-peru-became-one-of-the-biggest-markets-for-fdi-in-south-america/

[55] *Why invest in Peru: key reasons to explore untapped opportunities,* Thomson Reuters, February 2, 2022. Available at: https://www.reuters.com/article/sponsored/why-invest-in-peru-key-reasons-to-explore-untapped-opportunities

PANEL 3

OUR EVOLUTION INTO NEW CATEGORIES OF DISPUTES ARISING FROM FUTURE INDUSTRIES

Are African practitioners ready?

MODERATOR'S SUMMARY

Jackwell Feris

This Panel provided a unique global perspective on future and evolving industries in Africa. The Panel took us through a journey of evolving and future industries such as renewable energy, green hydrogen, issues around ESG (in particular the "E" in ESG-focused climate change disputes), and the development of cryptocurrency. And importantly it asked the question: what is the appropriate dispute settlement process for these future industries? As part thereof, the central question was: are African practitioners ready? Based on the poll conducted at the end of the session, the general consensus was that for African practitioners to be ready for these future industries will require both expertise in ADR and in the particular substantive law issues relating to these future industries.

SPEAKER PAPER

DISPUTE RESOLUTION IN THE CLEAN ENERGY SECTOR IN AFRICA

Natasha Peter*

As noted by the International Energy Agency (IEA), Africa currently accounts for around 20% of the world's population but attracts less than 2% of its spending on clean energy.[56] But this is set to change. In its Africa Energy Outlook 2022, the IEA models a Sustainable Energy Scenario for Africa, which sees primary energy supply rising by over a third by 2030. Renewables, including solar, wind, hydropower and geothermal account for over 80% of new power generation capacity to 2030.[57]

A new industry sector has therefore burst onto the scene, bringing with it an unprecedented speed of change and innovation.

Arbitration is a justifiably popular means of resolving disputes in the clean energy sector: it provides parties with a neutral forum, allows them to choose decision makers, and awards are relatively widely enforceable.[58] But is it fit for purpose in this new context? This paper will explore some of the unique features of renewables projects which pose particular challenges to us as disputes lawyers.

Technical Complexity

The extent and speed of the renewables scale-up necessitated by the energy transition brings with it a huge need for technological and other forms of innovation. Although basic wind and solar technologies are now well-tested, there is a constant pressure to innovate in order to reduce costs and increase efficiency. There are also emerging technologies in other renewables and ancillary industries: from floating wind and solar, to battery storage, green hydrogen or smart grids, to name but a few.

The corollary of an innovative and dynamic industry is a corresponding potential for disputes. Contractual provisions regarding the allocation of risk of technical failures and errors take on a

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[56] See International Energy Agency, "Financing Clean Energy in Africa: World Energy Outlook Special Report", September 2023.

[57] International Energy Agency, "Africa Energy Outlook 2022", revised version published May 2023.

[58] In the Queen Mary University London "Future of International Energy Arbitration Survey Report", 20 January 2023, 72% of respondents gave arbitration a score of at least 4 / 5 in terms of suitability for resolving energy disputes.

particular importance.[59] The pressures created by first-of-a-kind technologies, upskilling the workforce, adaptation of supply chains, and creative solutions in deployment and management of new projects can all lead to unexpected tensions between contracting parties.

As arbitration lawyers, we need to be equipped to deal, not only with new contractual solutions, but also with the underlying technologies themselves. This can be achieved by ensuring that all participants have the necessary skill sets:

- Arbitrators: One of the strengths of arbitration is that the parties have a large degree of freedom to choose their decision makers, but they often just revert to the usual suspects. Instead, they should ensure that the Tribunal has the right mix of technical, regional, human and legal skills.
- Party or tribunal appointed experts: A knowledgeable expert who is also able to present their position with clarity and conviction can be invaluable in educating the Tribunal (and the lawyers!).
- Counsel: Lawyers cannot simply rely on their experts. To be equipped to present their client's case and challenge and cross-examine their opponents, they need to develop an in-depth and first-hand understanding of the new technologies involved.

The Multiplicity of Stakeholders

Another striking feature of renewables projects is the complex regulatory, financial and human environment in which they operate. For example, a solar farm might typically be embedded in a project finance structure, which has contractors and subcontractors building the project while also having to conduct negotiations with a state offtaker and other government bodies about an appropriate regulatory and pricing framework for the project, and while also impacting on local communities: positively in terms of localised energy production and job creation, but also potentially negatively if issues surrounding land-use, labour rights, and so on are not appropriately handled.

Finance is central to the energy transition, and given the hesitations (real or perceived) of private investors, in many countries in Africa, renewables projects are either fully or partially reliant on the involvement of concessional capital from development banks and donors.[60] Concessional lenders will typically require compliance with environmental and social standards and will demand a greater involvement in projects. As well as giving rise to a potential for disputes with the financing parties, this also means that lenders play more of a role in the decision-making process surrounding any dispute.

Equally significant is the role of the State as offtaker, and state financial support mechanisms for renewables projects, the withdrawal of which has led to numerous energy charter treaty disputes in Europe and elsewhere.

Quite aside from the potential for disputes between stakeholders, the multiplicity of stakeholders also means that the decision to launch a dispute, and the way it is conducted, is complexified by the need to take sometimes competing views into account. Multiparty and multi-contract disputes can pose some significant challenges in an arbitration context. But early

[59] For an example in a litigation context, see *Mt Hojgaard A/S v E.On Climate and Renewables UK Robin Rigg East Ltd and Another* [2017] UKSC 59BLR 477, involving an erroneous figure in the equation set out in the contractual requirements for the foundations of an offshore wind turbine.
[60] See Wendy J. Miles and Nicola Swan, "Chapter 18: Climate Change Financing and Dispute Resolution", in Sherlin Tung, Fabricio Fortese, et al. (eds), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, Kluwer Law International 2019, pp. 323-346.

attention to these issues can put the parties in the best position to ensure that all of the multiple disputes are resolved efficiently and in the same forum.

The Need for Bespoke Dispute Resolution Solutions

In order to meet the IPCC goal of limiting global warming to 1.5°C to avoid the worst effects of climate change, an unprecedented scale-up of renewables projects is needed. At the same time, renewables projects are often smaller in scale than traditional energy projects (oil and gas, coal, nuclear), as well as being highly distributed. In this context, a traditional 18-month to two-year litigation or arbitration often makes no sense. Instead, the dispute mechanism needs to be efficient, cost effective, and tailored to the particular circumstances of the case.

Certain disputes are suitable for resolution by negotiation or mediation. Alternatively, where the parties are entrenched in their positions and less likely to agree, is there a quicker means of getting a third-party decision? Anecdotal evidence suggests that adjudication and dispute boards are currently less widely used in the energy sector that in other fields of construction, and this seems to be a missed opportunity. Increasingly popular, though, is the use of expert determination. This was traditionally reserved to technical, valuation or financial subjects, but it is now used as a means of resolving smaller value disputes of all kinds.

Arbitration remains the gold standard for larger or international disputes, however – and its inherently flexible nature means that it can be adapted to meet this challenge.[61] Counsel and arbitrators need to be proactive in finding the bespoke solution that works for the particular case at hand. For example, can proceedings be made more efficient by using expedited arbitration, early determination, streamlined procedural timetables, and/or virtual exchange of memorials and/or hearings?

Conclusion

The challenges posed by the clean energy transition to disputes lawyers are many and varied, but they are challenges that we need to dedicate our time, energy and talent to meeting. In the words of Barack Obama, "*we are the first generation to feel the effect of climate change and the last generation who can do something about it.*"

[61] For some examples, see the ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, 26 November 2019.

SPEAKER PAPER

ESG DISPUTES AND THE AFRICAN LEGAL LANDSCAPE

Uche Ewelukwa Ofodile*

Introduction

Over the last two decades, environmental, social, and governance (ESG) considerations have captured the attention of corporations, corporate lawyers, investors, lawmakers, regulators, and stakeholders around the world. Across the globe, governments, institutional investors, stakeholders, and the general public expect more transparency and accountability from corporations, especially concerning their ESG risks. ESG issues are not only reshaping the global and national legal and regulatory environment but have become an emerging battleground for international and domestic disputes.[62] Since 2015, more than 1,000 lawsuits that relate to climate change have been recorded globally.[63] According to the *Global Climate Litigation Report: 2023 Status Review* (Climate Litigation Report), as at 31 December 2022, there were 2,180 climate change cases filed in 65 jurisdictions; this includes 1,522 cases in the United States and 658 cases in all other jurisdictions combined. While there is no data on the number of ESG-related disputes that are resolved through ADR processes, experts believe the number is growing.[64] Three sectors with high environmental footprint – construction, engineering, and energy – currently account for the highest number of ICC cases.[65]

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[62] White & Case, Arbitration & the ESG Era, 7 June 2022.

[63] Polly Botsford, The rising tide of climate litigation, International Bar Association, 12 July 2021, available at: https://www.ibanet.org/The-rising-tide-of-climate-litigation?sapoutbound-id=25C69206F11AFDFABC3C85C45B1968B44D3F4C0C&utm_source=SAPHybris&utm_medium=email&utm_campaign=234&utm_term=Global%20Insight%20Aug%2FSept%202021___The%20rising%20tide%20of%20climate%20litigation&utm_content=EN

[64] See e.g. *Core Carbon v Rosgaz and Centregas Service.* https://www.quinnemanuel.com/the-firm/our-notablevictories/victory-december-2014-international-arbitration-victory/

[65] According to the 2020 Annual Report of Statistics on Dispute Resolution of the International Chamber of Commerce published in 2021, construction, engineering and energy disputes represent, historically, the highest number of ICC cases, reached 38% of all the new cases registered in 2021. ICC Dispute Resolution 2020 Statistics, 2021, p. 17, available at: https://iccwbo.org/publication/icc-dispute-resolutionstatistics-2020/

The primary focus of this paper is on the "E" of the ESG.[66] This paper sets out to answer four questions:

- What types of environmental/climate change disputes are now arising in Africa?
- What types of environmental/climate change disputes are likely to arise in Africa in the future?
- What are the legal and regulatory bases for emerging disputes?
- Are Africa's arbitration frameworks ready for environmental/climate change disputes?

The climate change risks confronting Africa are numerous and multifaceted and include sea-level rise and coastal degradation, loss of agricultural potential and droughts, loss of biodiversity, extreme weather, migration, conflict and warfare. Experts agree that climate change litigation "provides civil society, individuals and others with one possible avenue to address inadequate responses by governments and the private sector to the climate crisis."[67] Although the African continent is particularly vulnerable to the impact of climate change, studies suggest that only a few cases specifically related to climate change have been filed in Africa to date.[68] More environmental and climate-related disputes can be expected in the continent in the future, however. The future of climate change disputes in Africa will depend on a number of factors including, (i) the availability of up-to-date climate change legislation and other enabling leislation; (ii) the quality of environmental/ climate change activism in the continent; (iii) the success or failure of climate litigation and arbitration in other jurisdictions; (iv) the level of political commitment to climate change mitigation and adaptation, and, (iv) the quality of the dispute settlement frameworks in the continent. Whether African arbitral frameworks are ready for the next wave of climate-change disputes remains to be seen. Although the arbitration frameworks in Africa have seen a lot of growth over the last decade, environmental/climate change disputes present new challenges.

Environmental Disputes in Africa – Emerging Trends

The International Chamber of Commerce Task Force on Arbitration in Climate Change Related Disputes defines climate dispute as "any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change and the Paris Agreement." Climate change litigation has also been defined to "include cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change."[69] If the first wave of ESG was about marketing and promotion, then the second wave would be all about disputes, dispute resolutions, and enforcement.[70] As noted, since 2015, more than 1,000 climate cases have been filed globally.[71] Significantly, more climate cases have been filed since 2015 than were filed in the last thirty years between 1984 and 2014.[72]

[66] See *World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7 In *World Duty Free Co. v Kenya*, the arbitral tribunal concluded that there could not be a basis for a valid claim when the investment had originated from the corrupt acts of the investor. https://www.italaw.com/cases/3280

[67] UNEP/Sabin Center for Climate Change Law, Global Climate Litigation Report: 2023 Status Review (2023), p. 7.

[68] Id.

[69] https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf

[70] The ESG Litigation and Enforcement Wave (Or Is It a Tsunami) Has Arrived. https://www.mltaikins.com/esg/theesg-litigation-and-enforcement-wave-or-is-it-a-tsunami-has-arrived/

[71] https://www.whitecase.com/news/media/arbitration-esg-era

[72] Id. (Noting that only 834 cases were filed between 1986-2014.

What kinds of environmental/climate change disputes are emerging out of Africa? What legal issues underpin emerging disputes? Who is the typical claimant/applicant? Who is the typical respondent? Where (which fora) are these disputes being resolved?

First, climate change litigation is occurring primarily in the Global North. Presently, litigation in the Global South "represents a small but growing percentage of global climate litigation."[73]

Second, stand-alone climate change disputes – disputes that deal with climate change mitigation, adaptation, or the science of climate change – are still few in the continent. Cases that address failure to adapt and the impact of adaptation, and corporate accountability for carbon emissions are yet to emerge in Africa.

Third, the few climate change disputes in Africa are rights-based claims and claims that challenge the authority of a government agency to issue permits to corporate actors. Recent disputes have focused on climate rights, domestic enforcement, and corporate responsibility to some extent.

Fourth, instead of stand-alone climate change disputes, what has emerged so far are broader environmental disputes that touch on a host of issues including land use, natural resource conservation, environmental impact assessments, and environmental protection in general.

Fifth, in terms of the claimants, current cases in Africa are driven by non-governmental organisations (NGOs), individuals, or both. It is still rare to find cases initiated by States, subnational entities, and businesses.[74]

Sixth, in terms of the respondents, cases have been primarily brought against States and a handful of businesses, primarily large corporations.

Seventh, cases brought against companies have primarily focused on companies in the fossil fuel sector.

Overall, recent disputes in Africa fall into two broad categories: (i) disputes initiated by individuals and/or NGOs against governments and government agencies; and (ii) disputes initiated by individuals and/or NGOs against corporate actors, primarily large corporations.

Individuals/NGOs/Communities vs. Corporations

Some of the past or pending disputes are cases initiated against large corporations. Significantly, most of the cases go beyond the narrow definition of climate cases and are about the environment, natural resources protection, and human/constitutional rights; these cases were primarily about environmental impact assessment (or lack thereof) and about human rights/constitutional rights.

In the South African case of *MEJCON-SA & Others v Uthaka Energy (Pty) Ltd & Others* decided in 2021, the High Court of Pretoria granted the applicant – the Mining and Environmental Justice Community Network of South Africa[75] – urgent relief for an interdict against Uthaka Energy (Pty) Ltd (Uthaka) to prohibit the commencement of mining activities on properties which fell

[73] Id., p. 20.

[74] The City of Cape Town v National Energy Regulator of South Africa and Minister of Energy, High Court of South Africa, Case No. 51765/17, 11 August 2020 (South Africa). In South Africa, a case by the City of Cape Town seeking authorization to purchase renewable electricity from independent power producers without obtaining approval from the Minister of Mineral Resources and Energy was dismissed on technical grounds.

[75] https://mejcon.org.za/

within the Mabola Protected Environment.[76] The interdict prohibits the company from starting any mining at its proposed Yzermyn coal mine until six high court ongoing challenges to various approvals for the mine already granted by the authorities have been resolved. In November 2021, the Constitutional Court dismissed Uthaka's application for leave to appeal the order.

In *The Groundwork Trust v The Minister of Forestry, Fisheries and The Environment*, a case filed on April 8, 2021, two environmental groups filed a petition for review of South Africa's Department of Forestry, Fisheries and the Environment's authorization of a 3000MW gas-fired power plant.[77] Richards Bay Gas Power 2 (Pty) Ltd, the company that owns the power plant, was named as the Third Respondent. The plaintiffs alleged that the Environmental Impact Assessment (EIA) of the project included an inadequate assessment of its climate impacts, in that it failed to account for the full life-cycle emissions of natural gas. The plaintiffs sought a court decision setting aside the original government approvals of the power plant. At issue in this case was whether the South African government's approval of a natural gas power plant violated the country's environmental assessment laws. In a decision delivered on August 16, 2023, the High Court of Gauteng dismissed the petition on technical grounds.

Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others was an action instituted against (i) Shell for engaging in massive and unceasingly intense gas flaring in the community, in the course of its exploration and production activities; and (ii) the Nigerian government for its failure to stop the oil and gas company Shell in gas flaring for decades.[78] The claimant, a representative of the Iwherekan community in the Niger Delta, argued *inter alia* that Shell failed to consider the environmental impact of its activities on the community's means of livelihood or the gas flaring's contribution to the adverse and potentially life-threatening effects of climate change. The applicant also argued that Shell's gas flaring activities violated the right to life and the right to human dignity guaranteed in the 1999 Constitution of Nigeria. The Federal High Court held that the constitutionally guaranteed right to life and human dignity inevitably include the rights to a clean, poison and pollution-free environment and that the respondent's activities, in allowing and continuing to flare gas, was a violation of these rights. The court also ruled that Shell's failure to carry out an EIA was a violation of Nigeria's Environment Impact Assessment Act (EIA) Act.[79]

Individuals/NGOs/Communities v African States and State Agencies

In a growing number of cases, individuals, NGOs and community groups are challenging the issuance of permits by state agencies to corporate actors, and are challenging, largely on human rights grounds, the failure by governments to protect the environment or vital natural resources.

On September 1, 2022, the High Court of South Africa handed out a very important decision in *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*.[80] The High Court held that the grant of an exploration right for oil and gas, resulting in the need to conduct a seismic survey along the South Coast of South Africa, was unlawful. The Court made reference to the inconsistency of further oil and gas exploitation with South Africa's international climate change commitments.

