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## African Voices on Cultural Issues Impacting the Role of Africans and Africa in International Arbitration by V.L. Safran

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# **African Voices on Cultural Issues Impacting the Role of Africans and Africa in International Arbitration**

*If you want to go fast, go alone. If you want to go far, go together –N'gambai proverb*

*By Victoria L. Safran<sup>1</sup>*

## **Introduction**

Through interviews with eight individuals having expertise in the field of international arbitration and representing five different African nations, this article aims to explore various factors that are commonly described as “cultural” factors that may influence, positively or negatively, the roles of Africa and Africans in the international arbitration community. The paper considers both (a) elements of the legal cultures of various African nations, and (b) elements of the legal culture of the international arbitration community, that might be contributing factors.

Scholars have defined the term “legal culture” to refer to attitudes, opinions and values that influence and shape a legal system, as well as to refer to shared norms and expectations that are created by members of a legal community through numerous interactions over a time period.<sup>2</sup>

To speak of an “African arbitration culture” is largely to misspeak, when what we are looking at is a continent of 54 countries with diverse histories, cultures and legal traditions. Yet some commonalities do emerge. First, a major commonality, ironically, is one that has been artificially imposed by the outside world to a large extent. Thus, when non-Africans address cultural factors influencing Africa’s role in arbitration, they often speak in such broad terms that Africans are all left to battle the same “cultural” perceptions, regardless of how well they fit. Thus, Africans become united in their concerns. Second, as a number of the experts interviewed for this article mention, Africans from across the continent have joined forces to promote the growth of arbitration in Africa, and the use of African arbitrators and counsel in international arbitrations. Thus, Africans also share common interests. Nonetheless, this article by no means aims to present an in-depth analysis of the legal culture of even a single African nation, let alone to make sweeping conclusions about the legal culture of the continent.

The goal of this article is considerably more modest. Through interviews with the eight experts, this paper aims to present the voices of Africans on issues relevant to the roles of Africa and Africans in international arbitration. First, it examines those “cultural” factors which are often given as reasons by non-Africans for their reluctance to enter into arbitration agreements with African parties, or to arbitrate in an African seat—the laws are not modern, the laws are too variable, the judges interfere too much, there is too much corruption, and the like. The article explores to what extent these various factors reflect reality and to what

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<sup>2</sup> Tom Ginsburg, *The Culture of Arbitration*, 36 VANDERBILT J. OF TRANSNATIONAL L. 1335, 1336-37 (2003), available at <http://home.uchicago.edu/~tginsburg/pdf/articles/TheCultureOfArbitration.pdf>

extent they are grounded in perceptions, the efforts of different nations to overcome these factors and the extent to which those efforts have facilitated growth of arbitration in Africa.

Second, when speaking of cultural factors influencing the growth of arbitration in Africa, one cannot ignore the proliferation of arbitration centers across the continent. The arbitration centers reflect the diversity of African cultures, but at the same time have the potential to act as bridges between cultures. These institutions have a major impact on the selection of arbitral seats in Africa. They influence capacity building and are driving forces in promoting arbitration across the continent.

Third, the article looks at cultural factors that may restrict the numbers of Africans acting as counsel and arbitrators in international arbitrations, and the perspectives of Africans as to how the numbers are changing and can be further increased.

The article offers only a glimpse of a much wider and more complex picture. The experts with whom I spoke come from five Sub-Saharan countries in Africa: Kenya, Rwanda and Uganda in East Africa, Botswana in South Africa and Nigeria in West Africa. They include practitioners, arbitrators, scholars, leaders in arbitration training and the director of an arbitration institution. This article does not aspire to be a definitive scholarly piece but to provoke thought and discussion on the role that culture plays as it relates to Africa and international arbitration, with the belief that the international arbitration community is made richer as it embraces more Africans into its ranks, and opens the door to the opportunities that Africa presents for the growth of international arbitration. The experts who so graciously offered their time and keen insights for this article, in alphabetical order, are as follows:

1. **Ms. Aisha Abdallah** is head of the litigation department of Anjarwalla & Khanna, and is based at its Nairobi head office. She is dual qualified as an Advocate of the High Court of Kenya and Solicitor of England and Wales. Her practice focuses on all aspects of commercial litigation, as well as alternative dispute resolution, including arbitration and multi-party mediation. She regularly writes and speaks at conferences on a wide range of contentious issues, and is the co-author of the Kenyan chapter of the sixth edition of the International Arbitration Review.

2. **Mr. Phillip Alier** is a Barrister of the Inner Temple and Gray's Inn at Tanfield Chambers in London and a member of Arbitration Chambers in Nairobi and Kampala specialising in international commercial contractual disputes, including international commercial and investment arbitration. He is an advocate of the High Court of Uganda, a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators. Mr. Alier is a representative of Uganda to UNCITRAL. He holds a Bachelor of Arts from Vanderbilt University, an LLB from the University of Leeds and a Diploma in International Commercial Arbitration from the School of International Arbitration at Queen Mary University of London.

3. **Mr. Kamau Karori** is a highly-experienced dispute resolution practitioner based in Kenya, and a Fellow of the Chartered Institute of Arbitrators. He has been involved in many ground-breaking commercial disputes in courts and in various high-profile arbitrations. He is currently part of the defence team retained by the Government of Kenya in a multi-billion dollar investment arbitration claim filed by a mining company in the International Centre for Settlement of Investment Disputes (ICSID).

4. **Mr. Edward W. Fashole-Luke II**, FCIArb, FSIArb, FAArb, FBIArb, is a leading barrister and international arbitrator in Botswana, a Fellow of the Chartered Institute of Arbitrators in the United Kingdom, Kenya and Zambia, and a member of the London Court of Arbitration. He is listed in the Who's Who of Arbitrators published by the Global Arbitration Review, and has spoken at several international arbitration conferences, including being the keynote speaker at the American Society of International Law and Penn State University conference in Washington DC on the future of arbitration in Africa in March 2016. He wrote the Botswana chapter for the newly-published book, *Arbitration in Africa: A Review of Key Jurisdictions*, by K. Shah, J. Miles and T. Fagbohunlu (Sweet & Maxwell 2016).

5. **Dr. Fidèle Masengo** is a Board Member of the Kigali International Arbitration Centre in Rwanda, and currently serves as its Executive Director and acting Secretary General. He has a Bachelor's Degree in Law, a Master's Degree in Economic Law and a PhD in Law. Dr. Masengo is a teacher of law at various universities, where he teaches numerous courses, notably including Arbitration at the Master's level. Dr. Masengo also has a distinguished career in legal practice. He is registered as an advocate since 2006, has worked as a legal consultant and has held key legal positions in Rwanda. Dr. Masengo is a widely published author in the legal field.

6. **Dr. Kariuki Muigua Ph.D** is an Advocate of the High Court of Kenya, a practising arbitrator and an accomplished mediator. He is also a distinguished scholar and researcher based at the University of Nairobi. His research interests include arbitration, access to justice and environmental governance. Dr. Muigua is a Chartered Arbitrator, past chair of the Chartered Institute of Arbitrators (Kenya Branch), and a prolific author on diverse topics of interest in the legal field.

7. **Dr. Emilia Onyema** is a senior lecturer in the Law Department of the School of Oriental and African Studies, University of London, where she teaches international trade law and international commercial arbitration on the SOAS LL.M. program. She holds a PhD in international commercial arbitration, is a Fellow of the Chartered Institute of Arbitrators, and is qualified to practice law in Nigeria, and as a Solicitor in England and Wales. She is widely published and is the author of the book, *International Commercial Arbitration and the Arbitrator's Contract*, published by Routledge & Cavendish.

8. **Mrs. Adedoyin Rhodes-Vivour**, Managing Partner, Doyin Rhodes-Vivour & Co (Legal Practitioners and Arbitrators) is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators. She is the current Chairperson of the Chartered Institute of Arbitrators Nigeria Branch. Her legal practice of over three decades actively encourages alternative dispute resolution, and she has successfully mediated disputes. Among her many distinguished posts, she is a member of the Court of the Permanent Court of Arbitration, The Hague, the Netherlands.

## **I. Arbitral Laws in Africa and Risk of Judicial Interference**

In choosing a seat of arbitration, parties desire modern arbitration laws that recognize party autonomy and restrict unwelcome judicial interference in the arbitration process.<sup>3</sup> One

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<sup>3</sup> The Chartered Institute of Arbitrators, for example, in its London Centenary Principles necessary for an effective and efficient seat in international arbitration, lists as its first two principles (1) "a clear effective,

reason that international corporations and other parties outside Africa often give for their reluctance to enter into arbitration agreements with African parties, or to arbitrate in Africa, relates to concerns that local arbitral laws are not modern, and lack uniformity from one nation to the next. By this, parties often mean that they have a vague, general conception that the laws in African countries are not up to snuff, and that they vary from one country to the next, so that one can never quite be sure what one is getting into. Thus, it is much easier to just dismiss the whole idea of arbitrating in Africa rather than spending a lot of time trying to figure it all out.

But as Africa's profile in the world of international arbitration rises, as foreign investment in Africa continues to grow and as Africans begin to flex their muscles, Americans and Europeans with an interest in international arbitration are paying increasing attention to Africa.

It is certainly true that arbitration laws vary among African nations, but this is also precisely why generalizations cannot be made so as to characterize the local laws of Africa as modern and conducive to arbitration or as antiquated, and not conducive to arbitration.

Furthermore, with respect to lack of uniformity, while it is true that the many countries of Africa have different legal systems, cultures and histories, one must ask whether this is a valid reason for non-Africans to avoid arbitration in Africa, or only a reason to become more knowledgeable about different African countries.

While there has been talk about the need for African countries to harmonize arbitration laws, perhaps by adopting an approach similar to that of the OHADA nations,<sup>4</sup> at present, if a party is contemplating entering into an arbitration agreement with an African party, or agreeing to a seat of arbitration in an African locale, it is essential to understand the laws and judicial system of the particular country at hand.

A comprehensive analysis of the different laws of various African countries, and the roles of courts in the arbitral process in those countries, is far beyond the scope of this article, but the perspectives of the different experts who were interviewed for this article are important in that they demonstrate that these laws and the roles of the courts do vary, and easy

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modern International Arbitration law. . ." and (2) an independent, competent and efficient judiciary with expertise in international arbitration and international dispute resolution. CIARB London Centenary Principles, CIARB (2015), available at <https://www.ciarb.org/docs/default-source/centenarydocs/london/the-principles.pdf?sfvrsn=2>.

<sup>4</sup> The Organisation for the Harmonization of Business Law in Africa ("OHADA") was established by the OHADA Treaty to which seventeen mostly Francophone nations are parties. OHADA's purpose is to create a system of uniform laws in order to facilitate business among its members. The Treaty established a supranational court, the Common Court of Justice and Arbitration ("CCJA"), which, for arbitration purposes, serves as an arbitration center with its own rules. The Treaty also created a Uniform Arbitration Act under which ad hoc arbitrations can be conducted. See generally Paige Berges and Robert C. Sentner, *Doing Business in Africa—new regional institutions bring international arbitration to Sub-Saharan Africa* (Nixon Peabody LLP, Feb. 4, 2013), available at [http://www.nixonpeabody.com/files/154839\\_intl\\_arbitration\\_africa\\_4FEB2013.pdf](http://www.nixonpeabody.com/files/154839_intl_arbitration_africa_4FEB2013.pdf). For an example of a proposal that other African nations harmonize arbitration laws, see Kariuki Muigua, *Building Legal Bridges Fostering Eastern Africa Integration Through Commercial Arbitration*, CIARB KENYA (April 2015), available at <http://www.ciarbkenya.org/assets/building--legal-bridges,-fostering-eastern-africa-integration-through-commercial-arbitration-april--2015.pdf>

generalizations cannot be made. They also show that this legal landscape is not stagnant, but has changed dramatically in the last decade, and continues to evolve.

