Which Way Forward-Use of Indigenous or Foreign Dispute Resolution Authorities For Resolving Commercial Disputes In Africa?

By Edward W. Fashole-Luke11 at the African Bar Association Conference in Nairobi, Kenya on 24 July 2018.

In commercial disputes they are arbitration centres which are outside Africa like the London chamber of Commerce. Should we use these ones or our own to resolve commercial disputes? It`s best to use Indigenous Disputes Resolutions Authorities for resolving commercial disputes in Africa.

The most popular dispute management and resolution technique employed for commercial clashes in Africa, involving a non-domestic party, is arbitration. For domestic disputes in any particular African country, between two commercial entities entirely located within that country, court litigation may be a viable procedure for dealing with the dispute. However, whenever there is an international party involved, or even a local company in which there is a big outside investment, litigation is unpopular. This is because the outside party will have the perception, whether rightly or wrongly, that the courts of that country are more likely to be sympathetic to the local company rather than to their cause. Arbitration also has a variety of other important advantages over litigation in such circumstances, including the fact that international enforcement of an award is possible thanks to the New York Convention on the Recognition & Enforcement of Foreign Arbitral Award 1958, and the proceedings can be made entirely confidential by the parties.

Arbitration, as a key arm of Alternative Dispute Resolution (ADR) is hailed as a solution to the problems associated with litigation. 73% of multinational enterprises prefer to use arbitration over litigation to solve their disputes.[1] As per Lord Langdale MR. in The **Earl of Mexborough v. Bower**: [2] "many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a Court of law.

The growth of arbitration across Africa is supported by legal reforms across the continent. Several countries have modernized their arbitration laws, and 36 out of 54 African states have ratified the New York Convention, the most recent to accede being Angola, in March 2017.

Meanwhile, a number of home-grown African arbitration centres have also emerged. Arbitration lawyers and arbitrators are progressively calling for Africa-related disputes to be heard in Africa rather than 'exported' to international centres. The institutional architecture for arbitration in Africa is considerable stronger than it was a decade ago. A growing number of internationally-focused arbitral institutions are emerging in the continent[3].The number of arbitral institutions in Africa is increasing and some of the institutions are taking their mandate very seriously and have done a lot to promote awareness of international arbitration in the continent. Not surprising, some of the arbitral institutions in Africa have received high praises from experts

[1] 1 Gerry Lagerberg and Robert Kus, 'Global Survey Sheds Light on Perceptions of International Arbitration' (PriceWaterhouse Coopers 2007

[2] (1843), 7 Beav. 132

[3] Norton Rose, *Arbitration in Africa* (2010). http://www.nortonrosefulbright.com/files/ohada-25764.pdf

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Lagos Regional Centre for International Commercial Arbitration are such Africa-grown institutions with an international reach. In Francophone Africa, OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires – the Organization for the Harmonization of Business Law in Africa) is a supranational organisation aimed at harmonising commercial law among its 17 member states and increasing investment in the West and Central African economic zone. OHADA also provides for an arbitration institution, the Cour Commune de Justice et d'Arbitrage (CCJA) which is based in Abijan, Côte d'Ivoire.

The commercial dispute resolution landscape in Africa is undergoing a transformation, with arbitration emerging as the preeminent dispute resolution mechanism. Further, in the past decade, there has been an increase in arbitration-friendly laws, including the Moroccan Law on Arbitration and Conventional Mediation, the Algerian Law on Arbitration and Alternative Dispute Resolution Mechanisms. Another noticeable trend is the creation of new arbitration centres, with the Kigali International Arbitration Centre in Rwanda and the Casablanca International Mediation and Arbitration Center in Morocco among the new institutions. However, most of these arbitration centres do not yet manage a significant caseload. Additionally, several countries, such as São Tomé and Príncipe, Burundi, the Democratic Republic of the Congo and Comoros, have recently ratified the New York Convention.

Local African arbitral institutions have a proven track record in efficiently administering large arbitrations: They possess the necessary infrastructural facilities required for the smooth conduct of proceedings. Moreover, these international institutions have

professionals with several years of experience in administering large and complicated cross-border disputes. Thus, parties are encouraged to assess carefully what institutions are best suited to handle a future dispute.

