



# GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES

**Topic: Arbitration of international commercial disputes**

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# Introduction

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 and East Africa partner states 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.



## 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( **Any party may represent**: see art 4 CADER rules, 21 of NIAC rules, art 18 of LCIA rules, 24 of KIAC rules etc..).
- ❑ 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 is being challenged to the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position will be clearer when that case is decided



## International Arbitration & Legal Representation(Cont...)

**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 13 KIAC International arbitration case ( Parties have been represented by foreign counsels but preferred to work with local counsels since the **Lex Arbitri** was Rwandan law in the 13 cases)

- ✓ **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 Africans parties with Swiss law Applicable.**

## 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**



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

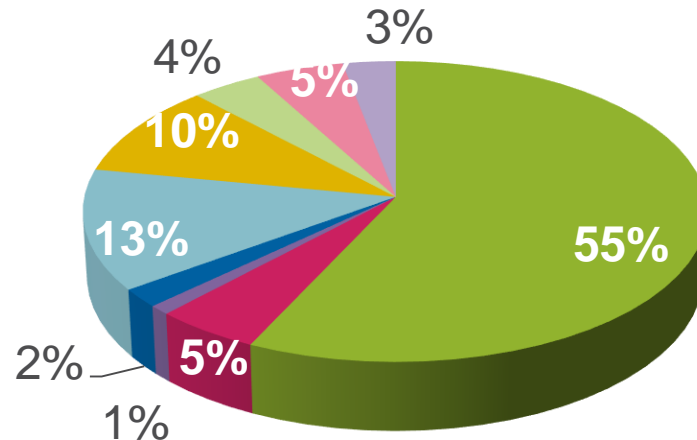


only **10%**  
of the appointed arbitrators  
for Africa cases hold an African  
nationality

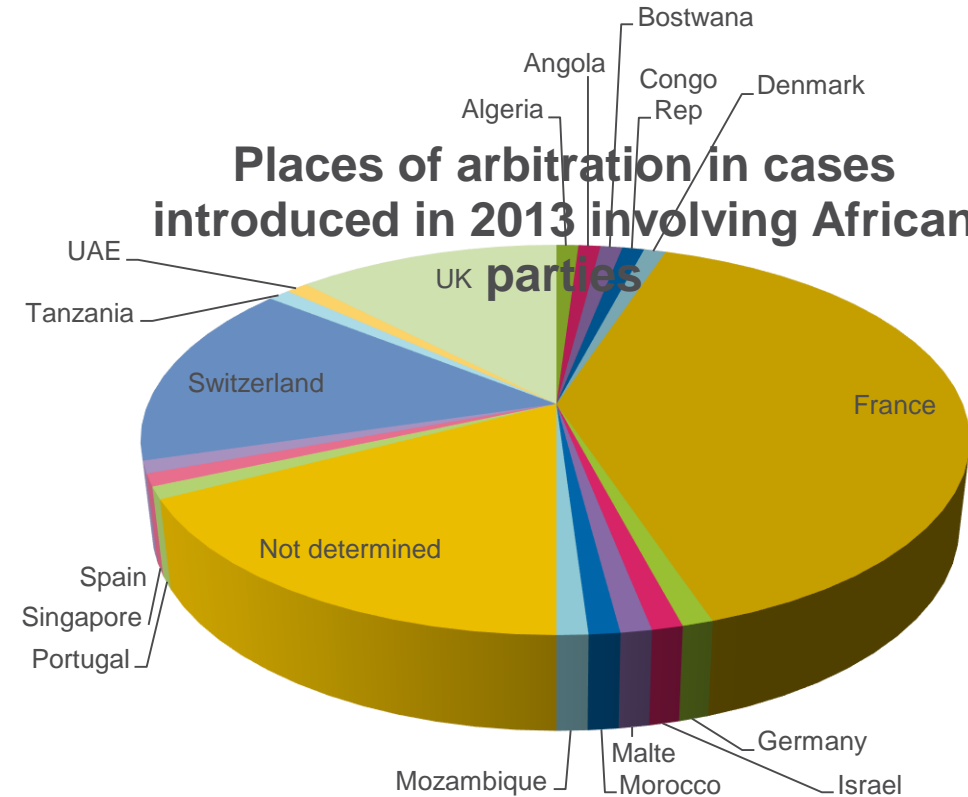
# Mapping Africa in Int'l Arbitration (ICC Statistics)

## ICC: Origin of Arbitrators (2014)

- 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







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)



# MEETING THE CHALLENGES

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

- ❑ Interference of Courts
- ❑ Corruption
- Limited trained professionals(issue of capacity building)
- Poor legal/regulatory frameworks( what does it mean?)
- Lack of data on Enforcement in Africa?
- What else? Political instability, visa issue? Airline? There is always excuses of not arbitrating 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-Stand on this**). **It is time to test our jurisdictions/Seat and our African arbitrators.**

For details (see example in following slides)





# 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 more than 70% in KIAC Int'l arbitration being African arbitrators appointed.
- 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)



## Meeting the Challenges: Dealing with the influence of negative perception of users: the Global Competitiveness Report 2015–16

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 etc..) have better ranking than developed countries).



## 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



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

- ☐ Driving/Positioning our 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 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 EAC region included.
- ☐ 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).

Eg2: 2012 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda)



# 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 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 contribute to make it happen more quickly than in the past. FOR THE CAKE TOBE SHARED PROPERLY**



# Conclusion (Cont...)

## The Analogy of East African captains during Turbulences



- Turbulences are directing to land out of East Africa such Paris, London or Zurich etc.. since during turbulence it is allowed to land any where ( you pay costly the landing).
- Despite the Turbulences, without fear the East African captain and his Assistant pushed and landed safely in Nairobi/Kigali/East African.

Those captains who can make it are:

EAC partner states Lawyers and EAC policy makers(Attorney General Forum) right from the beginning of the Contract negotiation and drafting to make sure that when dispute arises the CAKE WILL BE SHARE EQUALLY.





**THANK YOU**

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