## *A. Arbitral Laws*

### *1. The Big Picture*

**Dr. Emilia Onyema** points out that Africa has over 54 jurisdictions. With respect to complaints that African laws are not “modern” or suitable for international arbitration, she states that, first, one can’t generalize when it comes to the continent. Secondly, she cautions that when persons speak of “modern” laws, they need to be specific about their expectations. In Dr. Onyema’s view, those expectations would include substantive provisions providing for “party autonomy, competence competence and the basic provisions that are needed in order to give parties the freedom to design their dispute resolution mechanism as they would like, with very, very minimum interference. That for me would be what every single jurisdiction should aspire onto.”

Dr. Onyema notes that only ten African countries have adopted the UNCITRAL model law, and would be “properly described as model law jurisdictions.”<sup>5</sup> She advises, however, that this does not mean that there are not other countries whose laws are “model law compliant.” She explains: “Some laws are antiquated, and require modernization, but there are also many laws on the continent that are reasonably modern in the sense that they provide for party autonomy and limited court interference.” Dr. Onyema notes that the New York Convention is also an important marker, and over half of African countries are New York Convention member states.<sup>6</sup>

### *2. Arbitral Laws: Kenya*

With respect to Kenya, **Mr. Kamau Karori** states: “Kenya has placed itself in a very strong position in terms of having in place the necessary legislative framework for the promotion of arbitration, both domestically and internationally.” He notes that as foreign investment in Kenya increased, the Kenyan business community began to advocate for the adoption of laws that would advance international arbitration. This led to the amendment<sup>7</sup> of Kenya’s Arbitration Act in 2009,<sup>8</sup> which is based on the UNCITRAL model, the enactment of the provision in the Constitution 2010 calling for the promotion of alternative dispute resolution,<sup>9</sup>

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<sup>5</sup> The nations include two in North Africa—Egypt and Tunisia, and eight in Sub-Saharan Africa—Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Uganda, Zambia and Zimbabwe. Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html). **Mrs. Rhodes-Vivour** notes, however, that only two African countries, Mauritius and Rwanda, have modernized their laws in line with the 2006 amendments to the UNCITRAL model law. She states: “There is a need for all African countries to bring their arbitration laws in line with modern developments and practice.”

<sup>6</sup> Contracting States, New York Arbitration Convention, available at <http://www.newyorkconvention.org/countries>

<sup>7</sup> The Arbitration Amendment Act 2009, available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ArbitrationAmendmentAct\\_No.11of2009.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ArbitrationAmendmentAct_No.11of2009.pdf)

<sup>8</sup> Arbitration Act No. 4 of 1995 (2012), available at [http://admin.theiguides.org/Media/Documents/ArbitrationAct\\_\\_No49.pdf](http://admin.theiguides.org/Media/Documents/ArbitrationAct__No49.pdf)

<sup>9</sup> The Constitution of Kenya (2010), available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=Const2010>

and the enactment of the legislation establishing the Nairobi Centre of International Arbitration.<sup>10</sup>

### *3. Arbitral Laws: Rwanda*

**Dr. Fidèle Masengo** also cites the modern arbitration laws of Rwanda as one of its strengths. Rwanda's arbitration law<sup>11</sup> was passed in 2008, and closely follows the UNCITRAL model. Rwanda also became a party to the New York Convention effective in 2009.

### *4. Arbitral Laws: Uganda*

**Mr. Phillip Alier** advises that Uganda is also a UNCITRAL model law state. Uganda's law is the Arbitration and Conciliation Act of 2000, and Uganda is a New York Convention member state as well.

Mr. Alier observes, however, that governments in East Africa suffer from underfunding. Consequently, he says, the laws in Uganda, as well as other East African states, are not perfect. For example, there are typographical errors in the published statutes that have not been corrected, and which could be rather easily amended but have not been.

### *5. Arbitral Laws: Botswana*

**Mr. Edward Luke** states that Botswana's arbitration law<sup>12</sup> "is antiquated and in need of revision. It was enacted in 1959, and obviously arbitration has developed significantly since that time. For example, there are no provisions regarding international procedures. The law is lagging far behind." Mr. Luke points out that a new bill based on the UNCITRAL model (the "Alternative Dispute Resolution Bill") has been drafted by the Botswana Institute of Arbitrators and sent to the Attorney General. The Attorney General is charged with drafting the bill, and it will then be submitted to parliament. "It is hoped that Botswana might have a new law this year." Botswana acceded to the New York Convention in 1971.

### *6. Arbitral Laws: Nigeria*

**Mrs. Adedoyin Rhodes-Vivour** advises that Nigeria was the first country in Africa to adopt the 1985 UNCITRAL model law through its enactment in 1988 of the Arbitration and Conciliation Act.<sup>13</sup> The Act also incorporates the 1976 UNCITRAL arbitration rules. Nigeria ratified the New York Convention in 1970, and its treaty obligations under the Convention were domesticated in the Arbitration and Conciliation Act.<sup>14</sup> Mrs. Rhodes-Vivour states that the Act is now outdated because it does not incorporate the 2006 revisions to the UNCITRAL model law, or the 2010 and 2013 amendments to the UNCITRAL rules, but that there are ongoing initiatives among arbitral institutions in Nigeria advocating for revision of the Act.

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<sup>10</sup> Nairobi Centre for International Arbitration Act No. 26 of 2013, available at <http://www.kenyalaw.org/lex//actview.xql?actid=NO.%2026%20OF%202013>

<sup>11</sup> Law No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters, available at <http://lip.alfa-xp.com/lip/AmategekoDB.aspx?Mode=r&pid=8563&iid=2080>

<sup>12</sup> Botswana Arbitration Law, 1959, available at <http://arbitrationlaw.com/library/botswana-arbitration-law-1959>

<sup>13</sup> Arbitration and Conciliation Act, Chapter 19, Laws of the Federation of Nigeria 1990, available at <http://www.nigeria-law.org/ArbitrationAndConciliationAct.htm>

<sup>14</sup> Arbitration and Conciliation Act, Chapter 19, Laws of the Federation of Nigeria, available at <http://www.nigeria-law.org/ArbitrationAndConciliationAct.htm>

In 2009, Lagos State enacted the Lagos State Arbitration Law (“LSAL”),<sup>15</sup> which does incorporate the 2006 revisions to the model law, as well as provisions of the English Arbitration Act. Mrs. Rhodes-Vivour notes that the LSAL “also incorporates other modern innovations,” such as immunity of arbitrators, express powers of arbitrators to grant security for costs and award interest, as well as provisions on consolidation, concurrent hearings and joinder of parties. The LSAL “applies to arbitrations in Lagos State unless the parties agree otherwise; thus, the law preserves party autonomy.” Mrs. Rhodes-Vivour states: “The LSAL is the most up-to-date arbitration law in Nigeria and I believe it meets international best practices.”

### *7. Looking Ahead*

**Dr. Karuki Muigua** makes the point that, “as compared to Europe and America, Africa historically had a different legal system, the traditional African system that is more familiar. The formal system was imposed by colonialism.” But with globalization, Dr. Muigua sees a definite need for more African countries to embrace international best practices, adopt the UNCITRAL model and sign onto the New York Convention.

**Ms. Aisha Abdallah** suggests that foreign investment creates forward momentum toward modernization of laws:

In general, in East Africa, the trend is in favor of arbitration and modernization. Some countries are ahead of the pack, and some are lagging behind. Because the East Africa region is attracting so much foreign direct investment, there is a push for these countries to catch up so they will have in place a legal environment conducive to attracting foreign investment.

**Mr. Aliko** believes that modernization of laws is having an impact:

I believe that countries that have modernized their laws and adopted the UNCITRAL model are benefitting. Although there are problems such as underfunding, inefficiency in the courts, less well-trained lawyers and judges, and corruption, Africans realize that in order to be cooperative and to participate fully in international business, they need the rule of law.

Arbitration is one aspect of the rule of law, so notwithstanding all the difficulties, there is a view that by embracing arbitration, a country is creating an opportunity to attract investors who know that in the event that there is a difficulty, they can have their disputes resolved fairly by an impartial tribunal. It's not just lip service. Many countries, such as Kenya, Uganda and Rwanda, have set up dedicated commercial courts and have commercial judges who are trained in arbitration. Genuine steps are being taken to try to improve the way the courts work and improve the approach of the judges to arbitration.

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<sup>15</sup> Lagos State Arbitration Law (Law No. 10 of 2009)



## *B. Judicial Interference*

As Mr. Alier's last statements indicate, an issue closely related to the issue of modern laws is that of the role of the courts. Regardless of whether a jurisdiction has a good law on paper, parties need to be assured that, in practice, the courts will respect the arbitral process. Parties want courts that will be cooperative and helpful if they need them, for example, to assist in obtaining interim relief or discovery, and also when it comes time to enforce any arbitration award, but that will not unduly interfere with the arbitral process by, for example, not honoring the agreement of the parties to submit to arbitration, or refusing to enforce a valid arbitration award.

### *1. Judicial Interference: Kenya*

In Kenya, one of the major reforms introduced by the 2009 amendments to the Arbitration Act was the inclusion of Section 10 of the Arbitration Act that restricts intervention by the courts in the arbitral process.<sup>16</sup>

**Ms. Abdallah** says that, in practice, she does not see judicial intervention in Kenya as a problem. She states that judges have embraced the requirement in Kenya's 2010 Constitution that expressly requires courts to promote alternative dispute resolution, including arbitration, "because they have a huge backlog, and it helps them to get rid of cases." Furthermore, she states that "arbitration is a very well-established mechanism in Kenya. . . . The judges have all received training in arbitration and other forms of ADR. They are actively staying matters and requiring parties to go to arbitration when there is an arbitration agreement that governs the dispute. Thus, judges are upholding the provisions of the New York Convention."

Ms. Abdallah believes that in general the Kenyan judiciary is impartial:

There are sometimes question marks with respect to a particular decision. But on a whole the system has had many structural safeguards put into it by the new Constitution. The independence of judges is protected, and the powers of executives minimized.

Ms. Abdallah comments, however, that the courts are still very slow, and there is a need for more technology.

With respect to other countries in East Africa, Ms. Abdallah believes there is a legitimate concern about a lack of uniformity with respect to judicial intervention. "There are a variety of laws and perspectives within the region, so clients need local legal advice in every jurisdiction. They need to find out what local practitioners are saying about issues such as judicial intervention, because there is no uniformity."

**Mr. Karori** states that "Kenyan courts are very pro-enforcement." In that regard, he points out that "the Kenya Court of Appeal recently ruled that a party has no right of appeal from a determination by the High Court with respect to an application to set aside an arbitration

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<sup>16</sup> Section 10 provides: "Except as provided in this Act, no court shall intervene in matters governed by this Act." Laws of Kenya, Arbitration Act No. 4 of 1995, § 10 (2012, available at [http://admin.theiguides.org/Media/Documents/ArbitrationAct\\_\\_No49.pdf](http://admin.theiguides.org/Media/Documents/ArbitrationAct__No49.pdf))

award. This analysis by the Court was meant to put the stamp of finality on an arbitration award.”<sup>17</sup>

However, **Dr. Muigua** cautions that judicial interference in Kenya can be a problem:

Under Kenya’s Arbitration Act, there should be minimum court interference, but in practice, courts do interfere quite often by setting aside awards on grounds of public policy. This creates a lack of confidence with respect to the Kenya court system and an uncertainty as to whether the courts will interfere or not. . . .

