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**GLOBALISING YOUR PRACTICE
OPPORTUNITIES AND CHALLENGES**

Arbitration of International Commercial Disputes

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INTRODUCTION

- ❑ **Four of the six** fastest growing economies in the world will be in Sub-Saharan Africa(IMF, 2014)
- ❑ UK FDI in Africa grew from **19.2 to 39.5 Billion** between 2005-2014 and Post-Brexit: UK is doubling down on African Infrastructure investment (UK- DIT, March 2018)
- ❑ The EAC region's total trade with the rest of the world is doubling every 5 years(SADC ?)
- ❑ Economists confirmed that the 21st Century is indeed to be “Africa's century”.

With such a growth always disputes will arise and building/preparing a generation of arbitrators and counsels is paramount to handle the upcoming disputes



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INTRODUCTION(Cont...)

82% of all legal fees in Africa going to offshore firms(EALS report,2014):

The parties in 99% of all African disputes abroad are represented by lawyers and law firms based in the UK, USA and Europe (judge Edward T, 2013).

THE CAKE IS GONE. WHY?



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 arbitrations and the implication of doing so for positioning as a “ Safe Arbitration Seat” .

(2) Using current statistical data; mapping Africa in particular in international arbitration(involvement of counsels & Arbitrators) and discuss what Lawyers and policy makers have done or should be doing to get **the “CAKE SHARED PROPERLY” as way to face the Globalization.**



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International Arbitration & Legal Representation

- ❑ Limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system.
- ❑ freedom of legal representation is recognized in most national arbitration laws, and by most institutional arbitration rules. Despite this, laws in a few jurisdictions require that counsel in locally-seated arbitration be locally-qualified.
- ✓ That is true in Turkey, Thailand and was formerly true in Singapore, 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 has 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 appears to be that foreign lawyers are not allowed to appear in arbitration.
(<http://www.advocatekhoj.com/library/judgments/announcement.php?WID=9848>)



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International Arbitration & Legal Representation(Cont...)

- COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES of AMERICAN ARBITRATION ASSOCIATION (Rule-26).
- **Representation** "Any party may participate without representation, or by counsel or any other representative of the party's choosing, **unless such choice is prohibited by applicable law**. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing (....)



International Arbitration & Legal Representation(Cont...)

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?**)

Precision: 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 be qualified to practice law in Mauritius or in any other jurisdiction.**"

Tested Best Practice without Precision: case of Rwanda with 18 KIAC International arbitration case out 89 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 89 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 Case of two African parties with Swiss law Applicable.**



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Arbitration: Meeting the Challenges for African players?

Mapping Africa in ICSID caseload (Source: I-Arb Africa)

Nationality of arbitrators appointed in Africa ICSID cases

So far ICSID has administrated **541 cases**



120 cases concerned at least one African party, representing **22%** of all cases.

In the process of administering the **120 cases**,

400 arbitrators have been appointed.

Of the 400 arbitrators, the **top three** appointed nationalities are: **French, Swiss** and **US**. Representing **43%** of total appointments.



53% of the appointed arbitrators for Africa cases hold a European nationality

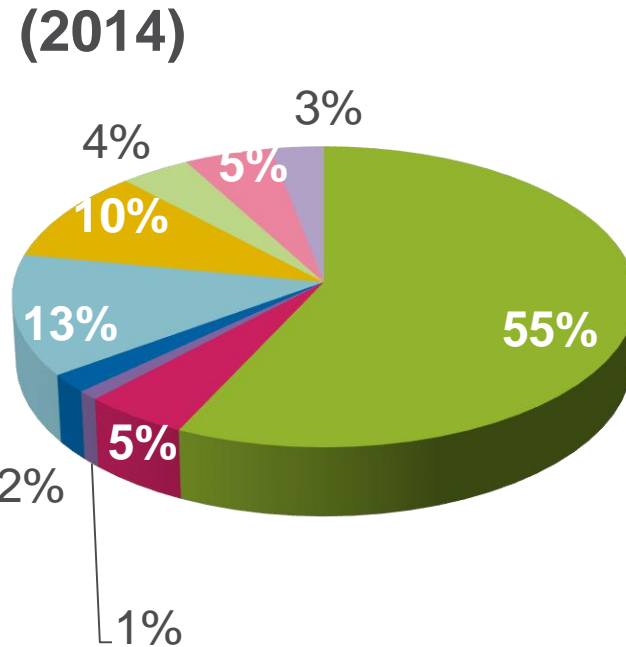
only **10%** of the appointed arbitrators for Africa cases hold an African nationality



