African Arbitration Association

CONFERENCE INSIGHTS

"African Arbitration Unbound: Arbitration and ESG in Africa"

African Arbitration Association 5th Annual Conference,
Douala, Cameroon,
9-11 October 2024

UCT ADRU Working Paper 2025/01

Editors: Lise Bosman and Faadhil Adams

UCT ARBITRATION AND DISPUTE RESOLUTION UNIT

UCT Arbitration and Dispute Resolution Collected Papers: Conference Insights

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<https://law.uct.ac.za/department-commercial-law/commercial-arbitration-dispute-resolution>

FOREWORD TO THE UCT ARBITRATION AND DISPUTE RESOLUTION COLLECTED PAPERS SERIES, CONFERENCE INSIGHTS (ADRU COLLECTED PAPERS 2025/01)

May 2025

We are honoured to present this volume of collected insights and papers from the 5th Annual African Arbitration Association (AfAA) Conference, held in Douala, Cameroon, from 9–11 October 2024, under the theme *"African Arbitration Unbound: Arbitration and ESG in Africa."*

This year's theme reflected the growing relevance of Environmental, Social and Governance (ESG) frameworks within the arbitration and dispute resolution landscape, particularly in the African context. The programme was designed to delve into the critical intersections between ESG obligations, international arbitration practice, and sustainable development goals across Africa's diverse jurisdictions.

Over three days, the conference brought together a distinguished group of arbitrators, judges, academics, counsel, in-house practitioners, and institutional leaders. Through keynote addresses, expert panels, and open-floor discussions, participants interrogated key issues such as ESG's influence on commercial and investment arbitration, the rise of mass claims and collective redress mechanisms, environmental remediation, social equity, and the cost and funding dimensions of ESG-driven disputes.

Importantly, the conference highlighted Africa's growing agency in shaping not just the discourse but also the institutional architecture and normative standards of international arbitration. From an expanded focus on African arbitral institutions to in-depth exchanges on climate justice, transparency, and responsible investment, the discussions underscored Africa's readiness to lead in global conversations around dispute resolution and sustainability.

The UCT Arbitration and Dispute Resolution Unit (ADRU) is pleased to continue its commitment to capturing and disseminating these important conversations. The present volume not only preserves the richness of the 2024 AfAA conference but also contributes to a growing body of African-led scholarship on international arbitration and ESG issues. We hope that it will be a resource for further reflection and research for scholars, practitioners, and policymakers alike.

We thank all programme speakers, moderators, authors, and participants for their thoughtful contributions to the conference, as well as the Programme Committee and Conference Hosting Committee for their tireless efforts in organising a successful and impactful event. We also thank Abigail Tshiamala, a student in the LLM programme at UCT, for her assistance with compiling this collection.

It is our hope that this volume of Collected Papers will inspire continued innovation and collaboration as African arbitration evolves in tandem with global legal and commercial shifts.

With best regards,

Dr. Faadhil Adams (Faadhil.adams@uct.ac.za)

and

Adjunct Professor Lise Bosman (uctarbitration@mac.com)

Co-Directors, UCT Arbitration and Dispute Resolution Unit (ADRU)
General Editors, *UCT Arbitration and Dispute Resolution Collected Papers*

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COMMITTEE AND SPEAKER PROFILES

AFAA PRESIDENT

GASTON KENFACK

ASSOCIATION FOR THE PROMOTION OF ARBITRATION IN AFRICA

Gaston Kenfack Douajni is a Magistrate, currently the Director of Legislation at the Ministry of Justice in Cameroon; he holds a Doctorate of International Economic Law, a Certificate on trade, negotiations and settlement of trade disputes and a Habilitation to Direct Researches at the University of Pau in France.

He is the Editor of the "Revue Camerounaise de l'Arbitrage", the President of the Association for the Promotion of Arbitration in Africa, registered on the list of arbitrators and conciliators at ICSID, at the OHADA Commun Court of Justice and Arbitration and Member of the Permanent Court of Arbitration (PCA).

In addition, Gaston Kenfack Douajni is a member of the Board of Directors of the Cairo Regional Center for International Commercial Arbitration and of the International Federation of Arbitration Centers and Associations. President of the 49th Session of the United Nations Commission on International Trade Law, he teaches business law at various universities (in Africa and Europe) and has recently been promoted as the Chair of the Management Board of the African Legal Support Facility. Gaston Kenfack Douajni sits as President of Arbitral Tribunal, Arbitrator, co-arbitrator in ICC, ICSID, CCJA and ad hoc arbitrations.

PROGRAMME COMMITTEE

CO-CHAIRS

JULIS NKAFU

BARRISTER (ENGLAND AND WALES AND CAMEROON)

Julius is a highly qualified legal professional with a diverse educational background, including a law degree from the University of Yaoundé in Cameroon, a CPE, and an LLM in International Business Law from London, United Kingdom. He also holds Post Graduate Certificates in Transnational Oil & Gas and Education. He is a member of The Barrister Group Chambers and Julex Chambers in the United Kingdom.

Specialising in Alternative Dispute Resolution (ADR), Julius is a recognised expert in International Arbitration, serving as a Course Director at the Chartered Institute of Arbitrators in London and a member of the ICC Court of Arbitration. His legal practice spans multiple areas such as energy, oil and gas, maritime, international trade, commercial, civil, and corporate agreements. He also provides advisory services on Business Email Compromise (BEC) and International Administrative Law.

Julius is actively involved in civic and international activities, having served on local authority committees in London as an elected member and as an election observer in various countries. He is a Direct Access Barrister authorised to conduct litigation and represent clients in all courts and tribunals in the United Kingdom and Cameroon.

He is fluent in English and speaks French and is a member of several professional organisations, including the Chartered Institute of Arbitrators (Fellow), the Commercial Bar Association (Combar), the London Maritime Arbitrators Association (LMAA), Support Member, and the African Arbitration Association (AfAA). He also chairs the ADR Committee of the African Bar Association and serves on the Sanctions Appeals Board of the African Development Bank Group.

SAMI HOUERBI

HOUERBI LAW FIRM

Sami Houerbi started his legal career in 1992 with French and German law firms in Munich and Paris. From 2005 to 2021, Sam Houerbi acted as the Arbitration and ADR Director of the ICC International Court of Arbitration for Middle East and Africa. He was entrusted with promoting ICC arbitration and presence in the region.

Since 2006, Sami Houerbi has regularly acted as counsel and arbitrator in ad hoc and institutional arbitrations mainly under the rules of ICC, DIAC, ACIC, ADCCAC, CRCICA and SWISS.

In 2008, he founded Houerbi Law Firm, where he developed a recognized Arbitration and ADR practice in energy and construction law disputes, with proven expertise in the enforcement procedures of arbitral awards.

Sami Houerbi is a Court Member at the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), a Board Member of the African Arbitration Association (AfAA) and of the Tehran Regional Arbitration Center (TRAC), and a Member of the Panel of Arbitrators of Hong Kong Arbitration Center (HKIAC) and Shanghai Arbitration Center (SHAIC). Sami is also Member of the International Bar Association (IBA), the German Institution of Arbitration (DIS), the International Arbitration Institute of the French Committee of Arbitration, the Swiss Arbitration Association (ASA).

PROGRAMME COMMITTEE

OLUSHOLA ADENIRAN

SHOBAN & ASSOCIATES

Olushola Adeniran is a distinguished Legal Practitioner with over 20 years of cognate experience in Nigeria. She is the Managing Partner of Shoban & Associates , a Corporate and Commercial Law Firm. She is an astute Legal Practitioner, Chartered Secretary, Mediator, Arbitrator and a Notary Public of the Supreme Court of Nigeria. Through her distinguished career, she has innovative approach to resolving disputes and advising clients on dispute resolution mechanism to adopt when dispute arises. Additionally, she is an active member of several domestic and international professional institutes and she has actively engaged in numerous webinars, conferences and workshops organized by the institutes demonstrating her dedication to staying updated and involved in the community's ongoing discussions and advancements. She believes in the value of knowledge sharing and access to information about arbitration and ADR in Africa. She currently serve on the Executive Committee of the Chartered Institute of Arbitrators, Nigerian Branch as the Event Coordinator. She enjoys meeting people, networking, knowledge seeking, mentoring, counseling and sponsoring individuals navigating their career, business, and life paths. She has been actively involved in leadership roles with several leading profession bodies and organizations. Additionally she has excellent coordinating and administrative skills and is known for her high sense of commitment, diligence and integrity

DR. HAYTHAM ALI

ALI & CO.

Haytham is a dispute resolution specialist with extensive expertise in arbitration, litigation, and other forms of alternative dispute resolution. He has acted in high-stakes disputes spanning a wide array of substantial commercial matters, often involving complex, multi-party, multi-jurisdictional, and commercially sensitive issues. He handles cases under the auspices of major international arbitral institutions and under various applicable legal systems.

Haytham devotes a significant portion of his practice to serving as chairperson, sole arbitrator, and party-appointed arbitrator in disputes across a broad economic spectrum. His sectoral experience includes telecommunications, distribution agreements, construction, hospitality, natural resources, international trade, shareholder disputes, and sports-related matters.

He also has extensive experience in business crime, particularly in managing cross-border litigation, multijurisdictional proceedings, and matters involving bribery and corruption, money laundering, fraud, frozen funds, sanctions, extradition, tax, and insider trading. He regularly advises on preventative strategies and compliance programs, and represents prominent international and regional companies, as well as their senior executives and directors.

In addition, Haytham has developed significant expertise in competition law within the Egyptian market, with a particular focus on private enforcement. He advises multinational and domestic corporations on competition and anti-dumping matters and supports in-house legal departments with claims handling.

Haytham is a Visiting Professor at the University of Paris I Panthéon-Sorbonne, where he teaches Competition Law. He is a Partner at Ali & Co., Counsel and Arbitrator, and a Member of the ICC Commission on Arbitration and ADR.

MARY ANG'AWA

CIARB KENYA

Hon. Ang'awa is a Fellow Arbitrator and an Accredited Mediator of the Chartered Institute of Arbitrators. After retirement Hon. Ang'awa ventured into Alternative Dispute Resolution (ADR). Where, as a sole arbitrator she has handled a wide range of disputes; on refurbishment of a building, lease agreements, insurance policy and investment disputes.

She sits and or is a member of the following panels: Member, African Arbitration Association (AfAA), Kigali International Arbitration Centre (KIAC), Nairobi Center for International Arbitration (NCIA) and Chartered Institute of Arbitrators (CIArb - Kenya). She is a mentor with the Chartered Institute of Arbitrators (CIArb - UK). She is currently the vice chairperson of World Anti-Doing Agency (WADA) Independent Ethics Board. Hon. Ang'awa was elected to the Board of the Chartered Institute of Arbitrators- Kenya, as a director, where she heads the Legal sub-committee. In her other responsibility on the Board, she headed a Task Force on Members obligation; Data protection advisory to the Board; Committee member in the setting up of the Uganda Chapter (CIArb); Chair of the Committee to establish the internal Chapters in the Kenya region; Headed the selection committee on coopting directors to the Board. She is also a member of the planning committee on Conferences held in CIArb Kenya: 40 years Celebration conference; Mediation conference to be held in October, 2024. Member of the committee organizing the AfAA Conference being held in Cameroon.

Hon. Ang'awa received the Presidential Awards and Honours, including the Moran of the Order of the Burning Spear (M.B.S), for her contribution, alongside other board members, to the President's Award – Kenya (now known as the International Award); and the President Gerald Ford (USA) Award, as an Eisenhower Fellow, for exemplifying integrity and leadership in public service.

Hon. Ang'awa is a Fellow of the Eisenhower Fellowships, an Alumni of the Aspen Institute on the leadership program and is on the Justice Cycle. She holds an LLB, LLM and is An Advocate of the High Court of Kenya, Notary Public and a Commissioner of Oaths.

She is currently serving as a director of AfAA. (2024) She has completed her first term as a director of CIArb Kenya.(2025)

ISABELLE FELLRATH

COUNSEL/ ARBITRATOR

Isabelle Fellrath holds a Bachelor's degree in Law (LL.B) of the University of Neuchâtel, Switzerland, as well as a Master of Laws (LL.M) and a Doctoral degree (Ph.D.) of the University of Nottingham, UK. She was called to the Bar (Geneva, Canton de Vaud, Swiss Federal Supreme Court, Switzerland) in 1998.

She has extensive experience in domestic and international commercial and investment arbitrations, acting as counsel and sitting as arbitrator (accred. Hong Kong International Arbitration Centre, Lagos Court of Arbitration, Kigali International Arbitration Centre, Vienna International Arbitration Centre). She also regularly sits as an arbitrator in sport-related disputes with Court of Arbitration for Sport (gen. list), Swiss Sports Tribunal (arbitrator) and was recently elected chair of Adjudicatory body of European Aquatics Integrity Unit.

She served as an Adjunct Judge at the Swiss Federal Supreme Court (1st civil chamber).

