



**GLOBALISING YOUR PRACTICE -
OPPORTUNITIES AND CHALLENGES**

Arbitration of International Commercial Disputes

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Introduction

(1) In this presentation we will be discussing (1) whether it is appropriate to impose restrictions on the choice of counsel(legal representation) in international arbitration and the implication of doing so for positioning as a “ Safe Arbitration Seat” .

(2) Using available statistical data in Central America(re: Costa Rica) regarding international arbitration and discuss what Lawyers and policy makers have done or should be doing to get **the “CAKE SHARED PROPERLY”** as a way to face Globalization.



International Arbitration & Legal Representation(Cont...)

- Article 8 of the CCA (Costa Rica) states *“The parties must be represented or advised by lawyers of their choice. In case the party wishes its lawyer to represent them, the party must grant sufficient power, which must meet the requirements required by law.”*

The law on international arbitration in Costa Rica is silent on the matter regarding the nationality of legal counsel, however art 2(a) of said law states that regard is to be had to the international origin of this law, so it is arguable that foreign attorneys may represent clients in international commercial cases seated in Costa Rica. (Source: <http://djarbitraje.com/pdf/908CostaRicaIBAArbitrationGuide.pdf>)

- Article 21 Paragraph 3 of the Brazilian Arbitration Act states that *“The parties may be represented by legal counsel, and the right to appoint someone to represent them in the arbitration proceeding will always be respected.”*



International Arbitration & Legal Representation(Cont...)

- ❑ Despite what have been said: laws in a few jurisdictions require that counsel in locally-seated to be locally-qualified to represent in arbitration
- ✓ That is true in Turkey, **Thailand** and was formerly true in Japan and a few other jurisdictions(Gary Born , 2014).
- ✓ **difficulties also in India.** There, the law appears to allow foreign lawyers to appear in arbitration but this is have been challenged to the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position of the SC of March 18, 2018 appear to be that foreign lawyers not allowed to appear in arbitration.
(<http://www.advocatekhoj.com/library/judgments/announcement.php?WID=9848>)
- ✓ **In Nigeria(Africa):** Nigeria Legal Practitioners Act define a legal Practitioner as only lawyer registered to practice law in Nigeria(**Is that a good way to share the CAKE?**)



International Arbitration & Legal Representation(Precision)

- **Philippine(Asia):** Article 13 of the Philippine Dispute Resolution Center *rules of 2015* : “*the parties may be represented by persons of their choice, irrespective of, in particular, **nationality or professional qualification**” .*
- **Mauritius(Africa):** In the Mauritius Arbitration Act (section 31) " Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, **who need not to be qualified to practice law in Mauritius or in any other jurisdiction.**“
- **Tested Best Practice without Precision:** case of Rwanda with 32 KIAC International arbitration case out 105 total cases(Parties have been represented by foreign counsels but preferred to work with local counsels since **the Seat of arbitration and applicable law to the contract were mainly Rwanda in the 105 cases: Rwandan Law**)
- ✓ **Allowing anybody is important for defining a “safe arbitration seat”**
- ✓ **Focus much on your Seat in contract (Applicable law) for ended share the “CAKE”**
- ✓ **Example of two central American’s parties applying law of one of the country of North America(USA) or Europ(UK)? **Is this lead to share the cake? The answer in No.****



