



# **1<sup>ST</sup> ANNUAL INTERNATIONAL ARBITRATION CONFERENCE**

The Coming of Age of International Arbitration in Africa  
3 - 4 April 2019 - Kigali Convention Centre

## **CONFERENCE SUMMARY**

More than 200 delegates from different parts of Africa and the rest of the world attended the 1<sup>st</sup> AfAA Annual International Arbitration Conference, which took place from 3 to 4 April 2019 in Kigali, Rwanda at the Kigali Convention Centre. Under the theme 'The Coming of Age of International Arbitration in Africa', the event demonstrated the importance of all stakeholders working together in order to realize the objectives of the AfAA.

The subsequent conference summary provides an overview of the various panel sessions that transpired during the event.

### **Wednesday, 3 April 2019**

#### **14:45 - Responses to the African Arbitration Survey by African States**

**Moderator: Isaiah Bozimo**, *Partner, Broderick Bozimo & Company*

#### ***Panellists***

**Dr Didas Kayihura**, *Rector of The Institute of Legal Practice and Development in Rwanda*

**Justice Babatunde Adejumo OFR**, *Hon. Justice, President of the National Industrial Court of Nigeria*

**Emmanuel Bitta**, *Principal State Counsel, Office of the Attorney-General and Department of Justice, Kenya*

**Prof. Mohammed Sameh Amr**, *Chair of Public International Law, University of Cairo, Board Member of General Authority for Investment, Egypt*

#### **Précis of Discussion**

This panel spoke to the findings of the first Arbitration in African Survey. Panellists concurred that their experiences largely mirrored the survey results.

As to the representation of Africans in international arbitration, 82.2% of the survey respondents indicated that they had not been appointed as an arbitrator in an international dispute.

Also, a surprising 58% of respondents said that they had not been appointed as an arbitrator in domestic arbitration.



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Panellists concurred that a lack of diversity isn't just an international problem – but also exists at a domestic level. They opined further that a lack of diversity is an inevitable product of how arbitrators are appointed. We only select those we know and trust as having the requisite experience and expertise.

As to the reasons for underrepresentation, panellists agreed that more needs to be done to identify and appoint qualified African Arbitrators. Likewise, practitioners need to do more to demonstrate their competence to be nominated.

**Prof. Mohammed Sameh Amr** was of the view that not enough African States participated in the arbitration survey. With 54 countries in the continent, we have a responsibility to ensure that more States participate actively in such surveys. He felt that many States did not participate because of language barriers e.g. Portuguese speaking States. He also opined that other fields should be engaged such as the oil and gas, IT and construction fields.

While **Dr Didas Kayihura** agreed with the underrepresentation, he felt the underrepresentation was 82% our own fault because it is us who appoint international experts and forget our own expertise.

**Emmanuel Bitta** felt that domestic arbitration had grown in Kenya and that arbitrators are appointed based on experience and not too many have experience.

**Justice Adejumo** was of the view that appointment of arbitrators was a matter of contract and law as well as choosing someone based on their integrity. He also pointed out that being a qualified arbitrator did not necessarily mean that you would be available for appointment, for instance, those who have judicial positions.

**Prof. Mohammed Sameh Amr** felt that it was the duty of African regional arbitration institutions to nominate Africans. We have to have trust in ourselves and we need to take the step to disseminate information about African arbitrators. The AfAA is well placed to do this.

**Dr Didas Kayihura** concurred that the AfAA could take on some kind of representative role to push the brand of African arbitration practitioners.

Finally, panellists concurred that developing a stable and competent framework for domestic arbitration is key to building expertise on the continent. This includes facilitating ease of



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movement, having a knowledgeable, supportive judiciary, access to judicial decisions and honouring arbitral awards.

**Thursday, 4 April 2019**

**10:45 - The African Arbitration Association is here: Now What?**

**Moderator:** *Duncan Bagshaw, Partner, Howard Kennedy*

### ***Panellists***

**Julius Nkafu**, *Barrister, Great James Street Chambers, London*

**Bwalya Lumbwe**, *Arbitrator, Zambia*

**Tafadzwa Pasipanodya**, *Partner Foley Hoag LLP, Washington DC*

**Lise Bosman**, *Senior Legal Counsel, PCA & Executive Director, ICCA*

### **Précis of Discussion**

**Julius Nkafu** discussed in sweeping terms the purpose and future of the AfAA. He emphasised the important role that such an organisation could play in the development of the practice of arbitration on the continent. His specific proposals included the advising and lobbying of governments to promote arbitration and African institutions; coordinating cooperation between African arbitration institutions; and improving awareness of, and coordination of training across the continent.