Isabelle regularly publishes in her areas of expertise, which she has been teaching for many years i.a. at the Universities of Glasgow, UK and Lausanne, Switzerland, as well as at the Swiss Federal Institute of Technology in Lausanne, Switzerland

MATILDA IDUN-DONKOR

REINDORF CHAMBERS

Matilda Idun-Donkor provides legal advice and support to both multi-national and local clients with respect to diverse areas of Ghanaian law including dispute resolution, corporate/commercial law, telecommunications, tax and intellectual property rights. She has represented clients in court, negotiations, mediation, arbitration, and before quasi-judicial bodies such as the National Labour Commission and the Trademarks Registry for the past 14 years.

Matilda has provided satisfactory legal services to major clients facing challenging legal issues, significant business transactions, and critical disputes in mining, insurance, banking, telecommunications, real estate, and the hotel industry. With a deep understanding of clients' needs and the complex local landscape, Matilda advises on the appropriate corporate structure for conducting business in Ghana and the applicable legal and regulatory framework. She also assists clients in establishing businesses, coordinates due diligence on companies to be acquired or merged, and supports clients entering into joint ventures.

Matilda contributed to the World Bank's annual "Doing Business" reports, which compare business regulations across approximately 185 economies. She co-authored the International Council for Commercial Arbitration Handbook Country Report for Ghana in 2018, which is updated annually. Additionally, she contributed a chapter to Chambers and Partners' Anti-Corruption Global Practice Guide in 2017.

ANNE-SOPIE JULLIENNE

AFRALAW CHAMBERS

Anne-Sophie Jullienne is a bilingual Arbitrator and Commercial Barrister, admitted to practice at both the Mauritius and English Bar, and is also a non-practising member of the Paris Bar. With over 20 years of experience as counsel in international arbitration, she has represented clients across a wide range of ad hoc and institutional proceedings, including PCA, ICC, LCIA, FOSFA, MARC, and MIAC arbitrations, seated in Mauritius, London, and Paris.

Ms. Jullienne began her career at Weil Gotshal and Skadden Arps in London, and now practises in Mauritius. She is a Fellow of the Chartered Institute of Arbitrators and regularly receives appointments as arbitrator, including from the ICC and MARC. In addition to her arbitration practice, she advises clients on investor protection under bilateral and multilateral investment treaties, and has served as counsel in ICSID proceedings. She also dedicates a significant portion of her time to pro bono work, representing NGOs in court litigation aimed at advancing environmental and human rights law in Mauritius.

FIDELE MASENGO

KIAC

Dr. Fidèle Masengo is a Secretary General of Kigali International Arbitration Centre (KIAC) and teaches International Economic Law; International Competition Law at Kigali Independent University (Masters Level). He also teaches International Arbitration Law at the Institute of Legal Practice and Development, a Post graduate Institute that trains judges and other legal practitioners. He served on the First Board of Directors of KIAC since 2011 to 2007 for six Years. Before joining KIAC, he served as the Deputy Chief of Party and Senior Technical Adviser within USAID Chemonics International LAND Project (2012 to 2015). Dr. Fidèle Masengo worked as the Director of Public Prosecution services (1999 to 2001) and Director of the Administration of Justice (2001 to 2004) with the Rwanda Ministry of Justice. He holds a Master Degree in Economic law from the University of Louvain in Belgium in 2003, a PhD in Law from the University of Antwerp, a Doctorate in Theology from Life Pacific University of Canada. He is registered as an Advocate in Rwanda since 2006. He has written articles, books, led Master thesis in law including arbitration law. He has attended many arbitration Conferences as key speaker. He has many certificates in arbitration.

IDRIS MOHAMMED

FAMA FIRM

Idris Mohammed is the Managing Partner of Fama Firm, a commercial law firm based in Kaduna, Nigeria, where he has spent his entire legal career. He has extensive experience in Telecommunication Law, Commercial Law, and Arbitration, and has represented a wide range of companies across Nigeria's commercial sector, particularly in the telecommunications industry.

His legal services encompass company secretarial duties, regulatory advisory, due diligence, and general legal counsel for potential investors navigating Nigerian law. Idris holds three postgraduate degrees, including a Postgraduate Diploma in Computer and Communications Law from the University of London and an LLM in Corporate and Commercial Law.

With over two decades at the helm of Fama Firm, he has demonstrated a sustained commitment to excellence in arbitration and commercial litigation. As Alternate Chair of the Digital Committee at the Nigerian Bar Association, he has actively promoted legal innovation and engaged with the evolving complexities of the digital age. His strategic legal insight and dedication to client-focused solutions continue to shape the firm's impactful presence in Nigeria's legal and telecommunications landscape.

HERMAN OMITI

NGERI, OMITI & BUSH ADVOCATES LLP

Herman is the Partner in charge of Finance & Strategy and the Head of the Disputen Resolution Department in the Firm of Ngeri, Omiti & Bush Advocates LLP. He holds a Bachelor of Laws (LL.B.) Degree from Moi University. Herman is also a qualified arbitrator and a member of the Chartered
Institute of Arbitrators.

Herman is also trained by the Communications Authority of Kenya in joint collaboration with International Telecommunication Union (ITU) on critical areas of the Information Communication and Technology regulatory framework in terms of interpretation, implementation and enforcement.

Herman has acted and advised various clients in various areas including Commercial Litigation & Dispute Resolution, Intellectual Property Law, Information, Communication & Technology Law, Real Estate Development & Construction Law, Procurement Law, Arbitration & Alternative Dispute Resolution Law & Practice, Media & Technology Law, Constitutional and Administrative Law; Comparative Law and Governance; Environmental and Land Law; Health Law; Tax Law; Procurement Law; Company Law; Insolvency Law; and Employment Law. He has extensive experience in handling disputes before the High Court, Court of Appeal, Supreme Court as well as other specialized tribunals. He is the Convenor of the High Court Constitutional and Human Rights Division Bar - Bench Committee.

He has acted for and advised clients within the East African Community (Tanzania, Burundi, Rwanda and Uganda), within the African Continent (South Africa, Ghana, Ethiopia, Zimbabwe) and beyond Africa (Turkey, Thailand, Canada, China, Mauritius, United Kingdom and India). Herman is also engaged in handling probono briefs in partnership with Kituo Cha Sheria and the Court of Appeal Legal Aid Program.

NATASHA PETER

TRINITY INTERNATIONAL

Natasha Peter is a dual-qualified English barrister and French avocat and is a partner in the arbitration team of Trinity International in Paris as well as a member of the London barristers' chambers, Cornerstone Barristers. She has over 20 years' experience in international arbitration, litigation and dispute management.

Natasha focuses on disputes in the energy (including renewables), joint venture/ M&A, infrastructure, construction, natural resources, transport, finance and telecommunications sectors. She represents multinational and domestic companies, states and individuals in high-value disputes, particularly those with a link to Anglophone and/or Francophone Africa.

Natasha is a Fellow of the Chartered Institute of Arbitrators and sits as both an arbitrator and an adjudicator. She is a visiting lecturer at the Paris II Panthéon-Assas University, where she teaches drafting and written advocacy skills. She regularly publishes articles and gives seminars on topics relating to international arbitration, commercial/ contract law and alternative dispute resolution

She has been listed in the category "Best Lawyers: Arbitration and Mediation" by Best Lawyers since 2023.

BEN SANDERSON

INDPENDENT ARBITRATOR

Ben Sanderson FCIArb is an independent arbitrator and arbitration counsel based in Madrid and London. He has over 20 years' experience of complex international commercial and investment treaty arbitrations working at leading global law firms (DLA Piper, Skadden and Kirkland & Ellis). He has advised clients across a range of sectors, notably energy and natural resources, construction and infrastructure, and technology and telecoms. He has particular expertise in disputes arising in Africa and Latin America.

Ben has represented both States and commercial parties in investment treaty claims, and he has advised international organisations on a range of public international law issues.

Ben is a member of ICC UK's Arbitration and ADR Committee and he is a Fellow of the Chartered Institute of Arbitrators. He is also a visiting lecturer on international arbitration and public international law for the Masters programme at Universidad Carlos III, Madrid.

Ben is a UK national, and speaks English, French and Spanish.

OLASUPO SHASORE

SENIOR ADVOCATE NIGERIA

Olasupo Shasore is a partner at Africa Law Practice and a Senior Counsel as well as serving as the Chair of CWEIC's Nigeria Advisory Board

Olasupo Shasore is a partner at Africa Law Practice and a Senior Counsel (a member of the inner bar, appointed Senior Advocate of Nigeria (SAN) in 2006); often referred to as a 'seasoned arbitrator and strategic litigator', thirty years of experience acting for sovereign, sub-national and private international parties in international commercial & investment arbitration/litigation and other advisory capacities; shipping & maritime law, project and risk advice in mining, natural resources, energy and infrastructure; seasoned and frequently appointed arbitrator or expert on Nigerian Law.

Shasore has significant experience in commercial arbitration; lead counsel in an on-going complex State- Investor dispute, an International Investment Arbitration before ICSID Tribunal; Represented the Sovereign States and entities in leading precedents on Sovereign Immunity in Nigeria; Frequently selected expert on Nigerian law at arbitration/foreign proceedings.

Olasupo is a counsel and legal adviser to the Eko Atlantic City development project, a ten million square meter city and infrastructure development project in Nigeria; Energy advisor to energy sector investors and transactions involving significant power company M&A transactions; significant public sector experience: Attorney-General for Lagos State Nigeria, (2007-2011); He was a member of ICCA's Consultative Workshop Cooperation among African Arbitral Initiatives; London Court of International Arbitration Africa User Group; the Panel of Recognised International Market Experts (PRIME) and its Advisory Committee; the International Lawyers for Africa (ILFA); board member of Nigeria Ports Authority and Interswitch.

HABIBATOU TOURE

PARIS BAR

Habibatou Touré has been a member of the Paris Bar for 24 years. After specialising in international economic law and the law of African countries in France, Habibatou Touré worked in the United States before joining the project finance department of an international law firm where she worked on mining, oil and infrastructure projects.

She is particularly involved in project finance, PPP, international contracts, international markets, company formation and joint ventures, in various sectors (land transport (train, roads, water buses, electricity, air transport), and natural resources (mining, hydrocarbons).

Habibatou Touré is fluent in English and French. She also drafts and negotiates legal documentation in both languages.

As a counsel for States/ State-owned companies, it is also called upon by private companies or other national or international public entities in matters of concessions, public service delegations and public contracts. It assists them in particular during the pre-litigation and litigation phases.

She is an arbitrator at the CCJA and at the International Chamber of Commerce in Paris.

Habibatou is among the top business lawyers ranked in Senegal by Chambers Leading Firm and the International Financial Law Review has ranked her as a "rising star" for Senegal and among the 1000 leading law firms in the field of infrastructure and mergers/acquisitions.

KEYNOTE SPEAKER

ESTHER MOUTNGUI IKOUE

PRESIDENT, OHADA COMMON COURT OF JUSTICE AND ARBITRATION

Esther has served as the President of the Common Court of Justice and Arbitration (CCJA – OHADA) since April 2022 and has been a Judge at the same institution since June 2018.

As a senior-ranking Magistrate of the Cameroonian Judiciary, she was admitted to the National School of Administration and Magistracy (ENAM) in 1985, sworn in in 1987, and embarked on a long career during which she held various leadership positions. These include serving as Sub-Director of Legislation and Human Rights, President of the High Court of Wouri, and First Advocate-General of the Court of Appeal of the Littoral region in Cameroon.

She holds a Master's degree in Private Judicial Law from the Bilingual Faculty of Law at Yaoundé University and a Diploma of Advanced Studies in Private Law. She is also a certified Mediator from McGill University (Quebec, Canada).

CJ Esther is well-versed in both civil and common law systems and is fluent in French and English, with an intermediate level of Spanish. She has extensive knowledge of OHADA law and excellent skills as a lecturer and mediator.

SPEAKERS AND MODERATORS

STEPHEN AGYEI

PPM CONTRACTS MANAGEMENT

Stephen Agyei is an adept professional in the fields of commercial management, project management and various forms alternative dispute resolution, including mediation and arbitration.

CHIEF GBOLA AKINOLA

SENIOR AVOCATE NIGERIA

Chief Gbola Akinola is a practising Lawyer, Senior Advocate of Nigeria, Bencher and Arbitrator. He obtained a B.Sc Degree in Political Science from the University of Ibadan in 1982, was called to the Nigerian Bar and admitted to practice as a Barrister and Solicitor of the Supreme Court of Nigeria in 1987.

He is a Partner in the law firm known as 'THE LAW UNION' with cognate experience in Corporate and Commercial Law practice and a highly skilled advocate with extensive commercial legal advisory experience.

Chief Gbola Akinola was appointed a Notary Public in May 1998, admitted as an Associate of the Chartered Institute of Arbitrators in November 1999, elected a Fellow of the Chartered Institute of Arbitrators in February 2001 and became listed as a member of the Institute's Panel of Chartered Arbitrators in August 2006, admitted to the KIAC Panel of International Arbitrators, Kigali, Rwanda, in November 2012, member African Arbitration Association (AfAA) and member of the Board of Directors of Lagos Chamber of Commerce International Arbitration Centre (LACIAC) January 2021.

