

## **THE CONTRIBUTION OF ARBITRATION TO THE RULE OF LAW - THE EXPERIENCE OF AFRICAN COUNTRIES**

### **ICCA Keynote Speech – Mauritius, 9 May 2016\***

#### **I. Introduction**

I would first of all like to thank the Government and people of Mauritius for the warm and fraternal welcome extended to me since my arrival in Port Louis. I would also like to thank the organisers of the conference and the programme committee for inviting me to deliver this keynote address. Before turning to the subject-matter of my speech, I would like to make three preliminary remarks, two of which concern my country, Somalia.

First, being from Somalia, where there was an absence of the rule of law for sometime in the recent past, I am always ready to support any means to contribute to the consolidation of the rule of law in Africa. When you have experienced a situation in which there is a total absence of rule of law; a situation of lawlessness and anarchy; a situation in which “might is right”; a situation in which the poor and the weak are downtrodden; and a situation in which there is no equality before the law; you come to understand and fully appreciate the importance and centrality of the rule of law to the well-being of peoples and nations.

Second, throughout my speech, whenever I refer to the rule of law, I will be referring to the experience of African States with respect to the potential contribution of international arbitration to the rule of law, and to the actual existence of such contribution; but will not engage in any conceptual or theoretical analysis of the concept of the rule of law.

Third, I would like to refer to an initiative that was recently undertaken by a young Somali lawyer - Ms. Maryan Hassan, who is with us here today - to organize on 11 April 2016 the first Somali International Arbitration Summit in Mogadishu, although the meeting was finally held in Nairobi. I wish to pay tribute to her and to the distinguished arbitrators and practitioners who responded positively to her call and contributed to the success of the Summit. By showing their unwavering belief in the capacity of arbitration - as a mechanism for the settlement of disputes - to contribute to the restoration of the rule of law

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in Somalia, they have given us their answer to the title of the topic to be discussed this morning.

I am quite sure that you do not expect me to contradict such a high-powered Summit, particularly as it related to the Somali situation. I must, however, share with you the challenges that such a potential contribution still faces in the African continent.

To illustrate those challenges I will briefly go back in time and deal, first of all, with arbitration in African customary law and how it contributed and continues to contribute, in certain instances, to the rule of law in African countries; secondly, I will address the evolution of legislation on arbitration in African countries from the colonial period until the recent introduction of laws based on the UNCITRAL model law, and how that may also contribute to the rule of law; and thirdly, how the contribution of arbitration, particularly international arbitration involving African countries, could be harnessed to better serve the rule of law, and what the African countries themselves have to do in this regard.

## **II. Customary Dispute Settlement in Africa**

To start with customary law, let me first of all say that arbitration is not an alien practice, but a practice that is indigenous to Africa as part and parcel of the customary laws of African countries. To elucidate this proposition, I will again refer to Somalia and the customary norms on arbitration which existed in my country before the colonial period. The system of customary norms was based on the consent of the Parties for the award to be binding. The composition of the tribunal would vary depending on whether the arbitrators - who were always chosen amongst the elders - were from the same community as the contending parties, or whether they were from another community. If they were from the same community as the Parties and nominated by them, then they would have to be equal in number from each side. In that case, all the decisions of the tribunal would have to be adopted by consensus. If, instead, the elders came from a different community, their number had to be uneven and in that case the arbitral tribunal's decisions were adopted by majority.

These customary norms became very useful again when all State institutions collapsed in the country, and lawlessness and chaos reigned supreme. People were able to resort to

their customary law and meet again under the acacia tree to resolve local disputes. Arbitration was one of the mechanisms used for this purpose, and contributed a lot to the upholding of the rule of law in a society where modern post-colonial legislation almost disappeared with the State apparatus.

Arbitration under the customary laws of other African countries were not far removed from this. In Ghana, for example, the Supreme Court (in *Budu II v. Caesar, 1959*), described customary arbitration as follows:

“in customary law, there are three essential characteristics of an arbitration, as opposed to negotiation for a settlement. These are:

(a) voluntary submission of the dispute by the Parties to arbitrators for the purpose of having the dispute decided informally, but on its merits; (b) a prior agreement by both parties to accept the award of arbitration; and (c) a publication of the award.” (quoted in E. COLTRAN and A. AMISSAH (editors), *Arbitration in Africa*, p. 114).

