IMPROVING HOMEGROWN INTERNATIONAL ARBITRATION IN AFRICA

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1. Introduction

The African economy is one that is constantly developing in spite of economic challenges like declines in global commodity prices. As one of the most profitable regions in the world, the continent continues to be a very conducive hub for investments. According to the United Nations' Conference on Trade and Development's ("UNCTAD") World Investment Report 2019,[1] Foreign Direct Investment flows into the continent had risen to US$46 billion in 2018, making the region one of the few to escape the global decline in FDI. Various industries, both related and unrelated to the continent's natural resources remain on the rise, and the booming African market keeps attracting investors from various sectors and jurisdictions.

It is, however, important to note that there will always be disagreements in business. An increase in business and investment within the continent is proportional to an increase in disputes. Ordinarily, the first step would be to turn to the Courts. However, litigation in Africa can be quite convoluted due to the abundance of varying legal systems, litigation costs, duration of litigation and many other factors. This has made international arbitration the healthy alternative resorted to by parties who wish to avoid the complications that could be brought about by litigation in Africa. However, for a region that is one of the world's biggest and most buoyant investment hubs, homegrown international arbitration is not quite as developed as it should be. Most arbitration cases are "exported" outside the continent to be heard in foreign countries. This article aims to take a look at some of the problems faced by homegrown international arbitration in Africa and suggest various means by which it can be improved.

2. Current State of Homegrown International Arbitration in Africa

International arbitration is not unknown in Africa as most African states already have some form of framework for arbitration in place, and arbitration is employed by quite a number of African parties.[2] However, while the number of African arbitrators continues to increase and

[1] United nations, 'Foreign direct investment to Africa defies global slump, rises 11%' (*United Nations Conference on Trade and Development's website*, 12 June 2019) <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2109> accessed 26 June 2020; United nations, 'UNCTAD World Investment Report 2019' (*United Nations Conference on Trade and Development's website*, 12 June 2019) <https://unctad.org/en/PublicationsLibrary/wir2019en.pdf> accessed 26 June 2020.

[2] There are currently some locally and internationally known arbitration institutes across the continent such as the Lagos Court of Arbitration (LCA) in Nigeria, the Cairo International Centre for International Commercial Arbitration (CRCICA) in Egypt, the Kigali International Arbitration Centre (KIAC) in Rwanda, the Nairobi Centre for International Arbitration (NCIA) and many others. Also, rules and laws such as the KIAC Arbitration rules 2012, the NCIA Act 2013, the Arbitration and Conciliation Act, 2004, Lagos State Arbitration Law 2009 and many others have been enacted to govern the conduction of arbitration proceedings in various African countries.

more arbitration matters involving African parties continue to be heard, the number of arbitration proceedings carried out in Africa is dismally low with the ICC Dispute Resolution Statistics putting it at about 0.001% in 2016.[3] The 2018 ICC Dispute Resolution Statistics show that only eight countries served as seats of arbitration in 2018 and out of the eight, six were chosen by the parties while two were appointed by the Courts.[4] The report further shows that out of about 706 cases seated in various places around the world, only 13 cases had African countries as their seats of arbitration, and the number of parties to arbitration matters with African nationalities was 182.[5] This indicates that though the parties to an arbitral matter may be African, the matter is still arbitrated at a foreign seat on most occasions, leading to a dearth of cases with African countries as the seat of arbitration, and a lag in further development of the understanding of the laws surrounding arbitration in the continent.

Currently, more than 15 African states are not parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards commonly known as the New York Convention. The refusal of some African states to implement these laws leads to a stagnation in the development of arbitration in these countries. Even among the states that are parties to the New York Convention, there are some that have imposed various limitations on the enforcement provisions and some of these limitations might be considered negative by investors. For example, the Democratic Republic of Congo issued about four reservations before its ratification of the New York Convention. These limitations imposed by some of the African states that have signed the Convention play a very key part in motivating parties to pick a seat of arbitration overseas in order to avoid what they perceive to be needless complications.

Also, despite the numerous advantages arbitration has over litigation, litigation is still the very first port of call for the resolution of most commercial disputes in Africa. In addition to this, there is a strong underrepresentation of African Arbitration Practitioners both at home, as well as in international arbitration. Although African arbitrators undergo extensive trainings and are well qualified and competent, fellow Africans seldom appoint them as arbitrators. There is typically a bias by the parties in favour of foreign counsel and arbitrators. This has in no small measure contributed to a poor perception of African Arbitration Practitioners as lacking in skill and expertise, and it gives the impression that generally, arbitration is quite underdeveloped in Africa. This impression in turn fuels the exporting of arbitration cases to jurisdictions that are considered to be more developed in the field of arbitration, leaving the African arbitration scene to suffer.

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[3] Herbert Smith Freehills, '2016 ICC Dispute Resolution Statistics: Record Year for the ICC' (*Herbert Smith Freehills' website*, 15 September 2017) <https://hsfnotes.com/arbitration/2017/09/15/2016-icc-dispute-resolution-statistics-record-year-for-the-icc/> accessed 26 June 2020

[4] International Chamber of Commerce, 'ICC Dispute Resolution 2018 Statistics' (*New York International Arbitration Centre's Website*, October 2019) <https://nyiac.org/nyiac-core/wp-content/uploads/2019/08/icc_disputeresolution2018statistics.pdf> accessed 26 June 2020

[5] Ibid.