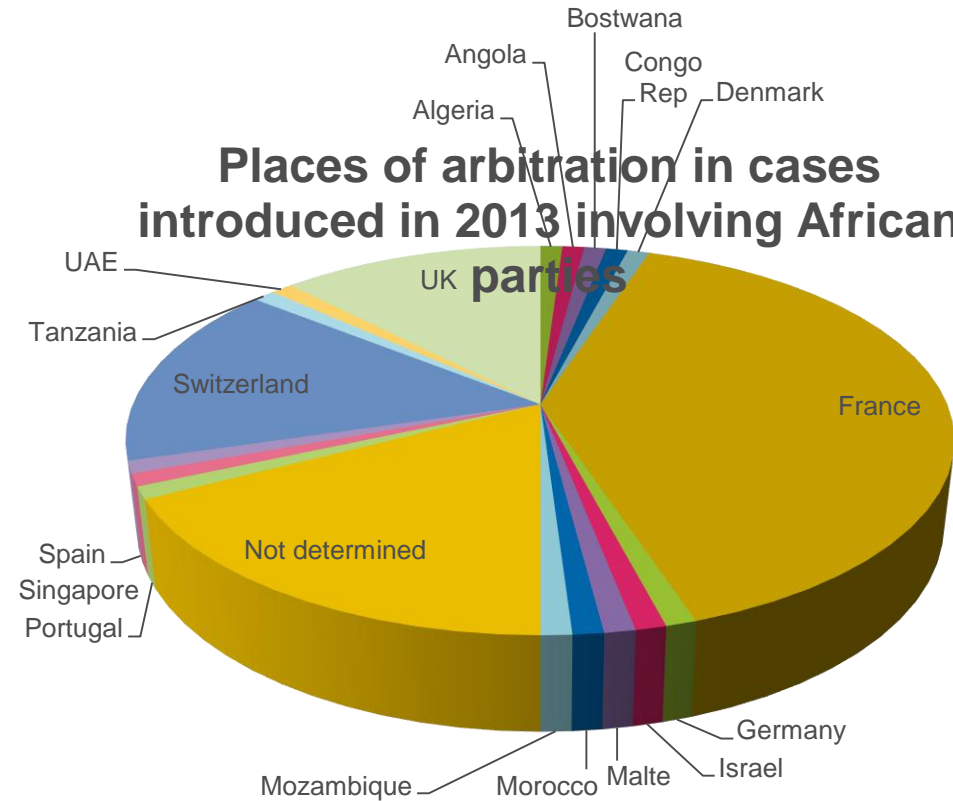
Mapping Africa in Int'l Arbitration (ICC Statistics)

ICC: Origin of Arbitrators

- North & West Europe
- Central & East Europe
- North Africa
- Sub-Saharan Africa
- North America
- Latin America & Caribbean
- Central & West Asia



Places of arbitration in cases introduced in 2013 involving African parties





Mapping Africa in Int'l Arbitration (See 2016 ICC Dispute Resolution Statistics: Record Year for the ICC)

African seat rose from 2 to 6 (one arbitration in each of Morocco, Nigeria, South Africa, Tanzania, Egypt, and two arbitrations seated in Algeria), although the total number of **African-seated cases remains strikingly low (less than 0.01% of the overall new cases filed).**



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Is Africa Present from the statistics?

Which Impact on Legitimacy of Arbitration outcome?

Do we need to continue protect our legal profession? Or other strategies are needed to share the CAKE Equitably?

- The past ICCA president Jan Paulsson in **1987**: "*when the entire centre of gravity of an investment contract from its negotiation to its performance is in an African country and has resulted in the creation of an enterprise whose physical plant, corporate records and personnel are located in that country, the concept of arbitration in Europe or North America may be not only artificial but truly burdensome*".
- Currently: 95% of arbitration involving an African party is taking place out of the continent with counsels and Arbitrators other than Africans (Justice Yusuf, ICCA 2016 Key note Speech)



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MEETING THE CHALLENGES

Some barriers to Arbitrate in Africa cited in literature (Action Need)