He became an Approved Tutor and Resource person of the Chartered Institute of Arbitrators in January 2003 and lectures in Arbitration both in Nigeria and other parts of Africa. He was a member of the National Committee on Reform of Arbitration Laws and is the former President of the Maritime Arbitrators Association of Nigeria (MAAN), November 2010 – 2013.

He is the Immediate Past Chairman of the Chartered Institute of Arbitrators Nigeria Branch.

FATHI AL-TAQI

PRCOTOR & GAMBLE

As a legal practitioner, Fathi Al-Taqi developed his skills beginning with an LLB and continued to build his expertise through legal research and international commercial arbitration in prestigious environments such as Alshlakany. Additional experience through partnerships, such as the IEUK Internship, further enriched his legal acumen.

At Procter & Gamble, his contributions as a Digital Marketing Specialist help drive the team's success through cutting-edge strategies. He leverages his proficiency in Google Ads to execute impactful campaigns. A graduate of Al-Azhar University, Fathi's background in international law and legal studies provides a strong ethical foundation, ensuring compliance and integrity in digital initiatives.

In his concurrent role as an Instructional Facilitator at Soliya, he applies his facilitation skills and legal knowledge to promote cross-cultural dialogue, fostering global understanding and collaboration. His commitment to diversity, inclusion, and education underpins his work, enabling him to create meaningful engagement and measurable success in both legal and digital marketing fields.

JOYCE ALUOCH

INDEPDENDENT ARBITRATOR

Hon. Lady Justice Joyce Aluoch, EBS, CBS, (Retired) is a former Judge and First Vice-President of the International Criminal Court at The Hague, The Netherlands.

Prior to that, she was a Judge of the High Court and Court of Appeal in Kenya, having been appointed the second woman Judge in Kenya.

She holds an LLB Degree from the University of Nairobi, and Diploma from the Kenya School of Law. She has a Master's Degree in International Affairs (GMAP), from the Fletcher School of Law and Diplomacy, Tufts University in Boston, which granted her the Distinguished Achievement Award in April 2015, and in September 2018, the same University awarded her its top Award, "The Class of 1947 Award" (honoris causa),making her the first black person to receive such an honour to only bestowed on one who has embodied the school's mission and its founding ideals throughout their career.

Justice Aluoch has successfully moved her legal profession to other forms of Alternative Dispute Resolution mechanisms, namely, Arbitration and Mediation. She a Certified Mediator, International Mediation Institute (IMI), and Accredited Mediator (Centre for Effective Dispute Resolution London). She a member of the Chartered Institute of Arbitrators, London, and the Kenya branch, the International Council for Commercial Arbitration (ICCA) Peace Palace, The Hague, Nairobi Centre for International Arbitration and African Arbitration Association. She conducts mediations under the High Court Annexed Mediation program, Kenya as well as FIDA-Kenya, and private mediations. She is an Accredited Trainer for Foundation Mediation Skills of the Strathmore University Dispute Resolution Centre. She has recently been appointed a Board Member of Mediators Beyond Borders International, the Chair of the Advisory Board of the newly formed Africa-Asia Mediation Association, and Patron of Kisumu Mediation Centre.

She is a recipient of several international and national awards. These include the Presidential honours of Elder of the Burning Spear (EBS), First Class Chief of the Order of the Burning Spear (CBS), and The Trail Blazer Award (2018), for services rendered to the Kenyan nation.

GULLAUME AREOU

INDEPENDENT ATTORNEY

Guillaume Aréou is an independent lawyer specialized in International Arbitration with more than ten years' of experience. Guillaume is also a Professor at ESSEC Business School where he lectures on International Business Law and Arbitration.

He advises clients on commercial and investment arbitration matters, with a particular focus on Africa/Middle-East related disputes. Guillaume assists both investors and States alike in complex arbitration proceedings under a variety of seats and arbitration rules, spanning various industry sectors (including, but not limited to, the construction, energy and food sectors).

Guillaume regularly publishes and speaks at events on international arbitration.

Guillaume is a co-founder of AfricArb, a non-profit organization that aims to promote Alternative Dispute Resolution mechanisms in Africa.

DUNCAN BAGSHAW

HOWWARD KENNEDY

Duncan Bagshaw specialises in international arbitration and litigation, with particular focus on the energy sector and Africa-related disputes. He often advises on issues arising from joint ventures and commercial contracts.

Duncan is a highly experienced lawyer who advises on large international disputes in arbitration and litigation proceedings. He acts for clients on matters relating to the upstream oil and gas industry, electricity generation and supply, and renewable energy projects.

He also has particular experience dealing with disputes arising from joint ventures in the property development, hospitality and tourism industries.

Duncan handles cases from all over the world, and has particular experience in Africa, having lived and worked in the region and handled many disputes arising from African projects. He has worked on many cases involving African law and African seats of arbitration, and where there are simultaneous proceedings in multiple jurisdictions.

He acts for clients in arbitration tribunals under the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), DIFC-LCIA and other rules, and before all courts of England and Wales, including the Supreme Court.

AFOLASADE BANJO

BRODERICK BOZAMO AND COMPANY

Afolasade Banjo is a Senior Associate at Broderick Bozimo & Company, where she expertly navigates the spheres of dispute resolution and corporate law.

AUGUSTIN BARRIER

LA LIVE

Augustin specialises in international arbitration, including commercial and investment treaty arbitration in a wide array of business sectors with particular emphasis on energy, mining, joint ventures, supply and distribution and foreign investments, notably in Europe and Africa.

He has acted in numerous international arbitral proceedings under the aegis of various institutions (ICC, LCIA, SCC, NAI, CCJA, ICSID) as well as ad hoc proceedings governed by a range of substantive and procedural laws, both common and civil law, such as French, Swiss, Swedish, English, Algerian, Nigerian, Mauritanian, OHADA or international law.

Augustin regularly publishes content relating to international law, international arbitration and arbitration law. He also contributes to the preparation of the Revue des revues for the Journal du droit international (Clunet).

NADIA DRIDI

INDEPNDENT PRACTITIONER

Nadia specialises in both commercial and investment arbitration, with a focus on the latter and a specific expertise in proceedings involving Arab States, including OIC cases.. She has experience representing States, State-owned entities, private individuals, and companies in high-value international disputes across a variety of sectors such as construction and energy (both oil and gas).

SALMA EL-NASHAR

KHODEIR AND PARTNERS

Salma is a RICS accredited mediator, and a lawyer specialized in commercial litigation and arbitration across a variety of industries. She has served as a counsel and tribunal secretary in arbitration proceedings, both ad hoc and before the most prominent arbitral institutions. She has also handled contentious matters under several jurisdictions in the Middle East, advising major developers, consultants, sub-contractors, and contractors in different types of construction projects, including matters based on the FIDIC forms. In addition, Salma has advised clients on issues of public international law and the protection of foreign investments, risk mitigation and dispute avoidance. She is currently a senior lawyer at Rizkana & Partners law firm in Cairo.

She works in French, English and Arabic. She is a member of the IBA Mediation and International Construction Projects Committees, and a member of the LCIA Young International Arbitration Group (YIAG).

She studied Public International Law at the Hague Academy of International Law, obtained her Legal Business French Diploma from the Chamber of Commerce and Industry of Paris (CCIP), her LLB from Alexandria University, and her master's degree in international relations from Science Po Grenoble.

SALLY EL SAWAH

JUNCTION/ EL SAWAH LAW

Dr. Sally El Sawah is the Co-Founder and Head of Arbitration & Litigation of Junction |Paris. She is Egyptian and French qualified and Registered Foreign Lawyer with the SRA in England & Wales, acting as Arbitrator, Counsel, Consultant and Legal Expert.

As International lawyer and Arbitrator, Dr. El Sawah has been involved in high-profile cases and projects in Egypt and the "Europe, Middle East and Africa" region (EMEA). She has gained a wealth of experience during a career spanning over eighteen years in Paris, London, and Cairo, both in reputable law firms and as an independent practitioner.

She regularly advises and appears as Counsel before French and Egyptian Courts, in projects and cases involving States, State Entities, State-owned companies, SMEs and major multinational companies in the Middle East, Europe, Africa and Asia.

Dr. El Sawah is a leading authority on State and International Organisations Immunities and her book on the subject, "Immunités des États et des organisations internationales – Immunités et procès équitable", Larcier, Brussels, 2012, is "The Reference" for all specialists on this matter.

She is laureate of the African Arbitration Association for young arbitration/ADR Practitioner for the year 2020. She is recognised by Chambers & Partners Global Guide 2022, 2023 and 2024 for expertise based abroad, by Africa Business + (Jeune Afrique) among the 100 Legal Powerlist in 2024.

ABASIEMEDIONG ETUK

KENNA PARTNERS

Abasiemediong Etuk is an Associate specialising in the Dispute Resolution, Arbitration, and Governance & Compliance units of Kenna Partners. Her practice spans a wide range of dispute resolution matters, including oil spill litigation, breach of contract, labour disputes, shareholder actions, cross-border arbitration proceedings, and fundamental rights actions. She has considerable experience in managing the legal and procedural complexities inherent in these cases.

Abasiemediong has a proven track record of representing clients in complex legal matters, bringing a deep understanding of industry-specific issues and negotiation dynamics to each case. In addition to her dispute resolution expertise, she advises Nigerian and international clients in the public and private sectors on various corporate governance matters, ensuring adherence to best practices and regulatory compliance.

UCHE OFODILE ETUK

UNIVERSITY OF ARKANSAS

Professor Uche Ewelukwa Ofodile is the E.J. Ball Professor of Law at the University of Arkansas School of Law and was previously the Arkansas Bar Foundation Professor of Law at the same institution. She is also an Affiliated Professor of the Department of Political Science and of African and African American Studies at the University of Arkansas' J. William Fulbright College of Arts and Sciences. She is a Senior Fellow of the Harvard Kennedy School's Mossavar-Rahmani Center for Business and Government and an Honorary Fellow of the Asian Institute of Financial Law in Hong Kong. In 2021, Professor Ofodile was elected to the Council on Foreign Relations.

Professor Ofodile's teaching, research, and scholarship focuses on intellectual property law, business and corporate law, food law, arbitration, international trade and investment law, as well as technology and the law. She is an award-winning legal scholar who has been featured in legal magazines and publications and whose articles have appeared in leading national and international law journals as well as in magazines, newspapers, and blogs. She is currently working on two books, Legal Aspects of China-Africa Trade, Business and Investment (under contract, Oxford University Press) and Business, Human Rights and Sustainability in Africa (under contract, Routledge).

Professor Ofodile has advised numerous governments, international organizations, businesses, and public interest organizations on a range of issues within her fields of expertise. She currently serves on the Editorial Advisory Committee of International Legal Material, a publication of the American Society of International Law (ASIL), and is co-editor of the African Arbitration Association Blog. She has served as a Book Review Editor for The Law & Practice of International Courts and Tribunals, a leading peer-reviewed journal on international adjudication.

YAOCHEN GONG

UNCITRAL

Yaochen Gong is Associate Legal Office in the the Treaty Section of the United Nations Office of Legal Affairs as an Associate Legal Officer. Before that, he worked for the International Trade Law Division of the same Office, which also serves as the secretariat of the United Nations Commission on International Trade Law (UNCITRAL). He oversaw issues related to the UNCITRAL Transparency Standards and technical assistance for China. He also serviced the legislative work of UNCITRAL, including Working Group VI (Negotiable Cargo Documents) and the work programme on climate change and the law of international trade. Before taking his current position in the UN, he worked for the Ministry of Commerce of China (MOFCOM) for 5 years, mainly focusing on WTO disputes settlement and modernization of trade policies in China. He also got rich experience in trade negotiations, as negotiator of a series of bilateral free trade agreements between China and its major trading partners. Before joining the Chinese government, he was employed by China Export Credit and Insurance Corporation (SINOSURE), a state-funded and policy-oriented insurance company and oversaw the outbound investments and infrastructure projects risk evaluation. He holds an LLB and Master of Law Degree from Nanjing University and a Master of Arts Degree from Johns Hopkins University.

ORHPEE HADDAD

ADNA ALGERIA

Orphée is an attorney admitted to the Paris Bar with experience in international dispute resolution, including litigation and arbitration, particularly in the Central and Western Africa region (OHADA zone), as well as in Northern Africa and the Middle East. He has represented international clients in complex cases involving international trade, public entities, debt collection, foreign judgment enforcement, and multiparty and multijurisdictional proceedings. Fluent in English, French, Arabic, and Italian, Orphée holds a Master's degree in Private International Law and International Trade Law from Sorbonne Law School in France.

DAMIAN JAMES

DAMIAN JAMES DELAY AND QUANTUM EXPERTS

Damian James is a leading expert in the area of quantum, delay, disruption and cost evaluation. His career has included appointments as an expert in arbitrations and adjudications worldwide. Damian's experience lies in engineering and construction claims and dispute resolution. He has expertise in preparing detailed claims to recover client entitlements. Clients praise Damian for his clear and knowledgeable reports. He is also praised for the clarity of his written directions to parties

Damian is skilled in the complex analysis of delay and disruption valuation. He disentangles global claims, establishing cause-and-effect relationships in complex projects. Damian is also strong in working with both forensic planners and quantity surveyors. He is conversant with techniques such as measured mile and time impact analysis.

