



Globalising legal practice in the East Africa Region

Challenges and opportunities



the global voice of
the legal profession*



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‘Globalising your practice: opportunities and challenges’

Introduction

The project funding awarded by the PPID Activity Fund of the International Bar Association (IBA) for the conference held on 18 and 19 May 2017 in Nairobi, Kenya was not only for a conference on helping East African lawyers to face globalisation. The award conditions made clear that the aim was also to deepen the working relationship between the East African Law Society (EALS) and the IBA.

Therefore, there were two parts to the project: the conference itself, but also the outcome of a meeting between representatives of EALS and of parts of the IBA present in Nairobi for the conference. The meeting took place on the day before the conference. Since the meeting preceded the conference, it will be dealt with first in the report.

The conference – entitled ‘Globalising your practice: opportunities and challenges’ - followed on the success of its predecessor, ‘Helping Zimbabwe’s lawyers face globalisation’, which took place on 2 and 3 November 2018 in Nyanga, Zimbabwe. The IBA speakers were more or less the same (there was one addition from the IBA Law Firm Management Committee). Their presentations were adapted to the requests of EALS to accord with specific East African needs. The topics covered included:

- instruments on international trade in legal services and their applicability in East Africa
- creation of joint ventures: different forms of international alliances and their benefits
- mega contracts; bidding, negotiations and implementation
- international sub-contracting – what is realistic, how to obtain work on international projects and what international law firms look for in local counsel, attracting new and quality clientele.
- trends in law firm management
- raising capital in international markets
- arbitration of international commercial disputes
- the EU lawyer cross-border regime

The substantive content of the conference contributions is summarised in the pages that follow.

The final number of registered participants was 98, including speakers, Law Society officials from East Africa and participating lawyers from the following countries, with the numbers of lawyer participants present in brackets: Burundi (3 – who were all funded by the PPID grant); Kenya (21); Rwanda (12), Tanzania (19, including 4 from Zanzibar), and Uganda (17).

The conference programme is attached as Annex A. A summary of the participant evaluation forms is attached as Annex B.

Meeting between EALS and IBA representatives

The award of funding for this project had the following stipulations attached:

- 1. The PPID Steering Group would encourage you to get in touch with Hermann Knott and Rob Millard of the IBA's Law Firm Management Committee, to discuss the Law Firm Management Committee's involvement in an outreach with EALS in 2015 and 2016, to build on these and coordinate the outreach with the committee.*
- 2. Please contact the African Regional Forum to see if they can offer any advice or coordination with this project, and include this outcome of this outreach in your report.*
- 3. Lastly, the group feels it would be beneficial to start building a long-term relationship between the IBA and EALS, and believe this project would be a good context to start this, and would like to see an outline of this in the report.*

As a result, the project team contacted Hermann Knott and Rob Millard of the IBA Law Firm Management Committee, the Chair of the African Regional Forum, and EALS itself, to ensure that a dialogue could take place between all parties.

A meeting was set up in Nairobi, Kenya at 17.00 on 17 May 2017 at the Intercontinental Hotel to discuss a long-term relationship between IBA and EALS. The following attended:

EALS

Richard Mugisha (President, EALS)
Anne Abeja (Vice President, EALS, in charge of international relations and regional integration)
Isaac Okero (President, Law Society of Kenya)
Edwin Tabaro (Vice Chair, EALS professional development committee)
Brenda Dosio (EALS secretariat)

IBA

Antony Atata (Vice Chair, African Regional Forum - ARF)
Rob Millard (Co-Chair, Law Firm Management Committee - LFM)
Alison Hook (Vice Chair, Bar Issues Commission International Trade in Legal Services Committee – BIC ITILS)
Ben Greer (Past Chair, BIC ITILS)
Jonathan Goldsmith (member, BIC ITILS)
Juan Javier Negri (member, BIC ITILS)
Thierry Ngoga (member, BIC ITILS)

Alonso Hernandez-Pinzon Garcia (Managing Director, European Lawyers Foundation – responsible for the implementation of the project)

Jonathan Goldsmith chaired the meeting. Antony Atata informed participants about the ARF conference in Accra on 15-17 November. BIC ITILS and LFM were identified as potential partners for EALS within the IBA.

The scholarship competition for lawyers to attend the IBA annual conference was mentioned, and in particular that it was not generating enough interest from African lawyers this year. Bars were requested to assist with dissemination of the publicity.

It was agreed that the IBA representatives would take up internally within the IBA the question of which other committees could support the EALS' needs. EALS would send in a list of their needs after this meeting.

The following proposals were received from EALS after the meeting:

- 1) *replication in 2017-18 of the programme on globalising practice held at the regional conference on 18 and 19 May, but at national level in at least two countries back to back, using the same speakers*
- 2) *annual joint IBA/EALS symposium bringing together lawyers from both jurisdictions for networking and benchmarking*
- 3) *organise a continental forum of law firm managing partners from East Africa – SADC- WABA and Europe*
- 4) *support young lawyers exchange programme across borders*
- 5) *work with the African Regional Forum to identify how to make attendance at IBA meetings and other international conferences affordable*
- 6) *IBA to connect EALS to access funding from the Commonwealth for regional activities*
- 7) *have a secondment programme between the Law Society of England and Wales and the EALS*
- 8) *have a technical relationship between the institutions at programme level, including a joint project between IBA and EALS with funding from EIDHR (EU)*
- 9) *IBA to assist EALS to mobilise talent to speak at events and conferences, such as the author of how to form international law firms networks (Ben Greer contact) or Richard Susskind for the Leading Law Firm Forum in November 2017*
- 10) *make available speaking opportunities for EALS lawyers at IBA conferences*
- 11) *mentorship programme between IBA and EALS*
- 12) *webinars with key resource persons of the IBA for the benefit of EALS members*

These proposals now need to be considered within the IBA.

Conference report – first day

Welcome

Isaac Okero, President of the Law Society of Kenya, and **Richard Mugisha**, President of the East Africa Law Society (EALS), welcomed delegates to the conference. **Richard Mugisha** described the work undertaken by EALS on ‘future proofing’ and the introduction of best practices.

Keynote address

Hon. Prof. Githu Muigai, Attorney General of the Republic of Kenya, gave the keynote address on ‘Demystifying international legal practice: experience from the front line’.

He spoke about the many changes taking place in the Kenyan legal profession, including the opportunities for Kenyan lawyers in legal process outsourcing because of their language and education. He also spoke about the differences in legal culture between the various countries of EALS, and the need to overcome difficulties of integration of the legal profession among these members.