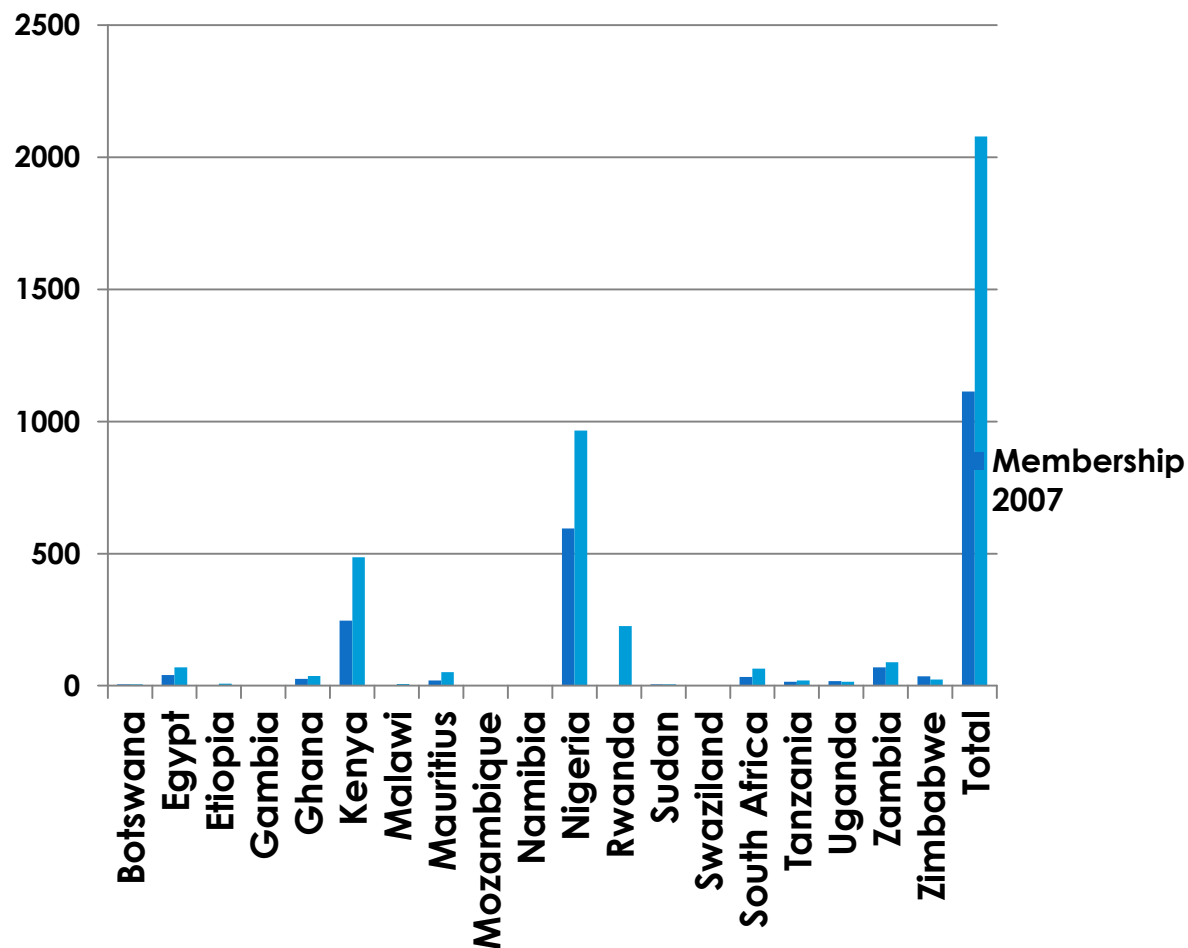
- ❑ Interference of Courts
- ❑ Corruption
- Lack of awareness of ADR in commercial matters;
- Limited trained professionals(issue of capacity building)
- Poor legal/regulatory frameworks.
- Lack of data on Enforcement in Africa

We need to admit some of the weaknesses and work hard to improve but African players need to highlight the effort in the last decade **to change perception of Africa (Africa in not entirely Dark). It is time to test our jurisdictions/Seat and our African arbitrators.**

For details (see example in following slides)

Ciarb-UK-Statistical data on Africa Accredited arbitration (membership 2007 and 2014)
 Considerations: In 16 countries, the number double in 7 years from 1114 (in 2007) to 2078 members (in 2014).

NO	Country Name	Membership 2007	Membership 2014
1	Botswana	6	5
2	Egypt	40	69
3	Etiopia	2	8
4	Gambia	0	1
5	Ghana	26	37
6	Kenya	246	486
7	Malawi	2	7
8	Mauritius	20	52
9	Mozambique	0	1
10	Namibia	1	1
11	Nigeria	595	966
12	Rwanda	0	226
13	Sudan	5	6
14	Swaziland	1	1
15	South Africa	33	65
16	Tanzania	15	20
17	Uganda	17	15
18	Zambia	69	89
19	Zimbabwe	36	23
	Total	1114	2078



Meeting The Challenges: Time of Enforcement of awards in Africa

- Sample data for Arbitrating Commercial Disputes in Sub- Saharan Africa in 2011 shown ***that the time to enforce an arbitration award in Africa varies from 55 days in South Africa to over a year in Ethiopia(375), Tanzania(425), and Ghana(436).***
- The time to enforce an award in Rwanda varies between 3- 6 months(Arbitration User's perception Survey 2015), with 70% in KIAC Int'l arbitration being African arbitrators appointed. 40 awards which none never been set aside in Rwandan courts.
- The average dispute resolution time of ICSID case since 1 July 2003 is 3.2 years or 1,171 days (GAR Journal vol. 4, Issue No 5)