3. Suggestions for the Improvement of Homegrown International Arbitration in Africa

International arbitration in Africa is by no means undeveloped, but a lot still needs to be done in terms of developing homegrown international arbitration in Africa. Steps to do this have been taken by various governments, with multiple homegrown African arbitration centres like the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Kigali International Arbitration Centre (KIAC), the Lagos Court of Arbitration (LCA), the Nairobi Centre for International Arbitration (NCIA) etc. having been established in many countries across the continent. The 2018 report on Arbitral Institutions in Africa created by the SOAS University of London and expanded by the International Congress and Convention Association (ICCA) puts the number of arbitral institutions at 74.[6] This is quite impressive seeing as the continent has only 54 countries. However, beyond the establishment of arbitration centres and institutions, there are additional measures that can be taken to further aid the development of homegrown arbitration in Africa. Some of them are:

a) Legal Reforms

Legal reforms are very important in fostering the development of homegrown international arbitration in Africa and making Africa a key destination for the resolution of arbitral matters. African states need to reform existing laws where necessary, as well as pass new laws and implement policies that will provide for a conducive conduction of international arbitration proceedings as well as enforcement of arbitral awards so as to minimise the tendency of the parties to export their cases to other continents. These policies will make it easier to conduct arbitration proceedings and enforce awards and will dissuade the common assumption among investors that there is no institutional framework to support arbitration in Africa, making them lean more towards having their arbitration proceedings here rather than exporting them to foreign jurisdictions.

b) Provision of Adequate Infrastructure

Adequate infrastructure plays a very important role in fostering the development of homegrown arbitration in Africa. Arbitration centres have to be fully equipped, secure and easily accessible for parties to be comfortable with bringing their matters there. Parties do not desire to have an arbitral proceeding in an underequipped centre, or spend hours navigating terrible roads to get to the arbitration centre. The governments have key roles to play in providing adequate infrastructure to aid the development of homegrown arbitration as African arbitration cases are exported due to a perceived lack of adequate infrastructure to handle these proceedings. Convenience and general infrastructure are key considerations in picking a seat of arbitration. Therefore, for homegrown arbitration to develop, conducive and secure arbitral centres, good road networks, adequate and effective internet coverage among other things are fundamentals that must be present.

[6] SOAS, ICCA, 'Arbitral Institutions in Africa (Created by SOAS, expanded by ICCA, 2018)' (*Africa Arbitration Association's website*, 2018) <https://hsfnotes.com/arbitration/2017/09/15/2016-icc-dispute-resolution-statistics-record-year-for-the-icc/> accessed 26 June 2020

c) Intracontinental and Intercontinental Cooperation and Collaborations between Arbitration Centres

As has been mentioned earlier, there are currently over 70 arbitral institutions in Africa. Collaborations between these institutions would be very beneficial to the development of homegrown international arbitration in Africa. Cooperation between the African centres will present a united front and will pave the way for collaborations between already established foreign arbitration centres and African centres. This will have a positive effect on credibility and exposure, and it will encourage the use of African centres. This is important because although some of the African arbitration centres are considerably known and have gained a reasonable level of credibility, quite a number of them cannot boast of this level of exposure and credibility enjoyed by the better-known centres. Collaborations will help to bring the relatively unknown centres into the limelight as well as boost their reputations.

d) Adoption of the New York Convention by Yet to Adopt African States

The ability to enforce an arbitral award is always a major concern for investors when deciding on a seat of arbitration. Currently, the main instrument governing the enforcement of arbitral awards in international trade is the New York Convention. Non ratification of the New York Convention by some African states has a negative impact on the development of homegrown international arbitration in Africa as the non-ratification of the Convention signifies to the parties that the recognition and enforcement of arbitral awards would not be guaranteed in those states. This factor contributes hugely to the exportation of arbitral matters as well as investments in African states. To develop Africa's place as a viable seat of arbitration, the international instruments governing international arbitration have to be adopted and implemented.

e) International Arbitration Trainings

Countries with more developed arbitration systems should work together with the up and coming African arbitration systems to train and educate arbitrators. Although the continent currently has quite a number of trained arbitrators with most of them coming from the West African country of Nigeria,[7] there is a need to train even more arbitrators to serve the continent's large population. The organisation of trainings, conferences, workshops etc. by countries with more advanced arbitration systems will expose African arbitrators to more knowledge about arbitration, and this will in turn lead to a further development of homegrown arbitration in Africa.

f) Perception of Corruption

The African governments have a very key part to play in dispelling the general assumption of the presence of bias and corruption in arbitral proceedings conducted in Africa. Quite a number of parties both local and international, operate under the belief that they will not get a fair trial if their arbitration proceedings are conducted in Africa. While most of these

[7] Emilia Onyema, 'SOAS Arbitration in Africa Survey' (*SOAS University of London's website*, 2018) <https://eprints.soas.ac.uk/25741/1/SOAS%20Arbitration%20in%20Africa%20Survey%20Report%202018.pdf> accessed 27 June 2020

assumptions are not based on any concrete evidence or precedent of corruption during an arbitral proceeding, they are still held onto by parties who, after an examination of the political clime often come to the conclusion that impartiality in an arbitration conducted in Africa is impossible. Therefore, the government and indeed all stakeholders need to work to correct this perception of corruption if Africa is to increase the number of arbitration proceedings held in its countries.

International arbitration continues to grow and gain popularity in Africa, but in order for homegrown international arbitrations in the continent to develop and for Africa to become a world class seat of arbitration, deliberate efforts must be put in by all stakeholders. A continent with world class arbitration facilities as well as the proper legislation will definitely see a rise in the conduction of arbitration proceedings in it both by indigenous and foreign parties.