In applications to set aside arbitration awards based on public policy grounds, Kenyan courts have not clearly defined public policy. The High Courts have interpreted the term differently. There are a number of cases setting aside awards on grounds of public policy. No international investor wants to see an award set aside on grounds of public policy so that is a potential problem.

On the positive side, however, he notes that “with the new Constitution, there is an emphasis on arbitration and there is a visible commitment on the part of the judiciary to respect arbitral awards and that has helped.” Dr. Muigua states that when a dispute is governed by an arbitration clause, Kenyan courts will honor the parties’ agreement, not interfere, and refer the matter to arbitration. Also the Kenyan judiciary has held that there is no automatic right of appeal from an arbitral decision, so Mr. Muigua believes that “to that extent, the courts are doing well.”

### *2. Judicial Interference: Rwanda*

**Dr. Masengo** perceives the judiciary of Rwanda to be very friendly to arbitration. He states that Rwandan judges have been trained in arbitration since the establishment of the Kigali International Arbitration Centre (“KIAC”), and are very supportive of arbitration. Rwanda also has a reputation for being pro-enforcement. To date, Rwanda has had five challenges to arbitration awards, and not one has been set aside by the courts.

### *3. Judicial Interference: Uganda*

In Uganda, **Mr. Aliko** states, there is case law on arbitration, and a website with reported decisions. The decisions demonstrate that judges are in favor of arbitration, but also show some unfamiliarity on the bench with arbitration principles that can occasionally produce interesting judgments. Mr. Aliko elaborates:

The cases are not way off the mark, but if you are an investor with large sums of money, you are unlikely to voluntarily select an arbitral seat in a country where you face the risk of having a less well-experienced judge decide a jurisdictional challenge or a point of law.

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<sup>17</sup> *Nyutu Agrovet Ltd. v. Airtel Networks Ltd.*, Civ. Appeal No. 61 of 2012 (Kenya Ct. of Appeals 2015), available at <http://kenyalaw.org/caselaw/cases/view/106473/>

In Mr. Alier's view, the judges in East Africa are fairly familiar with the arbitration legislation, but not as familiar as judges in developed countries, so there are inconsistencies in decisions.<sup>18</sup> Mr. Alier gives as one example a case in Kenya where a party challenged an arbitrator on impartiality grounds. Under the UNCITRAL model law, Mr. Alier states, the tribunal has the choice to stay the arbitration or to allow it to continue, "with the understanding that any impending award would not be effective until after the challenge has been decided. The Kenyan judge misinterpreted the provision, and held that both parties had to consent to the arbitration continuing, which effectively destroys the intention of the provision to vest power in the arbitrators to decide whether or not the arbitration should continue. Instead, the decision would appear to give to one party the right to veto whether or not the arbitration process continues while the challenge is pending."

Mr. Alier states that these odd decisions occur in some cases in East Africa because of the way the UNCITRAL model law has been written. There may be slight changes from the UNCITRAL model law language that produce unintended results, particularly when interpreted by a judge who may be inexperienced in arbitration.

This has produced uncertainties, and amendments are not always made in East Africa when they are needed.

#### *4. Judicial Interference: Botswana*

Although Botswana's arbitration law is antiquated, in **Mr. Luke's** experience, "the current law does not truly create any impediments to arbitration." Mr. Luke notes that Botswana has its own Botswana Institute of Arbitrators with its own set of rules, and "a significant body of case law recognizing that parties have the right to proceed with arbitration and, accordingly, upholding arbitration agreements and arbitrators' awards."

#### *5. Judicial Interference: Nigeria*

With respect to judicial interference, **Dr. Onyema** states:

Most countries in Africa have very weak institutions. Some of the courts are very weak in themselves, so parties and their lawyers can exploit those weaknesses, in order to frustrate that process. At the same time, there are arbitration references that run smoothly on the continent, without any reference or recourse to the courts during the process.

The key thing to remember is that parties drive this process. If you have a recalcitrant party who wants to frustrate every single move you make,

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<sup>18</sup> Tanzania is not a UNCITRAL model state. In Tanzania, Mr. Alier states, the judges appear to be less familiar with arbitration, and Tanzania has had difficulties with judicial enforcement of arbitration awards. Mr. Alier points to two examples: "There was an LCIA award that was handed down about ten years ago that has yet to be enforced in a case related to the Standard Charter Bank Tanesco ICSID case. There have also been difficulties with the enforcement of the award in the Tanesco case itself. Basically it appears that Tanzania has just refused to implement the direction given by the ICSID tribunal. That has culminated in a new arbitration last year. However, Tanzania's new President, John Magafuli, is a real champion of the rule of law. Tanzania has changed. There is a huge surge in infrastructure projects in Tanzania with the rail link between the Tanzania coast and Rwanda and the pipeline to the coast from Uganda. Tanzania is poised to see a step change in arbitration."

he has the ability to do so. No matter what jurisdiction you are in, the law can only limit that sort of intervention and try not to make it easy for parties to abuse the process of such courts.

With respect to Nigeria specifically, Dr. Onyema states that “a recalcitrant party can exploit the weaknesses in Nigeria’s judicial system.” She explains:

A major concern is that not all the judges in the High Court are supportive of, or understand, their role in the dispute resolution landscape. Another big problem is that Nigeria has a guaranteed constitutional right of appeal to the Supreme Court that applies even on procedural matters. That has implications of time and costs. A constitutional amendment would be needed to change that. This affects not just arbitration but the legal system in general. It is a major weakness in the system. The appeals process can take five, ten, or fifteen years. That is way too long. That's a massive problem which the Nigerians themselves recognize.

**Mrs. Rhodes-Vivour** agrees that delays in the court system “is the major challenge in Nigeria.” Mrs. Rhodes-Vivour explains that a challenged arbitration award in an enforcement proceeding must currently “go through the three-tiered appeal in the Nigeria court system, i.e. High Court to Court of Appeals to Supreme Court.” She cites as an example a matter in which she has been involved as counsel where “the award is yet to be enforced as we have been locked up in the court system for the past 12 years.” Mrs. Rhodes-Vivour concludes that “Nigeria should consider whether time has come to constitutionally limit the right of appeal in arbitration matters.”

But Mrs. Rhodes-Vivour also thinks there are many positive attributes to Nigeria’s judicial system. She says in Nigeria, “a lot of capacity building has gone on to ensure that our judges understand arbitration,” and that as a result, “Nigerian judges are generally knowledgeable about arbitration.” Nigerian courts recognize the principle of judicial non-interference in accordance with the Arbitration and Conciliation Act, and the LSAL, both of which are based on the principle contained in the Model Law, and judges “appreciate their supportive role in arbitration proceedings. Parties to arbitration can seek judicial assistance to obtain interim relief, or to compel the attendance of a witness or the production of evidence in arbitral proceedings. Mrs. Rhodes-Vivour further states that Nigeria “has a pro-enforcement policy on international arbitration awards.” She acknowledges that “at times there may be some decisions that do not reflect the proper understanding of arbitration,” but says “those decisions have been set aside by a higher court through the appellate system.”

### *C. Possible Solutions: Building a Strong Judiciary*

The experts discuss a number of steps that have been taken, and suggest further steps that might be taken to strengthen the judiciary.

Many experts see progress as underway. **Ms. Abdallah** and **Mrs. Rhodes-Vivour** both point to steps taken by the courts to encourage alternative dispute resolution and relieve court congestion. **Ms. Abdallah** explains:

There is a pilot program in the Kenyan courts whereby if a party files a commercial (or family) case in High Court of Nairobi, the court will assess whether alternative dispute resolution would be appropriate, and if so, can require the parties to submit the case to ADR. If the parties reach an agreement in ADR, that agreement will have the same legal effect as a court order.

**Mrs. Rhodes-Vivour** states:

Active case management has been incorporated into the Rules of Court of many states in Nigeria. These Rules mandate litigants to explore alternative dispute resolution prior to litigation. In Lagos State, before a case is assigned for hearing, the parties are obligated to try to resolve it amicably through alternative dispute resolution, including arbitration.

**Mr. Aliko** and **Ms. Abdallah** note that a number of countries (such as Kenya, Uganda and Rwanda) have established commercial divisions in their court systems for hearing arbitration issues. Ms. Abdallah also states that under the budget allocated by Parliament, the judiciary in Kenya has grown enormously. Funding has been allocated to build courts outside Nairobi so people can have access to justice throughout the country. She also points to judiciary reform:

The new Constitution introduced mandatory vetting of judges. All judges were required to undergo a very public vetting process that was televised. Many in the old guard were vetted out, and many new people were hired into the judiciary.

**Dr. Muigua** notes that particularly in the last five years following the enactment of the new Constitution calling for the promotion of alternative dispute resolution, Kenyan judges have become well trained in arbitration. A number of prominent arbitrators have been appointed to the bench so they have expertise in arbitration matters, and many judges are attending training courses such as those offered by the Chartered Institute of Arbitrators.

In terms of moving ahead, **Dr. Onyema** stresses the importance of communication and training:

In addition to needing good laws, courts need to be supportive of the arbitration process. Courts need a clear understanding of where arbitration fits in the scheme of things. Judges need to fully understand that they are not in competition with arbitrators. Then it will be easier for judges to understand that there is a symbiotic relationship between the judiciary and arbitrators. It's not a question of guarding one's own jurisdiction, but understanding that both are in the "same business" with clearly defined spheres of influence.

We need to provide training. It has been suggested that training needs to go back to law school. It is important to think about legal education, but that is a long-term view. In the here and now, we need to exchange ideas with judges who are sitting on the bench, collaborate with them, and conduct training.

Arbitrators need to understand the limits of their powers as well. Lord Hoffman addressed this in his closing speech at the last ICCA Congress when he said that ultimately arbitrators have limited powers and need to understand and accept that. Everyone needs to understand his role. Everyone is working together but in different fields.

**Mr. Alier** views the underfunding of the judiciary as one of the biggest problems Africa faces:

The challenges ahead continue to be the underfunding of courts, and the failure of governments to understand that the rule of law is as important as the ability of a country to defend itself from external aggression. There are countries that will spend huge sums on arms but will not spend anything on the courts. Countries need to understand that the courts are extremely important and that judges are highly valuable—the most important employees of government. If judges were compensated better, it would improve their job satisfaction and the public’s respect for them.

**Mrs. Rhodes-Vivour and Mr. Alier** also suggest the possibility of having specialized courts. **Mrs. Rhodes-Vivour** states that Nigeria “should take a cue from the reforms in other jurisdictions.” She notes Mauritius “where there is a panel of six Judges to hear arbitration proceedings,” and “special rules for arbitration applications, a detailed and clear set of procedures of bespoke rules.” She says there have been some similar initiatives in Nigeria; the Lagos State Arbitration Law provides for special rules for use in arbitration applications, with strict time limits and cost penalties for delay. Mrs. Rhodes-Vivour opines that the “time has come for Nigeria” to consider having special courts to handle arbitration applications or to accord some kind of special expediency to arbitration claims.

**Mr. Alier** suggests a specialized court, but on a continental rather than a national scale:

Perhaps what Africa should do is set up a supranational court of appeals run by Africans to handle arbitration appeals, because there are institutional problems in the supervising courts in Africa. In order to promote international arbitration, and to encourage parties to opt for a Ugandan seat, for example, parties need to have the confidence that the courts are going to be up to the mark. Furthermore, if the courts happen to get it wrong, they want to know that it can be put right. An African international court of some kind would give parties assurance that there was an authority beyond the national court system.

I believe the East African Court of Justice also sees itself playing this type of role. But I think there may be a need to go further and have not just an East African court, but an African court.