**Lise Bosman** emphasised the importance of the role of the judiciary in the development of expertise and awareness of the substantive principles amongst judges. As a corollary to that, Lise noted that there is room for much better reporting and sharing of the judgments of African courts in international arbitration matters. To support the improvement of these areas, Lise suggested that AfAA could collate reports of arbitration-related judgments, and create a hub for access to them, and distribute resources specifically on the New York Convention.

**Bwalya Lumbwe** took a critical look at the constitution of AfAA. He noted that the constitution referred extensively to arbitration but also to alternative dispute resolution which would include several other dispute resolution techniques. He noted that the activities of the AfAA seemed focused on arbitration to the exclusion of other methods of ADR and he proposed that this be considered by the AfAA. He also identified that, in considering the extent of African professionals in dispute resolution, attention should also be paid to their participation in other techniques which are quite often part of tiered system of dispute resolution such as



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adjudication, dispute boards and other techniques with arbitration being the final tier. The techniques should be given due consideration given the very high success rates in finally resolving disputes without recourse to arbitration.

**Tafadzwa Pasipanodya** offered several specific proposals for AfAA activity, with a view to fulfilling its strategic objectives. These included: (i) increasing its efforts to enhance pan-African unity in the arbitration space, by cooperating with other associations, increasing francophone and lusophone involvement and using technology, such as online initiatives, to make the activities of AfAA as inclusive as possible; (ii) Participating in discussions with governments, and other international bodies such as development banks, business chambers and similar; and (iii) holding annual awards ceremonies to recognise and celebrate excellence in the field in Africa. Tafadzwa also encouraged AfAA to consider participating as an interested party or observer in international-level fora such as UNCITRAL and ICSID, representing African stake-holders. However, Tafadzwa cautioned against proselytising – encouraging a realistic and sympathetic approach to the concerns of many governments and others regarding the legitimacy of international arbitration.

The session concluded with a lively question and answer session. This demonstrated a range of views, but confirmed that the AfAA will have no shortage of volunteers to assist with these initiatives.

## **12:00 - The Africanization of International Disputes: Rethinking Our Approach to International Dispute Practitioners**

**Moderator: John Ohaga, *Managing Partner, TripleOKLaw***

### ***Panellists***

**Dr Emilia Onyema, *Associate Professor, SOAS, London***

**Diane Okoko, *Principal Partner, Marcus-Okoko & Co.***

**Adebayo Adenipekun, *SAN, Managing Partner, Afe Babalola & Co.***

**Professor Nelson Enonchong, *Barrister, No 5 Chambers and Barber Professor of Law, Birmingham Law School***

### **Précis of Discussion**

**Dr Emilia Onyema** spoke on what African practitioners should do to attract arbitration related appointments as arbitrator (counsel, expert, tribunal secretary). She explored themes



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on: subject matter expertise; expertise in the applicable law; visibility (e.g. exploiting conference speaking opportunities, asking meaningful questions at conferences, etc.) continuous training and improving of skills; importance of excelling in our first appointment.

**Diane Okoko** emphasised the need to bring arbitration home. Bring the work to us. She spoke about procedural problems with enforcement of awards such as getting stuck in the court system; the need to amend arbitration laws, need to have specialised arbitration courts; use of practice directions by judges in support of arbitration and implementation of the laws.

**Adebayo Adenipekun, SAN** focused on the role of states/governments with respect to access and security. He felt that these two aspects in a country are very important. Kigali is a good example. African governments need to up their game and improve accessibility of venue; infrastructural development; security; and transport links. He also felt that because governments are the most frequent appointers of arbitrators and counsel, they should instruct African counsel and appoint African arbitrators to counter the negative perception. However, African governments tend to choose counsel and arbitrators by political affiliation. What you choose is what you get. African governments need to change negative perceptions by showing off the good side of African countries.