He mentioned his appearances before the International Criminal Court (ICC) on behalf of Kenya. He thought it was important for developing countries to monitor the ICC, and was surprised by the number of people involved in the court without legal backgrounds (diplomats, UN staff etc). They had ended up as trial judges, without an idea of, say, the law of evidence or the burden of proof.

He was also surprised by the lack of African lawyers in a representative capacity at the ICC, and the general lack of trial experience among court staff. Finally, he was surprised that judicial decisions were written by research clerks, who were not subject to judicial oversight. He believed that there were opportunities for Kenyan lawyers at the court.

The International Court of Justice (ICJ) was much better on this score, much more professional. However, the representing lawyers were a cartel – for instance, the lawyers who deal with maritime boundaries number no more than ten in the world.

Instruments on international trade in legal services and their applicability in East Africa

Ben Greer (IBA) went through his slides (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-Ben-Greer.pdf>).

He began by quoting from an OECD report regarding the growing awareness that some regulations may be inappropriate in a globalised world, and that a better balance should be struck between the need for regulation and the necessity to ensure competition. In his view, globalisation is here to stay. It facilitates economic development, but requires a robust legal framework in the shape of the rule of law.

A competent, independent and well-regulated legal profession is a key element of the rule of law, including core values to maintain trust. It was interesting to note that practitioners have reacted more quickly to globalisation than Bars.

Over the past 35 years, globalisation of many economic sectors has promoted a re-examination of the practices and structure of the world trading system, culminating in the WTO Agreements in 1995. These comprise a series of international treaties designed to liberalise international trade. Together, they have created an expanded, rule-based international trading system. For the first time, trade in services, including legal services, was covered through the General Agreement on Trade in Services (GATS).

The GATS contains provisions on ‘domestic regulation’ of professional services, which must be ‘no more restrictive than necessary to protect the public interest’.

All WTO members are subject to its general provisions (governmental and non-governmental bodies alike). Members not obliged to liberalise domestic regulation, but they must ‘stand still’ i.e. regulation cannot become more restrictive. Members may, however, make commitments to liberalise regulation.

He spoke about the GATS’ ‘General Obligations and Principles’ including:

- most favoured nation treatment
- transparency
- economic integration (East African Community, EAC) – which is faster than the WTO process
- domestic regulation must be administered in a ‘reasonable, objective and impartial manner’

The GATS is predominantly concerned with regulatory measures that discriminate between local and foreign service providers. The right to regulate is acknowledged, but is subject to GATS principles. Members are not obliged to make commitments in legal services, but if they do, these are then subject to GATS principles.

If legal services commitments are made, they can cover the following issues:

- establishment
- association
- licensing (regulatory status and admission)
- scope of practice
- temporary presence
- privileges
- relationship to courts and arbitral tribunals

He mentioned that all five countries covered by the East Africa Law Society are members of the WTO, although only Rwanda has made commitments in legal services.

He moved on to discuss the EAC Common Market Protocol. It covers all services, including legal services. There was a mutual recognition agreement in place for legal services.

Overall, he drew the following conclusions:

- bars must stay in touch with their governments
- regulation should aim for a better balance between legitimate regulatory concerns and maintenance of a competitive environment
- at the same time, regulation must guarantee the core values
- the IBA can help bars which face problems with GATS and liberalisation, through the work of its International Trade in Legal Services Committee

Vincent Oluoch (Kenya) spoke next. He is a Kenyan lawyer who has worked as a negotiator on trade agreements, and is also in private practice. He has specialised in international trade law and international trade in services. He was the lead consultant for EALS on the EAC mutual recognition agreement covering lawyers (MRA).

There are three possible legal instruments in this area: covering harmonisation (where two or more countries come together to make their systems the same); covering mutual recognition (where two different systems come together to agree equivalence); and covering certification (which is what applies presently within the EAC, and it involves examination).

He worked through the provisions of the EALS MRA. He explained that, before mutual recognition can be established, there needs to be a binding agreement to open up legal services. All but one EALS country has opened. Kenya and Uganda have opened up only minimally, Rwanda has opened up everything, and Tanzania is the country which has not opened up at all. There needs to be some equivalence of opening up before the MRA can function properly.

In the questions which followed, a lawyer from Rwanda pointed out that there had been no problem with opening up the market there, there were lawyers present in Rwanda from Europe and other countries in Africa, and they caused no problem. There was no complaint about foreign lawyers eating local cake, no complaint regarding professional conduct, either.

A lawyer asked who were the key players in the EAC MRA. **Isaac Okero** complained of the bureaucracy incorporated into the EAC. **Vincent Oluoch** said its main drivers were private players. The Law Society of Kenya has a function under the MRA, as do a couple of other institutional players, but the leads should be private sector lawyers.

A Ugandan lawyer in the audience said that the problem with the operation of the MRA in Uganda is that the Uganda Law Council is in charge of its provisions there, and the Uganda Law Council is under the authority of the Attorney General.

Creation of joint ventures: Different forms of international alliances and their benefits

Jonathan Goldsmith (IBA) spoke to his slides (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-Jonathan-Goldsmith.pdf>).

He began by explaining the benefits of cooperation between East African and foreign law firms, as follows:

For foreign law firms

- local law firms provide services they cannot, or do not want to, provide – e.g. to support investment, debt financing, infrastructure projects, as part of regional advice (e.g. to a client wanting to do something with EAC and needing advice on all EAC members), etc
- in order to advertise to clients they have a pan-regional offering

For East African law firms

- foreign law firms provide access to new clients/branding
- they enable economies of scale/sharing of back office

- sharing of experience/technology transfer can take place.

As for forms of cooperation, he mentioned the following:

For individual lawyers

- employment of a foreign lawyer/by a foreign lawyer
- partnership with foreign lawyers

For law firms

- marketing cooperation (e.g referral networks such as Lex Mundi, or best friends)
- law firm networks and alliances (e.g. DLAPiper/ENSAfrica networks)
- partial integration models (joint ventures, *vereins*, etc)
- full mergers

There are regulatory issues, and he listed the principal ones:

- with which foreign lawyers should cooperation be allowed (e.g. WTO list versus one-by-one approved list, etc)
- what work should such joint practices be allowed to do? (e.g. full/limited licences)
- what kind of vehicles should be allowed? (e.g. partnership, limited liability, ABS etc)
- what are the approval processes?
- how to maintain regulatory oversight, and to what level? – should there be regulatory/disciplinary recognition agreements with home country bars?
- what about insurance/social security/compensation fund contributions
- at what level should the fees be set (they should reflect the true cost of administration and not be a penalty for, or obstacle to, joint practice)
- does the local Code of Conduct apply to the joint practice, and how to deal with particular challenges e.g. names of firms
- be aware that a mix of domestic regulation and international rules (e.g. WTO, trade agreements) will be applicable