Amongst many other qualifications and memberships, Damian is qualified as an arbitrator. He is an arbitrator at the Dubai International Arbitration Centre (DIAC), Kigali International Arbitration Centre and LCIA. Damian is also a committee member for the Society of Construction Law in Africa, a member of the CIArb in Zambia and the African Association of Arbitrators.

JEFFERY KADU

BAF MPANGA ADVOCATES

Jeffrey Kaddu is an Advocate of the High Court of Uganda and all subordinate courts practicing in the Dispute Resolution Practice Group at AF MPANGA Advocates a member firm of Lex Mundi. He is a Member (MCIArb) of the Chartered Institute of Arbitrators, the WIPO ADR Young Group, Uganda Law Society and the East African Law Society.

He holds a bachelor's degree (LLB) from Makerere University, a Diploma in Legal Practice from the Law Development Center (LDC), A Certificate in International Arbitration from the Chartered Institute of Arbitrators (CIArb) and An Advanced Certificate in Arbitration and Mediation Under the WIPO Rules.

He has been involved in local, regional, and international arbitrations relating to commercial law, corporate law, intellectual property law, and construction law before the Center for Arbitration and Dispute Resolution (CADER) and International Center for Arbitration and Mediation Kampala (ICAMEK) and different ad-hoc tribunals.

SYLIVIA KASANGA

ARBITRATOR/ARCHITECT

Sylvia is an Architect and Arbitrator with 20 years experience, Managing Partner at Sycum Solutions Co Ltd, a leading architectural and construction management firm based in Nairobi but operating around the East African region. She currently represents Kenya as a court Member in the ICC Court of Arbitration. She is a board member in CIARB Kenya Branch, Executuve committee member Women in ADR, President of the Architects Alliance Kenya. She is currently persuing her masters degree in international dispute resolution at Queen Mary University of London, with a view to expand her ADR practise across the African Boarders. She is passionate and driven in the areas that interest her.

THOMAS KENDRA

KENNEDYS LAW

With over 20 years of specialised experience in international arbitration, Thomas has handled numerous multi-billion-dollar disputes in the energy sector in Europe, disputes relating to the alleged expropriation of mining licenses in Africa and Central Asia, major telecommunications disputes in Central Europe and West Africa, and investment arbitrations in the food production and energy sectors in Latin America. He acts as counsel and also sits as arbitrator.

Thomas is passionate about encouraging the growth of alternative dispute resolution, notably in Africa and also Asia. This led him to collaborate in establishing the Kigali International Arbitration Centre (KIAC) in Rwanda in 2012, for which he was nominated Solicitor of the Year by the Law Society. He remains an active member of KIAC's Board and Executive Committee, and is a founder and Co-President of AfricArb, an organisation aimed at encouraging the use of arbitration in Africa.

As Chambers and Partners put it: "Thomas Kendra assists clients hailing from the energy and TMT sectors with a range of arbitration mandates and is noted for his 'exceptional ability to navigate easily between civil and common law countries.'" Another source enthuses: "He is someone that is so quick-witted that he immediately gets respect and attention in a courtroom." (Chambers and Partners Europe 2021). Meanwhile, Who's Who Legal has noted: "Thomas Kendra 'leads the market' in relation to arbitrations in Francophone Africa."

TSEGAYE LAURENDEAU

SIGNATURE LITIGATION

Tsegaye is an international arbitration partner at Signature Litigation in London.

With over 14 years' experience of international arbitrations as counsel, Tsegaye has advised and represented companies, States and State-owned entities in arbitrations conducted pursuant to the arbitration rules of many of the major arbitration institutions, with a particular focus on disputes in the oil and gas, energy, mining, construction and telecoms sectors.

Tsegaye has developed an expertise in arbitrations involving complex corporate structures, financial products, accounting and tax issues and handles all matters relating to quantum in international arbitrations. While Tsegaye's practice focuses exclusively on arbitration, he began his career in the Project Finance group of a magic circle firm, acting for financial institutions and international corporates in relation to the financing and development of large energy and infrastructure projects in the MENA region and Sub-Saharan Africa.

Tsegaye was a partner at international arbitration boutique law firm Gaillard Banifatemi Shelbaya Disputes and Counsel in Shearman & Sterling's international arbitration group. Tsegaye is a member of the ICC International Court of Arbitration and the ICC Commission on Arbitration and ADR. He features in The Legal 500 International Arbitration Powerlist UK, which showcases the UK's leading arbitration practitioners. He is admitted as a Solicitor in England and Wales and at the Paris Bar.

EUNICE LUMALLAS

LAK ADVOCATES

Eunice Lumallas is a trial lawyer, international arbitrator, and mediator. She is Kenya's representative at the International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C. (2022-2026), a member of the Public-Private Partnerships Petitions Committee (PPPPC), the African Arbitration Association (AfAA), and the Advocates Disciplinary Tribunal (ADT) of the Law Society of Kenya. She is listed on several panels for arbitration and mediation, including the Nairobi Centre for International Arbitration, the Lagos Court of Arbitration, and the Kigali Centre for International Arbitration.

Eunice is an advocate of the High Court and a partner at LAK Advocates, where she oversees dispute resolution. She is also a tutor and trainer in law and Alternative Dispute Resolution (ADR), a qualified patent agent, a commissioner for oaths, and a notary public. She serves as the Chairperson of Women in Alternative Dispute Resolution (WADR) and was the inaugural winner of the Lawyer of the Year award from the Law Society of Kenya in 2018.Her interests include mooting, debate, and mentoring university students. She has judged several moots, including the Vis Moot, and conceptualised the Annual Lady Justice Joyce Aluoch Annual ADR Moot for inter-university competitions. Other interests include nature, culture, arts, and politics.

ANDREW MACLAY

MCNAIR INTERNATIONAL

Andrew Maclay is a Quantum expert witness, who has acted on commercial and investment arbitrations throughout the world over the last 15 years. He specialises in international arbitration and fraud and corruption investigations in anglophone and francophone Africa, and he has acted on disputes in Egypt, Nigeria, Kenya, Tanzania, Gabon, DR Congo, Rwanda, South Africa, Morocco and other African countries.

He has testified before ICSID, ICC and LCIA tribunals, the English High Court, a criminal court and by way of deposition.

Who's Who Legal have said of him "he is an excellent expert who is internationally recognised for his impressive work in arbitration proceedings" and "he enjoys a superb reputation for his strong experience in Africa-related disputes". He has authored chapters in the GAR Guide to International Arbitration and the Investment Treaty Arbitration Review.

He has an MA in Economics from the University of Cambridge and is also a Certified Fraud Examiner and a member of the African Arbitration Association.

He lived and worked in Burundi for three years in the early 1990s, and he is fluent in French.

He recently left the international accounting firm he worked for and now acts as an independent consultant with McNair International.

JOY MGBADO

ALN NIGERIA I ALUKO & OYEBODE

Joy Mgbado is a Senior Associate in ALN Nigeria I Aluko & Oyebode and a key member of the firm's Dispute Resolution team. She has considerable experience representing corporate entities and multi-nationals in commercial litigation before Nigerian courts, as well as in domestic and international arbitration proceedings. She specializes in energy and infrastructure disputes and has worked, as counsel and in advisory roles, on several complex and high value claims in the energy and construction sectors. As counsel, she has worked on ad hoc and institutional arbitrations administered by leading institutions such as the PCA, International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA) and under the United Nations Commission on International Trade Law (UNCITRAL) Rules. She also acts as counsel in arbitration-related court proceedings, especially proceedings for interim protective measures, as well as the enforcement (and annulment) of awards before Nigerian courts.

In 2024, she was recognized as one of the 40 under 40 rising stars in the ESQ Nigeria legal rankings.

MARY MUTUPA

iSETTLE MANAGMENT CONSULTANTS

Mary Mutupa is a Legal Consultant, Arbitrator, Mediator, Adjudicator, Governance, Human Rights and Gender Expert with over 8years of experience in arbitration and mediation and overall, 19 years of work experience mostly at Management level. Mary is the Founder and Managing Partner of iSettle Management Consultants, a company specialized in dispute avoidance and management, based in Lusaka Zambia.

Mary's ADR specialization include Commercial and Investment disputes and has handled Environmental Social and Governance, Energy, Joint Venture, Labour and Employment, Transport, Public Procurement, Human Rights and Business, Sports, Real Estate disputes. Mary has resolved disputes involving corporates, government, quasi-government institutions, banks and the private sector. Committed to fostering positive outcomes while promoting and preserving business relationships. Known for her ability to manage complex cases while maintaining efficiency, integrity, and professionalism.

THEDORE NAUD

DLA PIPER

Théobald Naud is an international disputes lawyer, representing clients in complex commercial and investment arbitration disputes often involving States or State-owned enterprises.

His experience spans a wide range of sectors, including aerospace, defence, energy, food and drinks, mining and natural resources, pharmaceuticals and telecommunications.

Théobald has significant experience in arbitration proceedings administered by International Centre for Settlement of Investment Disputes (ICSID), ICC, the LCIA and the PCA, as well as under various ad hoc rules, including UNCITRAL.

BABAJIDE OGUNDIPE

SOFUNDE OSAKWE OGUNDIPE &BELGORE

Babajide Ogundipe is a founding, and currently senior, partner of the Lagos firm, Sofunde, Osakwe, Ogundipe & Belgore. Prior to starting his firm, he worked in Chief Rotimi Williams' Chambers for nine years. In a career that has spanned more than forty-five years, he has appeared before State and Federal superior courts throughout Nigeria. He has, primarily, acted for parties in commercial disputes of all types. His practice has also involved advising, and acting on behalf of, corporations and individuals adversely affected by fraudulent conduct, and seeking to recover value lost because of such frauds. In addition, over the past thirty years, he has acted as arbitrator in domestic and international arbitrations covering a broad range of subject matters, from oil and gas related disputes to construction, airline agency commissions, sports sponsorships, defence contracts and electricity generation under the UNCITRAL Arbitration Rules, the ICC Arbitration Rules, the Arbitration Foundation of Southern Africa International Rules, the rules under the Nigerian Arbitration and Conciliation Act, the Lagos Court of Arbitration Rules and the Kigali International Arbitration Centre Rules.

ADEDOYIN RHODES-VIVOR SAN

DOYIN RHODES-VIVOR & CO

Mrs. Rhodes-Vivour, SAN, C.Arb has extensive experience as arbitrator and counsel under institutional rules and ad-hoc proceedings. She is listed on the international panels of several leading arbitration institutions. She is a member of the Court of the ICC Paris International Court of Arbitration, vice president of the LCIA African Users Council, and has held other leadership positions, including serving as the immediate past Chairperson of the CIARB (UK) Nigeria Branch. She is recognised in various publications, including Who's Who Legal and Expert Guides, as one of the preeminent professionals in arbitration. She is also the author of "Commercial Arbitration Law and Practice in Nigeria Through the Cases", published by LexisNexis.

LEONID SHMATENKO

EVERSHED SUTHERLAND

Leonid Shmatenko is part of Eversheds Sutherland's data protection and technology law team.

He has vast experience in regulatory and general issues in the areas of eSports and Blockchain. He advises eSports associations and clubs on all legal issues, advises and supports crypto startups in all matters from planning, preparation to execution of private and public token offerings (so-called Initial Coin Offerings or ICOs).

Furthermore, Leonid specializes in international arbitration and has participated in several arbitration proceedings (SAC, ICC, DIS, UNCITRAL, ICSID, ad hoc) as a party representative and secretary of the tribunal.

Before joining Eversheds Sutherland, Leonid Shmatenko worked as an attorney at leading law firms in Geneva, Munich and Paris.

He is admitted to the Bar in Switzerland and Germany.

GODSON UGOCHUKWU

FOTRESS SOLICITORS

Experienced Legal Practitioner with over 22 years of expansive practice, advising on complex commercial transactions, data protection and privacy, medical negligence, labour and employment law, IP and telecoms. A highly regarded and skilled international arbitrator and mediator and a Barrister and Solicitor of the Supreme Court of Nigeria. Godson is a founding and Principal Partner at Fortress Solicitors, a full-service law firm headquartered in Lagos Nigeria, with offices in Nigeria's major cities. He is a Senior Advocate of Nigeria (SAN), the highest rank and hallmark of distinction for Barristers in Nigeria. He is also a Fellow of the Chartered Institute of Arbitrators, UK, (Nigeria Branch).

JACQUELINE WAIHENYA

JWM LAW LLP

FCS JACQUELINE WAIHENYA C.ARB/FCIARB is Chartered Arbitrator (C.ARB) and Fellow of the Chartered Institute of Arbitrators (FCiarb). She is the Chairman of the Chartered Institute of Arbitrators (Ciarb) Kenya Branch and is an alternative dispute resolution (ADR) expert. She has been appointed a director to the International Chamber of Commerce (ICC) Kenya Board. She is well-versed in arbitration and in addition to being officially recognized as a Chartered Arbitrator she holds an LLM from Queen Mary University of London in International Dispute Resolution as well as a diploma in International Arbitration from Ciarb.