## II. Perceptions of Corruption and Lack of Safety

Fear of corruption and lack of safety are often cited as cultural factors restricting the growth of arbitration in Africa.<sup>19</sup>

The Transparency International Corruption Perceptions Index ranks countries by their perceived levels of public sector corruption, as measured by expert assessments and surveys. Each country is also given a score on a scale of 0 (“highly corrupt”) to 100 (“very clean”). Analyzing the latest 2015 results, Transparency International concludes that 40 of 46 Sub-Saharan African nations face “a serious corruption problem” and notes that “[i]ndicators for rule of law and justice score particularly badly.”<sup>20</sup> Botswana had the best showing in Sub-Saharan Africa with a corruption perceptions ranking of 28 of 168 countries surveyed worldwide, and a score of 63, followed by Cabo Verde, with a world ranking of 40 (score 55). Rwanda is next, with a world ranking of 44 (score 54), closely followed by Mauritius and Namibia, tied with world rankings of 45, and scores of 53. Among other countries discussed in this article, South Africa is ranked 61 (score 44), Nigeria 136 (score 26) and Kenya and Uganda are tied at 139 (both with scores of 25).<sup>21 22</sup>

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<sup>19</sup> See, e.g., Muigua Kariuki, *Promoting International Commercial Arbitration in Kenya*, CIARB KENYA (Nov. 2013), at 9, available at <http://www.ciarbkenya.org/assets/promoting-international-commercial-arbitration-in-africa-eaia-conference-presentation.pdf>; Collins Namachanga, *The Challenges Facing Arbitral Institutions in Africa* (CIARB KENYA July 2015), at 6-7, available at <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfvrsn=0>

<sup>20</sup> Chantal Uwimana, *Sub-Saharan Africa: Achieving ‘the Africa We Want’ Starts with the Rule of Law*, TRANSPARENCY INTERNATIONAL BLOG (Jan. 27, 2016), available at <http://blog.transparency.org/2016/01/27/sub-saharan-africa-achieving-the-africa-we-want-starts-with-the-rule-of-law/>

<sup>21</sup> 2015 Corruption Perceptions Index, TRANSPARENCY INTERNATIONAL (2016), available at <http://www.transparency.org/cpi2015/>

<sup>22</sup> Other indices of relevance include the Doing Business 2016 report by the World Bank that ranks the economies of 189 countries worldwide on ease of doing business. It shows Sub-Saharan countries with an average ranking of 143. Fact Sheet 2016: Doing Business in Sub-Saharan Africa, WORLD BANK GROUP, Oct. 27, 2015, available at <http://www.worldbank.org/en/region/afr/brief/fact-sheet-doing-business-2016-in-sub-saharan-africa>. Mauritius leads with a score of 32, then Rwanda at 62, Botswana at 72 and South Africa at 73. Among other countries with large economies, Kenya has a score of 108, Uganda 122 and Nigeria, 169. Doing Business 2016, WORLD BANK GROUP, available at <http://www.doingbusiness.org/~media/GIAWB/Doing-Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>. The World Bank notes significant trends toward reform in the region. Press Release, *Sub-Saharan African Economies Among World’s Top Improvers of Business Climate, Says Doing Business Report*, WORLD BANK GROUP (Oct. 27, 2015), available at <http://www.worldbank.org/en/news/press-release/2015/10/27/sub-saharan-africa-economies-among-worlds-top-improvers-of-business-climate-says-doing-business-report>. Also the Wall Street Journal 2016 Index of Economic Freedom indicates that overall scores for Sub-Saharan Africa remain low, but that the region experienced the most improvement of any region in the world. Mauritius and Botswana are the highest ranking in the region. Press Release, *2016 Index: Economic Freedom Expands in Many Parts of Sub-Saharan Africa*, THE HERITAGE FOUNDATION (Feb. 21, 2016), available at <http://www.heritage.org/index/pdf/2016/press-releases/THF-2016-sub-saharan-africa.pdf>. The overall ranking for Mauritius is No. 15 in the world, ahead of the Netherlands and Germany, with Botswana at a respectable No. 30. The index also provides scores for the category, “Freedom From Corruption,” with Botswana leading in Sub-Saharan Africa, followed by Cabo Verde, Mauritius, Namibia and Rwanda (tied), and Ghana. Many other Sub-Saharan countries, however, fare poorly. 2016 Index of Economic Freedom, available at <http://www.heritage.org/index/explore>. For comparisons among African countries, the Mo Ibrahim Foundation provides an annual statistical assessment of the quality of governance in all 54 African countries. It presents overall scores (1-100) and rankings, as well as scores and rankings on 4 categories and 14 sub-categories, one of which is “rule of law.” <http://mo.ibrahim.foundation/iiag/>. In 2015, the top three countries in Africa overall, in descending order, are Mauritius, Cabo Verde and Botswana. <http://mo.ibrahim.foundation/iiag/data-portal/>. In the sub-category, “rule

The panel of experts interviewed for this article were asked to what extent they believed concerns of corruption and safety to be real problems, or problems of perception.

### *A. Corruption*

**Mr. Karori** sees concerns regarding corruption in Kenya to be more of a problem of perception than reality. He concedes that Kenya has had challenges with corruption in many institutions, but notes that corruption in the area of the arbitration process itself has not been flagged as a problem. Mr. Karori states: “Kenya has extremely well-respected professionals in arbitration who are not affected by claims of corruption. In addition, the courts have acted in a very favorable way in terms of respecting the right to arbitrate and to enforce awards.” Mr. Karori concludes: “In my view, the claim—or more accurately the perception—of corruption is a deliberate strategy to prevent or delay the entry of African arbitrators into the currently-closed circle of international arbitration practitioners in Europe and the Americas.”

**Mrs. Rhodes-Vivour** states that “corruption is a world-wide phenomenon, and that the need to eradicate corruption is imperative.” She remarks:

The perception of Africa as corrupt is a very negative perception. I don't think it's fair to focus on Africa principally on the basis of corruption. Africans should strive to eradicate any corrupt practices through transparency and accountability. Nobody says they're not going to choose a European arbitrator because there is corruption in Europe. You look for the arbitrator who is not corrupt. You cannot paint everyone with the same brush. If non-Africans can come to Africa to do business, then they should be able to look for the right African arbitrators to appoint to their disputes.

**Dr. Muigua** states that while he is unaware of allegations of corruption in the arbitration process, he still believes that perceptions of corruption are a real problem for Kenya and Africa generally. Thus, Dr. Muigua views Transparency International's poor rating of Kenya as a problem for the Nairobi Centre. He explains:

I talk of perceptions of corruption rather than corruption. Perceptions are a real factor because they scare away parties who might otherwise come to arbitrate in Africa. There are instances of corruption--not necessarily anything to do with arbitration--but it is not good for our country. We need to make a concerted effort, globally and nationally. We must tackle it head on. We cannot hide our heads in the sand. Nobody wants to arbitrate in a system that is perceived as corrupt.

**Mr. Alier** sees allegations of corruption as a significant concern:

I hear that corruption is a big problem, and because I hear it, I suspect that there might be something in it. I have not had any experience of

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of law,” Botswana is first, followed by South Africa and Mauritius. All regions of Africa, excepting Central Africa, have seen improvement in scores for rule of law. The improvement has been driven in part by higher scores for judicial process and judicial independence. 2015 Ibrahim Index of Governance, Sub-Category Indexes, Rule of Law, available at [http://static.moibrahimfoundation.org/u/2015/10/02191556/01\\_Rule-of-Law.pdf?\\_ga=1.56819498.1215284728.1464637516](http://static.moibrahimfoundation.org/u/2015/10/02191556/01_Rule-of-Law.pdf?_ga=1.56819498.1215284728.1464637516)



corruption in the courts. Never. But one hears things anecdotally about corruption in the courts. And there are persons in positions of seniority in the system, such as the Chief Justice in Uganda talking about judicial corruption, so there must be some. In Kenya, there is a tribunal that's been formed by the President of Kenya to look into judicial corruption of the Supreme Court in Kenya. It relates it to an election matter. It is not an arbitration case. But if it is said that there may be corruption in the Supreme Court in relation to an election matter, then the question arises as to whether there is the potential for corruption in relation to a very valuable arbitration. It's the concern that if there is corruption in some areas, then it could affect other areas.

I hate to say this, but I think if a client came to me and asked, 'Is there corruption?' I would have to say, 'it is said there is corruption,' and if a client asked my advice between opting for arbitration in a certain African country or London, I would say London because I'm absolutely confident that there wouldn't be any corruption.

That's just the bottom line. But as I say, I have no experience at all of corruption in any court in East Africa.

**Mr. Alier** says that a related problem is that "because there is said to be corruption, allegations of corruption are easy to throw around, even when there is no basis at all for them." He says: "There are an extraordinary number of cases in Kenya, for example, where lawyers, including very senior lawyers, have made allegations against arbitrators. These types of allegations are harmful because international arbitrators are wary of sitting on a tribunal seated in Africa when there is a risk that baseless allegations of bias will be made against them. They do not want to risk having their reputations unfairly tarnished."

Mr. Alier believes that training and fair compensation are both potential solutions to problems of corruption:

I do think that by encouraging and supporting African lawyers and African arbitrators, one can fight problems of corruption. It sounds basic, but lawyers require training so they can understand what sort of behavior is appropriate.

They also need to be paid well. In international cases, typically, an international law firm is instructed with a local law firm. The international law firm receives most of the compensation, and the local firm makes very little money. That's not healthy. African lawyers need to be paid well so that there is no reason to resort to corruption.

Similarly, if Africans who are appointed as arbitrators are paid well, then others who might be inclined to resort to unethical tactics will see by example that those who conduct themselves well are the ones who get the appointments and achieve success. . . .

To get rid of judicial corruption, judges must be paid properly. Judges are such important people, and they should be paid very well so as to remove any temptation for corruption. It also reduces the plausibility of the allegations, because if judges are paid well, there is no need to receive extra money through improper means.

**Ms. Abdallah** states that political corruption was raised as a concern when the Nairobi Centre was first set up. The question was asked as to what the central government's involvement would be in its establishment. She explains:

Essentially NCIA must have central government support. The government provides facilities and pays for refurbishment, and although NCIA is trying to raise funds from the donor community, ultimately NCIA needs a lot of support from the government. The same is true of MIAC as well as reflected by the very visible and extensive support provided to the Mauritius ICCA conference at the most senior levels by the Mauritian government. That is the only way it can work. Later NCIA can expand its efforts to attract private funding, but initially it will require government support.

But Ms. Abdallah does not see governmental interference as a big concern for NCIA because "Kenya has many good things in its favor, such as the new Constitution, a strong commercial division in the High Court where most arbitration issues will be litigated, and many checks and balances."

**Dr. Masengo** believes that Rwanda's high rankings for integrity are an important factor in attracting arbitration to Rwanda and KIAC. He states: "Rwanda is known as a place of high integrity. It is corruption free. This is very significant in terms of attracting cases. Companies and governments will be unwilling to submit their disputes to countries with reputations for high levels of corruption."

**Mr. Luke** likewise points to Botswana's high rankings by Transparency International and others. He notes that in Sub-Saharan Africa, Botswana is ranked number one in terms of having the least corruption. Mr. Luke observes that Rwanda and Mauritius likewise enjoy high rankings, and believes that this will contribute to the success of KIAC and LCIA-MIAC.

### *B. Safety*

On the issue of safety, **Ms. Abdallah**, who practices in Kenya, but also practiced in London for twelve years, has the following to say:

I don't really think safety is a legitimate concern. I have heard of some foreign lawyers refusing to visit Nairobi unless they had extensive personal security in place. I thought it rather strange. We are as fearful entering parts of London as they are entering Nairobi. I am as likely to be subjected to terrorism in Paris, London or New York as an African country. I don't think it is a real issue but a bias of the international press. If it is a war zone, I am not going to go there either. But those are well-defined. I find it odd when Westerners ask me about security because I probably read as many incidents about their country as mine.