He then described the impact of the WTO on joint practice, making the following points:

- the General Agreement On Trade In Services (GATS) covers trade in legal services
- EALS member countries have all been members of the WTO since 1995/6
- only Rwanda has made a commitment on legal services
- the IBA has published a GATS handbook for bars, available on its website, which explains the workings of the GATS as regards legal services
- there are also IBA resolutions – see more below – on international trade in legal services which may be useful to lawyers, such as the one on classification of terms, or most particularly, on the transfer of skills

He showed on a slide the relevant part of the IBA resolution on transfer of skills:

'WHEREAS the extent and the modalities of Skills Transfer in cross-border legal services by Foreign Lawyers in a given Host Jurisdiction necessarily depend, inter alia, on the extent to which Foreign Lawyers in such Host Jurisdiction are permitted to practice law and to associate with Local Lawyers;

WHEREAS a regime permitting the association of Foreign Lawyers with Local Lawyers likely provides the most efficient and effective means of Skills Transfer by permitting Local Lawyers to work with more experienced Foreign Lawyers within the same firm, thus enabling them to gain practical experience and substantive knowledge in a way that would otherwise be impermissible due to the risk of breach of confidentiality'

(B) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the course of his/ her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.'

He also highlighted the example of how joint practice is dealt with in the EU, since it might be of value in the future in the EAC. The relevant provision is from the lawyers' establishment directive (98/5/EC), Article 11:

'(3) The host Member State shall take the measures necessary to permit joint practice also between:

(a) several lawyers from different Member States practising under their home-country professional titles;

(b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.

The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.'

Finally, he mentioned that the IBA was preparing a handbook on joint practice between foreign and local lawyers, to help guide bars through the problems. It was nearly ready, and should prove useful in East Africa.

As a general comment, Jonathan Goldsmith said that the Rwandan experience of an open legal services market – that it caused no problems - is similar to that of the EU with its own open internal market.

Wilbert Kapinga (Tanzania) spoke to his slides (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-Wilbert-Kapinga.pdf>).

He explained how the regulation of advocates works in Uganda. Tanganyika Law Society has an Ethics Committee, which is its conduct and ethics watchdog, but it has no enforcement powers. It is the Chief Justice and Judge of the High Court and the Advocates' Committee which have the power to admonish, suspend or remove an advocate from the Roll. There is also reciprocal enforcement of suspension and striking off of advocates from East African Countries and other reciprocating Commonwealth Countries. The decisions of the Chief Justice, Judge of the High Court and Advocates' Committee are appealable.

In order to become an advocate, the following are necessary:

- a law degree from a university recognised by the Council for Legal Education; or
- the right of audience in a court having unlimited jurisdiction in civil and criminal matters in a Commonwealth country or other duly designated country; or
- being a solicitor of the Supreme Court of England, Ireland, Scotland or a person with similar qualifications; or

- being a person having continuous practice as an advocate in Kenya, Uganda and Zanzibar for 5 (five) years preceding his/her application;

and

- compliance with such requirements (by instruction or examination) as to acquisition of professional experience.

The Council for Legal Education may exempt any person from all or any of the above requirements.

Application for admission as an advocate is to be made by way of a petition to the Chief Justice. Unless cause is shown to the contrary, the Chief Justice may admit the applicant as an advocate if:

- a) he is satisfied with the qualifications, suitability of the applicant;
- b) he is satisfied that the applicant possesses adequate knowledge of the language of the court (the language of Tanzanian courts is English); and
- c) the applicant has produced testimonials as required by the Chief Justice.

The following are the barriers for foreign lawyers to practice in Tanzania:

- residence requirements
- the requirement to have Commonwealth and other approved jurisdictions' legal practitioners' qualifications
- Tanzania Bar enrolment requirement
- unless exempted, the practitioner must show prior compliance with requirements (by instruction or examination) regarding the acquisition of professional experience.

There were questions to **Wilbert Kapinga** regarding the openness of the Tanzanian market (for instance, that those with residency were not allowed to pursue their applications; and whether Tanzania should apply the provisions of the EAC MRA).

There was a question to **Jonathan Goldsmith** about how the fears of liberalisation had disappeared in the EU. He said that the European Commission had abolished the fears by enacting the legislation, after which everyone saw that there was nothing to fear in practice. There was also a question about cross-border fee sharing. He explained that, within the EU, it must be allowed with other lawyers.

Trends in law firm management

George Etomi (IBA) spoke about his approach to law firm management (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-George-Etomi.pdf>).

For instance, he advised lawyers always to visit their clients. He always tours his client's businesses.

The largest consumer of legal services in Africa is government, and work should be got from them.

He told how he built up his client base, by hustling and offering services. He was always told that Nigerian lawyers did not have the experience, but he asked to be given a chance. Lawyers have to convince consumers that they can do the job, and then deliver. Lawyers may often be despondent that they are not making it, but should keep going. Now there is no area of law that Nigerian lawyers cannot deliver.

Additionally, lawyers should do what they can to bring down physical barriers – e.g. African flight schedules, which sometimes require that a person leaves Africa so as to travel to another part of Africa.

He mentioned that lawyers now need to move towards an area of specialisation. He commended the notion of bar sections like a Business Law Section. In Nigeria, law firms arrange collaborations, and have flirted with mergers, but have not managed any yet.

When making a partner, look for the following: who can bring in the work, who can do the work, who can get the fees paid.

His slides had useful statistics and information. For instance, the IBA President had launched the IBA Global Cross Border Legal Services Report in 2014 which indicated the impact of globalisation of legal services:

- in 80% of countries studied, foreign firms are now permitted to open offices (although often with restrictions)
- in 35% of countries, foreign firms may now employ local lawyers
- In 80% of countries, local firms may now employ foreign lawyers.
- 56% of jurisdictions covered by the study now allow partnership or association between foreign and domestic lawyers
- 77% of jurisdictions no longer have nationality restrictions on foreign lawyers requalifying as local lawyers
- in 47% of the jurisdictions studied, foreign law firms are present, facilitating cross-border trade and investment

His slides gave practical steps towards globalising a legal practice:

- harmonisation of business laws on a wider scale; begin by implementing a unified curriculum on business law at the university level as a foundation to encourage international legal practice
- national Bars should be more proactive to incorporate an international element in practical training.
- unification of African Lawyer's Union i.e. Pan African Lawyer's Union and (PALU) and African Bar Association to provide a more unified voice on liberalisation of legal services
- bar associations are enjoined to advise their respective legislature on the importance of reviewing foreign lawyer participation requirements in line with the current trends

He believed that the future was bright, as some African countries have begun to experience increased collaborative efforts – for instance, earlier this year, a strategic alliance agreement was signed between the Pan-African law group, Centurion and a South Sudanese law firm, Awatkeer Law Chambers.