**Professor Nelson Enonchong** spoke on the role of arbitration institutions in promoting diversity. He was of the view that institutions should develop specific policies and actions on promoting diversity; where diversity is recognised, it should be prioritised; collection and publication of data on diversity to include geographic, ethnic, gender and generational diversity. He also felt that arbitral institutions can assist by providing training and there was value in linking up with other institutions to provide relevant training. Additionally, he opined that there should be annual awards to individual practitioners for distinguished work in arbitration.

**14: 30 - Keynote Address** by **His Excellency Abdulqawi Ahmed Yusuf**, *President, International Court of Justice*

**Judge Yusuf** expressed his delight at the fact that the AfAA is finally a reality and praised the sense of Pan-Africanism that prevailed and led to the creation of only one Arbitration Association. He assured the AfAA of his unwavering support.



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Judge Yusuf started with a few remarks on arbitration across boundaries in Africa. He noted that although there is no written record of the use of arbitration by African States as a means to settle their disputes during the precolonial period, it is very likely that great empires such the Mali, Songhai or Benin, may have resorted to it, given the widespread use of arbitration in general throughout the continent and its importance in customary law in many African countries. He noted that there are examples of agreements concluded between African entities and foreign powers such as the treaty concluded on 29 January 1682 between the Sultan of the Sherifian Empire of Morocco and the French King, Louis XIV, which provided for arbitration in an agreement similar to a bilateral investment treaty. Another example is the arbitration of 1861 between the Sultans of Zanzibar and Muscat (the Oman of today), which was carried out by the Governor-general of India. A final example of the history of international arbitration in Africa relates to the *Spanish Zones of Morocco Claims* concerning damages caused to British subjects in Morocco between 1913 and 1921. In this case, he explained, the UK and Spain called upon Judge Max Huber of the Permanent Court of International Justice, to act as rapporteur and to prepare a report.

Judge Yusuf then referred to the 1964 Protocol on conciliation, mediation and arbitration adopted by the OAU. He noted that the peaceful means of dispute settlement listed in the Protocol were already enshrined in the 1963 Charter of the Organisation. What is striking, however, is that both instruments did not mention the judicial settlement of disputes, but referred to arbitration. In his view, two reasons may explain African countries' preference for arbitration, instead of judicial settlement during that period: first, the fact that at the moment of their independence, African countries were inspired by the Westphalian notion of absolute sovereignty to which submission to a judicial body is anathema; and, secondly, the fact that the traditional dispute settlement mechanism in pre-colonial African States was for the most part arbitral and not judicial.

Observing that neither the Protocol nor the Commission it established were ever used, Judge Yusuf observed that, in recent years, African States have placed a growing confidence in international law due to its evolution and progressive development in the 1960s and 1970s, to which African States and other developing countries participated. As a consequence, he noted an increasing acceptance of both investor-State and inter-State arbitration, citing the *Eritrea/Ethiopia* and *Eritrea/Yemen* arbitrations as examples of the latter.

Judge Yusuf then reverted to the AfAA, and listed three main challenges facing arbitration in Africa, which the AfAA can help overcome:



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1. First, the geographical delocalisation of the arbitral process. Judge Yusuf pointed out that the fact that arbitration and arbitral tribunals involving African parties take place far away from the African continent - either in Europe or the USA - presents a major obstacle to greater acceptance of arbitration in Africa, particularly by the common people. He emphasized that arbitration proceedings need to be held close to those that are affected by the tribunals' decisions and that they need to be covered in the local press so that the stakeholders can follow the proceedings and be convinced that the arbitration has been conducted in a fair and impartial manner. He stressed that the principal task of the AfAA is to promote relocalisation and repatriation of arbitral tribunals dealing with disputes relating to Africa.
2. Secondly, Judge Yusuf noted that African states should realise that arbitral tribunals in which they participate would have more legitimacy in the eyes of their own population if the arbitrators were not all foreigners, but included African arbitrators. He pointed out that in the *Eritrea/Ethiopia* and *Eritrea/Yemen* arbitrations mentioned above, only 2 of the 15 members of the arbitral tribunals were Africans. He observed that investor-State arbitration is much worse as only very few Africans sit on investor-State arbitral tribunals and deplored the fact that most African States never appoint an African arbitrator to sit on such tribunals. Judge Yusuf stressed that it is the task of the AfAA to change this most undesirable situation and to promote the participation of qualified Africans in arbitral tribunals dealing with African disputes. He pointed out that a lot of sensitization is needed but was confident that the AfAA could tackle the challenge.
3. Thirdly, Judge Yusuf indicated that the AfAA should also foster the training and accreditation of African arbitrators in Africa. In his view, African arbitrators do not need to seek accreditation from abroad. Africans can and should create their own Pan-African system of accreditation that would unify the different African accreditation systems used in different parts of the continent. He informed that the African Institute of International Law (AIIL) in Arusha, Tanzania, has prepared and is ready to roll out a full-fledged Pan African program of training and accreditation for African arbitrators. He emphasised the need for the AfAA to partner and work with the AIIL, so that all African hands are on deck for this major undertaking. He stressed the need to unify and not to disperse our efforts in order to achieve tangible results on this very important task.