[76] (11761/2021) [2021] ZAGPPHC 195 (30 March 2021).
[77] Case No. 22046/22.
[78] FHC/B/CS/53/05 .
[79] The court found that the Applicant's delay in approaching the court in terms of Section 7 of the Promotion of Administrative Justice Act was unreasonable.
[80] https://climatecasechart.com/non-us-case/sustaining-the-wild-coast-npc-and-others-v-minister-of-mineral resources-and-energy-and-others/#:~:text=The%20Court%20agreed%20that%20there,and%20sustainable %20use%20of%20ocean

In March 2022, the Pretoria High Court issued a landmark decision in *Trustees for the Time Being of the Groundwork Trust and Vukani Environmental Justice Alliance Movement in Action v Minister of Environmental Affairs* (the 'Deadly Air' case).[81] The case centers around corporate activities in South Africa's Mpumalanga province, an area that is home to 12 coal-fired power stations, a coal-to-liquids plant, a refinery, and many polluting industries and mines. The applicants challenged the failure of the South African government to protect people's constitutional rights to health and wellbeing from toxic levels of ambient air pollution caused by coalfired power generation projects in Mpumalanga province. In its March 2022 decision, the High Court found, for the first time, that the South African government was in breach of a constitutional right due to the health impacts of air pollution.

In *Save Lamu et al v National Environmental Management Authority & Amu Power Co Ltd.,* petitioners challenged the issuance of a license for a coal-fired power plant (the first in Kenya) by the National Environmental Management Authority (NEMA).[82] The National Environmental Tribunal (Tribunal) set aside the license issued to Amu Power Company for the construction of the Lamu Coal-fired Power Plant on the ground that NEMA violated the Environmental Impact Assessment & Audit Regulations ("EIA Regulations") by granting an Environmental Impact Assessment License without proper and meaningful public participation in the process.[83] The Tribunal also found that the Amu Power Company's Environmental & Social Impact Assessment was incomplete and scientifically insufficient in violation of the said Regulation. One of the insufficiencies of the assessment, according to the Tribunal, was the inadequate consideration of climate change and the Climate Change Act of 2016.

In *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others,* the issue before the court was whether under South Africa's National Environmental Management Act (NEMA) 107 of 1998, "relevant" considerations for environmental review of plans for a new 1200 MW coal-fired Thabametsi Power Project included the project's impacts on the global climate and the impacts of a changing climate on the project.[84] Notwithstanding that South African NEMA does not expressly contemplate climate change, the High Court held that climate change considerations were relevant and that their absence from the project's EIA made any approval of the operation unlawful.

In *Socio Economic Rights and Accountability Project* v Nigeria, a claim before the African Commission on Human and Peoples' Rights, applicants alleged that the government of Nigeria violated their right to a clean environment by condoning and facilitating the operations of oil corporations in Ogoniland.[85] Article 24 of the African Charter on Human and Peoples' Rights provides for a right to a general satisfactory environment favorable to development (Article 24). In a ruling delivered in May 2002, the African Commission affirmed the right to a healthy environment and found the Nigerian government in violation of Article 24 of the African Charter.

In *Mbabazi and Others v The Attorney General and National Environmental Management Authority*, a claim brought against the Attorney General of the Republic of Uganda and the

[81] http://climatecasechart.com/non-us-case/trustees-time-groundwork-trust-v-minister-environmental-affairs-others/

[82] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190626_Tribunal-Appeal-No.Net-196-of-2016_decision.pdf

[83] Tribunal Appeal No. Net 196 of 2016.

[84] Case no. 65662/16. https://climatecasechart.com/non-us-case/4463/

[85] 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria. https://leap.unep.org/sites/default/files/court-case/achpr30_155_96_eng.pdf [25] *Mbabazi and Others v The Attorney General and National Environmental Management Authority.* Civil Suit No. 283 of 2012.

National Environment Management Authority (Ugandan NEMA), claimants allege that various damage and loss of life resulting from extreme weather events are linked to climate change inaction on the part of the government.[25] The claimants argue that Article 237 of the Ugandan Constitution makes the government of Uganda a public trustee of the nation's natural resources—including its atmosphere.[86] It is their position that articles 39 of the Constitution,[87] together with Article 237, require the Ugandan government to preserve those resources from degradation for both present and future generations and that the government was breaching its constitutional duty by failing to take steps to prevent the damage and loss of life resulting from extreme weather events. Significantly, the plaintiffs are requesting several forms of injunctive relief, such as orders compelling the government to account accurately for nationwide greenhouse gas emissions and developing a plan to mitigate those emissions.

Center for Food and Adequate Living Rights et al. v Tanzania and Uganda (2020) is a suit against the Governments of the United Republic of Tanzania and Uganda in the East African Court of Justice. Plaintiffs, four civil society organisations, are seeking an injunction to stop the construction of the East African Crude Oil Pipeline. Plaintiffs allege that the Governments signed agreements to build the pipeline without proper environmental, social, human rights and climate impact assessments.[88] The plaintiffs further allege that the project is alleged to be environmentally untenable and will transverse protected areas in East Africa, with undue regard to livelihoods, gender, food security, children and public health of East Africans. The pending claim arises under Ugandan national law, and the East African Community Treaty and its protocols.

In conclusion, we are at the very early stages of climate disputes and arbitration in Africa. Countries in Africa are likely to see more disputes around environmental issues in general and climate change in particular as they pivot towards cleaner energy and develop the legal and institutional framework for environmental protection and climate change. The future will be shaped by at least four factors: (1) the quality of laws and regulation that develop in the continent in the coming years; (2) the level of activism in the continent; (3) strides in scientific attempts to attribute particular climate disasters to specific actors; and (4) the emergence of novel cases involving a new form of legal argument or filed in a new jurisdiction.[89]

The Future of Environmental/Climate-Change Dispute in Africa – Lessons From Other Jurisdictions

Around the world, businesses face a growing and unprecedented range of ESG needs, risks, and opportunities.[90] The ESG needs, risks, and opportunities that companies face arise across state, national, regional, and international boundaries and cover a broad range of issues including ESG claims, communications, performance, due diligence, and disclosures. Although

[86] Titled 'Land ownership.' Article 237(1) states that "Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."

[87] Article 39 (Right to a clean and healthy environment) provides: "Every Ugandan has a right to a clean and healthy environment."). Article 21(2)(b) states:

[T]he Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens.

[88] Application No. 29 of 2020 (Arising from Reference No. 39 of 2020) Centre for Food and Adequate Living Rights (CEFROHT) Limited & 3 Others v The Attorney General of the Republic of Uganda, The Attorney General of the United Republic of Tanzania, and The Secretary General of the East African Community.

[89] https://www.theguardian.com/environment/2023/may/22/big-polluters-share-prices-fall-climate-lawsuits-fossilfuels-study

[90] Freshfields, International Arbitration in 2022: Illuminating the Top Trends (2022). https://www.freshfields.com/490835/globalassets/our-thinking/campaigns/arbitration-top-trends-2022/international_arbitration_top_trends_2022.pdf

environmental and climate change litigation in Africa is still limited, they are likely to grow. In the future, we may see likely to see:

- ✓ More cases by States, regulatory bodies, and sub-national entities against corporate actors. National governments and sub-national entities are beginning to initiate environmental and climate-change related claims.[91] Climate-change-related lawsuits have been initiated by states (e.g Rhode Island and Minnesota), counties (e.g. the County of Maui) and Hawai),[92] and cities (e.g. Oakland and San Francisco), and even local governments.
- ✓ More cases by regulatory bodies, administrative agencies and sub-national entities against other regulatory bodies, administrative agencies and sub-national entities.
- ✓ More cases by businesses against other businesses based primarily on terms of commercial contracts.
- ✓ More cases by individuals and NGOs against corporate actors based on expanding legal theories and innovative arguments. Beyond rights-based claims, we may see: more science-forward cases such as (i) cases that challenge a corporation for failure to take climate risks into account;[93] (ii) cases seeking monetary damages or awards from defendants based on an alleged contribution to climate change harms.[94] See e.g. *Asmania et al. v Holcim*; *Ministerio Publico Federal v de Rezende*.
- ✓ More cases by individuals and NGOs targeting a more diverse range of actors such as financial intermediaries, corporate boards, and regulatory bodies. In a growing number of cases, claimants challenge the flow of finance to projects and activities that are not aligned with climate action. See.e.g. *Conectas Direitos Humanos v BNDES and BNDESPAR* and *Notre Affaire à Tous and others v BNP Paribas*.
- ✓ Claims that target financial institutions like banks and asset managers that back fossil fuel expansion, as well as companies involved in the production of energy, food and plastics.[95] On November 10, 2022, the Attorney General of California announced a lawsuit against major manufacturers of per- and polyfluoroalkyl substances — commonly referred to as PFAS or toxic "forever chemicals" — for endangering public health, causing irreparable harm to the state's natural resources, and engaging in a widespread campaign to deceive the public.[96]
- ✓ Cases by other stakeholders including shareholders of corporations. Shareholder action is still a rarity in Africa but is common in developed economies. In 2022, Shell's board of directors was sued for 'failing to properly prepare' for the energy transition.[97] The lawsuit alleges that the board's failure to implement a climate strategy that truly aligns with the landmark Paris Agreement is a breach of their duties under English law. This case is reportedly the first-ever attempt at holding a company's board of directors personally liable "for failing to properly prepare for the net zero transition."[98]

[91] https://www.theguardian.com/us-news/2023/jun/07/climate-crisis-big-oil-lawsuits-constitution

[92] In 2020, officials from the city and county of Honolulu sued eight fossil fuel giants that allegedly knew for decades about the climate dangers of burning coal, oil and gas, yet actively hid that information from consumers and investors. https://www.theguardian.com/us-news/2023/aug/17/hawaii-fossil-fuelcompanies-dismiss-lawsuithonolulu#:~:text=In%202020%2C%20officials%20from%20the,information%20from%20consumers%20and%20investors.

[93] Joanna Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2023 Snapshot (2023).

[94] Id. ("Three different avenues have been used to date: (i) compensation for past and present loss and damage associated with climate change; (ii) contributions to the costs of adapting to anticipated future climate impacts; (iii) compensation to 'offset' emissions, where those activities have caused damage to carbon climate sinks."

[95] https://www.theguardian.com/us-news/2023/jun/07/climate-crisis-big-oil-lawsuits-constitution

[96] https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-manufacturers-toxic-forever-chemicals

[97] https://www.cnbc.com/2022/03/15/oil-shell-directors-sued-for-failing-to-prepare-for-energy-transition.html

[98] Id.

Claims by Individuals and NGOs Based on Expanding Legal Theories

In addition to the rights-based claims, in the future, we are likely to see more climate changespecific claims – claims that take on a Government's lack of consideration of adaptation measures as well as claims that challenge adaptation measures and practices of corporations.

Regarding claims against States and sub-national entities, with an improved legal framework, climate change claims are likely to grow and the legal arguments supporting the claims are likely to expand. In *Tsama William and Others v Uganda's Attorney General and Others*, a case filed on October 14, 2020, the applicants (victims of recurring landslides in Bududa district, Uganda) alleged that the respondents have failed to put in place effective machinery against landslides in Bududa district, and that the respondents' acts and/or omissions have led to the violation of applicants' fundamental rights. At issue is whether Uganda has failed to fulfill its positive obligations under climate change and disaster management law to manage the risk of landslides in the Bududa district.

Regarding claims against businesses, we may see more climate change-specific claims based on expanding legal theories and innovative arguments. In 2015, a Peruvian farmer and mountain guide Saúl Luciano Lliuya filed an unprecedented legal claim against RWE seeking compensation for its role in causing historical climate change that threatens his home;[99] In 2017, an appeals court allowed the claim to proceed. In *Milieudefensie et al. v Royal Dutch Shell plc*, the Court noted a "broad international consensus about the need for non-state action, because states cannot tackle the climate issue on their own."[100] Greenwashing claims may also emerge in Africa based on misrepresentation of products, deceptive and unfair business practices, and misleading consumers about the impact of fossil fuels.[101] In 2022, a group of environmental NGOs filed a lawsuit in France against the country's largest energy company TotalEnergies, accusing it of misleading consumers about its efforts to fight climate change.[102]

Disputes Initiated by Businesses

More disputes are likely to be initiated by businesses. Two types of disputes are envisaged. Disputes by businesses challenging the transition policies and practices of States as well as disputes by businesses against other businesses.

Many past and pending ISDS cases are related to measures or sectors of direct relevance to climate action, according to the United Nations Conference on Trade and Development (UNCTAD). Indeed, "[t]he risk of investor–State dispute settlement (ISDS) being used to challenge climate policies is a major concern" for governments around the world. According to UNCTAD, three categories of cases have emerged: environmental ISDS cases (amounting to at least 175 cases), fossil fuel ISDS cases (at least 192), and renewable energy ISDS cases (at least 80).

Measures taken for the protection of the environment can be challenged and deemed a violation of BITs. Foreign investors are not shying away from initiating IIA-based ISDS cases to challenge government measures that are related to environmental protection. According to UNCTAD, at

[99] *Lliuya v RWE*, Case No. 2 O 285/15, Essen Regional Court. See also: https://www.theguardian.com/environment/2015/mar/16/peruvian-farmer-demands-climate-compensation-fromgerman-company

[100] The Hague District Court, *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (26 May 2021) (the "Court Decision").

[101] See e.g. Examples include *Connecticut v Exxon Mobil Corp*. (2022), *City of New York v Exxon Mobil Corp*. (2021), *Vermont v Exxon Mobil Corp.* (2022).

[102] https://www.reuters.com/business/sustainable-business/environmental-groups-sue-totalenergies-over-climatemarketing-claims-2022-03-03/

least 175 environmental cases have been brought against States, amounting to about 15 per cent of all 1,190 known ISDS cases based on IIAs.

- In *Eco Oro v Colombia*, the issue was whether Colombia's environmental mining ban decision violated the minimum standard of treatment in the investment chapter of the Colombia–Canada FTA (2008) and whether the general environmental exception included in the FTA (Article 2201(3)).
- In *RWE v Netherlands*, a case that resulted from the decision of the Government of Netherlands to ban the burning of coal for electricity generation by 2030 in compliance with the country's Paris Agreement commitments, the issue is whether the new law provides appropriate compensation for losses incurred by coal plant operators.

Countries face legal risks when implementing regulations for phasing out fossil fuels. Fossil fuel ISDS cases involve investments in at least four key economic activities: mining of coal and lignite, extraction of crude petroleum and natural gas, power generation from coal, oil and gas, as well as transportation and storage of fossil fuels.[103] Fossil fuel investors are resorting to ISDS and are using it to challenge climate change measures and even measures that are not necessarily related to climate action or the protection of the environment. Fossil fuel investors have challenged generally applicable measures such as changes in regulatory frameworks applicable to the investment and the denial or revocation of permits on other than environmental grounds. UNCTAD speculates that "[a]s fossil fuel investors have frequently resorted to ISDS, they can also be expected to use existing ISDS mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels."

ISDS cases brought by investors in the renewable energy sector are also proliferating. According to UNCTAD, many of these cases challenge Governments' legislative changes involving reductions in feed-in-tariffs for renewable energy production. While the renewable energy cases primarily concerned investments in solar photovoltaic power generation, a minority related to wind and hydroelectric power generation. The lesson is that as developing countries design legislative and regulatory measures related to renewable energy production, ISDS claims inevitably loom on the horizon. To date, climate change action by Africa States have not triggered much ISDS disputes. There is no renewable energy ISDS case based on IIA involving African States. While there are fossil fuel ISDS cases based on IIAs that involve African States, many of these cases have nothing to do with climate change (See Table 1).

TABLE 1

List of Environmental/Fossil Fuel ISDS Cases Involving African States 2013 - 2023

Year of Initiation	Short Case Name	Applicable IIA	Sector
2019	CTIP Oil & Gas v Egypt	Egypt–United Arab Emirates BIT (1997)	Transportation and Storage/ gas pipelines construction and operation agreement.
2019	Petroceltic v Egypt	Egypt–United Kingdom BIT (1975)	Mining and quarrying/ Hydrocarbon Concessions

[103] https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf

2019	Symbion Power and Others v Tanzania	United Republic of Tanzania–United Kingdom BIT (1994)	
2018	Coral v Morocco	Morocco–Sweden BIT (1990)	Manufacturing/ a local oil refinery and storage company.
2018	The Carlyle Group and others v Morocco	Morocco–United States FTA (2004)	Manufacturing/Petroleum Products
2018	Trasta v Libya	OIC Investment Agreement (1981)	Oil Refinery
2017	APCL v Gambia	Gambia–Netherlands BIT (2002)	Mining and quarrying/ Oil
2017	Puma Energy v Benin	BLEU (Belgium-Luxembourg Economic Union)–Benin BIT (2001)	Transportation/Storage
2016	Burmilla Trust and Others v Lesotho	SADC Investment Protocol (2006)	Mining
2016	Gosling and others v Mauritius	Mauritius–United Kingdom BIT (1986)	
2015	Total E&P v Uganda	Netherlands–Uganda BIT (2000)	
2014	VICAT v Senegal	France–Senegal BIT (2007)	
2014	Union Fenosa v Egypt	Egypt–Spain BIT (1992)	Mining/ Liquified natural gas
2014	Interpetrol v Burundi	BLEU (Belgium-Luxembourg Economic Union) – Burundi BIT (1989)	

Source: UNCTAD

If and when African states begin to take bold climate change action, for example by taking steps to limit oil and gas production, more ISDS claims can be expected. A study of recent ISDS cases suggests that different types of State conduct, including environmental measures and other regulatory actions, can give rise to ISDS claims.[104] Studies also show that the overwhelming majority of ISDS cases relied on old-generation IIAs.[105] Because African States have a disproportionately large share of old-generation IIAs, they are especially at risk.