Chacha Odera (Kenya) (<http://elf-fae.eu/wp-content/uploads/2017/05/Presentation-EALS-George-Oraro.pdf>) spoke in place of George Oraro, who was unable at the last moment to be present. He stressed that the traditional '9 to 5' working day no longer governed in international work – the day was governed by the task. As for the way forward, he felt that there should be an opening up of legal practice within the regional economic blocs, with a view to African countries becoming capable of allowing their professionals to operate within the continent and beyond, as a means of driving commercial relationships, if ever the expectation of the continent as the future growth area is to be achieved

There were questions to the two speakers about billing practices, being good enough, cybersecurity, succession of practices and branding.

International sub-contracting – what is realistic, how to obtain work on international projects and what international law firms look for in local counsel, attracting new and quality clientele

Alison Hook (IBA) and **Sim Katende** (Uganda) spoke together to their slides, each taking a different section (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-Sim-Katende-and-Alison-Hook.pdf>).

They covered the following five topics:

1. What sort of work might be available to a lawyer/law firm from East Africa?

First look around you...(*international does not just mean from US & Europe!*). For instance:

1. the EAC Partner States are 4 of Africa's top 10 foreign direct investment destinations by project and value e.g. infrastructure (e.g. Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET)), cross border projects like Standard gauge railway, the oil pipeline from Uganda through Tanzania etc
2. there are EAC businesses with outward looking ambitions (Kenyan businesses invested KSh 100 billion in EAC in 2016)
3. there are regional integration opportunities (EAC legal environment) – with the EAC there is soon going to be free movement of legal labour, too.

Then look to other opportunities:

1. international businesses from South Africa, Europe and the US are entering the market (e.g. Carnegie Mellon University in Rwanda)
2. there are venture capital investments (e.g. Nigeria's EchoVC Partners – investment in Ma3Route in Nairobi)
3. Asia – not just China but the Middle East, Mauritius etc; helping East African clients structure off shore investments is becoming popular
4. employment opportunities with international law firms

2. Where might it come from?

1. Who from?:

- intermediaries (referral law firms)
- direct from clients African funds/investors/brands/entrepreneurs; Foreign VCFs
- foreign businesses

2. Which sectors?:

- not just mega power, transport and resources projects

- fastest growing sectors for investment in 2016 included: education and training, logistics, manufacturing, business services, financial services, ICT and renewable energy
- providers of anything a growing affluent African middle class desires - malls, retail chains

3. Needs: Get out of the litigation mindset:

- you can help with the questions which are very country specific and difficult for someone abroad to do an online desktop review, replicate or standardise
- also local compliance, due diligence, land use/land title issues, employment, risk assessment and mitigation, country of origin compliance checks (e.g. BA, FCPA etc).
- for litigants, think more of mediation and arbitration

4. The “Third Transaction Rule”:

After the 3rd transaction:

- you should be able to handle the transaction from thought to finish
- the client should be comfortable dealing with you/your firm directly
- sometimes standardised work can be passed down to the local firm.

3. **How can you get this work?**

1. International law firms – think beyond the obvious (NB: who are potential relationship law firms from investing countries?)
 - Europe - London and Paris. Most Africa practices have their HQs there
 - Africa – South Africa, Kenya, Nigeria, Morocco
 - Far East – mainland China, Hong Kong
 - Middle East – Dubai, Abu Dhabi
 - USA – New York, Washington DC
2. Create the work yourself and do the referrals to the international law firms e.g. ALSF
3. Other professions (e.g. engineering consultancies, Big 4 audit firms)
4. Tenders: tender websites e.g. national government
5. Government initiatives: e.g. Tanzania – local content requirements in EA
6. Venture capital: not just foreign VCFs, African players increasingly evident (e.g. SAVCA)
7. Business directly (e.g. in house counsel in foreign businesses but NB also local business investing elsewhere (Kenya biggest source of African foreign direct investment by numbers of projects in 2016))

4. **What international law firms/general counsel look for in a local partner?**

What clients expect

- availability, affability and ability
- good service (plenty of information and updates, prompt action, follow through)

- transparent billing (not necessarily cheapest)
- local (and regional) insight
- recommendations/endorsements

What clients like

- evidence of experience or involvement in similar previous projects
- sectoral knowledge and contacts.
- thoughtful value added (thinking round the problem at hand not just answering the questions)
- internationally recognised credentials and qualifications
- consistency and continuity
- capacity

Some international clients perceptions of African lawyers

- not responsive
- law is not their primary focus – focus on side interests like real estate, politics etc.
- litigation focused, commercially inexperienced
- provide only legal not commercial problem solving advice
- little attention to quality with poor client care and inconsistent service
- poorly trained with little interest in continuing legal education and knowledge improvement
- individual practitioners
- generalists practices with little or no specialization lacking in depth knowledge
- no sector focus with limited understanding of client’s industries and trends affecting client’s businesses
- focus solely on their local jurisdictions
- inexplicable and hidden billing strategies
- firms are not run as proper businesses

5. What to do next

Internally

1. prepare your firm to work with international partners – think about service delivery, confidentiality etc. and how you can improve efficiency in this area
2. develop your expertise – get to know the law, issues, people and businesses in key economic areas (e.g. become known for a particular sector)
3. scale up and build the capacity of your teams to handle multiple assignments, back office work, business development etc.
4. develop your messages – the services you are selling to potential foreign clients are different to your domestic services

Externally

1. develop your networks within and beyond the region and in business more generally (e.g. half foreign direct investment in EAC from Kenya). Don’t just talk to other lawyers.

2. develop your profile and get known outside your own jurisdiction - some work goes to foreign lawyers because they (and their track records) can be found online (websites, directories etc).
3. are you a visible expert?

Success for a law firm today requires internal management, sales and marketing, and not only expertise in the law.

Conference report – second day

Mega contracts; bidding, negotiations and implementation

Hermann Knott (IBA) and **Asha Sabrina Ayub** (Tanzania) presented their slides together (<http://elf-fae.eu/wp-content/uploads/2017/07/Presentation-EALS-Hermann-Knott-and-Asha-Sabrina-Ayub.pdf>).

Hermann Knott began by emphasising the importance of getting to know the investor country, for instance by going to the local chamber of commerce.