With respect to the issue of security, **Dr. Onyema** states: “It is an issue for the government, and we need to engage them. Governments need to understand that weak governments adversely affect business.”

**Mrs. Rhodes-Vivour** acknowledges that in terms of safety in Nigeria, there are risks, but does not believe safety is a concern that should prevent parties from arbitrating in Nigeria. “In Lagos, we have international arbitration events and training seminars where many people come from abroad. You just have to be careful. Sadly, it is the negative occurrences that get thrown into the limelight.” Still Mrs. Rhodes-Vivour believes Nigeria should take steps to address safety and security concerns. She notes, as a positive example, the security measures Mauritius has put in place to promote safety.

### **III. The Roles of Regional Arbitration Centers in Africa**

**Dr. Onyema** states that there are over 70 arbitration institutions on the continent. Many of these centers function primarily as domestic arbitration centers but a significant number serve, or have aspirations to serve, as regional centers, and still a smaller number (at least in the view of some experts), aspire to be international centers. The focus here is on the larger regional centers including, for example, KIAC in Kigali, LCIA-MIAC in Mauritius, NCIA in Nairobi, the Regional Centre for International Commercial Arbitration - Lagos or the Lagos Court of Arbitration. The regional institutions tie into issues of culture and capacity affecting the growth of international arbitration in Africa in a number of ways. First, many African experts believe that the regional centers play a crucial role in helping to build capacity, and in increasing recognition both of Africa as a venue for international arbitration, and of Africans, as serious players in the field of international arbitration. Some believe that the regional centers will be a driving force in increasing the number of international arbitrations seated in Africa, and in helping more Africans find a path forward into the broader international arbitration community. Second, the multiplication of arbitration centers across the continent both reflects the diversity of cultures throughout Africa, and at the same time, is seen as a potential way to bridge those cultural differences.

The African experts with whom I spoke have differing opinions as to whether there is a need for the many arbitration institutions in Africa that exist today, or whether Africa would do better to focus on developing a fewer number of centers. The experts also disagree as to the long-term vision for these centers, and whether any might one day operate in the international arbitration arena on the same scale as the ICC or the LCIA, for example.

#### *A. The Role of the Regional Centers in Increasing Confidence in Africa as an Arbitral Seat and Building Capacity*

KIAC has been up and running since May 2012. In that four-year time period, its Executive Director, **Dr. Masengo** states that he has seen an increase in recognition and confidence in Kigali as a center for arbitration inside and outside Africa. He notes that Kigali recently approved 29 new arbitrators to its international panel, thereby increasing the total number of arbitrators on its panel from 34 to 63. The new arbitrators represent many countries including the United States, Germany, Great Britain, France, Zambia, Malaysia and Brazil. Dr. Masengo states that the arbitrators have strong credentials and excellent reputations, and include, for example, arbitrators with experience in the ICC or LCIA. Kigali has had a total of 38 cases, including 5 international cases involving parties outside of Africa or

governments other than Rwanda. From July 2015 through May 2016, Kigali has had 10 new cases.

**Mr. Karori** likewise sees the Nairobi Centre as a very significant step forward for Kenya. He says that the rules of the Centre have been promulgated and the Registrar and Board of Directors have been appointed, but “the Court has not been fully established since the judges have not yet been appointed. The arbitrators will need to be accredited and that is an ongoing process. We expect this is one of the boxes that needs to be ticked before the close of the year.” Mr. Karori states: “It is anticipated that the NCIA will be fully operational by the end of 2016. The Nairobi Centre offers Kenya an opportunity to inform the general world of Kenya’s capabilities in the field of international arbitration.”

Mr. Karori believes that the center will help build capacity and increase Africans’ involvement in international arbitration. He notes that under the statute establishing the Nairobi Centre, arbitrators will be trained and accredited by the NCIA. Furthermore, “having an institution that is truly representative of the region that can manage complex international arbitration matters hopefully will enhance the profile and visibility of Africans in the international arbitration world and create more opportunities for them in that field.”

**Dr. Muigua** sees LCIA-MIAC in Mauritius as a strong arbitration center. He notes that “its Supreme Court has come out very clearly in support of arbitration. . . . It has been very aggressive in marketing, and offers tourism opportunities as well.” **Dr. Masengo** expresses the view that “Mauritius, while technically a part of Africa, is an island in the Indian Ocean. It is quite far away from many places in Africa and very expensive to get to. For many parts of Africa, Mauritius is not more convenient than Europe.” But Dr. Masengo thinks Mauritius is “likely to survive because it is associated with the LCIA, and is a beautiful place. People will want to go there for fun. And Mauritius can serve the South African region.”

**Mr. Alier** states: “Mauritius has probably got it right. Mauritius suffers because it is not on the continent, and there is a perception on the continent, rightly or wrongly, that Mauritius is ‘not quite Africa.’ Culturally it is different. The majority of the population is of Indian origins. It’s an island. It is some distance from the rest of Africa.” But he believes that “Mauritius has done very well in terms of establishing a good, modern arbitration law,” and has taken the right step in designating the Privy Council of England as the final court of appeals. He notes that the judges in Mauritius are well trained, and understand that their decisions will be subject to review, and “that promotes excellence within the Mauritius judicial ranks.” Furthermore, Mr. Alier concludes:

If you're an investor and you opt for arbitration in Mauritius, then you know that if something doesn't quite go well, ultimately the issue will be decided by an English judge. Many Africans find an appeal to England unacceptable in this day and age. But Mauritius believes that it is more important what the international community thinks, so that it can promote itself as an international arbitration center. Mauritius has taken that step, and I think it's a very bold step.

Still there is much work ahead. **Dr. Masengo** notes that Mauritius has had only one international case. **Mr. Luke** mentions that the last arbitration involving Botswana went to the ICC in London, when it could have been handled in Mauritius. Mr. Luke believes the

reason is a lack of knowledge, and advises that parties should not overlook Mauritius which is less expensive and offers an excellent forum for international arbitration.

In West Africa, Lagos has both the Regional Centre for International Commercial Arbitration - Lagos and the Lagos Court of Arbitration. In **Dr. Onyema**'s view, the Lagos Court of Arbitration appears to be busier than the Lagos Regional Centre. **Mrs. Rhodes-Vivour** says that "hopefully," the Regional Centre "should begin to attract international cases." As to the Lagos Court of Arbitration which was formally launched in 2012, she notes that it "is relatively new" and it takes time to develop caseloads: "It does take time for users to become aware, to incorporate institutional clauses in their contracts, and for the disputes to arise." Mrs. Rhodes-Vivour believes, however, that there is enough work for all the arbitral institutions in Nigeria. "Generally, the courts are congested, so the more arbitral institutions we have, the better."

One difficulty in assessing the caseloads of various arbitration institutions, **Dr. Onyema** points out, is lack of data:

The Lagos arbitration centers say they are attracting international cases but there is no data, which is another major problem on the continent.

At the African Union conference last year in Addis Ababa, we told the institutions that we need annual reports, we need data—numbers of disputes, parties, subject matter, names of arbitrators appointed, etc. The institutions often claim decisions are confidential. But there is a push for transparency and other institutions now at least publish decisions in redacted form. Institutions are also encouraged to publish information because it can be used as a marketing tool.

### *B. The Regional Arbitration Centers: Too Few or Too Many*

As to whether or not there are too many regional arbitration centers in Africa, the experts are divided. Some experts express the view that there is a place for all the centers. For example, **Mr. Karori** states that he does not view other African arbitration centers such as Mauritius or Kigali as being in competition with Nairobi:

While the centers aim to offer similar amenities in terms of location, the different countries have substantial differences in terms of infrastructure and availability of facilities, such as sufficient bed space, meeting/conference rooms, trained manpower, etc.

Furthermore, Mr. Karori states that the types of cases the centers attract may differ:

In the case of Mauritius, for instance, as an offshore center, its clientele is likely to be people with cases involving offshore investments and related services. Kenya, as an onshore destination with a hinterland, is likely to attract cases involving onshore investments and related services. The attractions are therefore not the same, even though they are geographically in the same region.

While Mr. Karori concedes that there might be a certain degree of competition among the centers for some of the same cases, he believes that the different regional centers are necessary to serve the diverse needs of users. He gives as an example “cases where, from a perception point of view, investors in Kenya may be uncomfortable with proceedings being conducted in Nairobi as in a claim by or against the Government of Kenya.” Mr. Karori concludes that the availability of other centers in the region would provide an alternative, while still accommodating the parties’ desire to arbitrate within the region.

**Mrs. Rhodes-Vivour** states:

I do not think there are too many regional arbitration centers throughout Africa. The role of regional centers should be to continue to build capacity and promote African jurisdiction as seats for international arbitration as well as promoting the use of Africa-based arbitral institutes. I think we are in good stead provided that the institutions focus on what their objectives are and work together and not in competition with each other.

She suggests that institutions can collaborate “to formulate policies and advocate for arbitration-friendly laws” and “organize trainings, seminars and conferences for stakeholders in arbitration.”

**Dr. Muigua** also has a vision of the regional centers as collaborative. He states:

Arbitration serves as a bridge between legal systems so the centers offer a good forum for resolving disputes between countries with diverse legal systems. The idea is not to compete, but to offer alternatives, so, for example, parties can choose to arbitrate either in Kigali, Nairobi or Mauritius. The different centers can share information about arbitration, and cooperate by appointing arbitrators from other countries to serve on their panels. Individuals from Mauritius have come to Nairobi to talk about the Mauritius center, and Kenyan lawyers have visited Kigali to conduct international arbitration training and capacity building.

Still Dr. Muigua acknowledges that there are concerns regarding the proliferation of arbitration centers across Africa. While he does not think there are too many, he does see a risk that Africa could have too many, and they would end up competing against one another.

**Mr. Alier** does not believe there are too many centers to the extent their purpose is to “function as local institution whose primary purpose is the promotion of arbitration practice in a domestic arena,” but to the extent they are trying to serve as international centers, he sees it differently:

In terms of international arbitration centers in East Africa, I think it would probably have been better if there were just one single center. Instead there is Arusha, which has aspirations to be an international center because it's also the center for the East African Court of Justice. There is Uganda, which thinks it can get something off the ground, although nothing is actually happening. Then there is Nairobi and Kigali.

I think there's probably not enough international work to go around, and I think it's probably going to create a bit of a problem.

**Dr. Masengo** believes that it will be a case of survival of the fittest with respect to the number of arbitration centers. He states:

While it is true that there are many arbitration centers in Africa, not many of them have been able to compete. Some centers have had no cases. If they cannot attract cases, they will lose funding. Competition will kill competition. Not all of the centers will stand the test of time.

Dr. Masengo says there is a need for more than one center just because of the vast geographical scope of Africa, but that from his point of view, about three regional arbitration centers, or four at a maximum, would serve the continent well. Dr. Masengo proposes the possibility of KIAC for East Africa, Mauritius for South Africa, the Lagos Regional Centre for West Africa and Cairo for North Africa.

**Mr. Luke** expresses the view that currently there are too many regional centers in Africa and that it would be better to consolidate them, or find some way to harmonize them and bring them together. While one approach might be to have one center for each geographical region in Africa, the big issue he sees is that “no country will want to be the one to give up its arbitration center.” Mr. Luke states that “countries that have invested so much into their centers to make them state of the art will not be so keen to give up their claim to having an international arbitration center.” Mr. Luke believes that Africans need to continue the dialogue in an effort to find a solution that will be most beneficial to the goal of promoting international arbitration in Africa.