The validity and usefulness of customary law arbitration is still recognized in many African jurisdictions. Thus, arbitration is not and has never been viewed as an alien practice in African societies. However, due to the lack of understanding and appreciation by the colonial governors of its substance and its role with respect to the rule of law, it was gradually marginalized during the colonial period through the introduction of legislation based on the domestic law of the colonial powers. This meant at the time, i.e. in the early twentieth century, the adoption of the 1889 UK Arbitration Act as amended, or, in the case of the French colonies, provisions based on the Code of Civil Procedure of 1806 as extended by the Decree of 15 May 1889.

### **III. Arbitration Laws During the Colonial Period**

As we all know, the rule of law has to reflect the sense of justice in society as a whole; and, if that sense of justice is removed, the rule of law becomes a hollow and lifeless concept which is at odds with the realities and needs of society. Customary arbitration contributed to the rule of law in African societies because it reflected that sense of justice, and with the

introduction of colonial legislation that sense of justice disappeared. That is how a disconnect was created between African societies and arbitration for quite some time in the 20<sup>th</sup> century. The colonial legislation was a legal transplant which failed to grow on African soil.

A second deficiency of arbitration laws introduced by the colonial powers was that they outlived their usefulness because they remained on the books in most African countries until the late 1960s and 1970s - and in some cases until today - while the colonial powers themselves moved forward and enacted for themselves modern arbitration laws which reflected modern economic interactions within and between nations. So, the African countries at the time of independence found themselves in a situation whereby they had abandoned, and in some cases even forgotten about their customary laws on arbitration, but were far from being endowed with modern arbitration laws because they were stuck with the old legal texts which prevailed in Europe in the 19<sup>th</sup> century.

Under these circumstances, they were unequipped for dispute settlement through international arbitration, but they had to continue to enter into international contracts with foreign partners to promote their development. This led to suspicion, mistrust and resistance towards arbitration in the early 1960s, and resulted in a situation of legal insecurity with respect to international economic transactions in Africa; a situation characterized among others by the Libyan petroleum arbitrations of the 1970s, and by the adoption of the Charter of Economic Rights and Duties of States by the United Nations General Assembly with the support of the Afro-Asian group of States.

#### **IV. Arbitration Laws in the Post-Colonial Period**

A few African countries, being aware of this short-coming, decided to update their legislation and adopted modern laws, such as the Arbitration Act 42 of 1965 of South Africa and the Arbitration Act 1961 of Ghana or the Arbitration Act 1967 of Malawi, most of which were influenced by the 1950 Arbitration Act of the UK.

The real change came to African countries, as far as arbitration laws are concerned, as a result of the adoption of the UNCITRAL model law. This was, unlike the British, French

or other developed countries' laws, a United Nations initiative in which the African countries fully participated and to which they contributed. This helped them develop a sense of ownership akin to the process of codification of public international law promoted by the United Nations which enabled the newly-independent Afro-Asian States to embrace norms of international law originally developed in the context of the Public Law of Europe.

It is interesting to recall here that one of the first African countries which adopted an international arbitration code was the Republic of Djibouti which, because of its strategic position, had the ambition - and may still have that ambition - of serving as a centre of international arbitration for the Eastern part of Africa. Although this code was adopted on 13 February 1984, a year before the UNCITRAL model law was completed, the drafters of the Djibouti code appear to have benefited from the work of UNCITRAL, which was by then at a very advanced stage.

So far, there are more than 10 African countries, at the time of writing, that have adopted legislation based on the model law with some variations. They include countries like Nigeria that adopted an arbitration act already in 1988, based on the UNCITRAL model, as well as Egypt, Kenya, Zimbabwe, Togo, Algeria, Tunisia, Côte d'Ivoire and Senegal, all of which enacted modern arbitration legislation in the 1980s and 1990s. But equally important is the fact that 17 African countries took the unprecedented step in 1993 of concluding the OHADA treaty which harmonized their legislation on arbitration and was also partially inspired by the UNCITRAL model law, sharing many of its principles.

#### **V. The Challenges of Arbitration With Regard to Africa: Delocalisation, lack of Participation, Transparency, and Domestic Enforcement**

Despite the adoption by most African countries of modern arbitration laws which govern arbitration proceedings both at the domestic and international levels, the main problem faced by these countries is that of the delocalization of the proceedings, the removal – both geographic and personal – of the process of international arbitration from their shores.