[104] IISD (International Institute for Sustainable Development) (2021). Investor–State Disputes in the Fossil Fuel Industry. December 2021, written by Lea Di Salvatore. Winnipeg: IISD.
[105] UNCTAD (2022a). "The International Investment Treaty Regime and Climate Action". IIA Issues Note, No. 3, September 2022.

The Legal Bases of Future Environmental/Climate Change Arbitration in Africa

The new generation of ESG disputes will likely be grounded in (1) contracts; (2) climate specific domestic laws and regulations; and (3) international law including regional trade agreements, bilateral investment disputes, human rights and environmental treaties and even customary international law. Regarding claims based on domestic laws and regulations, climate rights claims are likely to remain very popular in Africa. In addition to climate rights claims, we are likely to see cases that focus on among other things: domestic enforcement; keeping fossil fuels in the ground; corporate liability and responsibility; failure to adapt and the impacts of adaptation; and/or climate disclosures and greenwashing.[106]

ESG in Commercial Contracts

ESG-related disputes can arise out of commercial contracts. Companies are proactively managing ESG risks by inserting ESG conditions and exceptions into commercial contracts. According to the ICC Task Force, climate change-related disputes could arise out of or in relation to three types of contracts:

> (i) "contracts relating to the implementation of energy or other systems transition, mitigation or adaptation in line with the Paris Agreement commitments";
>
> (ii) "contracts without any specific climate-related purpose or subject-matter but where a dispute involves or gives rise to a climate or related environmental issue"; and
>
> (iii) "submission or other specific agreements entered into to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations."

Contracts are increasingly used to oblige corporations to enforce due diligence in their supply chain. In other words, a growing number of jurisdictions have passed or are preparing to pass mandatory human rights and environmental due diligence laws. In turn, companies are inserting due diligence clauses in their contracts with third parties as part of their overall approach to legal risk management. As one attorney put it:

"One way of securing ESG compliance is by including ESG clauses in business agreements (e.g. commercial, sales and supply agreements, construction project agreements, loan facilities, even M&A contracts), usually as representations, indemnities or warranties. For example, buyers and suppliers often agree to conduct human rights due diligence, or a developer warrants to comply with environmental and health policies."[107]

Legislation

The last decade witnessed a rise in the number of ESG-relevant laws including disclosure laws, supply chain due diligence laws, and greenwashing laws. These new ESG-related laws are, in turn, shaping commercial contracts and influencing the direction of climate change disputes.

In a growing number of jurisdictions, governments have adopted or are adopting laws requiring companies to disclose information regarding human rights in their supply chains. While some laws address specific human rights issues (e.g. slavery), others target specific sectors (e.g. extractive industry).[108] Examples include the UK Modern Slavery Act 2015, Norway's

[106] https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf
[107] https://www.schoenherr.eu/content/esg-related-arbitrations-a-new-kid-on-the-block/
[108] Business and Human Rights Resource Centre, Modern Slavery in Company Operations and Supply Chains: Mandatory transparency, mandatory due diligence and public procurement due diligence, September 2017 at p. 18.

Transparency Act (2021), Section 1502 of the Dodd-Frank Act, the European Union Directive 2014/95 on Disclosure of Non-Financial Information and the EU Corporate Sustainability Reporting Directive, and Australia's Modern Slavery Bill 2018.

Laws that impose mandatory human rights and environmental due diligence requirements on businesses are also emerging. Examples include Germany's Supply Chain Due Diligence Act (2021), the Dutch Child Labor Due Diligence Bill and the European Regulation 2017/821.[109] Supply chain due diligence requirements that are limited to specific sectors (e.g. timber) and more comprehensive due diligence laws are also emerging.[110] On 23 February 2022, the European Commission adopted a proposal for a '*Directive on Corporate Sustainability Due Diligence.*'[111] Should it pass, the Draft Directive will be the first regional liability regime to oblige EU companies and some third-country companies to protect people and the environment adversely affected by their global supply chains.

Laws that target greenwashing are also emerging. On March 22, 2023, the European Union published a proposed Directive on Green Claims that is a direct response to growing concerns about the practice of greenwashing[112]. The proposed Directive introduces new rules on the evidence that companies will have to produce to substantiate their green claims. The rules also include a requirement that green claims be verified and certified by a third party before being publicized. Significantly, the proposal grants standing to interested parties to bring complaints against traders, including collective actions on behalf of consumers.

In sum, although legal developments around ESG are most common in developed economies, developing countries are not too far behind. Altogether, businesses:

- face new mandatory human rights and environmental due diligence obligations;
- face new mandatory obligation to remediate their own harmful impacts (whether as part of a mandatory human rights due diligence duty or separately, and whether individually or as part of an industry or multi-stakeholder initiative); and
- face laws mandating transition to low-carbon uses that are likely to create legal risks for businesses operating in the region and could expose states to liability.

Presently, many countries in Africa "have weak or functionally non-existent legislative frameworks in relation to climate change."[113] It is expected that legislative and statutory frameworks in countries in Africa will improve. With improved legislative frameworks, we are likely to see disputes that raise novel theories. In other jurisdictions, claimants are trying to increase the scope of climate change claims "by bringing claims for relief other than damages and basing their claims on alternative causes of action, which do not require them to prove a chain of causation between the defendant's GHG emissions and the specific climate-related injury that is alleged." The complaint in the California action against the oil companies includes five causes of action: public nuisance, damage to natural resources; false advertising;

[109] International Federation of Human Rights, Press Release. Germany: call for an improvement of the Supply Chain Due Diligence Act, 15 November 2021. https://www.fidh.org/en/issues/globalisation-human-rights/germany-call-for-an-improvement-of-the-supply-chaindue-diligenceact#:~:text=The%20Supply%20chain%20due%20diligence%20act%20was%20adopted%20by%20the,companies%20and%20their%20value%20chains.

[110] Australia's Illegal Logging and Prohibition Act 2012 (Cth). Timber is the focus of the Lacey Act of 190 which requires US manufacturers to ensure that their wood products are not produced using illegal timber by implementing specified supply chain due diligence procedures to. See 16 USC s3372(a)(2(A) (2006).

[111] European Commission, COM (2022) 71 final, p. 2.

[112] https://environment.ec.europa.eu/topics/circular-economy/green-claims_en#:~:text=With%20a%20proposed%20new%20law,make%20better%20informed%20purchasing%20decisions.

[113] https://www.whitecase.com/insight-our-thinking/climate-change-litigation-africa-current-status-and-futuredevelopments

misleading environmental marketing; unlawful, unfair, and fraudulent business practices; and product liability (strict and negligent).

ESG-focused Regulations

Businesses are also confronting the ESG regulatory wave in a growing number of jurisdictions.[114] Most of the world's economic powers are now developing ESG-focused regulations some of which have extra-territorial effects. Regulatory oversight bodies are increasingly afforded powers to receive and investigate complaints from victims of business-related human rights violations. Some of the regulatory bodies have the power to issue binding remedial orders, such as for compensation, restitution, or injunctions.

Emerging economies are not shying away from ESG-focused regulations. In a growing number of countries, stock exchanges are playing a major role in guiding companies in the transition towards a sustainable economy. Among emerging market economies, stock exchanges that have issued ESG-related guidelines include: the Shanghai Stock Exchange, the Dhaka Stock Exchange,[115] the Bombay Stock Exchange,[116] and the Dubai Financial Market.[117] Regulatory bodies in Africa are also beginning to assume an important role in the continent's sustainability agenda. In line with developments in other parts of the world, stock exchanges in Africa are beginning to issue reporting guidelines (See Table 2). In Africa, Egypt Stock Exchange was the first to publish an ESG reporting guide in 2016,[118] followed in 2017 by Morocco's Bourse de Casablanca, in 2018 by the Nigerian Stock Exchange[119] and the Botswana Stock Exchange, in 2021 by the Nairobi Securities Exchange[120] and the Tunisia's Bourse des Valeurs Mobilières de Tunis,[121] and in 2022, by the Ghana Stock Exchange[122] and the Johannesburg Stock Exchange.[123] To date, seven stock exchanges in Africa have issued guidance on ESG disclosure guidelines. South Africa is reportedly actively promoting ESG reporting and sustainability practices, both through regulatory frameworks and voluntary initiatives.[124] South Africa has also committed to a Climate Plan which includes reducing GHG emissions to net zero by 2050.

If and when mandatory disclosure requirements are implemented, companies are likely to face major exposure to significant legal risks arising from misleading or incomplete ESG reporting. Companies whose reports are found to be incomplete or misleading may face investigations, enforcement actions, litigation and/or arbitration by governments, regulators, shareholders, and other stakeholders.

[114] https://www.telefonica.com/en/communication-room/blog/the-esg-regulatory-wave-todays-challenge-tomorrowsopportunity/
[115] https://www.dsebd.org/assets/pdf/DSE_GRI_Guidance_Document_Final.pdf
[116] https://www.bseindia.com/downloads1/BSEs_Guidance_doc_on_ESG.pdf
[117] https://assets.dfm.ae/docs/default-source/default-document-library/esg-reportingguide_en.pdf?sfvrsn=60fa7681_0
[118] https://www.egx.com.eg/getdoc/98b4f610-5544-4f93-a36e-636d3baf8f45/EGX-Model-Guidance-on-ESG_en-1110-2016.aspx
[119] https://ngxgroup.com/ngx-download/sustainability-disclosure-guidelines/?ind=1604672225156&filename=Sustainability%20Disclosure%20Guidelines.pdf&wpdmdl=25949&refr esh=61499a451a2581632213573
[120] https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf
[121] https://sseinitiative.org/wp-content/uploads/2022/01/TSE-ESG-Disclosure-Guidelines.pdf
[122] https://gse.com.gh/wp-content/uploads/2022/11/GSE-ESG-DISCLOSURES-GUIDANCE-MANUAL-1-1.pdf
[123] https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance
[124] https://www.greenstoneplus.com/blog/esg-reporting-in-south-africa-preparing-for-regulation

TABLE 2.

African Stock Exchanges and Disclosure Guidelines

Year	Regulatory Body	Title of Regulatory Instrument
2016	The Egypt Exchange	Model Guidance for Reporting on ESG Performance and SDGs
2017	Bourse de Casablanca	Guide sur la Responsabilité Sociètale des Enterprises et le reporting ESG
2018	The Nigerian Stock Exchange	Sustainability Disclosure Guidelines
2018	Botswana Stock Exchange	Guidance for Listed Companies on Reporting ESG Information to Investors
2021	Nairobi Securities Exchange	ESG Disclosure Guidance Manual
2021	Bourse des Valeurs Mobilières de Tunis	TSE - ESG Disclosure Guidelines
2022	Ghana Stock Exchange	ESG Disclosures Guidance Manual
2022	Johannesburg Stock Exchange	JSE Sustainability Disclosure Guidance

Source: Compiled by the Author

Treaties

Investors can bring claims against states for violating their obligations under existing BITs. Claims could be brought for a violation of some of the common provisions in a traditional BIT including the expropriation clause, the fair and equitable treatment clause, and the full protection and security clause. Tanzania's recent experiences with investor-state dispute settlement is a reminder that states remain vulnerable to ISDS long after they have terminated their BITs.[125]

On the State side, African States are beginning to terminate BITs that appear to limit the government's ability to regulate investments in the public's interest.[126] ESG-related provisions are appearing in a growing number of IIAs involving African States. First, provisions that impose direct obligations on investors are beginning to appear. Second, in a growing number of IIAs, specific obligations related to respect for human rights, protection of the environment, corruption, and sustainability more broadly are beginning to appear. Overall, we are seeing the beginnings of a next-generation model BITS attempt to bring together the divergent regimes

[125] Tanzania Faces a New ICSID Claim under the Terminated Netherlands BIT (June 21, 2019). https://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminatednetherlands-bit-2/

[126] https://www.theeastafrican.co.ke/business/Tanzania-ends-investment-treaty-with-Netherlands/2560-47946143ywb8l/index.html

of investment protection, business and human rights, and environmental protection.[127] For example, in November 2022, stakeholders endorsed the *Sustainable Investment Facilitation and Cooperation Agreement (SIFCA) Model Framework for The Gambia* for all future BIT negotiations.[128] On 18 November 2022, the European Commission concluded negotiations with the Republic of Angola on a Sustainable Investment Facilitation Agreement (SIFA) – the first EU agreement of this kind. The EU reportedly plans to pursue such agreements to promote sustainable investments in its engagement with African partners.

Environmental/Social Provisions

In the last ten years, a new generation of IIAs has emerged that contain significant provisions relating to the environment, human rights and corporate social responsibility. Article 18(7) of Morocco's Model BIT stipulates that investors "shall manage and operate their investments in a manner consistent with international environmental, labor and human rights obligations to which both Parties are party." Some treaties are even more specific and address a host of issues including (i) precautionary principle; (ii) impact assessment; and (iii) climate change. Regarding environmental impact assessment, Article 14 (1) of the Morocco-Nigeria BIT provides:

> *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 investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.*

Article 20.4 of Morocco's Model BIT states that Investors "will be expected to manage or operate their investments in compliance with international obligations regarding human and labor rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives." A tribunal established under the Agreement is empowered, by this Agreement shall, in determining the amount of compensation, take into account the failure of the Investor to comply with its commitments referred to in paragraph 20.4 of this section.

Transparency Provisions

Transparency provisions are also appearing in BITs involving African States. Article 15(2) of the ECOWAS Investment Code provides that Member States "have the right to seek information from a potential investor or its home state about its corporate governance history and its practices as an investor in its home state or in a third country." Pursuant to Article 15(5), "An investor shall provide such information to a Member State concerning the investment in question for purposes of decision-making in relation to that investment or solely for statistical purposes." Article 18(3) of Morocco's Model BIT states that "[a]n investor shall provide the Host Party with any information it requires concerning its investment for the purpose of making decisions related to such investment or for statistical purposes only. The provision of false information can be very damaging and could open the door for counterclaims against an investor. Article 18(5) of Morocco's Model BIT stipulates that "[a]n investor shall not commit fraud or provide false information regarding its investment" and that a material breach of this obligation by an

[127] https://arbitrationblog.kluwerarbitration.com/2021/11/26/notes-from-practice-announcing-the-sifca-framework-isthe-confluence-of-investment-protection-with-business-and-human-rights-the-future-of-investment-treaties/

[128] https://thepoint.gm/africa/gambia/headlines/stakeholders-validate-sifca-model-framework-for-gambia?LKGPXLoOpsCLDjot4aV1P6yEisEsKsCi

investor "shall constitute a violation of the domestic law of the Host Party relating to the establishment of its investment."[129]

Regulatory Space

A growing number of BITs contain provisions that provide host states wide latitude to adopt social and environmental measures. Article 13(4) of the Morocco-Nigeria BIT (2016) provides:

> *Nothing in this Agreement shall be constructed to prevent a Party from adopting maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental and social concerns*.

Conclusion

We are likely to see increased scrutiny of IIAs in Africa. We are also likely to see a few more governments pressing for change to their existing IIAs.[130] The good news is that there is now a broad consensus that the IIA regime needs to be recalibrated.[131] In its 2022 report, Working Group III of the United Nations' Intergovernmental Panel on Climate Change (IPCC) expressed concern that much of international governance still promotes fossil fuels and highlighted the role of investment treaties and investor-state dispute settlement. OECD's initiative on investment treaties and climate change is also prompting serious conversation around the role of IIAs in addressing climate change. [132] [133] The bad news is that the obligations of African states under existing IIAs do not end immediately the treaties are terminated.[134]

ESG Arbitration, African States, and African Arbitrators

Is arbitration ready for ESG disputes in general and climate change disputes in particular? Can arbitration proceedings accommodate the multidisciplinary nature of climate change disputes and their particular needs? Is Africa ready for the coming wave of ESG disputes and arbitration?

[129] https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8

[130] Kitonka, N. H. (2023). Balance between Investment Protection and Sustainable Development under Tanzania-Canada BITs: Need for Progressive Domestic Investment Law. *Journal of Law and Legal Reform*, 4(1), 79-108. https://doi.org/10.15294/jllr.v4i1.60464

[131] Alvarez, J. E. (2010) Why Are We Re-Calibrating Our Investment Treaties? World Arbitration & Mediation Review, Vol. 4 No. 2, 2010, pp. 143-162.

[132] Conference on investment treaties and climate change: Paris Agreement and Net Zero alignment. https://www.oecd.org/daf/inv/2022-conference-investment-treaties.htm

[133] Conference: Investment treaties, the Paris Agreement and Net Zero - Towards alignment? https://www.oecd.org/daf/inv/investment-policy/conference-investment-treaties.htm

[134] Article 3 of the Netherlands BIT states, "In respect of investments made before the date of the termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from that date."

Arbitration and ESG: Some Concerns

Concerns have been raised, in some quarters, regarding the suitability of arbitration for ESG disputes.[135] Concerns arise because the issues and parties involved in some ESG disputes are different from those in typical commercial disputes, investor-state disputes, or state-to-state disputes. A growing number of ESG-related disputes involve victims of business-related human rights violations and environmental pollution.

First, there are concerns about whether existing arbitration rules provide an adequate procedural framework for ESG-related disputes. As noted in *The Hague Rules On Business and Human Rights Arbitration: Questions and Answers* "Because the issues and parties involved in business and human rights disputes are different from those in typical commercial disputes, investor-state disputes, or state-to-state disputes, existing arbitration rules do not provide an adequate procedural framework."[136] Second, there are concerns about corporate capture. In a recent report, the European Law Institute warned that "any consensual system of dispute resolution such as mediation or arbitration is open to capture by the stronger party unless effectively and externally controlled"[137] Third, there are concerns that arbitration lack the coercive powers that national courts possess. In arbitration involving workers, and other stakeholder groups, there is concern that arbitral award may never be enforced. Additionally, there are concerns related to lack of transparency, challenges to third-party intervention, and whether arbitration is adequate for resolving ESG disputes that implicate broad public best interest concerns.