**Dr. Onyema** discusses the merits of both views regarding the regional centers. With respect to the view that there are too many, she offers the same proposal as Dr. Masengo, except she chooses the Lagos Court of Arbitration rather than the Lagos Regional Centre, and adds a center to serve Central Africa:

Should there be one identified regional institution for each African region--North, West, East, South, and Central Africa? In that case, there is almost a process of natural selection. There are clearly defined major arbitration institutions that can be defined as regional hubs. In North Africa there is the Cairo regional center. In West Africa, the Lagos Court of Arbitration appears to be busier than the Lagos Regional Centre. In East Africa, you have Kigali. Then you have the South Africans. There isn't much activity in Central Africa, but there you can have OHADA CCJA, although OHADA includes bits of West Africa.

Then one must consider whether enough work is generated to make all of these institutions viable. The next issue would concern the roles of the regional centers in relation to all the other arbitration institutions. Having regional centers would not mean that countries should not have their own independent institutions. But one must explore the issue of how they would share the local space without competing. Should the

regional centers be the only ones that handle international disputes or cross-border disputes, with the other institutions handling domestic disputes, or would that be a form of restraint of trade, or entail other legal problems?

In discussing the concept of regional centers, Dr. Onyema adds that the continent is not homogeneous, and that is one reason “why the idea of regional hubs may just not work.”

With respect to an alternative viewpoint, Dr. Onyema states: “Another view is that all the centers should continue doing what they are doing but collaborate with one another and share experiences. Maybe that is the way to go. I don't know the answer, but those are questions we are exploring.”

**Ms. Abdallah** does not see the different centers as competitive. She states: “The Rwanda legal system is quite different from Kenya, which is a common law system. Tanzania is again quite different.” Thus, citizens of one country might prefer not to use a center in a country with a legal system different from their own. Ms. Abdallah sees the different regional centers more as complementary to the promotion of arbitration as a whole, than as competitive. She states:

I have never come across a client who said, ‘It is either Mauritius or Rwanda.’ More likely it would be either London or Singapore. If as Africans we can get them on the continent we would be happy. It doesn’t matter if it is our patch or a neighbor’s patch. At least we have gotten them out of London or Singapore. So I don’t think I would be worried about Kenya versus Rwanda. Whoever does well does well for the whole continent.

### *C. The Regional Arbitration Centers: The Long-Term Vision*

**Ms. Abdallah** believes that Nairobi will be a very good base for the region because of non-legal factors, such as a well-educated workforce, that will promote it and help it do better than others. She sees it initially more as a regional center than an international center, but states that it will take some time to develop. In Ms. Abdallah’s view: “The aspiration would be for Nairobi to compete with Mauritius in cases involving an African party. Maybe from there it will re-base its aspirations. But for now it is more realistically viewed as a regional center.”

With respect to KIAC, **Dr. Masengo** states:

At present, the aim of Kigali is not to strongly compete with the ICC or the LCIA. Its plan is first to position itself as an alternative to the ICC or the LCIA, to serve the needs of the African region, to expand to other regions progressively and to build a strong regional practice. Kigali will need marketing and a solid record for performing high-quality work. Slowly as it becomes more well known, it will evolve and develop a greater international practice so that one day in the future it may compete with the ICC or the LCIA, but that is not the goal at present.



**Mr. Luke** believes that a few centers have the potential to be international centers that would one day compete on the same level as the ICC or LCIA. He states: “Nigeria has an advantage by virtue of the sheer size of its population which is approaching 190 million. Consequently, the market in Nigeria is massive.” He notes the huge investment that has been put into developing Lagos as a premier international city, as well as its notable improvements in governance and safety in recent years. Mr. Luke further states that “the Lagos Court of Arbitration has truly impressive facilities that offer a venue for arbitration that can compete with any in the world.” He likewise believes that KIAC has the potential to be a true international center. He points to the vast sums that Rwanda has invested in order to showcase itself as a major conference center and hub for doing business, as well as the major efforts it has undertaken to attract foreign investment. Mr. Luke believes Mauritius should have the same international potential but notes the frustrating struggle Mauritius is facing in trying to attract international arbitrations, despite the fact that “Mauritius is a phenomenal place and has gone all out in promoting itself. It has invested in amazing facilities, has partnered with the LCIA and has developed a permanent court of arbitration.”

**Mrs. Rhodes-Vivour** sees international potential in Africa’s centers:

I think Africa’s arbitration centers could one day be international institutions that would operate on the same level as the ICC or the LCIA if they remain focused. The ICC didn't build itself up in one day. Neither did the LCIA. It takes time and it takes years of sustained effort.

**Dr. Onyema**, on the other hand, does not see the regional centers as competing with institutions such as the ICC or LCIA. She states:

That is not a long-term goal. I don't think that would make sense. One of the busiest centers that does quite a lot of international arbitration is the Cairo regional center, and that is not the vision. A vision has to be realistic. That is not a reasonable vision.

Ultimately, it would be foolhardy to expect Americans and Europeans to come and use African centers where the dispute has no connection to Africa. They wouldn't do it, because of lack of confidence. Rightly or wrongly, that's not the point. It's just the reality. The key point is, if the dispute has no connection to Africa, keep it, but if a dispute is connected to Africa, it's important to at least consider Africa’s major arbitration institutions.

#### **IV. The Underrepresentation of Africans as Arbitrators and Counsel in International Arbitrations**

The underrepresentation of Africans as arbitrators and as counsel in international arbitrations has been frequently discussed.<sup>23</sup>

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<sup>23</sup> See, e.g., Hon. Justice Edward Torgbor, *Opening Up International Arbitration in Africa* (Lagos Ct. of Arbitration 2014), reprinted at [http://eprints.soas.ac.uk/20421/1/Addis Arbitration Conference 2015.pdf](http://eprints.soas.ac.uk/20421/1/Addis%20Arbitration%20Conference%202015.pdf) See generally Courtney Dolinar-Hikawa, *Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators*, TDM 4 (2015), available at <http://www.transnational-dispute-management.com/article.asp?key=2249>

With respect to arbitrators, for example, ICSID numbers disclose a significant underrepresentation of African arbitrators and a significant overrepresentation of arbitrators from Western Europe and North America as compared to the nationalities of the parties in the arbitrations.<sup>24</sup> Thus, in all ICSID cases from 1972 through the end of 2015, 16% have involved a party from Sub-Saharan Africa; only 7% of the cases involved a party from West Europe, and 4% from North America. However, only 2% of the arbitrators (or conciliators or ad hoc committee members) were from Sub-Saharan Africa, 48% were from Western Europe and 21% from North America.<sup>25</sup> With regard to whether or not there has been improvement over time in the number of African arbitrators, the 2015 figures are discouraging. 15% of ICSID cases registered in 2015 involved parties from Sub-Saharan Africa—1 from Cabo Verde, 1 from Cameroon, 1 from Guinea, 2 from Kenya, 1 from Senegal, 1 from Tanzania and 1 from Uganda. Only 1% of the arbitrators appointed were from Sub-Saharan Africa.<sup>26</sup>

In 2015, LCIA made 449 appointments of arbitrators, 43.5% of whom were selected by the LCIA court, and 56.5% by the parties, or co-arbitrators. As a reflection of the small pool from which arbitrators were selected, the 449 appointments comprised only 227 different arbitrators. The LCIA statistics for 2015 do not reveal exactly how many African arbitrators were chosen, but it is a safe guess that the number is very small. Among arbitrators, only three nationalities were represented in Africa: Nigeria, South Africa and Tunisia. In 2014, it was the same. In 2013, four African nationalities were represented (Mauritius, Nigeria, South Africa, Uganda), and in 2012, three (Egypt, Nigeria, South Africa).<sup>27</sup> Thus, one can surmise that there is great potential for growth in the number of African arbitrators, both in cases where the parties or co-arbitrators select the arbitrators, and in cases where they are chosen by the LCIA.<sup>28</sup>

#### *A. Reasons for the Underrepresentation*

The African experts interviewed for this article suggest a number of different factors contributing to the low representation of Africans as counsel and as arbitrators in international arbitrations.

One reason, **Dr. Muigua** points out, is low capacity. Kenya does not have enough lawyers with the necessary expertise to handle large international arbitration matters. But there is encouraging process. Dr. Muigua notes that the Chartered Institute of Arbitrators Kenya

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<sup>24</sup> ICSID rules do restrict the appointment of arbitrators who are of the same nationality as either party, such as requiring that the majority of arbitrators to a dispute be of a nationality different than that of the parties, although the requirements can be varied somewhat by agreement of the parties. Nothing in the rules, however, restricts the appointment of arbitrators who are from the same continent as that of either party. Rule 1 of the ICSID Arbitration Rules, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap01.htm>

<sup>25</sup> *The ICSID Caseload Statistics* (Issue 2016-1), WORLD BANK GROUP, available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>.

<sup>26</sup> 50% of the arbitrators were from Western Europe; 37% of the newly-registered cases involved a party from Western Europe. (The percentage was higher than usual because there were 15 new cases involving Spain. Additionally, there were 3 from Italy and 1 from Austria.) 19% of the arbitrators were from North America, although only 4% of the cases involved a party from North America. (There was 1 case to which Canada was a party, and 1 to which Mexico was a party.) ICSID 2015 Annual Report, World Bank Group, available at <https://icsid.worldbank.org/apps/ICSIDb WEB/resources/Pages/ICSID-Caseload-Statistics.aspx>

<sup>27</sup> All figures are from the LCIA Registrar's Reports for 2013, 2014 and 2015, all of which are available at <http://www.lcia.org/LCIA/reports.aspx>.

<sup>28</sup> In 2015, 6.4% of 326 LCIA arbitrations involved a party of African nationality. In 2014, the figure was 5.6%. In 2013, it was 10%, and in 2012, it was 5.5%.

Branch is very active and has conducted extensive training in Kenya; it now has over 700 members. With the inclusion of arbitration and ADR in the Constitution, many universities have begun offering ADR courses, including arbitration courses, when previously it was rare for these subjects to be formally taught. Mr. Muigua believes this instruction “in the long run will bear fruit.” Also, he says, various institutions in the judiciary and government are sending individuals to conferences and training.

Capacity is an issue in Rwanda as well. KIAC’s international panel of arbitrators does not include any Rwandans. **Dr. Masengo** states that KIAC sets its standards very high, and requires that members of its international panel be qualified as fellows of CI Arb. Seventy Rwandans lawyers have been trained and have qualified as members of CI Arb, but none have yet trained at the fellowship level, although that will be changing, because some will be trained at the fellowship level by the end of 2016.

Representation of Africans in general is increasing on Kigali’s international panel. Of the 34 arbitrators listed on the international panel on the Kigali website as of May 2016, ten were from Nigeria and two from Kenya, and no other African nations were represented. But new members have since been added to the panel, so KIAC now has 63 members, with arbitrators from 9 African countries, including Nigeria, Zambia, Botswana, Sudan, Kenya, Egypt, Cameroon, Mauritius and Ghana.

**Mr. Luke** comments that it is very difficult to gain international arbitration experience as a lawyer in Botswana. He states that he has gained experience by participating in extensive training outside Botswana, including mock arbitrations at the ICC, IBA and LCIA, and attending many international seminars and conferences, but is the only lawyer in Botswana with such experience. **Mr. Luke** believes that capacity building is paramount. “The answer lies in attending more international conferences and getting more international training. There is a need to go out and learn, to publish, to speak.”

**Dr. Onyema** emphasizes that there has been positive change:

More people are engaging with arbitration. That is a very good thing. Awareness is massively important. There is a lot of interest in international arbitration among the younger generation. There are many Africans who have international exposure and education, thriving international law practices and partnerships and collaborations with international firms. It is all great for the continent. All of that is building capacity. It is raising awareness, creating interest and helping with professionalism.