Asha Sabrina Ayub said that the presentation would focus on mega-contracts or mega-projects. She herself entered that world by attending special conferences and introducing herself. In order to get on the list, you had to build exposure and build reputation, for instance through legal directories. Your entry should mention the ‘bling’ clients and describe the local ones. They do not call themselves local counsel but resident counsel, and the international firms are called foreign counsel.

Behind every good lawyer is an excellent business development team. She quoted the statement that, on average, each additional hour per week spent on business development activities results in an additional \$30,000 in origination revenue. It was important also to network, at a professional level, and at conferences.

Regarding the kind of local knowledge and experience that foreign counsel were seeking, she listed the following:

- cross-border Network
- real, in-depth experience of:
 - ✓ project land acquisition
 - ✓ environmental
 - ✓ community relations, resettlement, human rights (In Tanzania: Policy Forum, Hakimadini)
 - ✓ port issues, work/residence permit issues other ‘real’ local issues
 - ✓ public law issues
 - ✓ investment laws, cross-border enforcement and BITs
 - ✓ security laws
- People Knowledge:
 - ✓ regulators
 - ✓ (other market players)

- Geographical Knowledge
- Legal Knowledge:
 - ✓ policies (not just laws)
 - ✓ draft legislation and change-of law risks

International law firms have wonderful training materials for local law firms with whom they work on projects. It is important to work together to improve the jurisdiction's profile and the regulatory environment. It is not just about the law but tailored advice with the knowledge of local policy. We need to continue to work with the international firms because we are not sufficiently specialised.

She added that at her firm, lawyers are also appraised on business development. In general regarding cost, lawyers should price reasonably and not undercut.

There were the following questions following the presentation: How should junior lawyers decide in which area to specialise? How can we tell London firms to ask appropriate questions? How do we deal with Chinese construction, when they pay bribes to government officials rather than fees to lawyers?

Wilbert Kapinga added that senior lawyers have a duty to mentor junior lawyers, who are not competitors.

Raising capital in international markets

a discussion of markets and bonds, focusing on the role of the local legal advisor to an issuer wishing to tap international capital markets

Juan Javier Negri (IBA) and **Mary Njuguna** (Kenya) also presented a joint set of slides (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-Javier-Negri-and-Mary-Njuguna.pdf>).

Juan Javier Negri began by comparing Kenya and his home country of Argentina. They had roughly the same population size, but incomes were higher in Argentina. However, Kenya was higher-rated on ease of doing business.

There was pressure of time, and so he did not have the opportunity to go through all the slides he had presented. He made a summary of the main points:

He defined various important terms:

- capital markets: markets where securities are bought and sold, usually overseen by some state authority
- securities: negotiable instruments that can be easily traded on capital markets, such as stocks and bonds (and their derivatives, such as futures contracts, options, or mutual funds)
- bonds: securities allowing holders to become creditors of the issuer (whether a company or a government), taking no ownership but enjoying the right to have their money paid back with interest

Some typical bonds include:

- straight fixed-rate bonds, having a designated maturity date, when principal is promised to be repaid; fixed coupon payments are paid to bondholders
- floating rate notes, medium-term bonds with coupon payments indexed to a reference rate (like three-month or six-month US dollar LIBOR)
- convertible bonds allow the holder to exchange them for a pre-determined number of shares of the issuer
- bonds with equity warrants are a straight fixed rate bond with a call option, entitling the holder to purchase shares at a pre-stated price over a predetermined time period
- zero-coupon bonds are sold at a discount from face value and do not pay interest over their life
- stripped bonds are zero-coupon bonds resulting from stripping coupons from a coupon bond, resulting in a series of zero coupon bonds
- dual currency bonds are straight fixed rate bonds issued in one currency and paying interest in such currency, but at maturity principal is repaid in a second currency
- composite currency bonds are straight fixed rate bonds denominated in a currency basket (SDRs, for example).
- Eurobonds are denominated in a currency other than the home currency of the country or market in which they are issued, frequently grouped together by the currency in which they are denominated: Eurodollar bonds, Euro yen bonds, etc
- foreign bonds are issued by a foreign borrower in the capital market of country X and denominated in country X's currency
- sovereign bonds are issued by a government or a governmental entity enjoying sovereign immunity (that is, they cannot be sued unless such immunity is waived). The existence and scope of sovereign immunity is not determined by the laws of the sovereign, but by those of the country where bonds are issued.

He added the general comment that lawyers are many times called upon not only to provide legal assistance and representation for their clients, but also to bridge the gap between different cultures.

He ended with a quote by the English solicitor, Philip R Wood, QC, who wrote: 'The law is the one universal secular religion which everybody believes in, although they may differ, and usually do, about the scope and content of the codes of this religion. Unlike many other religions, belief in the law, the role of law and the rule of law, does not require a belief in the supernatural. This religion does not require a showing of commitment to the codes in the form of rituals or attendance at churches or temples or in the form of other outward marks of identity. This religion is not regional or local but is universal. Because much law appears to be driven by emotion, and because its enforcement is sometimes pugnacious and bellicose, it is one of the primary tasks of lawyers to instil rationality, common-sense and a measured coolness, as well as tolerance.'

Mary Njuguna spoke about her work at the Kenya Capital Markets Authority. She asked why lawyers have to give so many assurances when raising capital, e.g. about litigation. Why must there be so much disclosure about the financial, budgetary and political circumstances? It is because investors have to be paid back in 5 or 10 years, and they want guarantees that they will be paid, particularly because countries have sovereign immunity. Sometimes Kenya waives immunity and agrees to arbitration in London, but only for a specific purpose. International investors need to know what will happen if they do not receive interest or principle. She also spoke about the Kenya Eurobond.

There were questions about bitcoin, and about the currency which should be used, local or dollar/euro and at what rate?

Mary Njuguna said there is no decision to permit bitcoin in Kenya, even though people might be trading in it.

Javier Negri said currencies are usually issued by a national sovereignty, and bitcoin is not such a currency. Therefore, it is a commodity. Countries do not care about it so much because it is like maize or wheat; therefore, the degree of control by nations over bitcoins will depend on local circumstances.

Arbitration of international commercial disputes

Thierry Ngoga (Rwanda) spoke to his slides (<http://europeanlawyersfoundation.eu/wp-content/uploads/2017/05/Presentation-EALS-Thierry-Ngoga.pdf>).

He began with the link between international arbitration and legal representation. Limitations on the parties' choice of legal representatives contradicts the basic concept of arbitration as a flexible and self-tailored dispute resolution system. Freedom of legal representation is recognised 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. There are 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 the case of Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position will be clearer when that case is decided

In the Mauritius Arbitration Act (section 31), it is stated that: '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 practise law in Mauritius or in any other jurisdiction.'