In closing, Judge Yusuf emphasized his strong attachment to Pan-Africanism and hoped that this sentiment was equally shared by the participants. He deplored that Africans are still divided in the continent by various colonial legacies, including in the area of law, in general and, of course, that of



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arbitration, which applies that law. He encouraged the AfAA to overcome these divisions and called it to unify African arbitration by rejecting divisions based on colonial legacy and promoting a Pan-African arbitration culture which brings together all African countries in this field. Judge Yusuf emphasized that this is the only way and that only then would African arbitration truly come of age.

## **14:45 - The Use of African Arbitral Institutions: The Pan African Investment Code Paves the Way**

**Moderator: Babajide Ogundipe, Partner Sofunde, Osakwe, Ogundipe & Belgore**

### ***Panellists***

**Dr Ismail Selim, Director, Cairo Regional Centre for International Commercial Arbitration**

**Oluwatosin Lewis, Executive Secretary, Lagos Court of Arbitration**

**Dr Fidele Masengo, Secretary General, Kigali International Arbitration Centre**

**Jacqueline Oyuyo Githinji, Board Member, Nairobi Centre for International Arbitration**

### **Précis of Discussion**

The panellists provided a brief outline of their institutions, stating the instrument under which it was established, how it is organised, and the role it plays in both International and domestic arbitration in national and regional areas, and in a broader international context.

Each panel member gave a brief outline of her/his institution, stating the instrument under which it was established (i.e. CRCICA and NCIA were established by the Asian African Legal Consultative Organisation "AALCO" in implementation of an "Integrated Scheme" having the same goals as the AfAA but on the Afro-Asian Level).

Whilst CRCICA was established in 1979, the other institutions KIAC, LCA and NCIA have been established later but are rising and fast growing steadily. CRCICA has administered more than 1300 cases in 40 years whilst KIAC has administered more than a 100 cases in less than 10 years of existence. The four institutions administer both international and domestic arbitration and mediation cases. They are all fully independent from their host state by virtue of their agreements with such host states.

The four institutions have adopted modern arbitration rules based on the UNCITRAL Rules with minor modifications due to their nature as institutions and appointing authorities. They also administer ad hoc cases governed by UNCITRAL Rules or other rules. Finally, they





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provide Hearing Services for cases administered under their own rules as well as under the rules of other institutions.

The Senior Staff in these institutions are not appointed by their respective host states. All the four institutions are well managed (by Directors/Secretary Generals), well governed (by Board of Trustees/ Directors) and possess Advisory Committees/Courts (as the case may be) to decide upon challenges against arbitrators.

Under the Rules of the four institutions, arbitrators are appointed by the parties and the presiding arbitrator is appointed by the Co-arbitrators. In case of failure, the institution shall appoint including the use of the "Identical List Procedure" which also involves the parties in such appoint.

The panel also discussed the role national or regional governments play in each institution. The also discussed whether States should play any role in seeking to increase the use of national and other African arbitral institutions in international dispute resolution and, if so, how they should go about doing so.

It was noted that the growth of these institutions cannot be achieved without the support of national courts in Africa which are encouraged to adopt a pro-arbitration bias policy *since arbitration is an industry* that must be developed in African seats alike the rise of European (Paris and London) and Asian (Hong-Kong and Singapore) seats of arbitration thereby contributing to the development and attractiveness of Africa.

