Increasing Diversity: The African Perspective

Sometime in the mid 90’s I commenced my journey into the arbitration field. I sought knowledge in the field through attendance at training programs and subsequently applying for membership of the leading international arbitral organisations. At that time, there were very few arbitration trainings being held in Nigeria: mainly those conducted by the United Nations Centre for Transnational Corporation under a technical assistance agreement with the Federal Government of Nigeria and events organised by international organisations outside our shores. London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC) and Chartered Institute of Arbitrators trainings were those I benefited immensely from. At that time there were few African arbitrators recognized internationally, maybe two from Nigeria and a slightly higher figure from Africa as a whole.

Since then things have changed. Wide-scale capacity building programmes aimed at deepening the knowledge of Africans in the field of international arbitration have assisted in producing many good and skilled African arbitrators. A considerable number of Africans have gained recognition in the field. African arbitrators are yearning for balanced participation and diverse representation on international arbitral tribunals. Africans are yearning to have their countries accepted as favourable seats and venues for arbitration.1

A recent survey by the School of Oriental and African Studies University of London (SOAS) on Arbitration in Africa reveals the concerns of African arbitrators for more representation on international arbitral panels.2 The survey reveals that though African disputes have a strong presence in international arbitration, the same cannot be said of African arbitrators practising either as counsel, a member of the arbitral tribunal or tribunal secretary.3 Africans not appointing fellow Africans as arbitrators, bias by foreign appointors and the poor perception of the expertise and experience of Africans were identified as reasons for the lack of balance and the under-representation of African arbitration practitioners in international arbitration.4 The recent launch of the African Arbitration Association (AfAA)5 at the headquarters of the African Development Bank in Abidjan Côte d’Ivoire was borne out of the desire to promote Africa and Africans in International arbitration. The objectives of the AfAA includes enhancing the capacity of African parties, institutions and practitioners, facilitating and encouraging the appointment of African international arbitration practitioners and strengthening the legislative and judicial frameworks in the field of arbitration in Africa.

International arbitration spans continents, diverse parties, different legal systems and cultures and ought to be representative of the whole society it serves. Lack of diversity allows for perceptions of systemic bias.5 The perception that international arbitration is dominated by the western world to the exclusion of Africa and Asia began the clarion call for change. Indeed the development of the African Regional Centres for Arbitration was rooted in concerns about the flow of arbitration cases involving African and Asian parties outside the African and Asian continents6 and the perceived domination of arbitral tribunals by the traditional concept of the white male, pale and stale.7 Thus the Regional centres that were set up were conceived as an alternative to Africa as a whole.

1. Responses on ethnicity and national background showed 54% or respondents saying “Yes” to improved diversity. See Berwin Leighton Paisner’s report on International Arbitration Survey: Diversity on arbitral tribunals, Background note; http://www.blplaw.com/media/download/BLP-Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf
3. SOAS Arbitration in Africa Survey Domestic and International Arbitration: Perspectives from African Arbitration Practitioners 2018, Ibid., pg 4
4. Ibid., pg 8
6. Practices embedded in the everyday working of a system or institution that creates or supports disadvantageous outcomes from minority backgrounds
9. Regional Centre for Arbitration, Kuala Lumpur, Malaysia ,Cairo Regional Centre for International Commercial Arbitration (CRCICA), Arab Republic of Egypt , Regional Centre for International Commercial Arbitration (RCICA), Lagos, Nigeria ,Tehran Regional Arbitration Centre (TRAC), Islamic Republic of Iran , Nairobi Centre for International Arbitration (NCIA), Nairobi, Republic of Kenya
The Director-General of the LCIA, Dr. Jacomijn van Haersolte-van Hof was one of the early western world proponents of the call for improving diversity and inclusion in the field of international arbitration. In 2014, at the ICCA Congress in Miami themed; “Legitimacy: Myths, Challenges, Realities, she delivered a paper as a commentator on one of the B-Stream Sessions (Justice Stream) on the topic “Who are the Arbitrators?” where she advocated that increasing diversity and inclusion in international arbitration was to be a priority for the coming years.