He said that to become a 'safe arbitration seat' it was important to allow wide choice of representation. The important thing was to focus much on the seat of arbitration in the original contract, which would define the applicable law, and so increase the amount of cake for all.

He then showed the following illustrations about the origin of arbitrations and arbitrators:

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

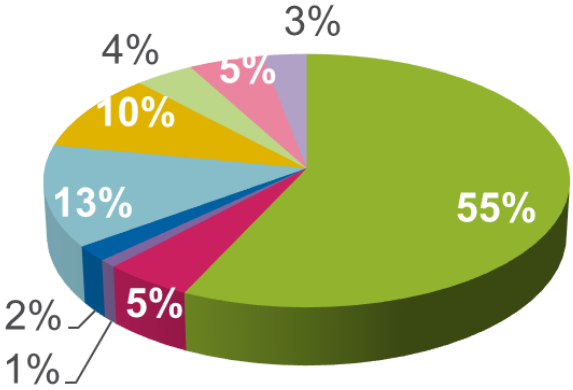


@iarbafrica

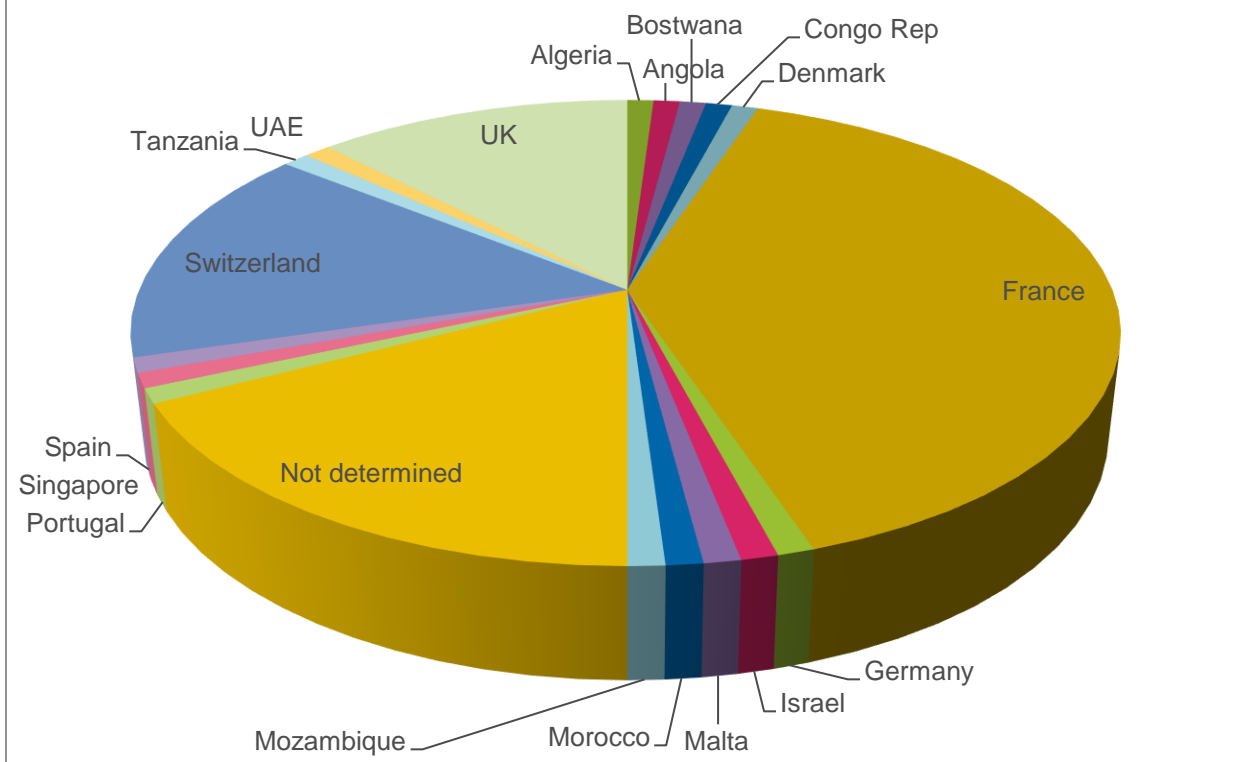
ICC: Origin of Arbitrators

(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



Currently, 95% of arbitration involving an African party takes place out of the continent with counsel and arbitrators other than Africans, as quoted by Justice Yusuf in his 2016 keynote speech to the ICCA.

Thierry Ngoga also quoted a past president of the ICCA, Jan Paulsson, who said 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.'

He mentioned some of the barriers to arbitrate in Africa, as cited in the literature:

- the interference of the courts
- corruption
- lack of awareness of ADR in commercial matters;
- limited training of professionals (the issue of capacity building)
- poor legal and regulatory frameworks
- lack of data on enforcement in Africa

He felt that African lawyers needed to admit some of the weaknesses and work hard to improve. There had been an effort in the last decade to change perception of Africa. He felt it was time to test African jurisdictions and African arbitrators.

Sample data for arbitrating commercial disputes in sub-Saharan Africa in 2011 showed that the time to enforce an arbitration award in Africa varied 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 6/9 cases in Kigali International Arbitration Centre having African arbitrators.

The average dispute resolution time of ICSID cases since 1 July 2003 is 3.2 years or 1,171 days (GAR Journal vol. 4, Issue No 5). And other countries rate as follows: Sri Lanka (720), Pakistan (806), and Philippines(948).

These times have an impact on the seat determination by parties, and sharing the cake in the future may require making your seat "safe".

In the Global Competitiveness Report 2015–16, when dealing with strength of institutions, Rwanda is no. 17 out of 140 countries, after Canada no. 16. Rwanda is ahead of countries such as Australia (18), Belgium (22), Germany (20), France (29), Israel (41), Spain (65) and United States (28). Other well positioned African countries include Mauritius (34), Botswana (37) and, South Africa (38).

In the same report, the ranking of judicial independence, favouritism in decisions by government, efficiency of legal framework in settling disputes etc., some African countries, including Rwanda, Botswana etc., have a higher ranking than some developed countries.

In conclusion, he said that it was important to think and rethink the re-localisation of arbitration dispute resolution mechanisms, especially the re-localisation of arbitration to Africa for a future equitable share of the cake, and to reduce progressively the 95% of arbitration involving African parties taking place outside the continent.

The lesson from some African countries, which have tried out African arbitrators and African arbitral centres, is encouraging. Change is possible, it is happening, and the mission of legal practitioners is to contribute towards making it happen more quickly than in the past for the cake to be shared properly.