The panel discussed the relevance of the Pan African Investment Code and the African Continental Free Trade Area Agreement, and whether the dispute resolution provisions, specifically Article 42 of the Pan African Investment Code, are likely to be of any assistance in increasing the use of African arbitral institutions in Investor State disputes or other international commercial disputes.

The panel discussed the extent of the role that African States should play in increasing the use of African arbitral institutions in Africa-related arbitrations in light of the Pan African Investment Code and the African Continental Free Trade Area Agreement both providing for arbitration under the auspices of an institution located in Africa.



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The session confirmed that the existing arbitral institutions located in Africa merit a closer look and to be more frequently used by African Public and Private Entities as well as their non-African counterparties in the resolution of their disputes rather than exclusively resorting to arbitral institutions located outside the continent. Such use shall be made regardless of the region in which the African institution is located.

The four institutions combined offer the possibility of administering cases in following languages (English, French, Arabic and Kinyarwanda).

Institutions located in Africa are not outright competitors as regional institutions rarely compete on the same pool of users. To the contrary, it is of their common interest to cooperate (Ex: KIAC and CRCICA have concluded a cooperation agreement in 2018 at Addis Ababa in which they endeavor to achieve the goals of the AfAA).

Promoting “Institutional Diversity” in Africa (rather than exclusive use of institutions located outside the continent) would develop arbitration as a legal field and as an “industry” in Africa and will enhance more diversity in arbitrators’ appointments.

## **16:00 – Investment Arbitration Developments in Africa: We Are Awake But Are We Smelling the Coffee?**

**Moderator: Shan Greer**, Consultant, Floissac Fleming & Associates

### ***Panellists***

**Naomi Tarawali**, Associate, Cleary Gottlieb Steen & Hamilton LLP

**Tarek Badawy**, Partner, Shahid Law Firm

**Vlad Movshovich**, Partner, Webber Wentzel

### **Précis of Discussion**

The panel discussed differing approaches to investment arbitration across Africa with particular reference to recent legislative developments in certain African states and investment treaty changes in the regional blocs, and offered observations on what might be to come for the future of investment arbitration in Africa. All the way from St Lucia, the panel’s moderator **Shan Greer** drew parallels with the trends and developments in investment arbitration in the Caribbean region.



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Egypt has generally promoted itself as a jurisdiction that is welcoming of foreign investment, a position which is supported by new investment legislation as well as commitments to arbitration in various forums as a means of resolving investment disputes. **Tarek Badawy** presented thoughtful insights as to why, notwithstanding legislation indicating a protective environment for investors, Egypt may continue to face challenges from investors arising from inconsistencies in the overall legislative framework and the practical application of the legal rules.

South Africa by contrast is often perceived as being anti-investment treaty arbitration in recent times, having terminated a number of its bilateral investment treaties following a treaty arbitration instituted against the state in 2007 and the awards made against Zimbabwe by the SADC Tribunal in 2008. **Vlad Movshovich** discussed the legal developments in the Southern African region. Vlad emphasized that although South African courts are arbitration friendly and international arbitration awards are respected and enforced, the state's retreat from bilateral investment treaties and the fact that the SADC governments negotiated measures which diminished the jurisdiction of the SADC Tribunal and the investor protections set forth in the SADC Protocol on Finance and Investment may have created a contrary impression with investors. Recently, however, the Constitutional Court of South Africa ruled that retrogressive measures which diminish access to international justice, such as a limitation of the SADC Tribunal's jurisdiction, were unconstitutional, which provided a further boost to the importance of international arbitration and put paid to the SADC's attempts to limit the Tribunal's powers. Also, South Africa has a year ago adopted the UNCITRAL Model Law. With regard to the future, Vlad observed that South Africa's trend of terminating BITs had likely come to an end and expressed the hope that the South African government and the SADC region would adopt an internationalist outlook and will seek to address any issues which may arise by engaging actors within the context of the international arbitration system, rather than acting outside it.

**Naomi Tarawali** highlighted that there are indications that there is a shift in the position of African states and other African stakeholders in investment treaty arbitration, particularly as African states become increasingly capital exporting as well as capital importing nations. Naomi noted that this creates opportunity for African states not only to be awake to the imbalances and deficiencies of the existing investment dispute resolution mechanisms, but also to 'smell the coffee' by participating in the reform of these mechanisms to better reflect the current and future interests of African states (and indeed, African investors).