First, most of the arbitration involving an African party - whether it is a corporation or a State - still takes place outside the continent, which has a negative effect on the contribution of arbitration to the rule of law in Africa. If the arbitration does not take place

in the country where the contract was concluded and where the business was established, the outcome of that arbitration can have no positive effect and no contribution towards the consolidation and strengthening of the rule of law in the country. Moreover, as Jan Paulsson noted already in 1987:

“When the entire center of gravity of an investment contract – from its negotiation to its performance – is in an African country, and it 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 American may be not only artificial but truly burdensome.” (J. PAULSSON, “Third World Participation In International Investment Arbitration”, ICSID Review, Foreign Investment Law Journal, Vol. 2, Number 1, (Spring 1987), p. 44).

Paulsson observed at the time - that is almost thirty years ago - that this was “an idea whose time perhaps has not yet come”. Do we still find ourselves in the same circumstances in today’s Africa? In the Mauritius of today, or in the Nigeria, Kenya, Côte d’Ivoire, and Rwanda of today? Just to name a few African countries where arbitration Institutes have been established. I will return to this question in a few minutes towards the end of my speech.

The second issue is the lack of participation of African arbitrators in Arbitral proceedings involving an African party. This also constitutes a negative factor with respect to the potential contribution of arbitration to the rule of law in Africa. The continued absence of Africans from the process raises issues of legitimacy and affects not only standard-setting and knowledge transmission but also the taking of ownership of arbitration by African countries as an ADR mechanism. When the law governing arbitration involving African parties is interpreted and applied without the participation of Africans, there is both a manifest absence of African perspectives in the development of that law and a lack of potential contribution of Africans to the evolution of its rules.

The third factor which has a direct effect on the contribution of arbitration to the strengthening of the rule of law is that of transparency. Transparency is a fundamental element integral to the rule of law. We have made some progress at the international level - at least on paper - with the adoption of the UNCITRAL rules as well as the Mauritius United Nations Convention. However, in the case of Africa, the lack of transparency is

aggravated by the fact that all documents relating to arbitral proceedings are held outside the continent. This deprives African researchers, arbitrators, and legal historians of part of the memory pertaining to the use of arbitration as an ADR mechanism in their countries. Here again, we see that delocalisation undermines the potential contribution that arbitration could make to the rule of law in Africa. It would be helpful if all Africa-related awards were made available on the internet so that local practitioners and researchers can learn more about cases that affect fundamental interests of their countries.

Last but not least, there is the issue of enforcement of arbitral awards. This is something that is intimately linked to the judicial institutions of a country and to their ability to apply arbitration laws. Most of the arbitral awards involving an African party are at present enforced outside the continent and submitted either to European courts or to American courts. The justification that is usually given is that the judiciary in most African countries is either unfamiliar with arbitral proceedings or that judges lack independence or are unreliable. There is, however, no concrete evidence to substantiate this claim because there are hardly any international arbitral awards, especially significant arbitral awards, involving African parties that have been submitted to African courts for enforcement. Unless African courts, wherever they may be in the continent, are given a chance to deal with enforcement issues, the results of international arbitration involving African parties cannot contribute to the rule of law in Africa. The lack of enforcement in Africa also renders meaningless African States' adherence to the New York Convention.

## **VI. Regionalization and Re-localisation**

An encouraging development which may gradually help African countries meet those challenges - of course with cooperation from foreign partners and their law firms - is the establishment of regional and domestic arbitration centres in various African countries, such as the centres established by the Asian-African Legal Consultative Organization, in Lagos and Cairo, as well as the new centres in Kigali, Mauritius and Nairobi or the OHADA Common Court of Justice and Arbitration in Abidjan. Through the work of these centres and the growing confidence of foreign parties in their work, it is possible that delocalization

may gradually be reduced and that arbitration involving African parties may take place in these African centres. However, for re-localisation to be successful and for better participation of African arbitrators in cases involving African parties, there is still need for capacity building in the continent, and for African parties, particularly the African governments, to appoint African arbitrators. Efforts are being made by some institutions, including the African institute of International Law (AIIL), with which I am associated as a founder, to provide training for African lawyers. However, much more is still needed, and we will need to discuss that in the Consultative Workshop on arbitration in Africa to be held on Wednesday.