Muiruri Lawrence Ngugi (Kenya) spoke to his slides (<http://elf-fae.eu/wp-content/uploads/2017/05/Presentation-EALS-Lawrence-Muiruri-Ngugi.pdf>). The opening slides gave the arbitration legislation of each of the EALS member states, and also showed which states had adopted their legislation based on the UCITRAL Model Law on International Commercial Arbitration (1985), and where the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1985) was in force.

He spoke about the role of arbitral institutions. They required various things to guarantee success. For instance, the arbitrators should be multinational, multilingual and multi-disciplinary. The location should have favourable entry visa requirements, direct flights from international cities, world-class hospitality, have adopted the model and have arbitration-friendly courts. The institution itself should have proper hearing rooms, and good legal and technological support.

He tackled the question of how to approach arbitration. First, pre-arbitration, lawyers needed to be sure that there was a good dispute resolution mechanism in contracts. Then, if arbitration was pending, selection of counsel and arbitrator were key. After the arbitration, thought needed to be given to grounds for appeal or setting aside, where to enforce or challenge, and settling the costs.

He spoke about the recent Yukos arbitration award, and UK earnings from legal services, as examples of the huge size of the arbitration market. Malaysia has easy fly in-fly out immigration rules for arbitrators – should East African

countries consider the same? And Malaysia also excludes international arbitrators from local requirements regarding legal practice – should East African countries try adopting a similar rule?

There were questions about the Tanzanian legal situation, the use of foreign lawyers in local arbitration, the use of the phrase ‘sharing the cake’ for arbitration (would it not be more appropriate to consider what is in the interests of justice?), and what Rwanda has done in being able to lure international work to its jurisdiction that Kenya has not done. It was mentioned that arbitration can be used for purposes beyond commercial contracts e.g. cases involving cybersquatting.

Muiruri Lawrence Ngugi mentioned that the Nairobi Centre for International Arbitration is thinking of moving to on-line arbitration and also alternative dispute resolution.

EU lawyer cross-border regime

Alison Hook and **Jonathan Goldsmith** gave a brief introduction to the way that EU lawyers are able to practise cross-border in the EU.

Jonathan Goldsmith described the outline of the various directives that laid out EU lawyers’ rights:

- the ability to offer services across borders without registration or notification (77/249/EEC)
- the right to requalify easily as a lawyer in another Member State (2005/36/EC)
- the right to establish under home title in another Member State (98/5/EC)

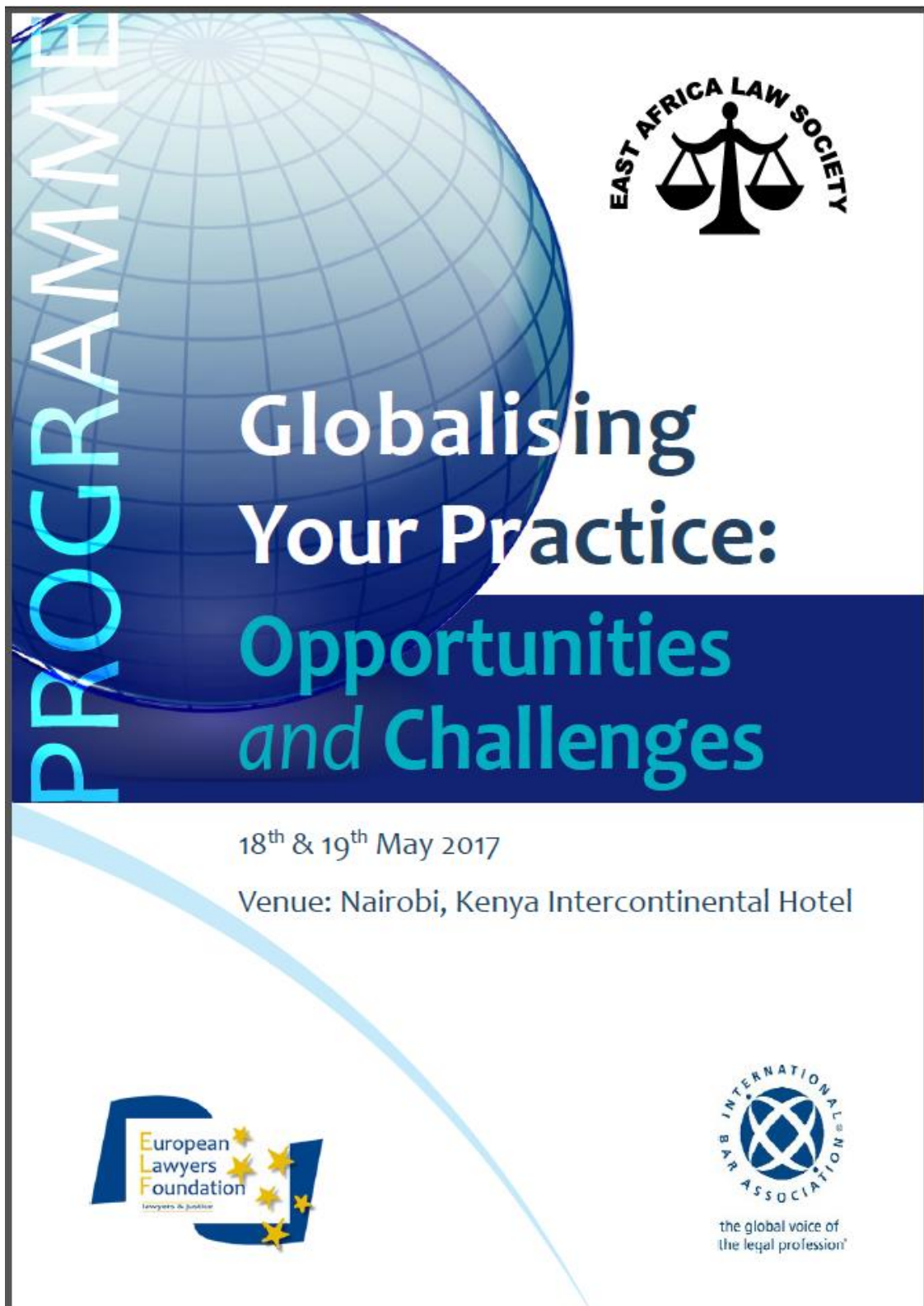
He said that this regime had given rise to remarkably few problems, and everyone agreed that it worked well.

Alison Hook compared the EU regime to the MRA that applies in the EAC, showing the different bases on which the two regimes worked.