Her proficiency extends to construction adjudication holding an advanced certificate from Ciarb. Her expertise is bolstered by her connection to the Dispute Resolution Board Foundation (DRBF) plus her specialized training from King's College London and FIDIC (International Federation of Consulting Engineers) in Construction Law. Additionally, she is a Chartered Mediator with advanced mediator skills being certified by both the International Mediation Institute (IMI) and the Kenyan Institute of Chartered Mediators and Conciliators. She is the sole Kenyan mediator approved by FIFA (Fédération Internationale de Football) and is a pioneer accredited mediator within the Kenyan Judiciary.

She represented Ciarb Kenya Branch in the National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020 where she convened the NSC Sub-Committee on Legislative Proposals. The Kenyan Cabinet approved the National ADR Policy in March 2023, which has now been placed before Parliament as Sessional Paper No.4 of 2024.

Jacqueline is an Advocate of the High Court of Kenya and has practiced actively since 1998. She is the founder and Managing Partner of JWM Law LLP based in Mombasa, Kenya. She served as the inaugural Convenor of the Admiralty & Maritime Committee of the Mombasa Law Society, the oldest bar association in Kenya, from 2015 to 2023.

She is listed on the panels of the CIARB President's Panel, CIARB Kenya, the Nairobi Centre for International Arbitration (NCIA), the Arbitration Foundation of Southern Africa (AFSA), the African Arbitration Association, Shenzhen Court of International Arbitration (SCIA) and the International Chamber of Commerce (ICC).

Keynote Address

ARBITRATION AND ESG IN AFRICA - ALIGNING JUSTICE, INVESTMENT, AND SUSTAINABILITY

Esther Moutngui Ikoue

Introduction

Nowadays, arbitration has become a preferred Alternative Dispute Resolution (ADR) mechanism. As such, it is playing an increasingly important role in global economic development, through its contribution to legal stability, investment attractiveness and efficient dispute resolution. In Africa, the arbitration landscape is dynamic and constantly changing through its stakeholders, such as arbitrators and African arbitration institutions, that have experienced a real boom in recent years. In fact, there currently exist around a hundred reliable arbitration institutions on the African continent, with different areas of expertise.[1]

Another recent emergence is that of the intersection of arbitration and Environmental, Social and Governance (ESG) considerations within the continent. In fact, Africa keeps attracting significant investment in sectors such as mining, energy and infrastructure. Foreign investment on the continent is on the rise, especially with the advent and recent entry into force of the Africa Continental Free Trade Area (AfCFTA),[2] which according to the World Bank forecasts, will boost Africa's exports by 29% (US $560 billions) relative to business as usual by 2035, and exports by 81% with the removal of 97% of tariffs on intra-AfCFTA trade.[3] This calls for a solid dispute resolution mechanism to handle disputes arising from ESG obligations.

For its 5th Annual Conference, the African Arbitration Association (AAA) has chosen a cutting-edge theme, that is "African Arbitration unbound: ESG considerations in Arbitration in Africa". Throughout the Conference, we will surely explore the evolving role of arbitration in Africa, assessing whether arbitration is the right process for handling ESG-related disputes, examining the recent trends and case studies, as well as the legislative developments on ESG issues, and the opportunities and challenges for African arbitration in the context of ESG considerations will be exposed.

For now, allow me to focus on the influence of ESG considerations in Africa (I) and the impact of advancing arbitration in Africa through ESG (II).

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1 Wheal R, Oger-Gros E, & autres, "Institutional arbitration in Africa: Opportunities and challenges" (Whitecase.com, September 2020), [online], Available at: https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges.

2 On May 30th, 2019.

3 The African Continental Free Trade Area: Economic and Distributional Effects' (World Bank, 2020), [pdf], Available at: https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.

I THE INFLUENCE OF ESG CONSIDERATIONS IN ARBITRATION

A. Definition of ESG and its importance in Arbitration

Definition of ESG

There is no universally accepted definition of ESG.[4] This is due to several factors such as: cultural, regional and judicial differences in the world, evolving ESG standards and best practices, complexity and scope of ESG-related issues, and lack of standardisation (as there is no single global body setting ESG standard).[5]

Nevertheless, there are definitions that seem acceptable in many jurisdictions. ESG is said to be "*an umbrella term for issues relevant to an organisation's assessment of its impact on society and the environment*".[6] It refers to a set of criteria used to evaluate a company's operations and performance in three key areas: Environmental, Social and Governance.

The *environmental consideration* includes the way a company impacts the environment, such as carbon emissions, resource use, waste management, and efforts to combat climate change. In fact, with global growing concerns about this environmental consideration, companies are facing more and more claims from investors, communities, and even governments, for breaching their environmental obligations.

As to the *social factor,* this covers the relationship of a company with its stakeholders (employees, suppliers, customers, surrounding communities). It therefore includes social issues like human rights, labour practices and community engagement, diversity and inclusion.

The third ESG factor, that is the *governance consideration*, deals with how a company is governed, including its leadership, internal controls, shareholder rights and duties, executive pay, and account audits.[7]

The above three criteria (Environmental, Social and Governance) are used to assess environmental and social impact of companies, and they are commonly applied in the context of investments.

Importance of ESG considerations in Arbitration

ESG considerations are gaining more and more importance in arbitration, especially international commercial arbitration. In fact, companies are increasingly agreeing that, by integrating ESG considerations into arbitration, they can resolve disputes more effectively, as well as aligning their operations with global responsibility and sustainability standards.

i) The rise of ESG-related contract clauses and provisions in international investment treaties

Across the globe, there is a growing recognition of the importance of sustainable and responsible business practices. This is reflected by the rise of ESG-related contract clauses and provisions in international investment Treaties. Companies are also becoming concerned about

4 Timken N.E., "*ESG Considerations In International Arbitration*", [online], Available at: https://www.linkedin.com/pulse/esg-considerations-international-arbitration-nelson-ed-ward--pkeie/.

5 Miller S.A., "Exploring the what and why behind ESG initiatives", [article], Available at: https://www.bakertilly.com/insights/environmental-social-and-governance-esg.

6 Stebbing H. and Furse I., "ESG disputes in international arbitration", (Norton Rose Fulbright, 2022), [online], Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration.

7 Krants T. and Jonker A., "What is ESG?", (IBM.com, 2024) [online], Available at: http s://www.ibm.com/topics/environmental-social-and-governance

the importance of inserting ESG contractual provisions, especially where there are different standards, laws and regulations, and even levels of transparency, between them, in their various countries. Here, ESG-related clauses requiring all counterparties to abide, can be a key solution to address jurisdiction barriers.[8]

The following are a few examples of ESG-related contract clauses:[9]

- *Climate change and sustainability commitments*: A lot of contracts now include clauses that commit parties to achieving specific climate-related goals, such as reducing carbon emissions or transitioning to renewable energy sources. An example is the Chancery Lane Project, a collaborative effort amongst UK lawyers to develop contractual provisions to support climate change mitigation.

- *Human rights, anti-discrimination and labour standards*: Contracts often include commitments to uphold human rights and labour standards, such as clauses complying with international human rights norms and prohibiting discrimination and forced labour. An example is the American Bar Association, which recently updated its model contract clauses to expand the scope of ESG obligations, thus including human rights obligations for buyers in international supply chains.

- *Governance and anti-corruption commitments*: Clauses related to governance often focus on promoting transparency, accountability and anti-corruption measures. Such provisions help ensure that business practices align with ethical standards and regulatory requirements. An example is the code of conduct of the Responsible Business Alliance (the world's largest industry coalition dedicated to responsible business conduct in global supply chains) that ensures responsible business commitments.

- *Environmental commitments*: These are becoming the more commonly used clauses, and they may include requirements for environmental impact assessments, pollution control measures, and sustainable resource management.

With regards to ESG provisions in international investment treaties, it is worth noting that there are more and more being taken into consideration, giving room for new types of claims and defences in investor-state dispute settlement. We can list some current ESG-related treaty clauses as follows:[10]

- *The EU-Angola Sustainable Investment Facilitation Agreement*: On March 4th, 2024, the European Council adopted a decision on the conclusion of the Sustainable Investment Facilitation Agreement (SIFA) between the European Union and Angola.[11] This is the first of its kind for the European Union, and it is aimed at making it easier to attract and expand investments while integrating environment and labour rights commitments in the EU-Angola relationship.

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8 Stebbing H. and Furse I., "*ESG disputes in international arbitration*", (Norton Rose Fulbright, 2022), [online], Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration.

9 idem

10 idem

11 Council of the EU, "*EU-Angola: Council gives final greenlight to the EU's first sustainable investment facilitation agreement*", (European Council, March 2024), [online], Available at: https://www.consilium.europa.eu/en/press/press-releases/2024/03/04/eu-angola-council-gives-final-greenlight-to-the-eu-s-first-sustainable-investment-facilitation-agreement/.

- *The Singapore/Australia -Green Economy Agreement (GEA)*: On October 18th, 2022, both countries signed the GEA, laying the foundations for greater collaboration between them to drive growth while reducing emissions;[12]
- *Preambles and aspirational statements*: Many modern investment treaties include in their preambles references to environmental protection and sustainable development.

The inclusion of the above-listed ESG-related clauses and provisions in contracts and treaties surely has implications for arbitration practice, which nevertheless seems to be the right process for ESG disputes.

ii) Arbitration appears to be the right process for ESG disputes

There are several reasons pleading on behalf of Arbitration as an effective process for resolving ESG disputes. The procedural flexibility and the specialised arbitrators, as well as the room given to arbitral awards to be executed in almost every country in the world under the New York Convention, give arbitration a prominent place over other dispute resolution methods. Here, the parties can also set themselves the rules and regulations applicable to their case, and more importantly, they are allowed to choose the arbitrators.[13]

In addition, arbitration provides a confidential forum and ensures a confidential award. As many ESG disputes involve sensitive information such as proprietary environmental data or internal governance practices, arbitration seems to fit their needs.

Moreover, arbitration gives the possibility of obtaining interim measures before the constitution of the arbitral tribunal or during the arbitral proceedings. This is worthy, especially in cases of imminent or irreversible environmental damage or serious violation of human rights.[14]

The aforementioned advantages of arbitration as a means of resolving ESG disputes shall, nevertheless, be balanced as there are also criticisms of its suitability, in respect of the increased complexity of cases to arbitrate (as arbitrators tend to navigate complex ESG issues, requiring expertise in environmental science, human rights and governance), the enhanced accountability of parties to arbitration (as ESG provisions hold parties accountable for their commitments, leading to more responsible business practices), and the balancing interests (because arbitrators must now balance the interested of investors and States, ensuring that ESG considerations are adequately addressed while protecting investment rights).

The increasing integration of ESG considerations into Arbitration is also reshaping the types of disputes submitted to arbitration.

B. The scope of influence of ESG on Arbitration on the types of disputes appropriate for resolution by arbitration

As stated above, the influence of ESG considerations on arbitration has expanded the types of disputes that are appropriate for resolution through this process. Some key areas of dispute

[12] Australian Government, "*Singapore-Australia Green Economy Agreement*", (Department of Foreign Affairs and Trade, 2024), [website], Available at: https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement.

[13] Von Wobeser, "*The role of arbitration in ESG disputes*", (2024), [online], Available at: https://www.vonwobeser.com/index.php/publication?p_id=1650.

[14] Von Wobeser, "The role of arbitration in ESG disputes", (2024), [online], Available at: https://www.vonwobeser.com/index.php/publication?p_id=1650.

where ESG factors play a major role are environmental and social disputes, commercial contract claims and investment treaty disputes.[15]

Environmental disputes (climate change, pollution)

As the world is more and more concerned about climate change and environmental degradation, companies will face claims from investors, communities and States related to failure to meet their environmental obligations and environmental damage and remediation.

Social disputes (human rights, community impact)

Social issues, such as human rights violations, labour practices and community impact, are also reshaping arbitration, especially international arbitration. Today, companies may be held liable for those social issues.

Commercial contract claims with ESG clauses

As mentioned earlier, ESG-related provisions are increasingly being incorporated into commercial contracts, varying from climate change and sustainability goals, environmental protection and labour standards. Over the coming years, there might be more and more disputes on the interpretation and enforcement of these clauses.

Treaty-based claims (investment Treaty disputes)

Investment treaties are increasingly incorporating ESG provisions to balance investor protection with sustainable development commitments. For instance, there are "non-relaxation of standard clauses" (to prevent States from lowering environmental or social standards to attract investment), and "non-precluded measures clauses" allowing States to take necessary measures to protect public health, the environment, or other ESG interests.

These ESG provisions can lead to disputes between States and foreign investors, especially when ESG obligations are perceived as conflicting with investment protections. It is therefore worth exploring measures that have the impact of advancing arbitration in Africa through ESG considerations.

II IMPACT OF ADVANCING ARBITRATION IN AFRICA THROUGH ESG

Exploring the impact of advancing arbitration in Africa through ESG principles involves, as seen previously, the interplay of legal frameworks, economic growth, and sustainable development. Arbitration has the potential to significantly ipositively influence the integration of ESG principles into the African business landscape (A). This influence does not, however, prevent challenges (B).

