

# Kluwer Arbitration Blog

## SOAS Arbitration in Africa Survey Report 2018

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Diversity in arbitration is currently topical, and this drove our engagement with it in relation to race (particularly African) in this survey. Related to this, is the entrenched perceptions against African arbitration practitioners which has negatively impacted on their participation in international arbitration (including Africa-connected disputes). The primary perception is that African arbitration practitioners are not skilled enough to be appointed as arbitrators in international arbitration references. This negative perception has never been supported with hard facts or scientific analysis but relied on “anecdotal evidence”. Our survey aims to fill this gap and provide empirical data to support or disprove this perception.

The survey which was distributed in the Arabic, English and French languages, attracted 191 respondents from 19 African and 12 non-African countries. Not surprisingly, 90.6% of the respondents are lawyers and have acted in various capacities in arbitration: as arbitrator, counsel, tribunal secretary, academic, consultant and legal adviser. The reporting period for the survey was from 2012-2017.

Over this period, 82.2% of the respondents did not sit as arbitrator in any international arbitration reference in contrast to 58% who did not sit as arbitrator in domestic arbitration. As it relates to acting as counsel (or co-counsel) in international references, only 40.8% of the respondents acted in this capacity; while only 2% acted as tribunal secretary in international arbitration. This data supports the claim that African practitioners are under-represented in international arbitration. The top three reasons the respondents gave for their under-representation are: (1) poor perception of African arbitration practitioners (by their foreign colleagues) as lacking in expertise and experience; (2) bias by appointors in favour of foreign counsel and arbitrator; and (3) Africans not appointing fellow Africans as arbitrators. I will examine each of these reasons:

### 1. Lack of expertise and experience in arbitration:

This perception is partially disproved because the finding from the survey is that experience is not uniform across the continent. 81.7% of respondents have acquired specialist training in arbitration and the vast majority (72%) were trained by the Chartered Institute of Arbitrators (CIArb). And more importantly, over the reporting period, 41.1% of the respondents sat as arbitrator in at least one domestic arbitration case (this is against 17.8% of respondents who sat as arbitrator in at least one international case).

The acquisition of experience by African arbitration practitioners will increase with the growth of domestic arbitration. 85.3% of the respondents believe domestic arbitration will grow in their

jurisdiction. This is important as it assures an increasing pool of arbitration practitioners on the continent of good workflow in which they can participate. However, a surprising finding from the survey is the limited pool of arbitrators sitting in the domestic space in African countries. 10% of the respondents had acted in 11 or more cases over the reporting period against the majority of 58% who did not sit as arbitrator in any dispute. This also raises concerns of diversity of the local pool from which arbitrators are selected or appointed.

## **2. Bias by appointors in favour of foreign counsel and arbitrator:**

From the findings of the survey, this bias remains a perception although 40.2% of the respondents had acted as counsel or co-counsel in international arbitration over the reporting period. This view is because we do not know the exact number of arbitration references that were Africa-connected during the reporting period. However, we believe this finding is useful for international firms instructed in Africa-connected disputes. Further, this finding may also explain the strong opposition to the opening up of the legal services market in some African countries (notably, Nigeria).

## **3. Africans appointing fellow Africans:**

This reason for the under representation of Africans in international arbitration references is one the respondents felt was within the control of Africans themselves (either as advisor, in-house counsel, arbitration centre, appointing authority, or government official). We also note the fact that ‘Africans appointing Africans’ has almost become a mantra but there is a caveat. The appointment must be of qualified and skilled practitioners, with an eye on diversity in appointment. It is massively important that African parties (and their advisors) appreciate their role in this rebalancing exercise and seriously consider skilled African arbitration practitioners in their appointment process. The other agencies that can make an impact on this issue of diversity are appointing authorities and arbitration centres and institutions. In informal discussions with heads of arbitration centres and lawyers, they generally accept the need for diversity and confirm they make an effort to include qualified and skilled Africans in their nomination lists but the parties choose not to appoint them. It will therefore, be useful if such appointing agencies include such data in their published statistics. The data should state the number of people falling within the under-represented groups (gender, race, age, etc) they nominated and how many were actually appointed. This data will provide the evidence we need to help us understand where the gap lies with diversity in appointment.

For the African arbitration practitioners, the top three changes they need to make to ensure their fair participation in international arbitration (particularly in Africa-connected disputes) are: continuing professional development, increase in visibility in arbitration circles, and appointing fellow skilled Africans as arbitrator, counsel and tribunal secretary.

Our survey report therefore confirms that, there are skilled African arbitration practitioners who sit as arbitrators and act as counsel and tribunal secretary in not only domestic but also international disputes. Obviously fewer Africans participate in the international arena than in the domestic arena. Our survey did not capture the percentage that act in these capacities in intra-Africa disputes. However, with the growth of intra-Africa trade, increase in the number of African companies that transact business across African borders, the growth in the number of African transnational corporations or investment companies, and the increase in intra-Africa trade and services envisaged with the signing of the African Continental Free Trade Agreement (and further

negotiations), it can only be envisaged that intra-African disputes will also increase. Such disputes will need skilled African arbitration practitioners to service them as arbitrators, tribunal secretary, counsel, and arbitration centres or institutions.

As already mentioned, 81.7% of the respondents are trained in the law and practice of arbitration with 72% of these trained by CIArb. The next phase of development, particularly in domestic arbitration, is the diversity in appointments as arbitrator to include women and young practitioners. Inclusion cannot be over emphasised and must be actively pursued by all African arbitration practitioners. This in particular can be driven by arbitration centres and institutions in Africa.

The SOAS Arbitration in Africa survey is an important addition to the growing body of surveys in arbitration led by the Queen Mary International Arbitration surveys. Our survey which shall be conducted biennially shall continue to focus primarily on arbitration practitioners with interest in Africa. Our vision is to provide original data on arbitration in Africa to enrich the global arbitration discourse.

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