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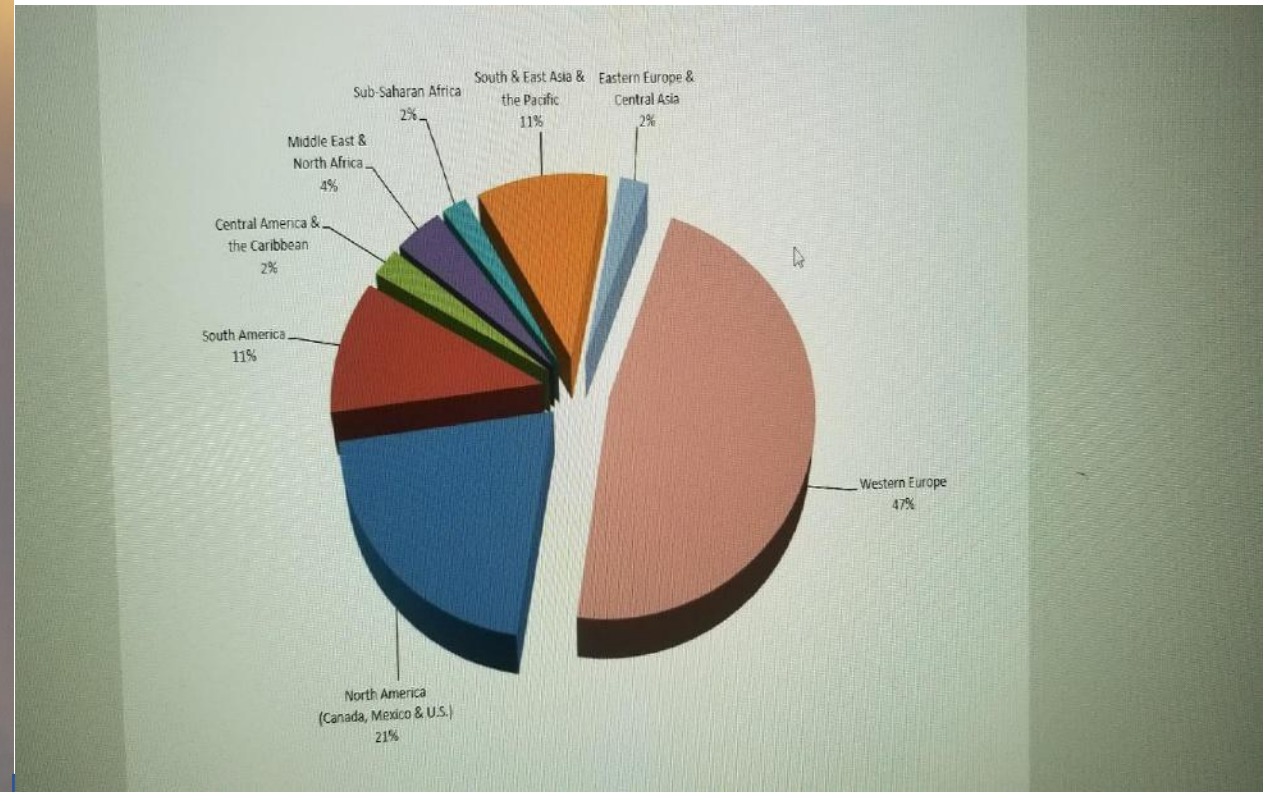
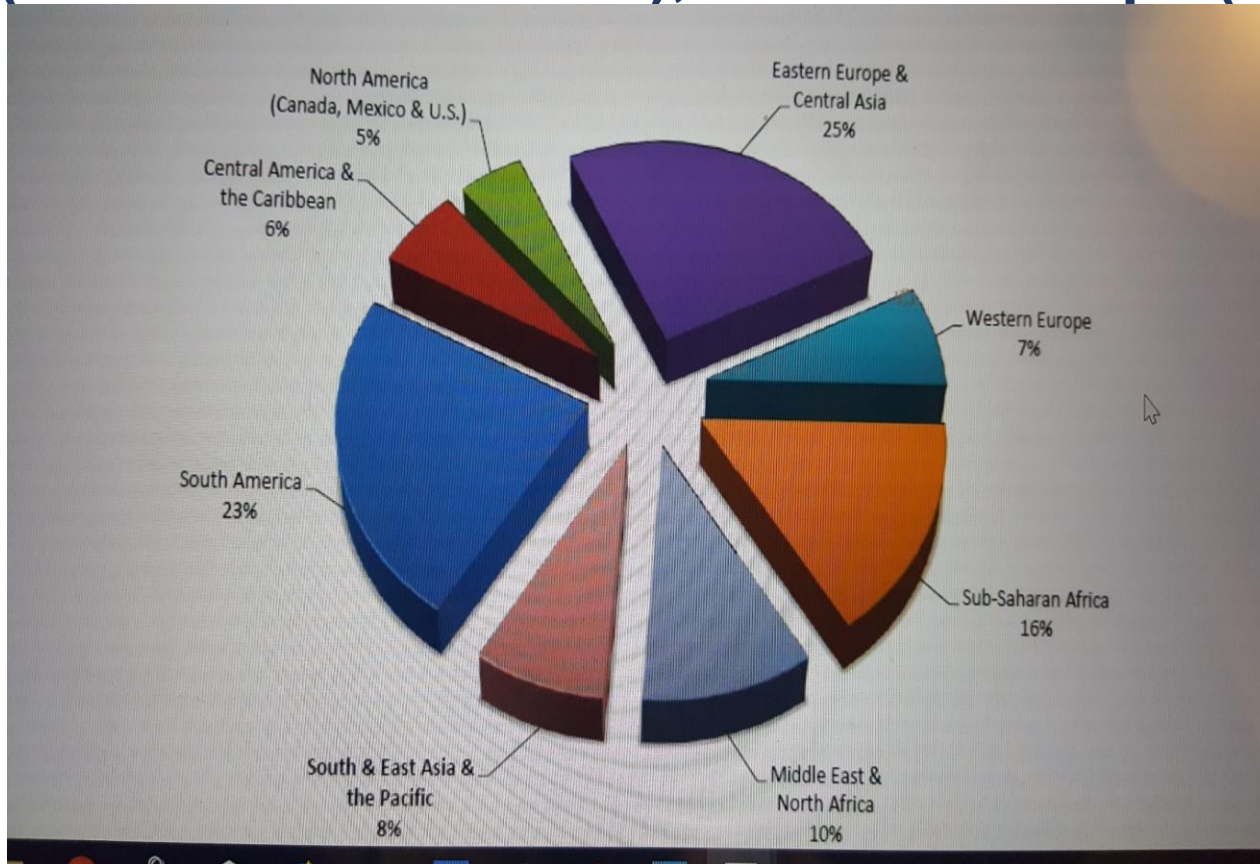
Second Objective of the Presentation