Regarding the suitability of arbitration for ESG disputes, arbitration experts believe that arbitration has many attributes and characteristics that make it an attractive and effective method for resolving disputes, including ESG disputes.[138] White & Case partner, Jonathan Hamilton is of the view that the field of arbitration is already "well positioned to adapt to this disruptive era" by pioneering disputes in the ESG field over the past two decades, and adapting arbitral practice to a new era.[139] As a means of resolving ESG disputes, arbitration offers several advantages. The advantages of arbitration include expertise, expeditious injunctive relief, speed and efficiency, and enforceability. As noted in a recent arbitration blog:

The Stockholm Chamber of Commerce (SCC), the PCA, and the Hong Kong International Arbitration Centre (HKIAC) have all heard cases pertaining to the Kyoto Protocol. At least nine independent instances of environmental issues resulting from the Kyoto Protocol in the PCA have been resolved by commercial arbitration. These cases range from a commercial contract dispute involving an Asian and European hydropower corporation to a disagreement over the number of units required to offset emissions against carbon credits.[140]

[135] Herbert Smith Freehills, The Rising Importance of ESG and its Impact on International Arbitration, July 27, 2021, available at: https://www.herbertsmithfreehills.com/latest-thinking/the-risingimportance-of-esg-and-its-impact-oninternational-arbitration.
[136] https://www.cilc.nl/cms/wp-content/uploads/2021/05/QA-The-Hague-Rules.pdf
[137] https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf
[138] https://www.vonwobeser.com/images/PDF_news/2021/21_11_12_ARBITRAJE_ESG_ING.pdf
[139] Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment. https://www.whitecase.com/news/media/arbitration-esg-era
[140] https://rmlnluseal.home.blog/2023/06/01/arbitration-as-a-mechanism-to-resolve-esg-disputes-2/

ESG Arbitration and African States – Assessing Readiness

The future of climate change disputes in Africa is likely to see new categories of claimants (e.g. shareholders), new targets (e.g. financial intermediaries, corporate boards), and will be based on old and new legal theories. While some of these disputes will be based on pre-existing legal duties, such as obligation under constitutional, consumer protection, human rights, or tort law, others will be based on future climate-specific legislation and regulations that are likely to emerge in Africa. Is Africa ready for Environmental/climate-change disputes? Are African lawyers and arbitrators ready? Are the arbitral institutions in Africa ready?

African Lawyers

Environmental disputes in general and climate change disputes, in particular, are likely to rattle the comfort zone of many lawyers and arbitrators in Africa. Many core principles in climate law stem from environmental law, a field that relatively few lawyers in Africa have studied or practiced. Are African arbitrators ready?

First, ESG cases raise important issues of extra-territorial jurisdictions and conflicts of laws. Indeed, the whole spectrum of environmental matters in a single dispute may implicate multiple jurisdictions. Consequently, expertise in all aspects of civil procedure will be needed.

Second, climate change raises many highly technological, scientific, and economically complex issues. In the future, we are likely to see more cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change. Consequently, expertise in the science of climate change and energy transition will become increasingly important.

Third, the future will involve sector-specific contracts and disputes related to renewable energy, fossil fuels, transportation policies and projects, complex technologies, land use changes, as well as urban and infrastructure systems. It is important that African arbitrators develop knowledge about these sectors.

Fourth, the future of climate change litigation is likely to embrace new legal theories and arguments. Analysts predict that the future of climate litigation will include cases involving climate migration, pre- and post-disaster conditions, transnational responsibility, and implementation of judicial and arbitral decisions themselves.[141] Increasingly, arbitrators will have to step out of their comfort zone to grapple with complex legal questions and theories.

Fifth, African lawyers must also begin to develop expertise of the myriad of legal issues that can arise when businesses operate extraterritorially and when businesses operate in conflict zones.

The time is ripe to begin to develop the knowledge needed to address future climate disputes in Africa. There are major challenges to the development of ESG arbitration in Africa. Top on the list of challenges are weak legal and institutional frameworks, resource and capacity constraints, and lack of adequate understanding of the science of climate change. Many lawyers and arbitrators in Africa lack access to current knowledge about climate law, climate science, and local climate impacts. How to develop the requisite knowledge base given resource limitations, ad hoc publication of laws, language barriers, and lack of transparency in administrative and regulatory procedures in most States in Africa is a question that must be urgently addressed.

[141] Global Climate Litigation Report: 2023 Status Review, p. 62.

ESG Disputes and African Arbitral Institutions

To the extent that there are perceived shortcomings, there are ongoing efforts to address these shortcomings and enhance arbitration's appeal in the ESG context.[142] There may be a need for African arbitral institutions to update their institutional rules and practices. Outside Africa, there are ongoing efforts to enhance arbitration's appeal in the ESG context through the modification of institutional norms. Several notable changes have been introduced:

- The adoption, in 2019, of the PCA *Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*;[143]
- The adoption, in 2019, of the *Hague Rules on Business and Human Rights Arbitration*; and
- The establishment, in 2018, of the ICC Task Force on Arbitration in Climate Change Related Disputes.

The mandate of the International Chamber of Commerce Task Force on Arbitration of Climate Change Related Disputes is insightful as it sheds light on how other arbitral institutions are preparing for the future of ESG arbitration. The mandate of the Task Force was *inter alia*:

- To explore whether, and if so, how ICC Arbitration and other dispute resolution services are currently used to resolve climate change related disputes.
- To ascertain what, if any, specific features are required for a dispute resolution mechanism to effectively resolve climate change related disputes.
- To review the ICC Arbitration Rules, Mediation Rules, Expert Rules and Dispute Board Rules in the context of climate change related disputes in order to consider whether it would be appropriate for ICC to offer any additional guidance and suggest sample wording for dispute resolution clauses and procedure.

The UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency") entered into force on 1 April 2014, and comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration. The Rules on Transparency apply in relation to disputes arising out of treaties concluded prior to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application. To date, only a handful of African States have incorporated the Transparency Rules into their BITs.[144]

African Legal and Institutional Frameworks

Many countries in Africa still do not have comprehensive or effective environmental laws. Many countries in the regime lack up-to-date laws in many fields including corporate law, insurance law, tort law, food and drug law, etc. Updated laws that are clear and accessible can go a long way in shaping ESG disputes in Africa and preparing African arbitrators for the disputes of the future.

States have a role to play in developing the legal and institutional framework needed for future climate disputes in Africa. In 2021, the United States Securities and Exchange Commission announced the creation of a Climate and ESG Task Force in the Division of Enforcement. The

[142] ICC Commission Report. Resolving Climate Change Related Disputes through Arbitration and ADR, November 2019, §5.80.

[143] https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment and_or-Natural-Resources.pdf. Reportedly the first arbitration rules on climate change issued by any arbitral organisation. It is aimed at addressing any gaps in existing arbitral rules that may arise in environmental disputes.

[144] See e.g. Japan-Morocco BIT (Article 16.4.(c), Article 16.11); Cabo Verde-Hungary BIT (Article 9.3.(c), Article 11); Morocco-Congo BIT (Article 9.3.(b)).

task force is mandated to identify ESG-related misconduct, including analysing disclosures relating to investment advisers' and funds' ESG Strategies. On February 7, 2023, the SEC's Division of Examination announced that one of its annual examination priorities was to continue its focus on ESG-related advisory services and fund offerings, including whether funds are operating in the manner set forth in their disclosures.[145]

Sub-national entities can also drive climate-focused action in Africa. On April 28, 2021, the Attorney General of California announced an expansion of the California Department of Justice's Bureau of Environmental Justice – the first of its kind in a state attorney general's office and was "created to protect people and communities that endure a disproportionate share of environmental pollution and public health hazards."[146] This office is expected to house 11 attorneys "who are solely focused on fighting environmental injustices throughout the state of California and giving a voice to frontline communities who are all too often under-resourced and overburdened."[147] On April 28, 2022, Attorney General of California announced an investigation into the fossil fuel and petrochemical industries for their role in causing and exacerbating the global plastics pollution crisis. According to him:[148]

> *No Californian should have to breathe toxic air or drink dirty water. But that is the unfortunate reality for far too many of our communities across the state, particularly low-income communities and communities of color. Their fights are our fights, and as Attorney General, I am committed to devoting staff and resources to helping those Californians whose health and safety are put at risk by environmental pollution. The expansion of the Department's Bureau of Environmental Justice will allow us to increase oversight, take on more cases, and hopefully, change the lives of impacted Californians for the better.*

Conclusion

ESG is maturing and evolving. Companies are no longer only assessed on their financial performance. As Ari D. MacKinnon and Martin Vainstein rightly note, "It is no longer enough to produce a good product or provide a good service: consumers, regulators and other stakeholders also demand that the product or service meets certain environmental, social and governance standards."[149] Polluting firms and especially carbon majors now face litigation risk, in addition to transition and physical risks. Experts agree that "[w]e are likely just at the beginning of significant ESG regulatory development." In the future, we expect that the ESG legal and regulatory framework of African states will toughen up as is the case in a growing number of jurisdictions around the globe.[150] Climate litigation and arbitration are emerging as alternative governance mechanisms to address climate change. Considering the impact of climate change on countries and communities in Africa, Africa and African lawyers should be leading in the terms of environmental and climate-change disputes. The time is ripe to actual and perceived gaps in legal and institutional framework for ESG-related disputes in the continent.

[145] https://www.sec.gov/news/press-release/2023-24

[146] https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-expansion-bureau-environmental-justice

[147] Id.

[148] https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-expansion-bureau-environmental-justice

[149] https://www.financierworldwide.com/the-rise-of-esg-disputes-and-the-role-of-arbitration-in-resolving-them

[150] https://www.whitecase.com/insight-alert/global-esg-regulatory-framework-toughens

PANEL 4

CREATING AFRICAN ARBITRAL INSTITUTIONS OF THE FUTURE

Best practices

PANEL OVERVIEW

This panel addressed perspectives from pertinent African arbitral institutions, aiming to offer users (clients and counsel) insights from the institutional standpoint. Issues addressed in this panel were then revived in Panel 8, which addresses the users' perspectives. In particular, the panel explored:

- The role of arbitral institutions in dispute and case management, including management of time and costs, and in taking decisions on issues such as challenge and removal of arbitrators, preliminary dismissal for manifest lack of jurisdiction, and ensuring independence and impartiality of arbitrators

- Adaptation of arbitral institutions in a changing arbitration landscape, such as:
  - Data and document management, data protection and cyber security, and their relevance to Africa in a post-Covid (hybrid) environment. Panelists asked: are African users of arbitration sufficiently well prepared for this aspect of arbitration?
  - Artificial intelligence and new challenges or opportunities for arbitral institutions.

- The extent to which arbitral institutions should be liable. This discussion addressed whether institutions enjoy immunity or liability according to their governing instruments and the position of the courts at the seat of the institution.

- Insights on best practices from arbitral institutions in Africa.

MODERATOR'S SUMMARY

TALKING POINTS – CREATING AFRICAN ARBITRAL INSTITUTIONS IN FUTURE

Sami Houerbi

The fourth panel's discussion was interactive and based on pre-agreed talking points. Sami Houerbi captures each of the panelists' speaking points in the table below.

NAME	PROPOSED TALKING POINTS	CONCISE TALKING POINTS
Tunde Fagbohunlu SAN (LACIAC)	**1.** Business development based on collaboration and comparative advantage - African institutions must share the space with developed-world institutions that have been in the market for over a century. What are the best strategies can they adopt to compete better? Are collaboration and comparative advantage key to such strategies? **2.** Technology **3.** Quality of ADR rules - Rules must undergo periodic review to ensure they meet the requirements of constantly developing and evolving issues in international arbitration.	**1.** Business Development Strategies for African Institutions: • Emphasise collaboration with developed-world institutions. • Leverage comparative advantages for a competitive edge. **2.** Technology: • Explore the role and impact of technology in your context. **3.** Quality Assurance for ADR Rules: • Conduct regular reviews of ADR rules. • Ensure rules adapt to changing dynamics in international arbitration.
Svetlana Vasileva (AFSA International Court)	Panel Topic 1: The Role of Arbitral Institutions in Dispute and Case Management • Management of Time and Costs: One perspective could be that arbitral institutions play a crucial role in ensuring efficiency and fairness by setting clear guidelines for timeframes and costs, which helps streamline the arbitration process. This can lead to quicker resolutions and increased trust in the arbitration system. • Decision-Making on Issues: Another thought could be that the authority of arbitral institutions in making decisions on matters like arbitrator challenges and jurisdictional issues helps maintain transparency and objectivity. However, there might be concerns about ensuring a balance between their authority	Panel Topic 1: The Role of Arbitral Institutions in Dispute and Case Management **1.** Management of Time and Costs: • Arbitral institutions' guidelines for timeframes and costs enhance efficiency and fairness. • Streamlining the arbitration process leads to quicker resolutions and trust in the system. **2.** Decision-Making on Issues: • Arbitral institutions' authority in addressing challenges and jurisdictional matters ensures transparency and objectivity. • Balancing this authority with parties' rights to

	and the parties' rights to challenge. • Independence and Impartiality: The topic of ensuring the independence and impartiality of arbitrators could bring up ideas about how arbitral institutions need to establish robust mechanisms to vet potential arbitrators and address conflicts of interest. Striking the right balance between party autonomy and ensuring fair proceedings could be a point of discussion. <u>As the research directions for this topic could focus on:</u> Investigating the effectiveness of different approaches to time and cost management in arbitration cases; Analysing the impact of arbitral institutions' decisions on issues like arbitrator challenges and jurisdictional disputes on the overall fairness and efficiency of the arbitration process; Studying the mechanisms and procedures used by arbitral institutions to ensure the independence and impartiality of arbitrators etc. Panel Topic 2: Adaptation of Arbitral Institutions in a Changing Arbitration Landscape • Data & Document Management: Thoughts might revolve around how technology and data management systems transform arbitration by facilitating better organisation, access, and analysis of case-related information. This could lead to more informed decisions and quicker resolutions. • Data Protection & Cybersecurity: Considering the relevance to Africa in a post-Covid hybrid environment, ideas could focus on how arbitral institutions need to adopt robust data protection and cybersecurity measures to safeguard sensitive information, particularly as digitalization increases.	challenge is a key consideration. **3.** Independence and Impartiality: • Establishing robust mechanisms for vetting arbitrators and handling conflicts of interest is essential. • Finding the equilibrium between party autonomy and fair proceedings is a critical discussion point. Panel Topic 2: Adaptation of Arbitral Institutions in a Changing Arbitration Landscape **1.** Data & Document Management: • Explore how technology and data systems reshape arbitration by improving data organisation, accessibility, and analysis. • Discuss how this transformation leads to informed decisions and faster resolutions. **2.** Data Protection & Cybersecurity: • The need for robust data protection and cybersecurity measures in a post-Covid digital environment. • Safeguarding sensitive information as digitalization becomes more prevalent. **3.** African Users' Readiness: • Assessing the readiness of African stakeholders to navigate the technological aspects of arbitration. • Exploring the necessity for education and training to ensure effective participation in digital arbitration.

	• African Users' Readiness: The preparedness of African users for these technological aspects could spark discussions on whether there is a need for increased education and training to ensure that all parties can effectively navigate the digital dimensions of arbitration. • Artificial Intelligence: Delving into artificial intelligence, ideas could explore AI's potential benefits in faster document analysis, etc. However, concerns about the limitations of AI and its potential biases might also arise. (Intro; Artificial Intelligence; Impact on our profession; What is AI) <u>As the research directions for this topic could focus on:</u> Researching the implementation of advanced data and document management systems in arbitral institutions and their impact on case efficiency and transparency, Examining the legal and practical challenges of data protection and cybersecurity in arbitration, especially in the context of a post-Covid hybrid environment; Assessing the readiness of African arbitration users for the integration of technology, artificial intelligence, and digitalization into arbitration processes. Panel Topic 3: Extent of Liability of Arbitral Institutions • Immunity vs Liability: Thoughts might vary on whether arbitral institutions should enjoy immunity for their decisions or be held liable for any shortcomings. This could prompt discussions on striking a balance between accountability and the need for institutions to operate without fear of constant legal actions. • Court's Position: Considerations might be raised about how courts at the seat of the institution view this matter. Opinions could vary on whether courts should have a more active role in scrutinizing institutional decisions or if they	**4.** Artificial Intelligence (AI): • Exploring AI's role in accelerating document analysis and other arbitration processes. • Addressing concerns about AI limitations and potential biases in the arbitration context. Panel Topic 3: Extent of Liability of Arbitral Institutions **1.** Immunity vs. Liability: • Debate over whether arbitral institutions should enjoy immunity for their decisions or be held liable for any shortcomings. • Balancing accountability with the need for institutions to operate without constant legal actions. **2.** Court's Position: • Considerations regarding the stance of courts at the seat of the institution. • Exploration of whether courts should play a more active role in scrutinizing institutional decisions or maintain a hands-off approach. Panel Topic 4: Insights from Arbitral Institutions in Africa **1.** Best Practices: • Showcasing successful strategies employed by African arbitral institutions. • Sharing insights on addressing challenges, ensuring fairness, and fostering regional expertise. • Highlighting innovative approaches that have proven effective.

	should maintain a more hands-off approach. As the research directions for this topic could focus on: Exploring the legal frameworks governing the liability of arbitral institutions and how they vary across jurisdictions and institutional rules; Analysing the potential consequences of granting or limiting immunity to arbitral institutions for their decisions and actions; Investigating the role and approach of courts at the seat of the institution in determining the extent of liability and immunity. Panel Topic 4: Insights from Arbitral Institutions in Africa • Best Practices: Ideas here could revolve around showcasing successful strategies employed by African arbitral institutions. Sharing insights on how these institutions address challenges, ensure fairness, and foster regional expertise could be of interest. As the research directions for this topic could focus on: Examining best practices and success stories from African arbitral institutions in addressing unique challenges and contributing to the development of arbitration on the continent; Investigating the role of regional arbitral institutions in promoting African expertise and providing a platform for resolving disputes in ways that reflect regional norms and preferences; Assessing the impact of African arbitral institutions on the perception of arbitration within the continent and globally. Considering the outlined topics above, the specific area that resonates with my interests is Panel Topic 2: "Adaptation of Arbitral Institutions in a Changing Arbitration Landscape." I hope I've captured the brief accurately.	