Other factors contributing to the underrepresentation of Africans concern the nature of the international arbitration institutions and lack of diversity among those responsible for appointing arbitrators and selecting counsel. **Dr. Muigua** points out that institutions such as the ICC and LCIA are very old institutions. “They were formed when many African countries were still colonies and have not changed their perceptions of Africa. There is a need for a change of policies by the arbitral institutions.”

**Mr. Luke** notes Judge Edward Torgbor’s account of a speaker at a London seminar who “observed that 99% of all African disputes are represented by lawyers from Europe and the

United States, and concluded that ‘the future of arbitration in Africa is in Europe.’”<sup>29</sup> Mr. Luke says that the speaker’s expression is “such a sad statement,” and reflects African lawyers’ lack of exposure in the international arbitration community. In order to increase opportunities for Africans in international arbitration, Mr. Luke says that “Africans need to keep on shouting, keep on making noise.”

In **Mr. Karori**’s opinion, it has been a challenge for Kenyans to gain exposure in the field of international arbitration, mainly because the leading international arbitration centers simply don’t appoint practitioners from Kenya as arbitrators, and Kenyans are rarely selected as counsel in major international arbitration disputes.

**Ms. Abdallah** agrees that it is a difficult problem. She states that there are only a handful of African practitioners who are known outside of the continent. Parties keep using these same four or five individuals, and do not venture outside that known group.

Many of the experts express frustration with the dilemma that Africans face in being denied appointment as arbitrators or counsel in international arbitrations because they lack experience, but being unable to obtain international experience without being appointed. **Dr. Masengo** states that he believes this is unfair. “If an individual has been trained and has handled a great many domestic or regional arbitrations, he should not be excluded merely because he has no international experience. It is not fair for parties to think an individual is not qualified, because he has black skin.”

**Mr. Karori** likewise believes that the need for specific arbitration experience in high-profile international arbitrations is over-emphasized. “Domestic and regional arbitrations also offer excellent experiences. Other than the ever-evolving international law principles, the procedure is not dramatically different and one gains experience by attending the many international arbitration conferences, going through the process of arbitration in complex commercial arbitration cases and conducting hearings.”

**Mrs. Rhodes-Vivour** suggests that international corporations and institutions should sign onto diversity pledges. **Mr. Alier** sees some progress in institutions’ efforts to diversify:

Many arbitration institutions such as the ICC and LCIA are recognizing the importance of diversity. I definitely have seen a greater diversity in tribunals over the last four years. Most of my arbitrations originate from, or relate to, Africa, and I’m increasingly seeing at least one African arbitrator on a panel. Five years ago, or certainly ten years ago, one wouldn’t have seen that.

**Dr. Muigua** notes that there is a need to address very practical considerations, such as physical barriers that prevent Africans from participating in arbitrations outside their own countries. For example, Dr. Muigua points out that a Kenyan would need a visa to come to the United States for an arbitration and there is no guarantee that the visa would be received in time. Likewise, if a Kenyan wanted to visit any African country outside East Africa, a visa would be necessary.

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<sup>29</sup> Hon. Justice Edward Torgbor, *Opening Up International Arbitration in Africa* (Lagos Ct. of Arbitration 2014), reprinted at [http://eprints.soas.ac.uk/20421/1/Addis Arbitration Conference 2015.pdf](http://eprints.soas.ac.uk/20421/1/Addis%20Arbitration%20Conference%202015.pdf)

**Dr. Onyema** makes the significant point that it is expensive to break into the international arbitration community. “There is also a question of means. International arbitration events are expensive to attend. In order to attend conferences, seminars and training, it requires a massive investment. You cannot commit to it if you lack the money.”

*B. Increasing the Number of African Arbitrators and Counsel in International Arbitrations*

The experts offered a number of different solutions for increasing the number of Africans serving as arbitrators and counsel in international arbitrations.

**Dr. Masengo** believes that the number of Africans involved in the international arbitration community can be increased in three ways:

The first is through training to a level that meets international requirements. Second, African counsel need to appear as counsel with others outside of Africa in the international community in order to obtain actual practice. Arbitration is all about practice. Third, African parties need to appoint qualified African arbitrators.

Because parties appoint the arbitrators, this is a factor that African parties can control. An African arbitrator should not be appointed merely because he is African. But neither should Africans be excluded simply because they are Africans. When there are qualified Africans, the parties should consider them.

**Dr. Muigua** states that “the bottom line is build capacity, build capacity:”

There are quite a lot of Africans in international arbitration institutions, although not an adequate number. . . . If we build capacity, we will be able to say there is a good arbitrator in Uganda, get him, there is a good arbitrator in Zimbabwe, get him. It is a gradual process.

**Mrs. Rhodes-Vivour** states:

One of the biggest challenges is getting the international community to give African arbitrators a level playing field. More African arbitrators need to be appointed, and they should not be restricted to appointments for African disputes. Instead, Africans should be treated in the same way as everyone else. . . . There is a need to address diversity concerns and take proactive steps to address the imbalance.

**Mr. Aliko** says that he has seen some progress:

Institutions recognize that they have to be more diverse and are opting to use indigenous African arbitrators, particularly black African arbitrators. It is a self-fulfilling prophecy: as Africans become more experienced in arbitration, as they are known and seen in action, people gain more confidence in them and they're invited to sit more. Whether or not one can accelerate the use of African arbitrators or promote them is an open

question, but certainly African arbitrators and African users are consciously trying to promote other African arbitrators.

### *C. Addressing the Argument that Africans Are Their Own Worst Enemies*

**Dr. Masengo** states that while it is true that in the past, African companies and governments have often appointed non-Africans as counsel and arbitrators in international arbitrations, one must consider the reasons. In choosing counsel, parties look for large, well-known firms with strong reputations who have handled many international arbitrations. Traditionally, these firms have been American or European. These American and European lawyers, in turn, then appoint arbitrators with whom they are familiar, and do not appoint Africans. Also culture and convention play a role. African companies and parties sometimes operate with a preconceived presumption that Africans are not as good as non-Africans in the field of arbitration. He adds:

But I do believe it is beginning to change. We can't keep saying that it will be like it is now. Africans must learn to value what we have and not treat our own people as second class. If we have competent lawyers, why not appoint them? That is the question we should be asking. But it takes time. It will not change in one day. It takes time for people to trust that we have qualified African arbitrators and lawyers. But I do believe it is happening now.

**Mr. Luke** expresses similar views. When asked about the problem that Africans themselves sometimes favor non-Africans when given the chance to select arbitrators or counsel in international arbitrations, Mr. Luke says there are a number of possible reasons why Africans might select non-Africans. Sometimes it is the clients who want non-Africans, and so the African counsel is merely reflecting their choice. Also there is concern about the perception of bias. Africans want to appear impartial, so they may choose non-Africans. Some Africans do perceive their fellow Africans to be less experienced but the reason is that they simply are not aware that there are qualified, competent African arbitrators because the arbitrators do not get enough exposure. African lawyers who are experienced in arbitration, in contrast, do recognize that there are experienced qualified African arbitrators.

**Mrs. Rhodes-Vivour** states:

It's not only outsiders that fail to appoint Africans. Some African institutions or organizations pass over qualified African arbitrators and appoint foreign arbitrators instead. I am not sure why that happens. I think Africans need to have more confidence in African arbitrators. Or maybe they are just accustomed to the pattern of appointing foreign arbitrators when the number of qualified African arbitrators was limited. This is no longer the case. There are many African arbitrators that can hold their own on any panel in any part of the world. There is a need for Africans to endorse our own homegrown arbitrators.

**Ms. Abdallah** notes that in ICSID disputes, the Kenyan government typically has hired international counsel, who has primary responsibility for the case, and local counsel, whose role is to advise on Kenyan law. Input from Kenyan law firms is often heavily restricted. Kenyan law firms are pushing for the government to insist that international law firms use

local firms more meaningfully, not just for advice on discrete matters of Kenyan law but to be involved in the arbitration process. This would enable Kenyan lawyers to develop the requisite expertise, so eventually the government has no need to go overseas to hire counsel. Many parts of the arbitration process, she states, can be competently handled by local firms. She notes that the government's concern with expenses is a driving factor favoring local firms.

Ms. Abdallah states:

Many Kenyan lawyers are lobbying the Attorney General and government here because we don't see the advantages of going overseas. Many of us have trained overseas or studied overseas. We are back here doing the same quality work at a fraction of the cost so we have a big argument with our government when they go overseas for legal services. But this will not be won by us haranguing the government. We are just going to have to demonstrate over a period of time good-quality work for non-Kenyan clients. Then maybe the Kenyan government will be convinced. It is very difficult but we will have to just keep at it.

**Mr. Alier** believes that the role of African lawyers in international arbitration cases is evolving. He points out that it used to be the case that when presented with an international dispute, Africans would always select an international firm. Now, he says, it is much more common to see an arrangement where local lawyers share responsibilities with international lawyers to handle an international dispute, and that this is still the primary approach being used by African governments. But, increasingly, he says, "people are realizing that the international firm ends up with the lion's share of the money, with the local firm merely playing a subservient role in supporting the big law firm." Consequently, he says there are a growing number of instances where the primary responsibility for the matter is being given to local lawyers, with outside consultants with expertise in international arbitration being brought in to assist as necessary:

I have now been involved with a number of arbitrations where the African client has used local lawyers, with the assistance of outside consultants. . . . Still this type of arrangement is not being utilized enough, perhaps because governments don't quite understand how they can use smaller firms as a resource. . . . There's still an apprehension on the part of governments to trust local lawyers.

But I think as local African practitioners become more competent, and as more African lawyers who have been trained in America or Europe return to the continent and build relationships, this approach of giving local lawyers primary responsibility will become more common.

I think the motivation for relying more on local lawyers is primarily cost, but there is also the question of control, because the African governments can control their local lawyers, but that is much more difficult if they choose an international firm.

**Dr. Onyema** emphasizes the need for conversation on the issue:

We need a conversation. We need to understand the reasons why. We also need to clarify that if Africans don't appoint Africans, don't expect other people to appoint Africans. We're not saying to appoint Africans who do not have the necessary skills. But there is no shortage of qualified Africans. If no Nigerian is available, maybe there is someone in Ghana to appoint, for example. But there is a need for more sharing of information about African arbitrators. This information is beginning to appear on some websites, and these are welcome initiatives.

## **V. Increasing The Number of Arbitrations in Africa**

### *A. Pushing Ahead On Many Fronts*

**Mr. Luke** believes that recent international conferences such as the 2016 ICCA Congress in Mauritius and the first ICC Africa Regional Arbitration Conference that was held in Lagos in June 2016 have served as excellent vehicles for “opening the eyes of Westerners to the great potential that Africa offers in terms of having highly-qualified arbitrators and world class arbitration facilities,” but still Mr. Luke states:

The greatest challenge is the continued need to enlighten the West as to all that Africa has to offer in the arena of international arbitration, and to convince non-Africans that Africa should be given opportunities to host international arbitrations. All international arbitration should not be going to London, Paris or New York, but should also come to Africa. This is particularly true when African governments or parties are involved. We have the facilities. We have the abilities. We have the expertise.

To encourage companies to arbitrate in Africa, **Dr. Muigua** offers the following suggestions:

First, it is necessary to build awareness. For example, Kenya has very reliable internet service, skype, excellent conference facilities and all the necessary infrastructure for modern arbitration, but this is not a factor that is widely known. Second, we need to assure people that the perceptions they have of Africa are incorrect. For example, people perceive Africa as a place of corruption but is it really corrupt? We need to aggressively market Africa. We need to tell people to come and try.