(2) Using available statistical data in Central America and beyond regarding under representation in international arbitration and discuss what Lawyers and policy makers have done or should be doing to get **the “CAKE SHARED PROPERLY”** as a way to face **Globalization.**



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ICSID Statistics 2010-2018 revealed that Central America & Caribbean registered (6% of the total cases), Western Europe (7%) and North America(5%)



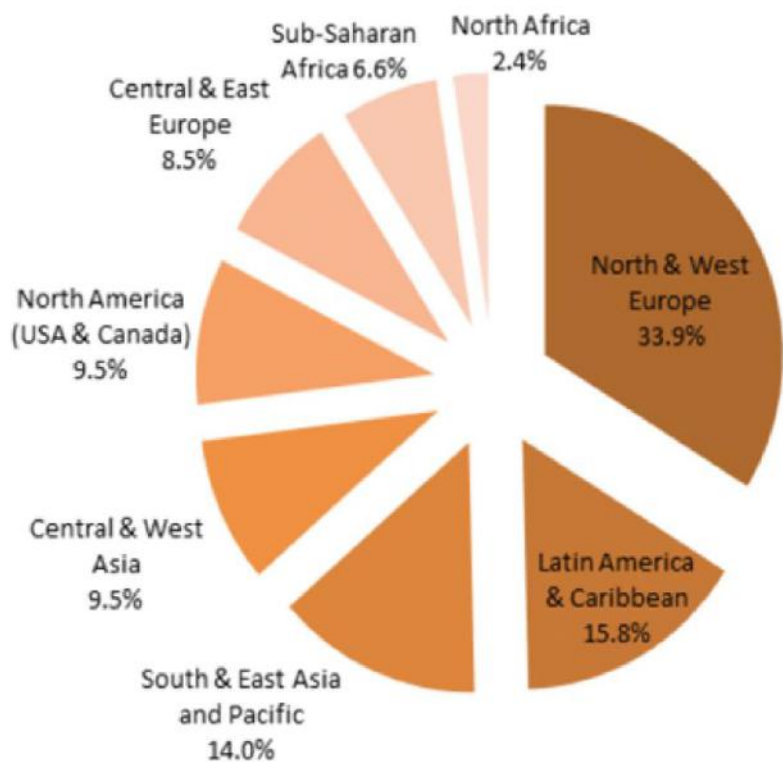
Arbitrators and Conciliators appointed: Central America & Caribbean(2%) , Western Europe(45%) and North America(21%) ,



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In 2017, on the 810 registered cases by the ICC, **15.8%** involved Latino America & Caribbean while North & West Europe (**33.9%**).