Datuk Sundra Rajoo (AIAC)	**1.** Study of the current challenges and issues faced by African Arbitral Institutions. **2.** Identification of the best practices that should be implemented as a part of these institutions. **3.** Tailoring and adapting these best practices specifically for the African context. **4.** Establishing mechanisms to ensure the achievement of these goals through collaboration, networking (both intracontinental and international), training, personal development, use of technology, and promotion of innovation. One particular point Datuk would like to emphasize is the role the Asian-African Legal Consultative Organisation (AALCO) can play in fostering collaboration among African Arbitral Institutions. The AIAC has been making considerable progress with its fellow African institutions under AALCO's guidance. This organisation has played a vital role in shaping legal systems across member states and providing expert opinions on various issues. Further, AALCO Regional Centres have been encouraged to work together in creating common standards and developing both administratively & financially sound systems. This is an excellent example of South-South collaboration that will undoubtedly have a significant impact on African Arbitral Institutions.	**1.** Assess current challenges faced by African Arbitral Institutions. **2.** Identify and implement best practices tailored to the African context. **3.** Foster collaboration, networking, training, and innovation. **4.** Emphasize the role of AALCO in promoting collaboration among African Arbitral Institutions. **5.** Highlight the positive impact of South-South collaboration on these institutions through AALCO Regional Centres.
Dr Lyna-Laure Amana Priso	A brief overview of the current state and challenges of Arbitral institutions in Africa. The way forward: foster the development and international expansion of our institutions (sub-regional and more):	**1.** A brief overview of the current state and challenges of Arbitral institutions in Africa. **2.** The way forward: foster the development and international expansion of our institutions (sub-regional and more):

	• Becoming ADR references at sub-regional level. • Leverage opportunities presented by AfCFTA/ZLECAF to broaden our visibility at an international level and become international arbitration institution. • Best practices: identify best practices and customize them to our contexts. • Technology: further incorporating digital tools in our practices and developing our digital efficiency (online arbitration, update of the regulatory framework).	**3.** Aim to become sub-regional ADR leaders. **4.** Exploit AfCFTA/ZLECAF opportunities for international recognition. **5.** Adapt international best practices to local contexts. **6.** Enhance digital capabilities, including online arbitration and regulatory updates.
Dalia Hussein (CRICA)	• The role of African arbitral institutions in guaranteeing the efficiency and fairness of the proceedings, including issues of time and cost, and the challenges they face in playing this role. • The role of institutions in taking different decisions related to the arbitration: decisions to proceed or not to proceed based on prima facie assessment of jurisdiction, challenge and removal of arbitrators, and reaction/ relationship with the courts of the seat regarding these decisions. • Arbitration institutions in Africa and other ADR mechanisms, and whether these mechanisms are as successful as arbitration (this could be overlapping with panel 2, so we may discuss the issues from the institutions' perspective). • Since CRCICA is an AALCO institution, I may also contribute to this point, if you need a second view on this in addition to Prof. Rajoo's intervention. • CRCICA is about to issue its new Arbitration Rules, so I may also tackle the issues raised by Tunde on the necessity to update the Rules.	**1.** Role of African arbitral institutions in ensuring efficient and fair proceedings, with a focus on time and cost challenges. **2.** Institutional decisions in arbitration, such as jurisdiction assessments, arbitrator challenges, and interactions with local courts. **3.** Comparison of arbitration institutions in Africa with other ADR mechanisms, assessing their effectiveness. **4.** CRCICA's perspective as an AALCO institution on these issues and its upcoming new Arbitration Rules and the need for updates.
Victor Mugabe (KIAC)	1. Non-exhaustive list of challenges affecting most African arbitration institutions:	Creating Better African Arbitration Centers: Strategies • Educating and Engaging Governments

	• Lack of support of Governments to Arbitration systems (Sometimes Governments are accused of paralyzing arbitration system in some African jurisdictions) • Lack conducive legal framework (1958 NY Convention, Arbitration law) • Inadequate arbitration Rules: This prevents international arbitration practitioners to trust institutions located in those jurisdictions • Lack of support to arbitration by State Courts • Inadequate institutional framework (institutional arbitration centers), incapable to meet the demands of the Clients • Lack of adequate of other basic infrastructures (Security, immigration policies, airports, transport system, hotel facilities and the like). These are important as they help in marketing a country to the rest of the continent as well as the rest of the world. • Lack of trust in the African arbitrators' capacity to process complex international arbitration disputes (lack of a well diverse panel of arbitrators) • Lack of adequate Information Technology (IT) infrastructure and other relevant physical infrastructure in the existing arbitral centres. • Lack of collaboration with Bar Association • Lack of information on awards and other case related information • Inadequate marketing of arbitration centres 2. How to create better African arbitration centers in the future? • Establishing better arbitration institutions requires the existing centres and new centres to address the challenges that African arbitration and African arbitration centres have been facing as above listed.	• Strengthening the Legal Framework • Capacity Building and Inclusion • Marketing and Reputation Building • Continuous Learning and Networking

	Strategies: • Educating the Governments on the business and investment side of arbitration. To demonstrate to Governments that Arbitration is a tool showing that a country is open for business and investment. Therefore, Arbitration being a source of economic activity since a safe seat of arbitration attract foreign companies and law firms in choosing where to locate the arbitration dispute (this bring money to the country). • Lobbying the Governments to enact conducive policies and legal frameworks for arbitration and other ADR mechanisms. Once established as an "arbitration-friendly" jurisdiction, it is possible to attract international disputes from across Africa and across the world. • To lobbying the Governments to choose and use Arbitration as the most effective option of dispute settlement for business. • Lobbying Governments to put in place conducive infrastructures to attract international ADR (easing free movement of people (easy access to the country & conducive immigration policies, developing hospitality industry, IT services, etc...). • Lobbying state Courts to support arbitration (adopting a pro-arbitration approach in arbitration proceedings) and equipping judges with deeper knowledge of arbitration as well as facilitating the enforcement of Awards and other settlement agreements • Adopting World-class standards Arbitration Rules (UNCITRAL Model Law) that guarantee parties' autonomy (the transparent arbitrators' appointment procedures, and free and fair choice of legal counsel; etc.. and translating the Rules in more than one international language and updating them regularly	

	• Investing in continuous Capacity building programs in Arbitration (school of law, lawyers, judges, young arbitrators, business community, • Enrolling well reputable international arbitrators without any discrimination (nationality, legal system, gender, etc,…) (Well diverse panel of arbitrators. • Having adequate physical infrastructures (meeting and hearing rooms, convenient physical location of arbitration centres, etc..) • Investing in vigorous awareness and marketing campaigns home and abroad to promote and showcase African arbitrators and practitioners (Marketing our arbitration institutions through different communication channels)-Reputation. • Different communication channels should be exploited. • Cooperating with national bar and law firms (embracing arbitration in legal practice); • Leading African Arbitration Centres should develop strong collaboration frameworks with reputable international arbitration institutions aimed at promoting one other (promoting referral mechanisms to discourage the exportation of African arbitration disputes non-African arbitral centres), sharing of best practices and experience, embracing new technologies (IT, VDC for virtual hearings, transcript tools, etc..) • Attending domestic and international events on ADR for learning best practices and emerging trends of arbitration (Conferences, seminars, roadshows, colloquium)	
Balla Galma Godan (The PCA's representative in Mauritius)	• Sub-theme of "Adaptation of arbitral institutions in a changing arbitration landscape", and focus on data and document management, data protection and cyber security.	• Data protection & cyber security. • Online arbitration: PCA as an example

	• Online arbitration. The intervention will be based on the practices of the PCA.	

SPEAKER PAPER

CREATING AFRICAN ARBITRAL INSTITUTIONS OF THE FUTURE: BEST PRACTICES

Victor Mugabe

Short Introduction

It is internationally well known that arbitration is the most preferred and the most appropriate dispute resolution mechanism for cross-border business related disputes.

Current researches have revealed that around 85% of arbitrations are administered by arbitral institutions while 15% are ad hoc arbitration.

As of today, Africa counts more than 90 arbitration institutions, though most of them are inactive; only a few number of them has been active and getting international recognition. Lack of reputation of most African arbitration institutions is one of the major causes of exportation of African arbitration disputes out of the African continent.

The lack of reputation of African arbitration centres is coupled with a persistent bias on the African arbitration. However, the existence of some a small number of African arbitration centres shows that the institutional arbitration is growing in Africa.

But, these centres need to show they are competent enough to attract reputation and address the challenges that persistently affect African arbitration and African arbitration institutions for a brighter future of arbitration in Africa.

Non-Exhaustive List of Challenges Affecting Most African Arbitration Institutions

- Lack of support of governments to arbitration systems (Sometimes governments are accused of paralysing arbitration system in some African jurisdictions)
- Lack conducive legal framework (1958 NY Convention, Arbitration law)
- Inadequate arbitration Rules: This prevents international arbitration practitioners from trusting institutions located in those jurisdictions
- Lack of support to arbitration by state courts
- Inadequate institutional framework (institutional arbitration centers), incapable of meeting the demands of the clients)
- Lack of adequate or other basic infrastructures (security, immigration policies, airports, transport system, hotel facilities and the like). These are important as they help in marketing a country to the rest of the continent as well as the rest of the world.
- Lack of trust in the African arbitrators' capacity to process complex international arbitration disputes (lack of a well diverse panel of arbitrators).
- Lack of adequate Information Technology (IT) infrastructure and other relevant physical infrastructure in the existing arbitral centres.

- Lack of collaboration with bar associations
- Lack of information on awards and other case related information
- Inadequate marketing of arbitration centres

How to Create Better African Arbitration Centers in the Future?

Establishing better arbitration institutions requires the existing and new centres to address the challenges that African arbitration and African arbitration centres have been facing as listed above.

Strategies:

- Educating the governments on the business and investment side of arbitration. To demonstrate to governments that arbitration is a tool showing that a country is open for business and investment. Therefore, arbitration being a source of economic activity since a safe seat of arbitration attracts foreign companies and law firms in choosing where to locate the arbitration dispute (this bring money to the country).
- Lobbying the governments to enact conducive policies and legal frameworks for arbitration and other ADR mechanisms. Once established as an "arbitration friendly" jurisdiction, it is possible to attract international disputes from across Africa and across the world.
- Lobbying governments to choose and use arbitration as the most effective option of dispute settlement for business.
- Lobbying governments to put in place conducive infrastructures to attract international ADR (easing free movement of people, easy access to the country & conducive immigration policies, developing hospitality industry, IT services, etc...);
- Lobbying state courts to support arbitration (adopting a pro-arbitration approach in arbitration proceedings) and equipping judges with deeper knowledge of arbitration as well as facilitating the enforcement of Awards and other settlement agreements.
- Adopting world-class standards for arbitration rules (UNCITRAL Model Law) that guarantee parties' autonomy (the transparent arbitrators' appointment procedures, and free and fair choice of legal counsel; etc.. and translating the rules in more than one international languages and updating them regularly)
- Investing in continuous capacity building programs in arbitration (school of law, lawyers, judges, young arbitrators, business community)
- Enrolling well reputable international arbitrators without any discrimination (nationality, legal system, gender, etc,...).
- Having adequate physical infrastructures (meeting and hearing rooms, convenient physical location of arbitration centres, etc..)
- Investing in vigorous awareness and marketing campaigns home and abroad to promote and showcase African arbitrators and practitioners (marketing our arbitration institutions through different communication channels). Different communication channels should be exploited.
- Cooperating with national bar and law firms (embracing arbitration in legal practice)
- Leading African arbitration centres should develop strong collaboration frameworks with reputable international arbitration institutions aimed at promoting one another (promoting referral mechanisms to discourage the exportation of African arbitration disputes non-African arbitral centres), sharing of best practices and experience.
- Embracing new technologies (IT, VDC for virtual hearings, transcript tools, etc..)
- Attending domestic and international events on ADR for learning best practices and emerging trends of arbitration (conferences, seminars, roadshows, colloquium)

PANEL 5

THE IMPLEMENTATION OF THE AFCFTA AND ISDS

PANEL OVERVIEW

In light of the operationalisation of the AfCFTA on 1 January 2021 (pursuant to the entry into force of the AfCFTA Agreement on 30 May 2019) and the adoption of the AfCFTA Investment Protocol by the African Union (AU) in February 2023, with its potential to impact ISDS, Panel 5 explored the following topics:

- Challenges of investment claims in Africa, primarily the challenges faced by African states in ISDS, in matters of transparency, huge (adverse) awards, and challenges by investors to legitimate public policies adopted by States.

- Evolving positions of African states on ISDS, including the evolving positions taken by African States at domestic, regional and bilateral level vis-a vis ISDS by amending their domestic rules, BITs, and regional dispute mechanisms (such as SADC, COMESA, ECOWAS, etc).

- The AfCFTA Investment Protocol and the proposed investor-state dispute settlement Annex being negotiated amongst AU member states, and the future of investment claims in Africa, including how the Protocol and Annex might influence the future of investment claims on the continent.

TALKING POINTS

THE IMPLEMENTATION OF AFCFTA AND ISDS

Tochukwu Anaenugwu

Tochukwu's presentation was centred on four key questions, listed below.

1. The balancing of the competing interests of the investors and the states is a long-standing conundrum. What, in your opinion, are the key factors responsible for this dilemma, and what measures can African governments take to effectively mitigate the risks they face (including huge unfavourable awards), while maintaining an attractive investment climate for investors?

2. A number of African states are becoming increasingly frustrated with the inclusion of ISDS provisions in investment agreements. Could you speak to the cause(s) of these concerns and proffer viable solutions?

3. The dispute resolution articles of the AfCFTA Investment Protocol are yet to be finalised. What dispute resolution mechanisms do you consider would foster an improvement in the future of investment claims in the continent.

4. The AfCFTA Investment Protocol harmonizes the investment framework in Africa by providing for policy coherence at the bilateral and regional level. How does this influence the future of investment claims/disputes in Africa?

QUESTION & ANSWER

THE IMPLEMENTATION OF AFCFTA AND ISDS

Agnieszka Zarówna

Question 1: The AfCFTA Protocol on Investment: States taking back control as "masters of a treaty"

Answer: The debate regarding investment treaties and in particular investor-State disputes has now been ongoing for well over a decade. Many States seemingly have focused on arguing how *existing* treaties *should be* interpreted and expressing disappointment when tribunals applying such treaties would take a different view. Against that background, the AfCFTA [draft] Investment Protocol is an example of States taking a pro-active stance and (re-)taking control. The African States that drafted this instrument (re-)took their position as masters of a treaty and addressed many of the criticisms of investment protection and arbitration regime in a manner that makes the States' intention clearer. For example, standards of protection are fewer and more precisely delimited by defining the terms and specifying relevant criteria and/or exceptions; expressly preserving the right to regulate – and, notably, imposing obligations on investors. Helpfully, the AfCFTA (Part III, Art. 10) provides that the Assembly is able to issue authoritative interpretation statements. Such a power, as wielded in the past by, e.g., the Free Trade Commission under the NAFTA, has proven a further useful tool for States to ensure that they remain in control.

Question 2: African States' public international law and arbitration specialists in investment arbitration: Way forward

Answer: It is trite to say that public international law (PIL) and arbitration specialists from Africa (or of African descent) are underrepresented in investment arbitration appointments. Recent ICSID statistics show that the to-date appointments of arbitrators from Sub-Sharan Africa and Middle East & North Africa do not exceed 4-6%. A variety of initiatives seeks to correct the situation, e.g., by raising awareness about potential candidates as well as seeking commitment from stakeholders to increase geographical diversity of arbitrators. See, e.g., the African Promise Pledge; the African Arbitration Academy's Model BIT's commitment to appoint African chairpersons. These initiatives are valuable but more is needed. When appointing their arbitrator or nominating individuals for ICSID Panels of Conciliators and Arbitrators, it is vital that States keep in mind that the appointee should have expertise that will allow them to be impactful with the tribunal at large. Appointments based on the appointee's experience in domestic law and proceedings and high profile domestically will not always prove most effective. There is many highly regarded PIL specialists across Africa (or of African descent) who are widely respected and could receive more appointments/ engagements (e.g., Prof. Dire Tladi, Prof. Dapo Akande). Such high-profile appointments of specialists well-versed in African perspectives on PIL and arbitration could contribute to the direction in which the investment arbitration jurisprudence is heading.

Question 3: The AfCFTA Protocol on Investment and other International Investment Agreements: Coexistence v replacement?

Answer: There are 50+ BITs in force between the AfCFTA State Parties and further a 130+ signed but yet to enter into force, many of which contain ISDS provisions; there has also been approximately a dozen of investor-State disputes between African investors and African States, with a growing trend in the recent years. While the ISDS Annex to the Protocol is yet to be negotiated, it calls into question the relationship between the AfCFTA's Protocol & Annex and intra-AU BITs. Coexistence of BITs with other treaties with investment provisions is a global phenomenon (e.g., DR-CAFTA and US-El Salvador BIT; ECT and UK Uzbekistan BIT). However, the issues of a potential clash between the BIT and another regime came to fore most vividly in the context of the intra-European Union BITs, discussed and argued for more than a decade and culminating with the 2020 Agreement on the Termination of Intra-EU BITs. The AfCFTA [Draft] Protocol on Investment, Article 49 requires that the BITs between State Parties be terminated together with their sunset clauses and no new such treaties be concluded. Clarity offered by the AfCFTA's Protocol regarding the relationship between the treaties is welcome. Care needs to be given to how Article 49 will be implemented.