Sri lanka(720), Pakistan(806), Philippines(948)
This have an impact on the Seat determination by parties and
Sharing the cake in the future may require making your seat "Safe"(a clear enforcement regime)



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Meeting the Challenges: Dealing with the influence of negative perception of users: the Global Competitiveness Report 2016–17

In the pillar of strength of institutions

Rwanda is no. (17) out of 140 countries after Canada no. 16. Ahead of countries such as Australia (18), Belgium (22), Germany (20), France (29), Israel (41), Spain(65), United States (28), Other well positioned African Countries: Mauritius (34), Botswana (37), South Africa (38).

Check also in the same report: **the ranking of judicial independence, Favoritism in decisions of Government, Efficiency of legal framework in settling disputes** etc..(some African countries including Rwanda, Botswana,RSA etc..) have better ranking than developed countries).



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Some resources

- ❑ Harvard Law School- Center on the legal profession: <https://clp.law.harvard.edu/>
- ❑ <http://globalarbitrationreview.com/news/article/35309/timerelocalisearbitrationafricaiccatold/> (Justice Yusuf Abdulqawi,2016)
- ❑ <http://www.iarbafrica.com/blog1/67-influence-of-negative-perception-by-users-on-the-growth-of-african-arbitration>(Dr.Emilia Onyema,2016)
- ❑ <http://www.iarbafrica.com/blog1/218-re-localization-of-arbitration-in-africa-the-rwandan-experience> (NGOGA Thierry, 2016)
- ❑ <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/> (ICC arbitration rules 2012)
- ❑ <http://www.kiac.org.rw/IMG/pdf/-3.pdf> (KIAC arbitration rules)

List of Surveys:

- ❑ WB Doing Business report which ranked 186 economies of the world
- ❑ Global Competitive Index,
- ❑ Global States of Mind Surveys
- ❑ Tony Blair Africa Governance Initiative
- ❑ Young African attractiveness survey of Ernest and Young
- ❑ Business baseline profitability index



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What the SADC lawyers can do to appear on the map of Int'l arbitration.

- Positioning the region as an Arbitration safe Seat(**legal representation, 1958 New York Convention, Model law, Supportive Courts, Clear Enforcement Regime**).
- Testing Arbitral Institutions in Africa(some of them have been tested)
- Start with Contract Negotiation & drafting (Seat-Applicable Law, Avoid Pathological Clauses). For purpose of reducing the 95% of cases out of the continent SADC included.
- Learn more than one International languages (for young Practitioners)
- Train yourself and Joint the arbitration Club via Conference and Seminar, Publication

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(2008)

Eg2: 2014 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda)

Model clause for arbitration Centres are simple with less risk of pathology

‘Any dispute arising out of or in connection with this contract, including any question regarding its validity or termination shall be referred to or resolved by arbitration under the Kigali International Arbitration Centre Rules

Note — Parties should consider adding:

- (a) The number of arbitrators shall be ... (one or three);
- (b) (b) The seat of arbitration shall be (country);
- (c) The language to be used in the arbitral proceedings shall be...

See as well model Clause for NIAC, LCIA, ICC , SIAC et.....



SOME EFFORTS TO FIL THE AFRICAN GAP

- 80 hours Training Course of International Arbitration by AIIL (based in Arusha).
- Different training of Branch of Ciarb in Africa(Nigeria, Kenya etc...)
- **Study: A Study to analyse the Economic loss of Delocalisation of Arbitration from Africa(to be conducted by AIIL)**
- International Arbitration Conferences and Seminars with focus on Africa
- Team of Experts to reflect on arbitration in Africa and how to get involved.



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Conclusion

- The Economic expansion at the continent need to think and rethink the Re-localization of Arbitration dispute resolution mechanisms especially the re-localization of arbitration to Africa for **future equitable share of the Cake.** to progressively reduce the 95% of arbitration involving African party taking out of the continent.
- Finally, the lesson from some African Countries which tested the African arbitrators and African arbitration centers(KIAC, Cairo etc) 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 contribute to make it happen more quickly than in the past. FOR THE CAKE TOBE SHARED PROPERLY**



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Conclusion (Cont...)

The Analogy of SADC captains during Turbulences



- Turbulences are directing to land out of Africa such as Paris, London or Zurich etc.. since during turbulence it is allowed to land anywhere (you pay the landing cost).
- Despite the Turbulences, without fear the captain and his Assistant pushed and landed safely in Lusaka, Kigali or LUBUMBASHI or Harare .

Those captains who can make it are:

SADC Lawyers and SADC 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