A further development of interest is the increased use of arbitration as a dispute resolution mechanism in particular industries and professional associations in some African countries, such as the Nigerian Petroleum and maritime sectors, the Beninese cotton industry, and the Cameroonian “*Groupement Inter-Patronal*”. The faith placed in arbitration by these industries complements the work of the regional arbitration centres, fostering trust in dispute settlement mechanisms that are carried out in African countries rather than outside the continent. The engagement with arbitration within these countries can only have beneficial consequences for the rule of law.

Yet, despite the facilities provided by arbitration centres and the demonstrated willingness of the domestic private sector to have recourse to arbitration, international investors continue to show a clear preference for arbitration venues outside the continent. It is of course legitimate to ask oneself why? Is this because of the state of the rule of law in African countries? Is there a prevailing sense of legal uncertainty in African jurisdictions?

## **VII. Strengthening the Rule of Law in Africa**

There is no doubt that a receptive legal environment is required for arbitration to make its contribution to the rule of law. It is often claimed that one of the main constraints on the development of the rule of law in Africa is corruption. Corruption is perceived as endemic and pervasive in most African countries. Corruption is definitely an issue, but it is neither

peculiar to Africa nor is it the most serious issue. There are more serious issues which undermine the rule of law in most African countries. First and foremost is the lack of stability and order in many African societies, including mine. Secondly, effective constraints on government power are often lacking. Thirdly, the independence of the judiciary continues to be fragile and vulnerable. That is why law firms advise their clients to go to the tranquil shores of *Lac Léman* or the austere surroundings of Fleet Street for arbitration. Suspicion and mistrust continue to colour the attitudes of many law firms and investors towards dispute settlement involving an African party.

Much remains to be done in African States to strengthen the rule of law. But Africa is not one monolithic entity, and some African States fare reasonably well in relation to the rule of law. Take Botswana, for example, which was recently ranked number 31 in the World Justice Project's 2015 Rule of Law Index. This places Botswana above Romania, Greece, Croatia, Brazil, and Hungary, and only one place behind Italy. Our host, Mauritius, as well as others are equally good examples.

In order to "re-localise" arbitration, these African States must work together to strengthen the rule of law and put into place the necessary legal measures to ensure respect for fundamental rights and to limit the exercise of arbitrary power by State organs. These proactive steps will help assuage the doubts that are currently shown regarding arbitration in Africa. On the other hand, foreign investors, corporations, and their law firms need to recognise that some African countries already provide the stability and security that they need for arbitration.

In this context, it is important to note that the rule of law should not be treated as an abstraction. It should be anchored in the realities of society. It should encompass the need to realize societal values and take account of the role of law in development.

## **VIII. Conclusion**

In a recent article published by Bloomberg, the author opened with the following statement:

“Here’s a nice way to stump your companions: Ask them what part of the world has had the fastest economic growth over the last 10 years. And whose governments and countries have enjoyed the greatest investment returns among the world’s emerging markets.

Did anybody say sub-Saharan Africa? Buy her a drink!”

From 2005 to 2015, the GDP of the 11 largest sub-Saharan countries increased by 51% – over twice the global average, and almost four times that of the United States of America. The populations in these countries are astonishingly young – for example, 43.7% of the Nigerian population is under 15 years old, as is 42.1% of the Kenyan population. And the United Nations estimates that by 2050, Africa will be home to a quarter of the world’s population. This means that investment in Africa will undoubtedly expand in the future. To be able to facilitate this growth, however, both States and investors must have faith that any dispute between them will be settled in the appropriate way by the suitable institution.

To return to the title of this speech, international arbitration can contribute to the rule of law, but only if governments, the private sector and various actors in the legal field join their efforts towards the achievement of that goal. Foreign investors and their law firms need to realise that the infrastructure to arbitrate exists today in Africa. And to go back to the question raised by Jan Paulsson almost thirty years ago, I can tell you here today, on African soil, that re-localization of arbitration to African venues is an idea whose time has come. There is no longer justification to continue delocalising arbitration involving an African party be it a corporation or a State. By delocalising the process, the ability of arbitration to contribute to the rule of law is greatly diminished. With the growing importance of African States and private corporations in international economic transactions and the unparalleled economic growth in the continent in the last decade, it is high time that this should be matched by a better recognition of African institutions’ ability to serve as a venue for arbitration in the continent and of African practitioners’ capacity to participate in such proceedings. It is only through such recognition that arbitration will contribute to the consolidation of the rule of law in Africa in a way that will benefit both Africans and their foreign partners.

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