A. The positive impact

Many examples of positive impacts could be outlined here, but for the purpose of being concise, two of them will be indicated, which can be considered as the most important: sustainable development, mingled with a better corporate responsibility, and compliance associated with attractiveness.

[15] Timken N.E., "ESG Considerations In International Arbitration", [online], Available at: https://www.linkedin.com/pulse/esg-considerations-international-arbitration-nelson-ed-ward--pkeie/.

Sustainable development and better corporate responsibility

Though it could seem, from our previous developments, that arbitrations in ESG cases (most of them being investment arbitrations) are often unfavourable to the States, the balance has begun to tip, and investors are already being condemned when they violate ESG principles. As a result of these rulings, multinationals are taking greater account of environmental, social and governance issues, thereby helping to improve people's lives. For example, in the *Methanex vs USA* case,[16] the tribunal dismissed Methanex's claims and ruled in favour of the United States. The tribunal found that California's measures were legitimate environmental regulations and did not constitute an unlawful expropriation of Methanex's investments.

In a more recent case, some investors brought an action against Costa Rica, alleging violations of environmental laws and investors' rights. At the end, the tribunal ruled in favour of Costa Rica, rejecting the investors' claims.[17]

Both examples point to two main pieces of information. Firstly, the State can decide to put in place measures to prevent, restrict or stop corporate activities with negative impact on the environment, the population or the economy in the large sense of the word, and such measures, in the interest of the population, cannot be considered as abusive. Secondly, corporations, companies and economic actors are warned, through arbitration, not to act in a way that destroys the environment or affects the living conditions of the population. Arbitration is therefore an effective tool for sustainable development and corporate responsibility.

Compliance and attractiveness

Compliance with ESG standards can enhance the reputation and credibility of companies involved in international arbitration. By adhering to these standards, companies demonstrate their commitment to responsible business practices, which can be a significant factor in their overall success. Moreover, just like their judicial counterparts, Arbitral tribunals, which are more and more enriched with public international law experts, are increasingly expected to consider ESG issues when interpreting and applying laws and contracts. This means that companies must be aware of and comply with relevant international, regional, and local laws and regulations concerning environmental protection, human rights, labour standards, and anti-corruption measures. Failure to do so can lead to legal repercussions and financial penalties.

On a judicial note, and as a comparison, penalties for non-compliance are illustrated by the sentencing, in September 2014, of British pharmaceutical company GlaxoSmithKline (GSK) by a Chinese court to a fine of 490 million Dollars for bribery.[18] In February 2020, Airbus undertook to pay several fines totalling 3.6 billion Dollars to put an end to corruption investigations in France, the United States and the United Kingdom. The corruption took place in no fewer than seven countries.[19]

There is also no doubt that promoting ESG through arbitration will lead to more attractiveness of the African continent. According to a study cited by the African Development Bank, the global environmentally and socially informed investments (using the broader sense of environmental and social integration) are expected to continue growing and to pass the USD 100 trillion mark

[16] Arbitral Award available at: https://jusmundi.com/fr/document/decision/en-methanex-corporation-v-united-states-of-america-final-award-of-the-tribunal-on-jurisdiction-and-merits-wednesday-3rd-august-2005.

[17] Aven and others v. Costa Rica, 18th september 2018 Available at https://jusmundi.com/en/document/decision/en-david-r-aven-samuel-d-aven-carolyn-j-park-eric-a-park-jeffrey-s-shioleno-giacomo-a-buscemi-david-a-janney-and-roger-raguso-v-the-republic-of-costa-rica-final-award-tuesday-18th-september-2018.

[18] https://www.bbc.com/news/business-29274822.

[19] https://www.sfo.gov.uk/cases/airbus-group/.

by 2030.[20] In the same study, the Bank reveals that up to 72% of asset managers are implementing or evaluating environmental and social considerations in their investment strategies. This shows that investors are increasingly interested in the ESG performance of the companies and countries they invest in, and the importance of ESG considerations in the decisive steps of investment.

Therefore, States that are seen as promoting and enforcing ESG standards can attract foreign direct investment. By incorporating ESG into their legal frameworks and arbitration practices, States can position themselves as attractive destinations for investment. This can lead to economic growth and development.

Moreover, and as mentioned above, more international law experts are being integrated in panels. Arbitrators with expertise in ESG issues are becoming more sought after. As parties to arbitration recognise the importance of these considerations, they are more likely to choose arbitrators who understand and can effectively address ESG concerns. This can lead to a more diverse and specialised pool of arbitrators, which can enhance the quality and legitimacy of the arbitration process. ESG in that sense can become a lever of attractiveness of arbitration in Africa, making African seats recommendable and developing the practice on the continent.

B. The challenges of ESG in arbitration

The integration of Environmental, Social, and Governance considerations into arbitration presents several challenges that are multifaceted and complex. These challenges stem from a proper and universal definition of ESG, the subjectivity of ESG performance assessment, and the imbalance of resources between the parties. Moreover, there seems to be a conflict between the need for transparency on ESG issues and the confidentiality of arbitration.

No universal definition of ESG

The lack of a universal definition reflects the evolving nature of ESG and the diverse perspectives on what constitutes responsible investment. Some investors may prioritise certain issues over others, and the relevance of specific ESG factors can vary depending on the country, the company's industry, size, and geography. This leads to the drafting of ESG rules and clauses in broad terms, and arbitrators (and judges) do not have a framework that enables them to apply the rule of law uniformly. This can lead to different solutions where facts are similar or almost the same, or even different considerations when appreciating a negative impact.

As an illustration, the oil spills in the Gulf of Mexico and the Niger Delta, two of the most serious environmental disasters in recent human history. Many agree that these two disasters, which occurred under virtually the same conditions and created virtually the same ecological and human disaster, are not being treated in the same way by environmental specialists, international bodies and even the media.[21]

While there is no single universally accepted definition of ESG, some organisations have developed frameworks and standards that are used in practice. For instance, the Global Reporting Initiative (GRI) provides a comprehensive sustainability reporting framework that includes ESG indicators.[22] Similarly, the Sustainability Accounting Standards Board (SASB)[23] offers industry-specific guidelines for reporting on material ESG issues. Can these attempts to

[20] African Development Bank, Africa Econimic Brief, the role of ESG information disclosure and rating in sustainable development in africa Volume 12, 2021, page 2.

[21] https://www.courrierinternational.com/article/2010/06/03/les-marees-noires-oubliees-du-delta-du-nige

[22] https://www.globalreporting.org/

[23] This organisation develops and maintains standards to help companies disclose financially material sustainability information to investors. Information available at https://sasb.ifrs.org/

standardise principles inspire purely African initiatives? That would necessarily be a good thing, given our specific characteristics and diversity.

Subjectivity of assessment of companies' ESG performance

As indicated above, while there are efforts to introduce objectivity and standardisation into ESG principles and therefore, assessment, the inherently contextual aspects of these metrics continue to introduce a degree of subjectivity.

ESG factors are multidimensional and often difficult to quantify. Environmental factors might include a company's carbon footprint, water usage, and waste management, while social factors could involve employee treatment, community engagement, and human rights practices. Governance factors might encompass board diversity, executive compensation, and transparency. Each of these areas is complex and can be influenced by a range of activities and policies that are not always easily measurable.

Moreover, the impact of these factors on a company's long-term sustainability and performance can be challenging to predict, which further complicates the assessment process. Moreover, some of the companies ESG non-compliant activities may lead to criminal prosecution, like the current GLENCORE case, involving many African countries, including the host country of this event. This adds to the complexity of assessment.

Further, the quality and availability of ESG data are crucial for accurate assessments. However, many companies are still in the early stages of collecting and reporting this information, and there may be significant gaps or variations in what is disclosed. This can lead to disparities in the information available for analysis and make it difficult to compare companies on an equal basis. Additionally, much of the data relies on self-reporting, which can be subject to exaggeration or misrepresentation of the company's efforts to appear more sustainable than it is in reality.[24] The most recent and famous cases are McDonald's and Coca-Cola.[25]

Confidentiality and transparency issues

Confidentiality is said to be a cornerstone of international arbitration. It is often perceived as a key advantage of this ADR, particularly in commercial contexts where parties may wish to maintain the confidentiality of sensitive business information, trade secrets, and other proprietary data. The confidentiality of arbitration proceedings is generally governed by the terms of the arbitration agreement, institutional rules, and applicable laws.

On the other hand, transparency is equally important in the context of ESG. Stakeholders, including investors, consumers, employees, and civil society organisations, are increasingly demanding that companies disclose information about their environmental and social practices, as well as their governance structures and policies. This transparency is important and is increasingly required in investment contracts, but above all in the disputes that arise from them, which often affect the public interest.

The intersection of ESG and arbitration can create tensions between the need for confidentiality and the demand for transparency. When ESG issues are involved in a dispute, parties may have conflicting interests regarding the disclosure of information. This conflict is even greater, depending on the arbitration rules governing the dispute. For example, there are notable differences between the ICSID and UNCITRAL rules on confidentiality and transparency. While UNCITRAL's Article 3 imposes greater disclosure obligations by requiring written submissions,

[24] This practice is also known as "greenwashing".

[25] https://thesustainableagency.com/blog/greenwashing-examples/. The first introduced paper straws that turned out to be non-recyclable, while the second had a 6.6% sugar rate in its "life" brand, resented as a healthy drink.

transcripts of hearings, a list of exhibits of documents, expert reports, witness statements presented in the proceedings, and awards to be made available to the public, ICSID Arbitration Rule 48(4) requires party consent for the publication of the final award[26].

When we know that ESG disputes involve public interest, and that the population often awaits the outcome of disputes, could we imagine, in that context, an award, or other important proceedings documents not published, for reasons of confidentiality?

We recall in this sense the ICSID *Biwater Gauff Ltd v Tanzania case*, in relation to access to documents during the proceedings. In this case, the claimant requested provisional measures on confidentiality because of the unilateral disclosure of the minutes of a tribunal meeting. The tribunal agreed to the requested measures, stating that the disclosure of some documents should not be allowed in principle since it would jeopardise the procedural integrity of the arbitral process.[27]

Imbalance of resources between the parties (eg: multinationals vs. States)

The imbalance of resources between parties in ESG arbitration, particularly between multinational corporations and States, is a significant concern that can affect the equity and fairness of the dispute resolution process. This disparity can manifest in various ways and can impact the outcomes of arbitration proceedings.

The proceedings are often costly. Multinationals typically have substantial financial resources at their disposal, allowing them to engage in prolonged and complex arbitration processes. They can afford top-tier legal representation, expert witnesses, and other necessary resources to effectively present their cases.

In contrast, States, especially developing ones in Africa, may have more limited budgets and may struggle to match the financial capabilities of multinationals, which can lead to an asymmetry in the quality of representation and potentially distort the outcome of the dispute.

Moreover, multinationals are often better equipped to gather and analyse information relevant to the arbitration due to their global networks and resources. This includes data on the local environment, social impacts, and governance practices, which can be crucial in ESG disputes.

States, particularly those with less developed information systems, may face challenges in obtaining and verifying the necessary data to support their claims. Not forgetting the fact that the power dynamics inherent in the relationship between multinationals and states can also affect the arbitration process. Multinationals may leverage their economic influence or the threat of withdrawal of investment to negotiate more favourable terms or to deter states from pursuing certain claims.

CONCLUSION

In conclusion, the integration of ESG considerations in arbitration within the African continent represents a significant and timely evolution in the field of international dispute resolution. The incorporation of ESG principles in arbitration provides a framework for addressing the complex and multifaceted challenges that arise from increased investment and development activities.

[26] ICSID Arbitration Rule 48(4): "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications, excerpts of the legal reasoning of the Tribunal".

[27] The award is available at https://www.italaw.com/cases/157.

By embracing these principles, African arbitration institutions are positioning themselves at the forefront of a global shift towards a more ethical and socially responsible business environment.

The increasing relevance of ESG in arbitration underscores the interconnectedness of commercial interests with broader social and environmental concerns. This convergence is not merely a response to international pressures but also reflects a growing awareness among African stakeholders of the intrinsic value of sustainable development. The continent's unique set of challenges, including environmental degradation, social inequality, and governance issues, necessitate a proactive approach to embedding ESG considerations into the fabric of investment and trade agreements.

We have indicated above that the potential benefits of integrating ESG in African arbitration are diverse. For investors, it offers a more reliable and transparent framework for assessing and managing risk, thereby fostering investor confidence and attracting responsible capital. For local communities and governments, it provides a platform for their voices to be heard and their rights to be protected in the face of international commercial interests. Moreover, by incorporating ESG principles, African arbitration centres can enhance their reputation as credible and innovative forums capable of addressing the distinctive challenges of the continent.

However, the journey towards a more ESG-oriented arbitration landscape in Africa is not without its challenges. There is a need for greater clarity and harmonisation of ESG standards across jurisdictions to prevent inconsistent application.

Additionally, capacity-building and training initiatives are essential to equip arbitrators, legal practitioners, and other stakeholders with the necessary skills and knowledge to effectively navigate the evolving legal terrain. The development of specialised arbitration rules and the inclusion of ESG experts in tribunals are further steps that can enhance the quality and effectiveness of ESG-related disputes.