Many African counterparties are increasingly attempting to include their own domestic African arbitration centres, or regional options such as L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) in west Africa and the Cairo Regional Centre for International Commercial Arbitration (. At the very least, they try to have the ICC and LCIA arbitrations seated in their home jurisdiction, or a compromise venue, such as Mauritius, that is deemed more neutral than Paris or London. For parties on either side of the table, this is an increasingly important part of the negotiation stages because when a project goes wrong and the disputes clauses have been ignored, the costs can be significant.

Even though Africa, like its European counterpart, does not have a harmonised arbitration law that applies to the continent as a whole, it is clear that Africa is rapidly improving in one of the most important factors affecting choice of seat[4]. This should give comfort to African countries that, in the event of a dispute, an arbitration seated in Africa will be governed by laws that are in accordance with internationally recognized principles.

The last decade has seen significant, even remarkable, improvement in the legal and

[4] Alexis Martinez and Emma Mason, 'Arbitration in Africa: Past, Present, and Future', Kluwer Arbitration Blog, January 13 2016, http://arbitrationblog.kluwerarbitration.com/2016/01/13/arbitration-in-africa-past-present-and-future/

institutional framework for international arbitration in the continent, growing familiarity with arbitration by local courts, and a keen interest, by some governments, to make their jurisdiction a credible hub for international arbitration. The good news also is that key arbitral institutions without a traditional presence in Africa are beginning to increase their presence in the region[5] Cases such *as Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (Constitutional Court of South Africa) and *Cruz City 1 Mauritius Holdings v Unitech Limited & Anor* (Supreme Court of Mauritius)**,** coming from the highest courts in jurisdictions in Africa point to a changing judicial attitude to arbitration in the continent. Therefore it's best to use indigenous Disputes Resolutions Authorities to resolve commercial disputes because Africa is rapidly improving in one of the most important factors affecting commercial disputes.

Many countries in the region have ratified or acceded to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention)[6] as well as the 1965 Convention on the Settlement of Investment Disputes between States and Nationals ofOther States ("ICSID Convention" or "Washington Convention")[7].

Regarding the strength of the legal framework for arbitration in Africa and capacity of

[5] The London Court of International Arbitration (LCIA) now has an office in Mauritius. See: http://www.lciamiac.org/

[6] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). Adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

[7] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967).

existing framework to meet challenges associated with cross-border business and commercial disputes, The following have been noted ;

- Some countries in Africa are party to key international conventions governing arbitration

  An indication of willingness to accept and implement international best practices.
- Harmonization of arbitration rules, within the OHADA region, is a welcomed development that arguably enhances the business climate in the region and contributes to legal certainty in that region.
- A good number of countries have adopted progressive laws governing arbitration and are exploring to need to upgrade and meet the challenges of a complex global market.
- Regional integration efforts in Africa, if successful, holds the promise of contributing to the development of a more enabling and competitive business environment for Africa.
- A growing number of constitutions in Africa specifically encourage the use of arbitration in dispute resolution.

One of the main advantages of institutional arbitration is the administrative support which it provides in the formative stage of the arbitration. Much the same result can be achieved, however, by designating an appointing authority, which will be able to perform the same essential functions with equal ease and sometimes at lesser cost.

In Africa, most domestic disputes are brought before judicial courts. However, in member states of the Organisation for the Harmonisation of Business Law in Africa (OHADA), the situation is gradually shifting as parties increasingly favour arbitration, including for domestic disputes. International disputes are predominantly resolved through arbitration and statistics from the International Chamber of Commerce (ICC) show that ICC arbitrations involving at least one African party are continually growing. 2016 saw an approximate 50 percent increase in the number of parties to ICC arbitrations from North and Sub-Saharan Africa. Mediation is also subject to an increasing number of laws and draft bills, such as the Burkinabe Law on mediation in civil and commercial matters, a draft bill in Cameroon and OHADA's plan to issue mediation rules. It encourages the amicable settlement of disputes and allows the parties to preserve their commercial relationships. In addition, arbitration encourages foreign investments, as it seeks to guarantee legal certainty and investor confidence.

Arbitration will continue to grow and remain the preferred forum to resolve international commercial disputes in Africa. In June 2016, the ICC and OHADA signed a partnership agreement seeking to enhance cooperation between the two organisations and to promote, professionalise and standardise the practice of arbitration. In October 2016, a similar cooperation agreement was signed by OHADA and the United Nations Commission on International Trade Law (UNCITRAL). This is a welcome step and illustrates the efforts undertaken to accelerate the modernisation of OHADA's dispute settlement system.

I would like to acknowledge and thank my intern, Ms Tendai Peradza for her invaluable assistance in researching for this paper.