Indeed the LCIA has heeded to the challenge by involving Africans and maintaining contact with the African continent through various initiatives including creating a platform for African users (the LCIA African Users’ Council), transparency in its caseload information, entering into collaborative arrangements with various arbitral organisations and African institutions and hosting conferences and trainings on the African continent.

The LCIA with a membership of over 2000 members from over 80 countries in its quest for inclusion and more effective participation created Users’ Councils. These were created with the objective of establishing, fostering and maintaining links between the LCIA users and prospective users of its services, to enable the LCIA to ensure that the arbitration and ADR services it provides to its users worldwide are relevant, cost effective, efficient and consistent with current best practice. The LCIA Users’ Councils provides a forum for effective participation by members located in different geographical regions and includes the African Users’ Council. Nigeria, Ghana, Kenya and Uganda are currently represented on the Africa Users’ Council.

Each Users’ Council has its own officials who are drawn from the different target jurisdictions. Achieving balance of representation plays a key role in the appointment of officers of the Users’ Councils.

The LCIA publishes its Casework Report with information on its caseload on an annual basis making for more transparency. The caseload provides information on the number of arbitrations referred to the Court, the geographic and industry sector origins of its cases, statistics on the nationality and gender of arbitrators appointed in its cases and information on the seats and the applicable laws in the references.

In 2016, of the 496 appointments made by the LCIA in a total of 303 cases, the Court appointed non-British arbitrators 19.8% of the time whilst parties and co-arbitrators appointed non-British arbitrators 10.5% and 5% of the time respectively. In 2017, the Court selected non-British arbitrators 52% of the time, an increase from the previous year, and compared to parties and the co-arbitrators who selected non-British arbitrators 26% and 20% of the time respectively. Indeed as rightly observed by Gary Born, the LCIA has made a concerted and determined effort to overcome perceptions of being an English organization.

LCIA has consistently organized seminars, conferences and symposia all over the world under the Chatham House Rule to encourage openness and facilitate free discussion. Africa has not been left out and the inaugural conference of the Pan-African Users’ Council was held in Kenya in 1994. Other conferences have been held in Africa. Indeed the LCIA format of delegates being invited to submit topics for discussion in advance allows for diverse discussions and input from delegates from all over the world including Africa.

The journey to diversity and inclusion in international arbitration has started but will not be fully accomplished until full parity is achieved, until a time when international dispute resolution includes Africans even in non-African disputes. The LCIA and other leading arbitral institutions have taken steps towards diversity in international arbitration. The task is not a task for arbitral institutions alone. The arbitral community, users and African governments have their role to play. The program of capacity building in the field must continue. African arbitrators must continue to build up capacity through education and training. African governments must play their role by making their jurisdictions attractive places for arbitration. Users must move away from the unfair perception/stereotype that Africans are not good, skilled or experienced in the field of international arbitration. The provision of secure environments, quality infrastructure and ease in visa requirements by African governments are all essential. Africans must continue to work towards enacting up to date arbitral laws and having strong/supportive judiciaries.

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10. LCIA’s Director General Jackie van Haersolte-van Hof on diversity: why it matters and what we can all do about it. https://us2.campaign-archive.com/?u=6f57b2ebaad8439f80b50d8b8&id=425b9f5e8
11. The LCIA has established the European User’s Council, the Arab User’s Council, the North American Users’ Council, Latin American & Caribbean User’s Council, the Asia Pacific User’s Council and the African Users’ Council.
14. Facts and Figures 2016: A Robust Caseload (The London Court of International Arbitration) pg 5 & 9
15. Facts and Figures 2017: A Robust Caseload (The London Court of International Arbitration) pg 14
17. Whereby participants are free to use the information received but neither the identity nor affiliation of the speaker(s) nor that of any party, may be revealed.
19. In 2016, the ICC International Court of Arbitration commenced the publication of arbitrators appointed with a view to promoting geographical diversity. Consequently upon the 2018 appointments to the Court, the ICC Court of arbitration has achieved full gender parity.
20. Of the 54 countries in Africa 36 countries have modern arbitration laws