Question 4: Third-party funding in Africa-related investment arbitration: A friend or a foe?

Answer: The rise of third-party funding of investor-State claims has been debated for over a decade now. The positions vary from chastising its users, whether for allowing unmeritorious claims to be brought, for lack of transparency of the entities involved (leading to potential conflicts of interest), or for leaving States with an unenforceable bill for adverse costs, to applauding it for increasing access to justice to impecunious claimants (think: David v Goliath). This is an important issue for African States who have and continue to voice their views in a variety of fora, including 37th, 38th and 43rd sessions of the UNCITRAL Working Group III and the ICSID Rules modernisation process, calling for more transparency, regulation, use of security for costs orders, or an outright ban. Current state of discussion tends to tip towards increasing transparency and disclosures (see, e.g., 2022 ICSID Rules; 2023 UNCITRAL Working Group III Draft provisions on procedural and cross-cutting issues; 2022 African Arbitration Academy's Model BIT).

PANEL 6

EFFECTIVE ENFORCEMENT OF ARBITRAL AWARDS IN AFRICA

Achievements and challenges

MODERATORS' SUMMARY

Matilda Idun-Donkor and Sofia Vale

Panel 6 aimed at discussing effective enforceability of arbitration awards in Africa. In order for enforceability to be ensured, one needs to be aware that: (i) attention must be given to drafting arbitration clauses; (ii) claims should be couched in a way that ensures they are upheld and enforced in the country in which enforcement is going to be requested; (iii) the procedure for enforceability may vary whether enforceability is made under NYC, ICSID or OHADA; and (iv) the scope of the public policy exception to the enforcement of arbitral awards is not uniformly understood/applied on the African continent. Legislative modifications to ensure a better enforceability of arbitral awards could include: (i) civil procedure rules to provide strict and short timelines for bringing and resolving challenges against arbitration awards to ensure enforceability; (ii) awarding costs against counsel and parties when they engage in delay tactics to prevent the enforcement of awards; and (iii) with AfCTA, one should establish a process that ensures that awards obtained in one African country can be enforced in multiple African countries. Enforceability is indeed the core of arbitration, for an award is of no relevance if it is not able to produce the effects it aims to achieve.

SPEAKER PAPER

ENFORCEMENT OF AWARDS AGAINST SOVEREIGNS

Yasmine Lahlou*

Introduction: Enforcement against Sovereign: A Multi-dimensional Conundrum

Enforcing an award against a sovereign can be as frustrating as it is fascinating for lawyers. As States' participation in cross-border economy is inevitable and international law, in particular investment law, has decades ago gone through a Copernican revolution and gave private parties a forum to sue sovereigns, the enforcement process is a reminder that States are anything but ordinary litigants in domestic courts.

In this paper and this panel, after examining the instruments that govern the recognition of awards and how they apply in the context of sovereign disputes, we examine the inevitable concept of sovereign immunity and how investors can best plan their strategies based on the differing domestic regimes. We will then identify the typical issues that creditors seeking to enforce an award against a sovereign in Africa and elsewhere face at every stage, and explore best practices and the creditors' strategic considerations when they are forced to confront such a powerful and resilient adversary.

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A partner at international disputes boutique Chaffetz Lindsey in New York, fluent in English, French and Italian, and proficient in Portuguese, Yasmine Lahlou has over 20 years of experience in international arbitration and litigation. Initially trained in Paris and admitted in New York, Yasmine is experienced in civil and common law systems. Yasmine has represented clients in international arbitration proceedings conducted under all major institutional rules and in ad hoc proceedings. Her practice spans a broad range of industries and sectors, including construction, energy, mining, food and beverage and pharmaceuticals. She has acted as a presiding, sole co-and emergency arbitrator in ICC, SCC, ICDR/AAA CRCICA (in Cairo) and LCIA arbitrations.
Yasmine also has extensive award and judgment enforcement experience. Yasmine has been named one of 17 "Global Elite Thought Leaders" in North America & the Caribbean— a title reserved for the top 2.5% of ranked practitioners considered the "very best by peers and clients, achieving the highest number of recommendations in the research"— by Who's Who Legal 2023 Arbitration report.
† Article 54(1) of the ICSID Convention.

Regimes Governing the Recognition and Enforcement of Awards

With the rapid increase of arbitrations commenced against states pursuant to investment treaties, it is useful to examine respondent states' treaty obligations to honour final treaty-based awards, in addition to the regime applicable outside the investment arbitration contact.

Broadly speaking, the enforcement of awards against sovereigns in Africa is governed by two conventions, which have been signed and ratified across the world, namely the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is also referred to as the Washington Convention.

While the ICSID Convention provides for a unique enforcement mechanism in that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a judgment of a court in that State[,]"† its scope is limited to awards issued under the aegis of the ICSID Convention, which are generally disputes arising out of investment treaties or disputes under contracts made with the State, which provide for ICSID arbitration.

For the rest, and assuming the state where enforcement is sought signed and ratified the New York Convention, the recognition of the award will normally be governed by the Convention.

We propose to examine during our panel how ICSID awards have been recognised as well as the unique ways in which Article V of the Convention, which lists the narrow bases to deny enforcement of the award, may play out when applied against a sovereign.

Overcoming the Immunity Hurdle

Based on the concept of equality among sovereigns under international law, sovereign immunity, or state immunity, is a principle of customary international law, by virtue of which one sovereign state cannot be sued before the courts of another sovereign state without its consent. Put in another way, a sovereign state is exempt from the jurisdiction of foreign national courts. A corollary is the concept of immunity from execution, whereby the assets of the state cannot be attached absent the State consent.

In this part of the panel, we propose to address the various doctrines of jurisdictional immunity and immunity from execution, including the implied waiver in the context of international arbitration, and the impact those have on what assets can in fact be attached and where.

Best Practices and Strategic Considerations When Enforcing Awards against Sovereigns

In this part of the panel, we will discuss, and invite views from the audience, on what award creditors can and should consider in order to maximize their ability to collect on an award and create leverage.

Some authors suggest exploring other options for voluntary compliance including "an installment plan, the issuance of bonds by the State that can be sold by the creditor on the secondary market, the assignment of a quantity of oil or other commodity with an ascertainable market value, or some combination of these options."[151] Other large creditors have been able

[151] George K. Foster, Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform, 25 Ariz. J. Int'l & Comp. L. 665 (2008).

to enlist their own government's help to intervene diplomatically or through international financial institutions to pressure compliance.

What to do when these are unavailable?

Immunity in Practice

We will first examine the importance of understanding the doctrine applicable in every jurisdiction where enforcement of the award is contemplated, as that jurisdiction's interpretation of the doctrine of sovereign immunity will determine whether and what assets are available.

As creditors seek to maximise their leverage, they are very keen to identify where pre-judgement attachment may be available and under what conditions.

Key Cases

As creditors and sovereigns are frequently engaged in a cat-and-mouse game, some execution efforts have played out in the open and given rise to widely publicised disputes, in which creditors seek to gain leverage. They do so by attempting measures, which are intended as much to attach assets as to embarrass a sovereign and catch its attention and that of the international community.

We will examine some emblematic disputes, including a US hedge fund's effort to detain an Argentine vessel in Ghana or attach a presidential plane, as well as review those landmark rulings that have defined the various facets of sovereign immunity worldwide.

Best Practices for Litigants

In this portion of the panel, we will examine certain recurring issues, as well as the various options and considerations available to private parties when negotiating an agreement with a government and later when planning means to collect on their award. Those include negotiating waivers or a performance bond, serving an award, selling it to investors, etc.

Finally, and going full circle, we will examine that in addition to getting potentially access to more assets, a creditor's decision to pursue enforcement in the host State's courts offers the unique advantage in that the courts' refusal to enforce an award against the State may give rise to an actionable international law claim, either for denial of justice or another obligation under an investment treaty.

SPEAKER PAPER

THE PUBLIC POLICY EXCEPTION IN AFRICAN JURISDICTIONS

Bilshan Nursimulu*

It is often suggested that the success of the New York Convention relies on its uniform interpretation and application.

March 2024 will mark the 20th anniversary of Mauritius's implementation of the New York Convention.[152] The Convention plays a pivotal role in the enforcement of arbitral awards in Mauritius as its application is not limited to foreign awards but also extends to awards issued in international arbitrations seated in Mauritius. Disputes relating to enforcement matters (amongst others) are determined by a panel of 3 judges of the Supreme Court, with thereafter an automatic right of appeal to the Judicial Committee of the Privy Council. The direct appeal to the Privy Council – which does not require the Mauritius court's formal permission – is seen as a means to safeguard the effective application of the New York Convention in conformity with international practice.

In June 2021, the Privy Council allowed an appeal against a judgment delivered by the Supreme Court of Mauritius in the widely reported case of *Betamax Ltd v State Trading Corporation*.[153] The Mauritius court considered that an SIAC award contravened the public policy of Mauritius because it enforced a contract, which according to the court, was in breach of the public procurement laws of Mauritius and, therefore, illegal. The arbitral tribunal had, however, reached a different view. In considering that it was entitled to review the arbitral tribunal's determination of the legality of the underlying contract, the Mauritius court relied on observations made by the English High Court in *Soleimany v Soleimany*[154] and the Singapore Court of Appeal in *AJU v AJT*[155]. A particularly interesting aspect of the Privy Council's judgment is its criticism of those observations. Its analysis is evidence of the inconsistent application of the public policy exception, even amongst well-developed international arbitration jurisdictions. Who then decides on what the correct approach should be?

The English and Singaporean Guidance Criticised by the Privy Council

In *Soleimany*, the English High Court refused enforcement of an award on the basis that it was clear from that award that the contract was illegal. However, the court went further to consider

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[152] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act was enacted in 2004 and became operational on 15 March 2004.

[153] [2021] UKPC 14.

[154] [1994] QB 785, 800.

[155] [2011] 4 SLR 739.

obiter that where the arbitrator held that there was no illegality, the enforcement judge should inquire further if there is *prima facie* evidence from one side that the award is based on an illegal contract. That guidance was, however, not followed by the English Court of Appeal in the subsequent case of *Westacre Investments Inc v Jugoimport SPDR Holding Co. Ktd*.[156] It was, further, formally rejected in *Betamax,* whereby the Privy Council held that if the arbitral tribunal has jurisdiction to determine the illegality and finds that the contract is not illegal, that decision should be final, in the absence of fraud, a breach of natural justice or any other vitiating factor.

In *AJU*, the Singapore Court of Appeal also commented *obiter* that if the Singapore court disagrees with the tribunal's finding that the underlying contract is not illegal under Singapore law, the court's supervisory power extends to correcting the tribunal's decision on this issue of illegality. Its rationale was that the supervisory court cannot abrogate its judicial power to the arbitral tribunal to decide what the public policy of Singapore is – this is the same basis on which the Mauritius court in *Betamax* considered that it was entitled to review the issue of illegality of the underlying contract. However, the Privy Council disagreed that article 34 of the Model Law (equivalent to article V(2)(b) of the New York Convention) allowed the court to review the decision of an arbitral tribunal on the issue of illegality of a contract.

The Singapore courts are, nevertheless, not bound by the Privy Council's judgment in *Betamax.* The Singapore International Commercial Court recently considered the Privy Council's remarks in *CHY v CIA*[157] and held that notwithstanding those observations, it would decide the case under Singapore law by applying *AJU*, which meant that it would be entitled to reopen findings of law made by an arbitral tribunal in deciding on the application of the public policy exception. The Singapore court considered that the question did not arise in that case and that it would be for the Court of Appeal to decide, in a case where it does arise, whether to adopt the Privy Council's approach in *Betamax*.

As such, before we turn to the position that applies in African jurisdictions, one should acknowledge that the scope of the public policy exception to the enforcement of arbitral awards is not uniformly understood internationally.

Where Does Africa Stand?

Some judgments delivered by enforcement courts in Africa would arguably be inconsistent with the Privy Council's views in *Betamax* as regards their power to review the arbitral tribunal's determination of a particular issue. For example, the Kenyan court held in *FoxTrot Charlie Inc v Afrika Aviation Handlers Ltd*[158] that it had jurisdiction, in determining the public policy exception to enforcement, to substantively interrogate the award to confirm its consistency with Kenyan law. Similarly, the Egyptian Court of Cassation[159] partially rejected the enforcement of an LCIA award on the ground that the award of interest at a rate above the maximum provided under Egyptian law, contravened the public policy of Egypt.

On the other hand, the South African approach in *Seton Co v Silveroak Industries Ltd*[160] seems to be more in line with *Betamax,* holding that the court would only refuse to recognise a foreign arbitral award if on the face of the award and arbitration agreement it was clear that the agreement was contrary to public policy.

[156] [1999] QB 740.
[157] [2022] SGHC(I) 3.
[158] [2012] eKLR.
[159] 25 January 2007.
[160] 2000 (2) A 215 (T).

As such, although African jurisdictions have significantly developed their case law on the public policy exception over the last decades, their respective approach to that exception remains inconsistent – a challenge that it shares with the rest of the international arbitration community.

SUMMARY OF REMARKS

THE RECOGNITION AND ENFORCEMENT OF ARBITRATION AGREEMENTS AND FOREIGN ARBITRAL AWARDS: HOW WILL SOUTH AFRICA INTEGRATE ITS EXPANSIVE CONSTITUTIONAL COMMITMENTS AND ITS ADOPTION OF THE MODEL LAW?

David Unterhalter

Some 20 years after the South Africa Law Commission's recommendations, South Africa passed into law the International Arbitration Act 15 of 2017 (the Act). Its central premise is the adoption by South Africa of the Model Law for use in international commercial arbitration.

The Act provides that the Model Law applies in South Africa, subject only to the provisions of the Act itself. The Model Law of application is incorporated as a schedule to the Act. The Act maintains a binary system of arbitration law. The Arbitration Act of 1965 governs domestic arbitration, whereas the Act applies to international commercial arbitration.

The Act stipulates that a foreign arbitral award be recognised and enforced in South Africa as required by the New York Convention, the text of which forms schedule 3 to the Act. Section 18(1) of the Act provides that a court may refuse to recognise or enforce a foreign arbitral award if: a) the court finds that a reference to arbitration of the subject matter of the dispute is not permissible under the law of South Africa; or b) the recognition or enforcement of the award is contrary to the public policy of South Africa. That is an adoption of Article V(2)(b) of the New York Convention.

How will South African courts interpret and apply the public policy to the recognition and enforcement of foreign arbitral awards?

South African courts have strongly supported the principle of party autonomy as the constitutional basis for the deference that is due to arbitration agreements. That principle allows persons to give expression to their liberty, as a constitutional right, to enter arbitration agreements that regulate the resolution of their disputes. *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at [47] and [48].

In *Lufuno Mphaphuli & Associates v Andrews & Another* 2009 (4) SA 529 (CC), the Constitutional Court, interpreting provisions of the Arbitration Act, considered that the values of the Constitution will not necessarily best be served by interpreting the Arbitration Act in a manner that enhances the powers of the courts to set aside private arbitration awards. (at para [235])

However, the Constitutional Court has also engaged upon an extensive treatment of the wide ranging rights in the constitution's Bill of Rights as the foundation of a robust conception of public policy in the law of contract under expansive concepts of fairness, reasonableness and good faith. *Beadica 231 CC v Trustees for the Time being of the Oregon Trust* 2020 (5) SA 247 (CC)

My remarks will explore the supremacy of the Constitution and the manner in which it has fashioned a broad remit for public policy and the commitments under the Act and its adoption of the New York Convention to a narrow basis upon which public policy may prevent the recognition and enforcement of arbitral awards.

PANEL 7

DIVERSITY AND INCLUSION

from the ground up

PANEL OVERVIEW

This panel explored topics of diversity, inclusion and capacity-building at all levels and across various role-players in the arbitration community in greater, tangible detail, with a view to engaging the attendees in an interactive and thought-provoking manner. Panelists were encouraged to explore solutions to the inevitable challenges, and participants were invited to do the same. The panel discussed:

- The current status of diversity and inclusion for different role-players in arbitration (using statistical or other hard data, where available), namely representation in the field by African counsel and law firms, African tribunal secretaries and African arbitrators.

- Effective and sustainable implementation to achieve the critical goals associated with diversity and inclusion. Under this sub-topic, the panel discussed:

    - Challenging perception biases, not only from outside of Africa but from within. For example, many African or Africa-based parties, including States and arbitral institutions, have appointed foreign / magic circle firms over local counsel who arguably have matched expertise and resources. The panel ventilated what role-players are doing day-to-day, or what they would do when faced with opportunities and choices.
    - Capacity-building as key. How do we generate experience and training/ toolkits on international arbitration to match existing competences, to (i) raise profiles for possible African appointments, (ii) enable Africans to take on roles in a way that is credible and sustainable so that Africans can challenge inevitable perception biases, and (iii) how can we build capacity effectively from the ground up rather than a “top-down” approach focusing on tribunals?
    - Actionable changes in arbitration policy so far and prospective implementation in practice. The panellists explored what institutions and arbitration users are doing to support these developments, using

audience polling. The panel considered some of the current policies and how to give them (more) impact (such as inclusion of provisions in Procedural Order No. 1 / Terms of Reference, appointments and selections, team compositions etc.).

SPEAKER PAPER

ACHIEVING NEUTRALITY THROUGH DIVERSITY: INADEQUACIES OF THE NATIONALITY CRITERION

Jamsheed Peeroo

Summary

The perception of neutrality as a paramount objective of international arbitration. The application of the rule that an arbitrator should not be of the same nationality as one of the parties does not always achieve this objective. Instead, the rule can be used in a manner that in fact neglects the appointment of African arbitrators on international panels. The requisite perception of neutrality can only be achieved through a proper application of this rule which, by its very nature, relies on diversity.