The Nationality of arbitrators appointed from Latino America (**165**) while North & West Europe (**798**)



Region	Year	Men	Men %	Women	Women %
North America	2016	193	86%	32	14%
	2017	114	82%	25	18%
Latin America & Caribbean	2016	145	88%	19	12%
	2017	165	82%	36	18%
Central & West Asia	2016	46	84%	9	16%
	2017	43	68%	20	32%
South & East Asia and Pacific	2016	109	89%	14	11%
	2017	123	87%	18	13%
North & West Europe	2016	617	86%	103	14%
	2017	679	85%	119	15%
Central & East Europe	2016	64	70%	27	30%
	2017	61	69%	27	31%



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Choice of Law in ICC arbitration 2017

In 87% of the disputes referred to ICC Arbitration in 2017, parties included a choice-of-law clause in their contracts. The laws of **England** and **USA** States remained the most frequent choices, followed by **French and Swiss law**.

Consideration: The choice of law (Lex Arbitri) determine the appointment and the counsel to involve(Dispute resolution clause)



MEETING THE CHALLENGES

Some barriers to Arbitrate in developing countries cited in literature (Action Need)

- ❑ Interference of Courts
- ❑ Corruption
- Limited trained professionals(issue of capacity building)
- Poor legal/regulatory frameworks
- Lack of data on Enforcement in many developing countries?
- What else? Political instability, **visa(case of Rwanda opening entry to the entire world)?**
Airline?

There is always excuses of not arbitrating in developing countries.

We need to admit some of the weaknesses and work hard to improve but players need to fight the negative perceptions.



Dealing with the influence of negative perception

- WB Doing Business report which ranked 186 economies of the world
- Global Competitive Index,
- Global States of Mind Surveys
- Business baseline profitability index

Some of the developing countries(in Central America &Caribbean for example) have better ranking than developed countries in the above index & Survey



Recent Experience of Rwanda(as Safe seat)

- Kigali International Arbitration Centre(KIAC) registered 105 cases in 5 years(32 Int'l cases)
- 3-6 months (enforcement of award vary between 3 to 6 months)
- None of the 48 KIAC is yet be set aside by the Rwandan court
- Chief Justice rules of 2012 giving priority of arbitration case over other matter. It doesn't follow the normal role/Registry
- The New civil code procedure of April 2018 and the provision on court intervention
- **Art: 21: Grounds for refusal of registration of a claim by the court Registrar**
- Files a claim without demonstrating that he/she has used amicable settlement or arbitration provided in the contract;



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What lawyers and their jurisdictions can do to appear on the map of Int'l arbitration(share the cake).

- Driving/Positioning your respective countries as an Arbitration safe Seat(**legal representation, 1958 New York Convention, Model law, Supportive Courts, Clear Enforcement Regime, visa policy, safety etc..**).
- Testing Arbitral Institutions in Central America & Caribbean (some of them have been tested)
- Start with Contract Negotiation & drafting (Seat-Applicable Law, Avoid Pathological Clauses). For purpose of sharing the cake when Dispute arises.**
- Learn more than one International languages (for young people)

Ended: Be aware that: Arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as **tourism, Hotels facilities, zero tolerance to corruption, Entry facilities(visa), safety, internet facility, transport etc....**

Example: **PRADA Report in France (2011).**

Contribution of arbitration to the economic growth

Eg2: 2012 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda) with model arbitration clause compulsory to Government contract.



Conclusion

- The Economic expansion at the Central America where according to OECD, the GDP is growing at 3.2% need to think and rethink the Arbitration dispute resolution mechanisms especially for **future equitable share of the Cake in this globalized world.**
- Finally, the lesson from some developing countries including Central American which tested their arbitrators and arbitral centers is encouraging. Additionally, what we also learned is that change is possible, it is happening, and the mission of the legal practitioners gathered here is **to IDENTIFY WHAT IS THE PROBLEM AND CONTRIBUTE TO THE SOLUTION FOR THE CHANGE TO HAPPEN MORE QUICKLY THAN IN THE PAST.**



Conclusion (Cont...)

The Analogy of Central America captain during Turbulences



- Turbulences are directing to land out of Central America such as Paris, London or AAA etc.. since during turbulence it is allowed to land any where (you pay the landing cost).
- Despite the Turbulences, without fear; the captain and his Assistant pushed and landed safely in San Jose or Panama

Those captains who can make it are:

Central American's Lawyers and their policy makers (Attorney General/Ministry of Justice) right from the beginning of the Contract negotiation and drafting to make sure that when dispute arises the **CAKE WILL BE SHARED EQUALLY.**



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THANK YOU