Closing remarks and conclusions

Isaac Okero, President of the Law Society of Kenya, drew the conference to a close. He particularly focused on alternative dispute resolution (ADR). He said that the Law Society was doing what it could to train its member lawyers in ADR. Once lawyers and citizens see that ADR is the best option to resolve disputes, then Kenya can invest in more facilities. But he felt the country was going in the right direction in this matter.

Jonathan Goldsmith, on behalf of the IBA, thanked the East Africa Law Society and the Law Society of Kenya for their close and fruitful cooperation in bringing about such a successful conference.



The image is a conference programme cover. On the left, a vertical blue bar contains the word "PROGRAMME" in white, uppercase letters. The background features a large, stylized globe in shades of blue and white. In the top right corner, there is a logo for the "EAST AFRICA LAW SOCIETY" featuring a scale of justice. The main title is "Globalising Your Practice: Opportunities and Challenges", with "Globalising Your Practice:" in white and "Opportunities and Challenges" in a larger, bold, blue font. Below the title, the dates "18th & 19th May 2017" and the venue "Venue: Nairobi, Kenya Intercontinental Hotel" are listed. At the bottom left is the logo for the "European Lawyers Foundation" with the tagline "lawyers in justice" and a graphic of yellow stars. At the bottom right is the logo for the "INTERNATIONAL BAR ASSOCIATION" with the tagline "the global voice of the legal profession" and a graphic of a globe.

PROGRAMME

EAST AFRICA LAW SOCIETY

**Globalising
Your Practice:
Opportunities
and Challenges**

18th & 19th May 2017
Venue: Nairobi, Kenya Intercontinental Hotel

**European
Lawyers
Foundation**
lawyers in justice

**INTERNATIONAL
BAR
ASSOCIATION**
the global voice of
the legal profession

PROGRAMME

FIRST DAY - 18TH MAY

Opportunities for East African lawyers/firms in global practice

Session Moderator: Olivia Kiratu / Edwin Tabaro

8.30	REGISTRATION
9.00	WELCOME
	<ul style="list-style-type: none">■ President of the Law Society of Kenya. Mr. Isaac Okero■ President of the East Africa Law Society. Mr. Richard Mugisha
09:30	KEYNOTE ADDRESS: "Demystifying international Legal Practice: Experience from the front line". Hon. Prof. Githu Muigai – Attorney General of the Republic of Kenya
GROUP PHOTO	
10:15	Instruments on international trade in legal services and their applicability in East Africa. International Speaker: Ben Greer Local Speaker: Justice Otieno Odek (Kenya)
DISCUSSION/PLENARY SESSION	
11.15	COFFEE BREAK
11.25	Creation of joint ventures: Different forms of international alliances and their benefits International Speaker: Jonathan Goldsmith Local speaker: Dr Wilbert Kapinga
12.25	DISCUSSION
13.00	LUNCH
14.00	Mega contracts; bidding, negotiations and implementation International Speaker: Hermann Knott Local Speaker: Asha Sabrina

PROGRAMME

15.00	International sub-contracting – what is realistic, how to obtain work on international projects and what international law firms look for in local counsel, attracting new and quality clientele. International Speaker: Alison Hook Local speaker: Sim Katende
16.00	DISCUSSION, AND CLOSE OF THE FIRST DAY

SECOND DAY - 19TH MAY

Session Moderator:: Emilia Siwingwa

9.00	Trends in law firm management International Speaker: George Etomi Local speaker: Oraro George SC
10.00	Raising capital in international markets – a discussion of markets and bonds, focusing on the role of the local legal advisor to an issuer wishing to tap international capital markets International Speaker: Juan Javier Negri Local speaker: Mary Njuguna
11.00	COFFEE BREAK
11.15	Arbitration of international commercial disputes International Speaker: Thierry Ngoga Local speaker: Muiruri Lawrence Ngugi
12.15	EU lawyer cross-border regime Jonathan Goldsmith/Alison Hook
12.40	Closing Remarks and Conclusions Mr. Isaac Okero – Chairperson EALS Professional Development Committee Mr. Alonso Hernandez-Pinzon – Managing Director European Lawyers Foundation

GENERAL INFORMATION

ABBREVIATIONS

IBA

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 55,000 individual lawyers and more than 190 bar associations and law societies, spanning all continents. For more information, see <http://www.ibanet.org/>

EALS

The East Africa Law Society ('EALS') is the umbrella Regional Bar Association of the legal profession in the East African Community region, bringing together the Law Societies of Burundi; Kenya; Rwanda; Uganda; Tanganyika and Zanzibar together with their individual members totalling over 15,000. Established in 1995, the East Africa Law Society works to enhance the professional competitiveness of its members; foster a conducive and progressive work environment for the legal profession in East Africa; and advocates for adherence to rule of law and good governance for sustainable social and economic development. For more information, see <http://www.ealawsociety.org/>

ELF

The main aim of the European Lawyers' Foundation (ELF) - established in 2014 by the CCBE - is to implement added-value projects that create services for European lawyers and on issues related of Justice's policies in Europe. Furthermore, the Foundation may also implement projects related to other objectives as Human rights and Rule of Law. For more information, see <http://europeanlawyersfoundation.eu/>

Annex B – Analysis of Evaluation forms

63 evaluations forms were handed in at the end of the session (23 men, 18 women, and 22 who did not declare their gender). The average score was very high. The participants did not have many complaints, and all of them were extremely grateful for the organisation of the conference, with overall positive comments.

Here are some of the specific conclusions of interest:

- almost all the participants considered themselves to be experts in the topics discussed
- asked about which part of the training was most useful, most of them said the mega-contracts/mega-projects panel
- participants were almost unanimous in saying that they will use the knowledge and skills gained from the training in their professional life
- the highest scores were found when it comes to meeting expectations, professional development value, the choice of the topics and the organisation of the conference
- some participants asked to receive training materials by e-mail
- it was also considered that it would be appropriate to involve the governments of the region more in such fora
- all the participants were happy with the opportunity of exchanging knowledge with other minds in the region; however, many suggested that networking activities should be improved
- regarding the organisation of the Conference, some participants missed more chances to participate and some argued that more participation should have been encouraged by the speakers
- also, some suggested that more time should be set for open questions on future occasions
- although the evaluation scores were in general very high, the ‘training materials (presentations)’ received the lowest scores
- Alison Hook’s intervention received very positive comments from many participants
- there were some comments asking to introduce more young lawyers in future panels
- some also asked for views on other jurisdictions (beyond EAC and the EU)
- there were interesting suggestions on the possibility of creating a virtual forum for further discussions and contact amongst participants and speakers (such as a Twitter account specially created for debating the issues)
- in general, most comments agreed that one and half days is not enough to cover all the important questions included.