Introduction

Most leading arbitration rules and laws provide that a sole or presiding arbitrator should not be of the nationality of one of the parties. This widely accepted principle is taken for granted, to such an extent, that attempting to question or criticise it may sound futile, if not farcical. Yet, when placed into perspective, and analysed in the light of various factors, such as its origin, current arbitral practice, the ever-evolving needs and expectations of parties, and the objectives of arbitration as a mode of dispute resolution, numerous flaws in its application can be identified. This paper aims to thus analyse the said rule and its application in order to identify and propose possible solutions to any flaws or disadvantages.

The Objective of the Rule

There has been a perception which has subsequently become, in practice, a presumption that a sole or presiding arbitrator of a nationality other than that of the parties is to be preferred in order to achieve neutrality. In addition to the general principles of independence and impartiality, difference in nationality is the main criterion that institutions and appointing authorities use to make sure that the arbitrator is neutral or at least perceived to be neutral. For many decades, it has been the only formal criterion used in various arbitration rules.

In some cases, appointing an arbitrator holding the nationality of one of the parties is prohibited, and in others, it is expressed as a factor to be considered in making appointments. Importantly, even where it is only a factor, it is the only named factor that appears (see for e.g. Article 11(5) of the UNCITRAL Model Law).

A Relatively Minor Shortcoming of the Rule

Following much debate, it is now accepted that this rule and criterion has a shortcoming in that it ignores the nationality of a parent company of parties. Some rules expressly cater for this situation and extend the principle to cover the nationality of the controlling shareholders or interests of parties.[161]

However, this was but one relatively minor inadequacy of the nationality criterion.

The Considerable Inadequacies of the Rule

In this author's view, for various other much more fundamental and potent reasons, the nationality criterion as applied does not reflect reality nor the perceptions of parties across the world, so that it its present application is unfit for both inter-continental and intra-continental trade.

The Origins of the Rule

In order to properly identify and understand the inadequacies of the criterion, one must look at its origins. The origins of this rule have been considered by Niuscha Bassiri and Tarunima Vijra in an article in 2019.[162] They noted that its origins were difficult to trace before identifying that the principle became an expressed rule under the ICC Rules in 1955. They further commented:

> *It is probable that the political scenario in the 1950s – the Cold War, weakening of colonial rule and emergence of new nations – which was one of distrust amongst nations, played a role in the adoption of the nationality criteria for arbitral appointments.*

It is clear that in such a context there may have been distrust amongst nations so that there was a need to make sure that arbitrators were not only neutral but were perceived to be neutral. It cannot be contested that in that particular context, the rule provided a satisfactory, workable solution for a given arbitration. More importantly, in that particular context, the rule reinforced trust in this mode of alternative dispute resolution as a whole.

And what was that particular context? It was a one where much of the world was subjected to colonial rule. Only a few nations, the colonial powers, provided a nationality that really counted in international trade and commerce. The major global trading parties were indirectly or indirectly linked to those colonial powers. Hence, when there would be a dispute between a French party and an English party, neutrality required that a German arbitrator, for instance, be appointed.

Clearly, although these nationals may have had many legal, cultural, historical, geographic affinities, the German arbitrator would also have had sufficient differences and interests that would demarcate the arbitrator fairly equally from each party.

What was otherwise an excellent technique to achieve a noble cause in that particular historical context has subsequently not been able to achieve that same cause in a more modern context. By way of illustration, it is useful to consider its application in disputes across different continents as well as in international disputes within the African continent.

[161] See for instance Article 6.2 of the LCIA Rules.

[162] Niuscha Bassiri and Tarunima Vijra, 'The (ir)relevance of an arbitrator's nationality', in Dirk De Meulemeester, Maxime Berlingin, et al. (eds), Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions, (© Kluwer Law International; Wolters Kluwer 2019), pp. 39-54.

Inadequacy of the Rule for Intercontinental Disputes

It is essential to reiterate here that the sole objective or *raison-d'être* of the rule that a sole or presiding arbitrator should not hold the same nationality as one of the parties was to achieve neutrality or at least a perception of neutrality. One may therefore legitimately question the application of this rule to intercontinental trade.

Would the German arbitrator be equally perceived as being neutral when he or she is appointed in a dispute not between a French party and an English party, but a dispute between a French party and a Nigerian party? The need to achieve the perception of neutrality and to thus promote trust in arbitration as a mode of alternative dispute resolution being valid and recognised paramount objectives would robustly militate against such a practice.

And this would, in the current world order, be exacerbated by the fact that there is an undeniable and documented European sentiment in more recent generations. Indeed, given the various facets of integration of EU member States in what is much more than a mere economic block, the EU has become comparable to the US. Surely one would not consider appointing a Texan arbitrator in a dispute between a New York company and a Belgian Company.

Inadequacy of the Rule for Intracontinental Disputes

It is quite striking to notice that often an African party would in fact prefer not to have an arbitrator from their own country when facing another African party. One may have assumed, on the basis of the nationality rule, that an arbitrator of the same African nationality as a party might be inclined to favour that party.

Yet, that African national tends to refuse to have a compatriot as arbitrator, and will sometimes go even further and specifically request arbitral institutions to refrain from appointing an arbitrator from the same country under arbitration rules where such an appointment would otherwise have been permitted.

It exceeds the scope of this article to explore the reasons why the assumed effect of an arbitrator holding the same nationality as a party in Europe tends to be its opposite in Africa. Perhaps a reason could be that the nationalities that emerged in Africa following colonial rule do not necessarily correspond to the people or peoples who obtained them. Contrary to the European context, one would see different peoples within one border as well as the same people across different countries.

Applying the nationality criterion in a strict and minimalistic manner in such a context hardly achieves its purpose. That is not to say that African arbitrators should not be appointed in intra-continental African disputes. On the contrary, African arbitrators are more likely to be familiar with the cultural and commercial practices on various parts of the continent. Rather, one should look for African arbitrators who have sufficient differences and interests that would demarcate themselves fairly equally from each party, so as to be neither too remote nor too proximate with them, as in the case of the German arbitrator referred to above in the European context.

Misapplication of the Rule and its Impact on Diversity

It is submitted that simply applying the rule of nationality in order to satisfy oneself of neutrality is an antiquated practice that should be banished.

This practice, which may have been soundly founded in a given historical context, has developed into a malpractice in the current world order. Merely ticking the "different nationality" box has led to the nearly systematic appointment of European arbitrators as sole arbitrator or presiding

arbitrators for decades to the expense of arbitrators from, and the development of arbitral practice, in other regions.

This has in turn had a drastic effect in suppressing the rise of African arbitrators and counsel. It is undeniable that this systematic type of appointment creates a situation where African parties and counsel have no choice but to appoint European co-arbitrators quite regrettably in the hope that they will have more affinity with and are likely to have more weight in the eyes of the presiding arbitrator.

Properly Achieving the Objectives of the Rule in Intercontinental Disputes

There has been much effort on the African continent to voice out concerns of lack of representation or diversity in the field.[163] Some leading arbitral institutions have made tremendous efforts to promote diversity in the field of international arbitration, and this is commendable. It is respectfully submitted that both the aim of achieving diversity and the current methods of achieving it may be misplaced.

Following the same reasoning as in the 1950's, and in the light of the above considerations, the need to achieve the neutrality and promote trust in arbitration would require the appointment of perhaps an Asian arbitrator in a dispute between a European party and an African party, or a European arbitrator in a dispute between an African party and an Asian party. And on the basis of the very same reasoning it necessarily follows that African arbitrators are to be seen, as a matter of the same principle, as the most neutral arbitrators in disputes between Asian and European parties.

As to the often-recurring question of where one would find suitable arbitrators from different continents, the answer is simple: arbitrator appointment is very rarely an exercise performed on a pro-bono basis. It is part of a service performed for remuneration. It is therefore the duty of the service provider, in order to provide and appoint arbitrators who are not only neutral but are perceived as neutral, to go and find them in their respective countries and continents.

Of course these arbitrators should not completely ignore relevant circumstances or the background of the parties. On the contrary, they should have the requisite experience, expertise and knowledge required for each case. And it is incumbent on each of them from every continent to learn about legal and business cultures from the different parts of other continents. Therefore, a degree of effort must come from both the arbitrators and the appointing authorities or institutions.

Turning to the important issues of xenophobia and conscious or unconscious bias, these ills also undeniably suppress diversity in the field. Institutions and appointing authorities should not be concerned with any sentiments of dissatisfaction as to appointments of arbitrators of different origins by certain xenophobic parties. Such parties choosing to trade internationally can hardly be surprised that arbitrators of foreign origin may decide their disputes. The fear of such illegitimate dissatisfaction should not prevail over the need to attain perceived neutrality by applying the same reasoning underlying the nationality criterion of 1955.

Such harms will only linger and endure for many more decades unless and until the international arbitration community becomes acquainted to the preferred situation where in intercontinental disputes not involving African parties, there is a strong probability that the sole or presiding arbitrator will be African, as opposed to a very remote possibility of such an appointment as per

[163] Amongst the more recent efforts are the African Promise drafted by Dr Emilia Onyema, Dr Stuart Dutson and Kamal Shah, the African Pledge proposed by Prof Dr Mohamed Abdel Wahab, an article by Funke Adekoya (SAN) titled "Is International Arbitration Truly International – The Role of Diversity article" published on the Africa Arbitration Blog, to name but a few.

the present state of affairs. Indeed the best remedy against xenophobia can only be familiarity, and the arbitration community should collectively refrain from delaying any further in striving to achieve this longoutstanding result.

Concluding Remarks

Perceived neutrality and the ensuing trust of parties in the arbitral process are paramount objectives in both intercontinental and intracontinental disputes. There cannot be any compromise or shortcoming in applying established principles when both legal reasoning and common sense point towards appointing arbitrators from the African continent as the most neutral choice. Diversity is not a goal in itself but rather a welcome result of the overarching quest for neutrality.

SPEAKER PAPER

DIVERSITY AND INCLUSION FROM THE GROUND UP

Madeline Kimei

Where is the low hanging fruit in diversity and inclusion?

What do the statistics from East Africa against global institutional efforts to close the diversity gap convey?

Statistics: Global Trends on Diversity & Inclusion

- International arbitration has a remarkably poor record on representation of women, more specifically for the African Arbitrator or Practitioner.
- In December 2022, the ICSID Caseload Stats Report of 2022 shows that women accounted for 23% of appointments to ICSID cases in 2022, compared to 27% in 2021 and 23% in 2020. Appointments made by the co-arbitrators were 40% women and 60% men; appointments by ICSID were 37% women and 63% men; and appointments made jointly by the parties were 32% women and 68% were men. Finally, men accounted for 90% of appointments made by claimants and 87% of appointments made by respondents in 2022.
- Also the ICC statistics for 2021 show measured progress in recent years to improve the gender balance of arbitrators, with women making up close to 40% of appointments by the ICC Court in 2021 – either upon proposal of an ICC national committee or group, or directly – compared to just under 30% in 2017. But in 2021, only 25% of arbitrators were nominated by the ICC Court. Just 17,5% of the arbitrators nominated by parties were women (compared to 12% in 2017) and 26% of the arbitral tribunal chairs nominated by the co-arbitrators were women (compared to 14% in 2017).

Where is the Problem?

- The ICCA Report identified barriers to appointment of female arbitrators as including: *"leaks in the pipeline" of qualified female candidates, such as retention of women in private practice, the promotion of women to senior ranks within an organization, and the availability of opportunities (or the awareness of opportunities) for women to gain relevant experience and promote their visibility and reputation among users of international arbitration.*
- The ICCA Report also identified *"additional barriers"* to obtaining arbitral appointments which included *"unconscious bias, gender stereotyping, and information barriers".* The report further states that *"The persistence of these barriers further indicates that gender diversity in arbitral tribunals may not simply be an issue that will resolve by itself over time"* (ICCA Report).

Back to the region, Tanzania's top institutions for example.

Institutional statitics

- Tanzania Institute of Arbitrators (TIArb) has reported an increase in the number of cases received from July 2022 to June 2023. Our caseload has increased by 14 cases over the previous year, and the total value of disputes under administration has crossed TZS 10 Billion (approximately equivalent to USD 4,132,231.40). What about diversity of panel members?
    - the annual report 2021-22 TIArb grew reporting a total of 277 members, consisting of 74 women and 203 men. On the Panel of Arbitrators, there was a ratio of 5 women and 13 men.
    - 2022/2023 in terms of gender and professional background it was reported that 22 new members were admitted in the category of Associate Members from engineers, quantity surveyors, architectures, lawyers, accountants, IT technicians, social workers and even project managers. It is encouraging to see that out of the new member entrants, 10 are men and 12 are women. On the panel of arbitrators TIArb reports that only 5 out of 24 panel of arbitrators are women.[164]
- The National Construction Council of Tanzania unpublished data from 2022 tells us its Panel of Adjudicators has a Total 30 (6 Women and 24 Men) and Panel of Arbitrators-Total 58 (14 Women and 44 Men), but no data is revealed on the appointment matrix in either of these institutions.

Accreditation requirement

- prohibits a foreign national from being selected as an arbitrator in an Tanzanian-seated arbitration; the amendments of the new accreditation system positive step toward effectively expanding India's arbitration landscape
- The presence of accredited arbitrators with diverse professional background offers parties with a range of professionals to choose from when choosing arbitrators to determine their case. While professional limitation may not have been an issue in the past, with a wide range of accredited members there is a higher chance of increased thorough understanding and familiarity of the facts of the case. The need to choose arbitrators from an accredited list of arbitrators has been brought by Section 64B of the Arbitration Act currently in force in Tanzania which came into operation in 2021.

Solutions

- The importance of intentional and sustained efforts, "*the results of efforts of this generation may not reflect until next generation*". For example - in January 2023, the ICC released its Centenary Declaration,[165] which pledges diversity, equity and inclusion for all stakeholders in dispute resolution as one of its ten main objectives for the next century.
- The 2022 ICCA Report (discussed above) provides a detailed road map, with advice aimed at different stakeholders, e.g. qualified women candidates, those who nominate/appoint arbitrators, in-house counsel, litigation funders, conference

[164] The statistics are based on the number of arbitrators who have updated their member information as requested.
[165] https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-centenary-declaration-on-dispute-prevention-and-resolution/

organisers, etc. The Report concludes with an important reminder that "*[t]hose in the position of making appointments—primarily parties and their representatives, but also institutions and co-arbitrators—have the greatest influence on gender diversity in arbitral tribunals*".

- Other efforts such as
    - Broadening the conversation - occasional articles, postings and webinars discuss the lack of female representation in international arbitration.
    - Responsibility for increasing the diversity of arbitrators must therefore inevitably lie with those tasked with nominating arbitrators, including arbitral institutions, parties/in-house counsel, external lawyers, and co-arbitrators.
    - Reform of the appointments process for arbitrators – to avoid the repetition of appointing the same arbitrators over and over again because this creates a barrier to entry to new players.
    - Building an increased transparency through standardized reporting. Increased reporting and transparency in relation to female arbitrator appointments will bring with it accountability and be an effective driver of change.
    - There is also a need to encourage stakeholders to develop internal processes (Diversity Toolkits) that focus on diversity. The Institutions play a pivotal role in building this practice. Allemann rightly puts it that "*With the vast majority of users relying on institutional rules rather than ad hoc or their own tailored procedures, the impact of arbitral institutions on efficient dispute system design cannot be understated. Arbitral institutions synthesize and codify best practices in the industry through a process of intellectual cross fertilization with users and practitioners, largely driven by institutional competition among institutions and jurisdictions more generally*". The arbitral institutions, parties, co-arbitrators and external lawyers many of whom have stated their commitment to increasing diversity, should ensure that their processes for confirming and appointing arbitrators have appropriate internal controls focused on diversity. The ICC is a great example to borrow leaf from- in making available statistics about the age of arbitrators and actively seeking to advance younger practitioners and increasing the visibility of diverse candidates. To achieve fair representation of women and diverse arbitrators, increasing their visibility is key.

- Ground efforts on the continent:

  Women in Arbitration Initiatives – Uganda based but regional

  CIArb Women in ADR Campaign - Kenya

  Young Arbitration Practitioners Groups established (CIArb/TIArb etc)

  ERA Pledge -Africa Sub-Committee

- The digital revolution and rapidity of application of artificial intelligence and other technological tools have opened up doors to many African practitioners to gain access to global panels, knowledge sharing platforms and other efforts hence increasing their visibility. Search engines such as Arbitrator Intelligence and Jus Mundi now have a database that includes African practitioners from diverse fields.

SPEAKER PAPER

ETHNIC AND GEOGRAPHICAL DIVERSITY IN ARBITRATION BY FOSTERING FUTURE GENERATIONS

Ranna Musa

What is Diversity?

The Oxford dictionary defines diversity as "a range of many people or things that are very different from each other synonym variety".[166]

Why is diversity important in the workplace in general and in arbitration specifically? The main aim of diversity in any given field and society is to provide equal opportunities to people from different backgrounds and offering an assorted pool of expertise, viewpoints, and skillsets. When it comes to arbitration, and specifically arbitration cases where either one or more of the parties is African, appointing African practitioners could provide better understanding of the dispute, nature of transactions, and parties' intent.

Diversity could assist in deciphering terms of underlying contracts.

Gender and Ethnic Diversity Statistics in Arbitration

Statistics reflect that African arbitrators are seldom appointed in arbitration disputes.

A 2018 Survey from the SOAS and Broderick Bozimo & Company (BBaC) Arbitration in Africa focused on the issue of diversity amongst arbitration practitioners. The survey involved 191 participants between December 2017 and February 2018, with respondents from 19 African jurisdictions and 13 jurisdictions outside Africa. During the reporting period (2012-2017), 82.2% of respondents stated that they did not sit as an arbitrator in international arbitrations. Equally, diversity issues exist within the domestic sphere as 58% of respondents said they did not sit as arbitrator in arbitrations in Africa.