To harness the full potential of ESG-integrated arbitration, Africa must continue to foster a culture of collaboration between governments, the private sector, civil society, and international organisations. This collective effort will be instrumental in shaping legal frameworks that are sensitive to local contexts and capable of adapting to the continent's dynamic landscape. For instance, some scholars, believing that ICSID arbitration was generally unfavourable to African States, have mooted the idea of creating a purely African International Centre for the Resolution of Investment Disputes, based in Africa. The idea is gaining ground, and this event is perhaps also an opportunity to study its specifications and implications.

As African nations strive to balance economic growth with social equity and environmental standards, the role of arbitration in upholding these principles will be vital. By embracing ESG, African arbitration can serve as a catalyst for responsible investment and a better and equitable global order. Through concerted efforts and a shared commitment to sustainable principles, Africa can demonstrate to the world the power of arbitration as a tool for positive change.

PANEL 1

AFRICAN PERSPECTIVES OF ESG

SUMMARY

Moderator: Abasiemediong Gabriel Etuk

Panel 1 considered "African Perspectives of ESG". The panel sought to answer three questions that would flow into the conference and the panels that were to follow:

The questions are:

- What is the importance and general content/targets of ESG in Africa?
- What is the level of legal transposition of ESG for corporate policies?
- What level of liability exposure is derived from ESG?

With contributions from three speakers, the discussion set the stage for the conference. Beginning by highlighting that ESG—Environmental, Social, and Governance—is a concept without a single, universally accepted definition. Its interpretation and application vary widely across different regions. Panellists noted that in recent years, environmental considerations have become more prominent in investment law, particularly through newer Bilateral Investment Treaties (BITs). These agreements aim to balance investment protection with environmental sustainability, while also promoting greater transparency in investor-state arbitration processes. On the social side, the panel emphasised that challenges such as poverty, stark social inequalities, and governance issues, like corruption and political instability, add a layer of complexity, particularly in the African context. Overall, the discussion underscored the importance of regional context when addressing ESG issues in arbitration.

PANEL 2

ROLE OF AFRICA IN ESG IMPLEMENTATION

SUMMARY

Moderator: Sally El Sawah

Panel 2 considered "The Role of Africa in ESG Implementation – The Role of ESG for Africa". It built on the opening session by directing the conference's attention to the duties, liabilities, and strategic importance of ESG implementation for African governments and African-incorporated companies. The panel focused on two guiding questions: the nature of state and corporate responsibilities in advancing ESG frameworks and the reason why ESG implementation is critical for African economies.

With contributions from five speakers, the discussion traversed a range of perspectives and sectoral insights. The topics included navigating ESG within the context of maritime arbitration, challenges and opportunities unique to the continent, and African-specific considerations in governance and implementation capacity. The panel also examined the role of the judiciary in ESG matters, drawing distinctions between the approaches of different jurisdictions in both a domestic and international context. The panel also reflected on the involvement of youth and civil society in shaping ESG strategies. Speakers highlighted practical case studies and concluded with recommendations aimed at strengthening ESG frameworks across Africa.

Speaker Paper

NAVIGATING ENVIRONMENTAL SOCIAL GOVERNANCE IN MARITIME ARBITRATION: CHALLENGES AND OPPORTUNITIES IN AFRICA

Jacqueline Waihenya

Introduction

Environmental, Social, and Governance (ESG) principles have not spared arbitration, including in the maritime sector, owing to the increasing global emphasis on sustainability, responsible business practices, and transparency. ESG considerations, as their moniker suggests, are those concerned with the environment, social and economic considerations, and the international best practices emerging within the governance space. They are transforming the way businesses are being re-engineered. Different sectors and whole industries worldwide are being repurposed, and the maritime business has not been spared in this process. This is because the world continues to prioritise sustainability, and disputes which are impacted by ESG concerns, such as emissions compliance, crew welfare, and environmental impacts, are becoming more common, causing the investing community to take notice. Emerging ESG trends and practices in Maritime business include green shipping, sustainable ports and ESG reporting. Disputes in these spaces have seen renewed interest in maritime arbitration to solve conflicts due to its perceived flexibility, confidentiality and the opportunity to leverage specialised expertise. Africa, for its part, is seen to embody potential in ESG implementation in natural resources mobilisation, renewable energy transition, climate change mitigation and sustainable development initiatives, with these factors being interwoven with the strengthening of regional economic communities and the emergence of the African Free Common Trade Area (AfCTA). AfCTA has further spurred a growing interest in the place of Africa in terms of global trade and developments, but longstanding misconceptions about the continent's capacity to adopt ESG-driven maritime arbitration persist. This paper accordingly seeks to examine the nexus between ESG and maritime arbitration in Africa to contribute to this dynamic and immensely exciting emerging phenomenon.

The Intersection between ESG & Maritime Arbitration

The maritime sector is globally connected, and key international and regional conventions and guidelines govern it. It is also impacted by the numerous and distinct national regulatory frameworks that dot the continent, which nevertheless conform to international maritime conventions. The United Nations Convention on the Law of the Sea (UNCLOS) serves as the primary legal framework that regulates maritime activities and includes dispute resolution mechanisms. In addition to this, numerous African nations are signatories to various International Maritime Organisation (IMO) conventions related to ESG principles, for example, the International Convention for the Prevention of Pollution from Ships (MARPOL), the Ballast

Water Management Convention, and the Safety of Life at Sea (SOLAS). Regional legal frameworks include the African Union (AU) Agenda 2063 and the African Maritime Transport Charter. All these regulations, whether on national, regional or international planes, emphasise environmental protection, labour rights and governance in maritime operations. Standard components include environmental impact assessment (EIA) laws, legislation on labour rights for seafarers and port workers, and anti-corruption frameworks, especially about public procurement and trade facilitation. The maritime industry has further engaged in initiatives such as the Global Maritime Forum's Getting to Zero Coalition which aims to achieve commercially viable zero-emission vessels (ZEVs) by 2030, aligning with ESG principles, particularly concerning environmental sustainability; the Poseidon Principles adopted by financial institutions that fund maritime operations that provide a framework for incorporating climate consideration into lending decisions within the sector and further ensure that investment decisions are aligned with climate-related targets. The African Blue Economy Strategy promotes the sustainable development of Africa's marine and freshwater resources, emphasizing environmental sustainability, economic inclusion, and effective governance in the maritime industry. It was launched under the AU's Agenda 2063.

African Peculiarities in Maritime Arbitration

Like everything else about Africa, its geography and maritime business are a mass of contradictions. Africa rises from sea level to peak elevations, boasting at least 8 climatic zones. The continent's coastline is 40,188km, accounting for 11% of the world's total of 356,000 km along the Atlantic Ocean, the Indian Ocean, the Mediterranean Sea, and the Red Sea. Countries along the eastern seaboard of Africa combined are considered to have the highest coastlines, followed by Northern Africa and then West Africa. However, paradoxically, Nigeria is the leading country in maritime business, followed by Egypt and South Africa. Nevertheless, 40 countries have coastlines, with 16 countries being landlocked and therefore having no coastlines. These are Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Eswatini, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, South Sudan, Uganda, Zambia, and Zimbabwe and they rely upon their immediate neighbours for logistics and transport of their import-export businesses. This has led to the emergence of major ports around the coastline, which can be ranked per volume of business calculated on the basis of twenty-foot equivalent units (TEUs) that they handle. These are Tangier (Morocco), Durban (South Africa), Port Saïd (Egypt), Coega Ngura Port Elizabeth (South Africa), Mombasa (Kenya), Casablanca (Morocco), Djibouti (Djibouti), Lomé (Togo), Abidjan (Côte d'Ivoire) and Tema (Ghana). Nevertheless, whilst Nigeria is the largest ship-owning nation with 291 registered vessels, African maritime business is still largely owned and operated by interests foreign to the continent.

The region is vulnerable to environmental threats such as coastal erosion and oil spills, which tend to be frequently exacerbated by geopolitical instability and multiple legal systems. Some of these systems combine statutory law with customary and religious legal systems, particularly where the disputes involve industrial shipping entities, industrial shipping practices, and local shipping communities. This unique blend has a domino effect on arbitration and alternative dispute resolution (ADR) proceedings, which must, of necessity, consider cultural norms and traditional practices, which vary per seat of the arbitration. Thus, for instance, approximately 4,600 members of the Kenyan fishing communities successfully challenged the expansion of the Lamu Port Project, which is part of the Lamu Port-South Sudan Ethiopia Transport (LAPSSET) Corridor that sought to establish a key regional trade hub but ran into headwinds with strong resistance from local fishing communities and environmental advocates. The key areas of contention included a failure of basic legal requirements relating to public participation, the right to information, the right to a clean and healthy environment, and the right to culture. They further raised issues related to environmental degradation, loss of livelihoods, and insufficient compensation. While the High Court ordered the government to pay Kshs.1.76 billion

(equivalent to US$ 15 million) subsequent mediation efforts to bring the government, port authorities, and fishermen to a consensus on how to resolve the dispute conclusively remains at large, particularly with regard to the implementation of compensation measures and restoration of fishing grounds. Nigeria's Port Harcourt, for its part, has also seen multiple disputes by local communities demanding reparations over oil spills that arise from shipping activities. Arbitration has been used to resolve conflicts between shipping companies, port operators and environmental advocacy groups.

Other disputes that have arisen have been in respect of governmental action, the most prominent of which is the *DP World and Doraleh v Djibouti* case, which arose after the Djibouti government terminated DP World's concession to operate the Doraleh Container Terminal. DP World successfully challenged this decision in the London Court of International Arbitration (LCIA). The LCIA rendered a substantial Award that was for US$ 48,163,408 plus interest, comprising loss of management fees and dividends that arose from Djibouti's breach.

Debunking Common Beliefs

Africa further suffers from persistent misconceptions regarding its ability to navigate ESG-driven maritime arbitration to wit: Africa lacks expertise, ESG is a Western concept, and arbitration is too slow for ESG disputes, African jurisdictions lack the capacity to handle large-scale disputes, Arbitration in Africa is costlier and slower than in Western jurisdictions, maritime arbitration in Africa cannot integrate ESG principles, African jurisdictions are too politically volatile for effective dispute resolution, African disputes are solely about labour issues or infrastructure delays, African Countries are dependent on Western arbitration centres, piracy and maritime security are beyond the scope of arbitration, community disputes cannot be addressed through arbitration, African maritime disputes rarely involve international stakeholders, arbitration lacks adequate enforcement in Africa. These myths can be categorised into questions relating to the capacity and competence of African jurisdictions, the types and nature of maritime disputes in Africa and perceptions of governance and external factors.

Capacity and Competence of African Jurisdictions

The *CIARB London Centenary Principles,*[1] were designed to identify the necessary characteristics for an efficient and safe seat for the conduct of international arbitration. They are not prescriptive but are signposts pointing to the necessary factors that indicate a jurisdiction is ready and suitable to host international arbitration. They are stated to comprise the legal framework, pro-arbitration judiciary, legal expertise of arbitration and ADR practitioners, as well as the legal fraternity, education standards, right of representation, accessibility and safety, neutral and functional facilities, ethics, enforceability, and arbitrator immunity. Despite an evolving arbitration infrastructure that largely achieve the Centenary Principles in several African jurisdictions such as Kenya, Nigeria, South Africa, Egypt, Rwanda, Zambia and Uganda parties to international arbitration, including many African governments, corporations and private stakeholders continue to demonstrate a preference for international arbitration centres such as the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) in Paris. This preference can be attributed to a cocktail of legal, economic and institutional factors ranging from trust, enforceability and the historical legal ties. The nuances connected to these factors suggest perceptions of a lack of neutrality tied to concerns about political interference, governmental influence and favouritism towards local parties. International centres like Geneva, London, and Paris are touted to offer greater independence and transparency in their dispute resolution processes, up to and including enforcement. From the foregoing attention needs to be paid to the nuances and

[1] CIARB London Centenary Principles (2015) see: <https://www.ciarb.org/media/ui1fjuf2/london-centenary-principles.pdf>

perceptions and therefore there is value in not only strengthening the independence of African arbitration institutions through robust governance structures but going further to visibly demonstrate on the global plane to both African and global parties that African institutions and African practitioners are up to par, they have more than adequate capacity and competence to handle all manner of complex arbitrations including maritime arbitrations. This can be done through publications of case outcomes, success stories and institutional reforms as a foundation for championing local arbitration clauses in contracts and otherwise promoting and marketing African arbitration hubs as cost-effective, efficient and world-class dispute resolution venues.

Types and Nature of Maritime Disputes in Africa

The maritime industry is one of the legitimate international spheres of global engagement that connect people, businesses, and trade. Given the multinational character of the actors and players in this space, as well as the complex and specialised disputes that tend to arise, Arbitration, since aeons past, has been the preferred mode of dispute resolution. Standard form contracts tend to be widespread, and most seek dispute resolution in Arbitration. Traditional maritime disputes nevertheless stretch over claims related to maritime activities and incidents broadly characterised into two predominant categories, that is to say, wet and dry claims. Wet claims, for their part, include ship collisions, salvage operations, piracy incidents, marine pollution and wreck removal, and dry claims, on the other hand, refer to contractual disputes regarding bills of lading, charter agreements, cargo claims, freight and demurrage disputes, ship financing, port handling disagreements and the like. Other claims include personal injuries, cargo damage and disputes over maritime liens. Both types of disputes demand specialised maritime legal expertise whose resolution is further determined by variations in jurisdictional frameworks, contractual obligations and applicable laws.