**Ms. Abdallah** points out, however, the difficulties that Kenya, as well as other countries, face in trying to promote international arbitration in Africa. For example, she states that she heard the Mauritius government spent two million U.S. dollars to host the recent ICCA conference. She says:

Kenya does not have two million U.S. dollars to spend to host a conference. For Kenya the challenge is not expertise or competence but money. Kenya has far more pressing needs. It is hard to win an argument to spend money on an arbitration center as compared, to say, on public health. The government has a very limited budget to allocate



to these kinds of projects, and it will be difficult for Kenya to get NCIA up and running when other centers are already established and well-funded. It is a tough environment but Kenyans need to start somewhere.

When asked how to overcome the resistance of international companies to arbitrate in Africa, **Dr. Masengo**, from his vantage point as Executive Director of KIAC, focused on the issue with respect to developing KIAC. Dr. Masengo acknowledges that foreign resistance does exist, but he makes a few points:

Progress takes time. Change will not occur overnight. Others who use the center will recommend it, and to this extent, they serve as a marketing tool. KIAC is using arbitrators who also arbitrate at institutions such as the ICC or LCIA, and they will recommend KIAC and help to increase its recognition.

Another issue is costs. The issue of costs is a real issue. For example, for a South Sudan company that has a dispute with the Kenyan government, it makes no sense to go to London or the ICC. Kigali is particularly suited to serve these regional conflicts. For parties in general, arbitration in Rwanda is less expensive than in Europe. It is certainly less expensive than in Paris.

Furthermore, arbitration at the ICC or LCIA in London takes longer. It will take more than one year to arbitrate a case there, whereas in Kigali, it takes three months, or six months at the maximum. When you compare KIAC to ICC, it does not have the same expertise or experience. But the caseloads of the institutions are different. The ICC handles the biggest, most-important cases where the stakes are very high.

**Ms. Abdallah** emphasizes the need to educate clients regarding arbitration in Africa:

With Kenya I have a lot that I can say that is positive. It does not necessarily mean that my clients will accept what I say of course. The decision is still theirs. If they are non-Kenyan they will always prefer to arbitrate outside of Kenya. So it is a process of education. I advise them of the pros and cons. They make up their own minds. It takes time. It takes education.

Finally, in analyzing how to increase the number of arbitrations on the continent, **Dr. Masengo** makes the very valid point that the market is not limited to Americans and Europeans. He notes, for example, that the Chinese market is growing, and that, for the Chinese, Rwanda can be a more convenient location than Europe. In addition to China, Dr. Masengo says that KIAC has also been reaching out to Hong Kong and India, because all three are strong potential markets for KIAC.

## *B. Foreign Investment Contracts: Negotiating Dispute Resolution Clauses*

**Dr. Muigua** points out that one of the reasons so few arbitrations are held in

Africa is that “the standard arbitration clause in investment contracts comes with the project, and provides for an arbitral seat outside Africa.” He says that African lawyers need to exercise their power and negotiate the clauses. “They need to understand how powerful the arbitration clause is.”

The arbitration clause takes on special significance, from the perspectives of many of the experts, because they see foreign investment as the greatest factor driving the growth of arbitration in Africa. For example, **Ms. Abdallah** states:

The biggest factor helping to foster the growth of arbitration in Africa is that there is so much direct foreign investment coming into, not necessarily all regions of Africa, but, at least, East Africa. Many of the investments are large-scale infrastructure projects that involve governments who have a better bargaining position when it comes to negotiating contract terms including dispute resolution provisions. Governments are becoming better educated with respect to negotiating dispute resolution provisions in order to protect themselves, and not just accepting the standard dispute resolution provision with a foreign seat. That is a big factor that will increase the number of arbitrations in Africa.

Likewise, **Mr. Luke** states:

According to the World Bank, six of ten of the fastest growing economies in the world are in Africa. There is an enormous amount that needs to be done in order to build Africa’s infrastructure and it will cost trillions of dollars. It will necessitate huge projects in Africa. Because many foreign investors do not trust African courts, a great many of these huge investment projects will include arbitration clauses, and this, in turn, will lead to an increase in arbitration in Africa.

**Mr. Alier** adds:

Africa is now quite wealthy in the sense that investors have recognized the opportunities to be gained in Africa, and therefore there's something that investors want. There is also competition among potential investors—European, Chinese and American investors—that gives African countries more leverage in insisting on an African seat of arbitration.

**Mr. Karori** believes that more emphasis should be put into efforts to negotiate arbitration clauses so as to require arbitration seats in African locales, or to require the use of African counsel or African arbitrators. He states: “At this early stage that approach might face resistance by non-African parties. In cases where the resisting party is in a stronger bargaining position, the option might be to negotiate a clause that appoints the NCIA or another international arbitration center in Africa to be the governing institution. In both

scenarios there will be a very high probability that African counsel and arbitrators will be involved in the process.” In contrast, for example, Mr. Karori notes that “in ICC cases, there has not been a single arbitration seated in Kenya or a Kenyan appointed as arbitrator in all the years Kenyans have been included in the list of practitioners at the ICC.”

**Ms. Abdallah** states that in order to get parties to actively arbitrate in Africa, there is a need for African governments to build arbitration clauses into contracts providing for an African locale as the seat of arbitration:

For example, the Kenyan government could mandate that investment contracts include a clause providing for Nairobi as the seat of arbitration, and the administration of the arbitration by the NCIA. This is one way of promoting more arbitration in Africa. But it will take time, because, first, such clauses need to be included in contracts, then there will be a period of time until disputes under such contracts arise.

Anecdotally, it appears that from a governmental level, African parties are beginning to put these types of clauses in contracts. As more and more African countries get hit with ICSID disputes or large fees in international arbitrations in London, for example, governments are seeing this as way to contain costs.

Governments have the power to do so because it is not easy to bully governments. It is more difficult with private parties because it depends on the actual bargaining position of each side.

Ms. Abdallah states that she helped conduct arbitration training for the Attorney General’s chambers recently, and spoke to them about ICSID and bilateral treaties:

They are very concerned about the expenses of the arbitration process. The main drive for them will be budgetary constraints. They will think of ways to control costs. One way is to bring arbitrations back to Kenya. The Kenyan government is involved in two ICSID disputes and a number of other international arbitrations so this is a very live issue for it.

**Mr. Karori** opines that African governments, in particular, will have the power to become more demanding in the drafting of BITS, as foreign investment in Africa continues to grow, and “more people knowledgeable in international arbitration join public service and occupy key decision-making positions.” He states: “Traditionally, the interests of Africans have not been represented in BITS. More investment means more negotiating power.” “Unless international arbitration institutions change and embrace African arbitration practitioners and treat them as peers,” Mr. Karori opines, African governments will resist the use of institutions such as ICSID and the ICC, and “will start demanding that arbitrations be held in international centers located in Africa.” Mr. Karori adds: “In my view, the ICC and ICSID have not treated Africans as equal partners.”

**Mrs. Rhodes-Vivour** states that the Nigerian government encourages the use of arbitration clauses with Nigeria as a seat, and that, at one time, Nigerian government departments were

mandated to include dispute resolution clauses in contracts calling for arbitration in Nigeria. Mrs. Rhodes-Vivour expresses mixed feelings about such clauses:

Perhaps there is a need to take proactive action by including clauses requiring arbitration at an African institution. This could raise more awareness of the institutions that are available in Africa. But in the long run I think what we should be aiming for is voluntary use of Africa as a seat. We need to build up confidence by qualitative service so that parties willingly and happily agree to arbitrate in Africa.

**Dr. Onyema** agrees that governments play a crucial role in influencing international companies to arbitrate in Africa:

The push has to be on governments and government agencies when they are negotiating contracts. You can still respect neutrality of venue, but you can choose an African institution in another African country. Nothing stops the Nigerian government from choosing Kigali or choosing Mauritius or Cairo. Absolutely nothing. But that is why there needs to be a conversation. Governments need to hear the justifications for why this should be done.

In Dr. Onyema's view, governments have the power to negotiate such clauses:

Why not? They're governments. If the investor refuses to accept a contract clause with an arbitral seat in Africa, then the investor goes. It's as simple as that. Governments have been convinced for some bizarre reason that they desperately need investors more than investors need them. That is not true. That is a lie that governments have been sold. They need to understand that it does not add up.

When asked about the possibility that foreign banks might refuse to provide financing for a large infrastructure project, with a contract providing for an arbitral seat in Africa, Dr. Onyema responded that in such a case:

There are also banks on the continent, such as the Africa Development Bank, for example. We need to talk openly about this. Let the banks explain why they will not finance a deal simply because the government is demanding an African arbitration institution. Let's be transparent.

**Mr. Aliko** states:

African governments, particularly if they're borrowing large sums of money, may have the leverage to insist on an arbitration being held in an African seat, but it all depends on the circumstances. If a financial institution is providing the financing, it may be unwilling to agree to an arbitral seat in Africa. Banks have shareholders and they want to minimize risk, including the risk of having courts that do not function properly, or the risk of corruption. . . .

If the government is investing huge sums in a project and, for example, is paying a party to build a power plant, it may have the leverage to insist on an African seat, although it would probably be easier to persuade the party to go to a different African country, as opposed to the government's own country. It all depends on who has the bargaining power to insist on one's preference for an arbitral seat.

Mr. Alier mentions also that he is aware of contracts financed by the European Development Fund that include dispute resolution clauses requiring arbitration in an African seat. "I believe the EU has taken a policy position requiring an arbitral seat in the country that is the recipient of funds in order to build the institutions of the recipient country."

**Dr. Masengo** says he would not advise a client to negotiate a dispute resolution clause in a contract that requires the use of African arbitrators or African counsel. "It is important to find the individuals who have the greatest competence with the particular dispute at hand. That individual may or may not be an African. But when it comes time to appoint counsel or arbitrators, and an African has the requisite expertise, then why not appoint him?"

**Mrs. Rhodes-Vivour** agrees: "I think it would take things too far to include in the dispute resolution clause a provision requiring the appointment of African arbitrators or counsel. Parties should be entitled to appoint counsel and arbitrators of their choice. Party autonomy should remain the bedrock of arbitration."

## Conclusion

Many changes across Africa in the field of international arbitration have taken place in a very brief period of time. Eight years ago, neither Kenya nor Rwanda had a UNCITRAL model law. KICAC has only been up and running for four years. LCIA-MIAC in Mauritius did not come into being until 2011, and the Lagos Court of Arbitration was not launched until 2012. As **Mr. Alier** notes, if foreign investment in Africa continues to grow, it will drive further progress, because "African countries recognize that they need the rule of law and strong institutions, or they won't attract the investments."

But as many of the experts point out, all the efforts directed toward developing capacity, increasing the number of African arbitrators and counsel in international arbitrations, building the regional centers, and increasing the number of international arbitrations seated in Africa require time. And as **Dr. Muigua** adds, it will also "take time to change the attitudes of institutions across the world."

Importantly, **Dr. Onyema** emphasizes that Africans are beginning to talk and to be heard:

[There is] this whole conversation that we've got going, among those of us that function in the international arbitration field across the continent. It's the idea of getting to know and connecting with other people across the continent.

The conversation is very new. At the African Union conference last year, we had attendees saying that they did not even know that this or that particular arbitration institution existed. Part of the feedback we got from the conference was that the attendees appreciated that everyone

had come together to sit in one room—Africans talking about arbitration in Africa. Nobody was lecturing them; they were simply engaging with each other. They can see the vested interest we all have in promoting arbitration in the continent, not arbitration in Ghana or arbitration in Nigeria, but arbitration across the continent.

As the international arbitration community turns its attention toward addressing the role of Africa and Africans in international arbitration, it is hoped that all members of the community can benefit by listening to the voices of Africans on the issues, and that Africans and non-Africans together can find the best path forward.