A recent report published by the ICSID on 30 January 2023 provided the following statistics between 1966 and 2022:

- Although a total of 25% of the ICSID case load between 1966 and 2022 was recorded for Sub-Saharan Africa (14%) and MENA region (11%), the appointment of arbitrators, conciliators, and ad hoc committee members from these regions was extremely low. With practitioners from the MENA regions representing a humble 4% of the

[166] https://www.oxfordlearnersdictionaries.com/definition/english/diversity#:~:text=%2Fda%C9%AA%CB%88v%C9%9C%CB%90rs%C9%99ti%2F,wide%2Frich%20diversity%20of%20opinion

appointments and those from Sub-Saharan Africa region representing only 2% of the overall appointments.
- As for gender diversity, the appointment of male practitioners during the same time period was 6 times higher (86%) than of female practitioners (14%).
- As for 2022 specifically, 14% of the cases came from the MENA region while 5% of the disputes were from Sub-Saharan Africa, with the total percentage of the appointment of practitioners from Sub-Saharan Africa and the MENA region being at a low 3%.
- 2022 saw an increase in gender diversity with female practitioners' appointment increasing to 23% of all the 41 cases filed in 2022.[167]

These statistics demonstrate the arbitration community's increased awareness of the importance of gender diversity. However, ethnic and geographical diversity remains dangerously unhinged.

Other reports that support this position are:

- The LCIA Court recorded a high rate of appointments of female arbitrators, with 47% of appointments being women in 2021.[168]
- The ICCA Report No.8 shows that the number of women appointed as arbitrators has doubled from 12.6% in 2015 to 26.1% in 2021.[169]
- Bryan Cave Leighton Paisner's survey found that entirely non-Anglo-European tribunals arbitrated only 4% of the international commercial arbitration cases.[170]
- The ICC Court between 2018 to 2021 term has unprecedented regional diversity: 13% of its members originate from Africa.[171]

University admissions and SRA qualification reports reflect low rates of ethnic diversity as well:

- At Oxford and Cambridge, black students make up 1.7% and 1.5%, respectively, of the total student population.[172]
- At the University of York, just 2.4% of those enrolled were black students, and at Durham the figure was 1.7%.[173]
- The SRA reports that on average 17% of lawyers are of BAME origin, with only 2% being Black.[174]

It is thus understood that ethnic and geographic diversity continues to take the backseat, while gender equality remains at large the focus of various major institutions. Although there has been an undeniable drive for ethnic and geographical diversity, the focus on this has been far from close when compared to gender diversity and greater efforts need to be done to achieve ethnic and geographical diversity.

[167] https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf
[168] International Women's Day 2023: The LCIA Continues to Lead in Gender Diversity.
[169] ICCA-Report-8u2-electronic3.pdf (arbitration-icca.org).
[170] CIArb - Recognising the development of 'Arbitration Consciousness' in Africa.
[171] Diversity in international arbitration | Practical Law (thomsonreuters.com).
[172] Education, diversity and the law | AllAboutLaw.
[173] Education, diversity and the law | AllAboutLaw.
[174] Ethnic diversity in law - Commercial Question (lawcareers.net).

Factors

A 2018 SOAS Arbitration in Africa survey identifies the below as factors believed to have led to this underrepresentation in the international arbitration community:

- Poor perception of African arbitration practitioners as lacking in expertise and experience.
- Bias by appointers in favour of non-African counsel and arbitrator.
- Africans not supporting fellow African arbitrators.

81.7% respondents have undergone formal training in arbitration of which 72% had been trained by the Chartered Institute of Arbitrators. Despite obtaining an international certificate in arbitration, little evidence has shown such arbitrators are appointed in international arbitration despite holding the same certificate as their non-African counterparts.

How to Make a Change (personal approach):

- Speak up and recognise the lack of diversity in your firm and in the choice of arbitrators: Africans who work within international firms or in international legal teams of MNCs have the upper hand to changing the demographic of practitioners.
- Acknowledge the bias in appointing African practitioners.
- Advocate diversity in social media accounts.
- Consistent and persistent approach.
- Mentor younger talents.
- Approach university students and be susceptible to being approached.

Available Initiatives:

- Africa in the moot
- AfAA and YMC
- The African Promise[175] [176]
- AfCFTA: has encouraged the resolution of inter-state disputes by a Dispute Resolution Body and the Appellate Body in Africa
- Emergence of international arbitration centres such as Kigali and Nairobi Centres for International Arbitration

[175] https://onyema-arbitration.co.uk/the-african-promise-2/
[176] https://onyema-arbitration.co.uk/files/promise/An%20African%20Promise%202019.pdf

SPEAKER PAPER

DIVERSITY, EQUITY, INCLUSION AND BELONGING IN CORPORATE ENVIRONMENTS: A NEW PERSPECTIVE BEYOND THE BUZZWORDS

Lerisha Naidu*

Summary

Diversity, equity, inclusion and belonging are often reduced to buzzwords, invoked to tick boxes and perception-manage corporate profiles in a world that increasingly demands consciousness around these topics. It is imperative that active efforts are made to transcend them. This requires an understanding and celebration of difference, an appreciation of the barriers to inclusion, a proactive approach to overcoming them and an intersectional slant around fostering belonging. This paper seeks to posit the proposition that the meaningful embedding of diversity, equity, inclusion and belonging requires that they pervade all aspects of corporate existence – from policies and recruitment practices, access to opportunity, psychological safety at work, the celebration of authenticity, and measurement and accountability against performance targets. Diversity, equity, inclusion and belonging ought not to be the work of discreet committees or event organisers, they must be driven through an unambiguous tone from the top and the application of inclusive leadership.

In today's world, corporates must demonstrate lived organisational values that extend beyond framed mission statements. Inclusive and enabling workplace cultures transcend the confines of written declarations, and the terms diversity, equity, inclusion and belonging should never be invoked as buzzwords for branding or social posturing. Rather, they should be practically deconstructed, understood, actioned and embedded to achieve meaningful change.

These terms are representations of concepts that serve as drivers of substantive transformation within organisations. While diversity denotes the quantitative exercise of attracting people into the door, the truly change-making work lies in the achievement of equity, inclusion and belonging: attaining equity through the appreciation of difference; identifying and eradicating barriers to meaningful inclusion; and fostering belonging through, amongst other things, an intersectional approach to recognising the identity of others.

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The project of achieving meaningful transformation must be driven by leadership to be optimally effective. To truly embed these principles and drive tangible change, inclusive leadership (characterised by people-centricity) must be actively practiced and built into the evaluation of performance of the leaders of today.

Equity

While equality and equity are often used interchangeably, they are not synonyms.[177] Equity recognises that each person has unique circumstances, requiring access to different resources and opportunities to reach an equal outcome. Historically oppressed groups have not only fought for equality but continue to fight for equity to address social justice concerns and the desire for fairness. Equity recognises that we do not all start from the same place and must acknowledge and make adjustments to address imbalances. Corporates must move towards equity rather than simply embracing equality if they are to meet the requirements of genuine transformation.

Barriers to Inclusion

A precursor to achieving optimal inclusion in the workplace is to embark on a deliberate exercise to identify the barriers to inclusion and the strategies to overcome them. Different microcosms are likely to exhibit different barriers. Some barriers include: (i) a conflation of the principles of equality and equity, such that difference is hidden; (ii) advocating a "fit in" culture, which necessarily requires people to leave parts of themselves at the door; (iii) unconscious biases and mechanistic stereotyping; (iv) lack of representation in positions of leadership; (v) privilege blind spots; (vi) a lack of candour and the absence of a "call out" culture; and (viii) psychologically unsafe spaces. To meaningfully achieve inclusion or incrementally advance towards it, the systemic barriers must be identified, and strategies formulated to overcome them.

Intersectionality

To distil the point on intersectionality, the appropriate point of departure is a definition. Kimberlé W Crenshaw's seminal article from 1989[178] first coined the principle and in an interview in June 2017 conducted by Columbia Law School,[179] Crenshaw explained:

> *Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all of these things.*

On a related note, Amartya Sen, in his book "*Identity and Violence*"[180] argues for a move away from a singular approach to identity, making the point that "*there are a great variety of categories to which we simultaneously belong*."[181]

South African constitutional jurisprudence on equality expressly recognises the concept of intersectionality and its relevance in interpreting constitutional provisions. In one of the

[177] <https://www.marinhhs.org/sites/default/files/boards/general/equality_v._equity_04_05_2021.pdf> (19 September 2023).
[178] K. W. Crenshaw, "*Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*", *University of Chicago Legal Forum* (1989).
[179] "*Kimberlé Crenshaw on Intersectionality, More than Two Decades Later*", <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later> (2017). (18 September 2023).
[180] A SEN /Identity and Violence: The Illusion of Destiny/USA: W,W, Norton/ 2006.
[181] Page 19 of *Identity and Violence*.

Constitutional Court's early decisions in the case of *Brink v Kitshoff NO*,[182] the Court expressly recognised the concept of "*patterns of disadvantage*" that required recognition. In the most recent case of *Mahlangu and Another v Minister of Labour and Others,*[183] the Court applied intersectionality as the primary approach to constitutional interpretation in that case. Victor AJ observed that:[184]

> *Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve 'the progressive realisation of our transformative constitutionalism.*

Extrapolating these principles to corporate spaces, what is clear is that understanding and inviting the "*whole self*" to show up in the workplace is indispensable to the project of fostering belonging. It is vital that an invitation and acceptance be extended to individuals to show up with all their facets, seen not as demographics or boxes to tick, but as multi-faceted, layered individuals. To inculcate belonging and develop a practice around understanding layers, story-telling is a key enabler. Exercising curiosity around the stories of others dismantles barriers and drives belonging.

Inclusive Leadership and People-Centricity

A survey conducted by Gartner Inc. revealed that 90% of Human Resources leaders recognised the importance of focusing on the human aspects of leadership for employee satisfaction and business success.[185] Their survey identified three essential traits for inclusive leadership within a people-centric paradigm: authenticity, empathy, and adaptability. Authenticity entails genuine and transparent interactions with employees and stakeholders. Empathy involves understanding and relating to the experiences and needs of others, fostering a supportive and inclusive environment. Adaptability is the ability to respond effectively to evolving circumstances and challenges. The survey noted that the benefits of human-centric leadership reduced turnover rates and led to higher levels of employee engagement.

Ashikali, Groeneveld and Kuipers (2021) conducted a similar study to examine how leadership impacts inclusiveness in diverse teams. The study noted that while team diversity did not automatically translate into an inclusive culture, it was leaders who supported an inclusive climate that created a culture of inclusiveness and belonging in already diverse teams.[186]

Ely and Thomas (2022) further detailed four actions that are important for leaders to build inclusion, notably: "building trust and creating a workplace where people feel free to express themselves; actively combating bias and systems of oppression; embracing a variety of styles and voices inside the organisation; and using employees' identity-related knowledge and experiences to learn how best to accomplish the firm's core work."[187]

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[182] 1996 (4) SA 197 (CC) para 43.
[183] [2020] ZACC 24.
[184] Ibid [79] (also quoting in part *Minister of Finance v Van Heerden* [2004] ZACC 3 [27]
[185] <Gartner HR Research Identifies Human Leadership as the Next Evolution of Leadership> (14 September 2023)
[186] Tanachia ASHIKALI, Sandra GROENEVELD, Ben KUIPERS/The Role of Inclusive Leadership in Supporting an Inclusive Climate in Diverse Public Sector Teams/Review of Public Personnel Administration, 41(3), 497–519/ Sage Publishing/2021/; <https://doi.org/10.1177/0734371X19899722> (10 September 2023).
[187] Robin J ELY and David A THOMAS/Getting Serious About Diversity: Enough Already with the Business Case. It's time for a new way of thinking/ Harvard Business Review 98, no. 6/November–December 2020/ page

The research demonstrates that inclusive leadership is key to driving the diversity, inclusion, equity and belonging in a way that embeds them into the fabric of the organisation, rather than simply employing them as buzzwords.

Conclusion

The subject matter of diversity, equity, inclusion, and belonging is not something that can remain a standalone initiative driven by a committee. Instead, it must be an integral part of the DNA of the organisation, driven from the top through inclusive leadership. Today's corporate world demands that organisations demonstrate lived values. The terms diversity and equity, inclusion, and belonging should be actively deconstructed, understood, and embedded to bring about meaningful change.

Inclusive leadership, characterised by authenticity, empathy and adaptability, is vital for creating an inclusive environment within organisations. Leaders play a pivotal role in harnessing diversity and driving a culture of inclusiveness and belonging. To advance the transformation agenda, leadership must actively embrace inclusive principles, and practices and performance should be measured against key performance indicators associated with inclusive leadership. This feeds into the known adage, extrapolated from the management thought-leader Peter Drucker that "what gets measured, gets done". This will ensure that real meaning and action are given to the buzzwords.

114–122. <Getting Serious About Diversity: Enough Already with the Business Case (hbr.org)> (11 September 2023).

PANEL 8

THE USERS' PERSPECTIVES

What do corporations, States and their counsel expect?

MODERATOR'S SUMMARY

Clement Mkiva

The last panel, which was constituted of a general counsel, external counsel and arbitrators who have acted for and adjudicated disputes involving corporations and States, synthesised the key issues arising from earlier panels, with a focus on what arbitration users and their counsel expect from and experience in arbitration and ADR. The main topics discussed by the panelists were the suitability of the processes in ADR and arbitration, including the appointment of arbitrators and the costs and duration of arbitration, perspectives on the introduction of innovative solutions, as well as improving the efficiency of African national courts.

The insight of the panelists, which emanates from varied vantage points, confirmed that as arbitral practices transition and new perspectives develop, the requirements and expectations of the users, and those who act on their behalf, should be given paramountcy to ensure that arbitration and ADR mechanisms remain fit for purpose and meet their expectations. It was acknowledged that users are not homogenous or static, and that the transitions and new perspectives should cater for diverse users and their respective evolutions. Transitions and the development of new perspective present an opportunity for the African arbitration community to reflect on how best we can meet the expectations of the most important stakeholder, the end-user of international arbitration and ADR.

CLOSING

CONCLUDING REMARKS

Njeri Kariuki

AfAA Vice-President Njeri Kariuki summarised the content of each of the eight panels, thanking and congratulating panelists, the programme committee and hosts.

CLOSING

CONCLUDING REMARKS

Sylvie Bebohi Ebongo

I was supposed to do these closing remarks in French, but I know how difficult it can be to listen to a speech in a language we don't practice often. I know you are getting tired as you were diligent and actively participated in the success of this conference, through your contributions, your questions, the room was full during these two days and for that, on behalf of the Board, I would like to thank you sincerely for your commitment which helps our common Association to move forward.

I would not therefore reiterate in French the excellent summary of the sessions Njeri just shared with you because according to me diversity (so close to my heart as you noted) deals with inclusion and particularly in our continent as I said in my opening remarks yesterday this means we should make efforts to understand what each other is saying and it starts by these different languages we inherited.

I have chosen for these closing remarks to address three main points:

The Conference Itself

This conference, which is an important tool for the development of our common association would not be possible without your participation. So, allow me on behalf of the Board to say a big thank you to all of you who were able to travel from all regions of the world and to you who follow us online.

We know this year has been particularly hard for some of us to get here in Cape Town, but we must keep in mind the positive aspect of what we are building together by attending physically whenever it is possible. Some of our speakers said to build our path in the international arbitration landscape, we as African practitioners must fill the space, make noise, and make people "uncomfortable" so that they may not forget we are there, and we are competent. We cannot achieve this goal if we are not present ourselves in our events such as this AfAA annual conference: Congratulations to all of us therefore.

Let me express our gratitude to our excellent moderators and panellists for sharing such meaningful insights based on their practice and experience. I have no doubt that we are leaving this conference with a lot of take aways, the desire to further explore some of the topics that have been discussed and the desire to take further action.

We received many comments on the program and the running of the conference. We know that everything was not perfect, and we would like to apologize for any inconveniences encountered by everyone during this 4th edition.

The Next Conference Venue

As you know, we usually announce the venue of our next conference at the end of the current conference. This year will be a bit different because the Board must take into consideration, more than in previous years, a certain number of concerns, notably:

- Easy visa facilitation;
- Flight connections;
- Accommodation.

Nevertheless, it is an open secret that to meet the diversity criteria, essential in our common Association (AfAA), the next conference will take place in a Francophone Africa country. But as I said earlier, the Board, considering all the concerns that have been addressed, must further deepen its consultations to choose a location that meets the requirements. Therefore, the venue will be announced later in the next weeks through the AfAA website.

The Programme Committee of the 4th Annual Conference

It is important to say again that the mastermind of the programme of this 4th conference has been prepared by a devoted woman, Lise Bosman, that we should sincerely thank. I was at her side to set it up and it was a pleasure to collaborate with her as co-chair. But the construction of this entire program would not have been possible without the members of the programme committee, who sacrificed their time and energy every week to improve the programme we all appreciated. Please join us in thanking them warmly for their devotion: Hamid Abdulkareem, Erin Cronjé, Jackwell Feris, Dalia Hussein, Matilda Idun-Donkor, Mouhamed Kebe, Clement Mkiva, Suzanne Rattray, Sofia Vale, Daniel Wilmot.

Having said all this I will turn into French to say: Merci beaucoup, bon retour dans vos différents pays. Nous vous espérons nombreux pour la prochaine conférence afin d'asseoir ensemble la légitimité de l'Afrique dans l'arbitrage international.

The 5th Annual African Arbitration Association Conference will take place from 9 to 11 October 2024 in Douala, Cameroon. Please consult www.afaa.ngo for more details.