African maritime disputes are perceived to be limited to labour, infrastructure delays, and piracy. However, the industry increasingly involves issues revolving around environmental compliance, illegal fishing, community displacement, and ESG concerns. Maritime disputes on the continent can also be categorised into wet and dry disputes involving distinct legal principles, stakeholders, and resolution mechanisms. Key challenges to wet disputes include jurisdictional conflicts involving multiple legal jurisdictions arising from the dynamics revolving around international waters and different flag states. Oil spills and pollution cases tend to involve state authorities and international organisations and affect diverse coastal communities, their organisations, livelihoods and even cultures. Further, piracy remains a significant threat in certain hotspots, which affects and complicates maritime insurance claims and ship detention cases. Dry disputes relating to charter party breaches, cargo claims, and freight disputes also favour arbitration due to confidentiality and speed. Negotiation and mediation are also employed by port operators, shipping lines and cargo owners to avoid lengthy litigation, and these mechanisms are well entrenched in Namibia and Morocco. In addition, resolution mechanisms such as maritime arbitration and ADR also tend to be affected by jurisdiction-specific legal frameworks. Thus, countries such as South Africa, Nigeria, and Kenya have specialised admiralty courts mandated to handle vessel arrests, salvage claims and maritime casualties. Considering the Kenyan framework more closely, it is important to highlight that the Judicature Act establishes the Admiralty High Court at Section 4, that sits in Mombasa, Kenya, with jurisdiction over matters related to navigation and shipping in Kenya's territorial waters, high seas, or upon any lake or other navigable inland waters in Kenya. This court adopts English Supreme Court Rules as opposed to Kenyan civil procedure, which elevates arbitration. This preference for arbitration in maritime disputes was affirmed in *E-Star Shipping & Trading Company v The Nabiha Queen* [2021] eKLR, entrenching the premise that arbitration is considered to be the best international practice in maritime dispute resolution.

Perceptions of Governance & External Factors

Some very persistent myths and assumptions continue to be propagated about the governance and stability of governance in Africa, as well as surrounding factors such as political stability, judicial independence, foreign investor confidence, and regional cooperation. These perceptions affect local and international stakeholders using African ad hoc and institutional arbitration. *Djibouti v DP World* is often cited as an example of how governments unilaterally interfere with the arbitral process, including post the delivery of the international arbitration award in favour of DP World generally to the effect that whilst the dispute arose in 2012, it took over a decade before the arbitration award then at US$200 million was finally enforced in 2024 in the United States of America. However, it must be pointed out that the DP World scenario is not unique to Africa. Various arbitration references to ICC, LCIA and ICSID have seen Spain, Italy, France, the United States of America, and South American states field maritime arbitrations with similar origins and outcomes to the DP World case. SIAC, HKIAC, ICC and ICSID have further handled claims relating to governmental action arising in India, China, and Asian Countries that have engaged in similar circumstances, and some disputes have escalated into geopolitical and territorial conflicts affecting Russia and Ukraine, amongst others. Further, the Corruption Perception Index (CPI) has consistently ranked some African countries high on the list of countries where judicial corruption is a concern. The real impact of this is that investors will not patronise arbitration centres where they fear that political or business elites can influence them, as national court intervention is contemplated in limited ways in the legal frameworks of both UNCITRAL and other jurisdictions.

Countering the foregoing negative perceptions of governance remains a complex endeavour that will require sustained and dedicated efforts first to build African expertise and capacity and strengthen regional arbitration institutions—a deliberate effort to streamline African arbitration, incorporating Francophone, Lusophone and English-speaking jurisdictions. Francophone Africa has the OHADA Uniform Act on Arbitration, which has greatly improved predictability in this zone. Establishing and maintaining clear structures for the arbitration process from contract to enforcement of arbitral award requires active incorporation of executive governments and the judiciaries of African countries to transform African maritime arbitration in particular and international arbitration in general. Other emerging factors include the increasing geopolitical influence of global superpowers such as China, the European Union and the USA, who continue to expand their strategic interests in African maritime infrastructure, such as China's Belt and Road Initiative (BRI), which stipulates that disputes arising in Chinese funded projects must be arbitrated in Beijing or Hong Kong.

Strategic Recommendations and Future Outlook

The potential for maritime in Africa continues to evolve even as the continent takes steps to strengthen its dispute resolution mechanisms, attract investment and assert greater control over its maritime sector. African jurisdictions should take a keen interest in establishing transparent maritime policies that consider their local seafaring communities and long-term port investments and minimise conflicts with foreign stakeholders. In addition, ESG considerations, which have become a central focus for all sectors arising from climate concerns, investor demands, corporate accountability and emerging international regulatory frameworks, should also be considered for strategic purposes.

Key Principles of Transparent Maritime Regulations

Transparent maritime regulations aim to provide a solid legal framework or platform that ensures fairness, legal clarity, and investor confidence by setting clear rules for port operations, shipping, environmental compliance, and dispute resolution. Key principles include clear legal frameworks setting out laws that govern port concessions, cargo handling, tariffs and ship

registrations; fair and consistent enforcement by governments and regulators; open and preferably publicly available access to key information such as port fees, environmental regulations and arbitration mechanisms; stakeholder engagements with key players such as shipping companies, investors, and local communities in the creation and development of legal frameworks; alignment with international standards such as those established by IMO, UNCLOS and World Trade Organization (WTO) to strengthen Africa's global maritime status; and the establishment of strong arbitration frameworks that address the efficient resolution of shipping, port and ESG-related disputes.

ESG as a Major Concern for Shipping Companies, Insurers and Regulators

ESG is no longer an option but rather a significant concern for individuals, businesses and international organisations and the maritime sector is no exception. Thus, regulators, insurers, and investors demand that players in this sector, such as ports and shipping companies, reduce emissions, uphold labour rights, and embrace corporate accountability. Therefore, at the very least, regulators, investors, and stakeholders ought (1) to consider and comply with and otherwise address the enforcement of carbon taxes on shipping per European Union Emissions Trading System (EU ETS) and IMO regulations and (2) to ensure greater transparency in ESG reporting. The leveraging of green finance initiatives is a further key consideration that includes insurance costs and bank lending to the extent that leading global insurers now assess climate risks and human rights records before insuring vessels. A further strategic imperative is the adoption of technology to monitor and harness practices, leveraging valuable tools, including blockchain and artificial intelligence AI-powered tracking systems, to ensure compliance with ESG metrics and reduce greenwashing. IMO has further initiated the Carbon Intensity Indicator (CII, 2023) that ranks vessels based on CO2 emissions per cargo mile, which has catalysed owners to modernise their fleets as their carbon footprints have become subject to disclosure and sustainability measures are demanded routinely. Increasingly, companies are now facing lawsuits related to environmental damage and human rights abuses, elevating ESG compliance to an essential factor for risk mitigation.

Emerging Dynamics of the Youth Demographic in Africa

The youth demographic is reshaping Africa's economy, including the maritime sector, especially concerning ESG compliance, workforce trends, and dispute resolution. Youth activism and legal innovation combined are further expected to drive future maritime disputes, particularly with respect to demands for stronger environmental protections, labour rights enforcement, and international financial architecture. Youth-led digital approaches towards advocacy and activism are increasing, and new AI-driven and blockchain-backed arbitration platforms are evolving. Therefore, it is critical to deliberate efforts to create avenues for youth representation and capacity building in arbitration and ADR. Edward Paice, in his book "Youthquake: Why African Demography Should Matter to the World", tracing Africa's demographics, outlines that in the 1950s, only 7% of the global population was African, but this is projected to increase to 25% by the middle of this century projecting an estimated growth factor of 11. Comparatively, Europe's percentages have reversed from over 20% to about 10% in the same period. This trend has created the single greatest demographic upheaval in history, which will ultimately affect geopolitics. Some of the highlights being that (1) Africa is touted to be the youngest continent with a median age of 19 years; (2) by 2050, 40% of the world's youth will be African thereby influencing global markets, technology and culture; (2) Africa's consumer market is estimated to be worth US$5.6 trillion by 2025 making it a major driver of global economic growth and maritime and port business on the continent; (3) By 2100 Nigeria, currently the leading maritime sector in Africa, will be the 3rd most populous country in the world; (4) by 2030 Africa will have 750 million internet users marking it as a global leader for digital revolution; (5) 85% of French-speakers will be African by 2050.

Therefore, the world must recalibrate its views about Africa and its youth. There must be a deliberate effort to invest in youth-driven legal education and ADR programs that will propel Africa into developing a new generation of maritime arbitrators and ESG specialists. Youth participation in maritime arbitration bodies will diversify dispute resolution, and legal education bodies must prioritise maritime ADR training to equip young African professionals for global arbitration roles.

Conclusion

The maritime arbitration sector in Africa is at a critical juncture, given the influence of ESG considerations that are reshaping arbitration frameworks, regulatory policies, and industry practices, particularly with regard to emerging green financing dynamics. Challenges nevertheless abound, as can be seen in weak ESG enforcement, legal fragmentation on the continent and the reliance to a large extent on external and traditional international maritime arbitration models. Unique opportunities, however, present themselves with growing African arbitration hubs to youth-driven ESG advocacy and digital dispute resolution innovations. By integrating ESG compliance into maritime contracts, fostering regional cooperation, and strengthening arbitration institutions in Africa, real opportunities exist for the continent to establish itself as a leader in sustainable maritime dispute resolution. Effective arbitration frameworks will be key to ensuring (1) ESG-driven economic growth, (2) adequate diversity in the arbitration community, and (3) that maritime dispute resolution efficiency is achieved.

Speaker Paper

ESG IN AFRICA: A JUDICIAL LENS ON IMPLEMENTATION, IMPACT, AND FUTURE DIRECTIONS

Mary Ang'awa

Introduction

I wish to thank the organisers for allowing me to be on panel 2 at this conference. I will be dealing with the subject on the implementation of ESG and the role of ESG for Africa. This will be through the judicial lens.

To begin with, I wish to provide an overview of ESG and its global significance. It was some years back that I had been invited, together with my peers, to attend a workshop held by the United Nations in Nairobi. One of the case studies that we looked at, was of the oil spill in the Niger Delta, Nigeria. The effects of the oil spillage were that the waters, rivers and soil were so polluted that the communities were not able to sustain themselves and their families.

This case study had an impact on me for a long time. What could be done? Little did I know, years later, that the situation being dealt with was ESG (ESG means Environment, Social and Governance). I wish to pause and say that we need to give recognition to Mr. Kofi Annan, the then Secretary-General of the United Nations. It was during his tenure that the term ESG was coined in 2004. It was "a joint initiative of financial Institutions which were invited by him" to "develop guidelines and recommendations on how to better integrate environment, social and corporate governance issues in assets management". "This topic developed in other United Nations initiatives. Thus, the principles of "responsible investments". How do we hold corporations responsible in their business dealings? ESG therefore:

> refers to the inclusion of Environmental (E), Social (S), and Governance (G) criteria into investment decisions that are taken up by companies. Its purpose and intention is for companies to reconsider their business on the way they deal with issues touching on ESG.

The rise of the awareness and the principles of Environmental, Social and Governance (ESG) issues envisage disputes arising. This means that more matters will come before the judiciary and, to some extent, to arbitration. What role can the judiciary provide in implementing these principles? This paper will look at how the courts would implement and enforce the ESG principles. The paper argues that the Judiciary has an important role in ensuring these principles are met. It may be a new area for the courts, and the question then turns to their preparation.

Case study: The Judicial Perspective on ESG in Africa

Environment

The case study of the Ogoni-land in South Nigeria provides a good example. Oil was discovered in this region in 1956. Commercial dealings with the oil began in 1958 and were first embarked on by the Shell Company. The Ogoni land consisted of 261 communities spread over nearly 1000 km². Oil spillage and pollution began to be recorded in 1970. As the pollution worsened, human rights movements demanded that the company and the government intervene. The effects of the oil spillage resulted in the waters, rivers and soil becoming so polluted that communities were not able to sustain themselves and their families. Fires would spontaneously break out, causing damage to the environment. Oil spills were caused on a continuous basis by pipes bursting or not being maintained. At times, allegations were made that the local people would vandalise the pipes causing further oil spills. In 2009, the United Nations Environmental Program (UNEP) was invited to establish the facts on the ground and the concerns raised. Three years later, a report came out stating that the activities on the ground were caused by oil contamination of the soil. A clean-up was recommended. One President attempted to bring together the community, the oil company and the Government to deal with the situation. The Community brought a class action against the Shell Company in the United Kingdom. In another action that took 13 years of hearing at The Hague, the claimants were successful.

Social

ESG issues are currently appearing in African courtrooms as human rights matters. I wish to touch upon a Kenyan case where three dams (commonly known as the Solai dam) were developed privately by a company. The dams were of a size that required supervision from the authorities. The government authorities in place warned the dam owners of the instability of the dam. The workers and residents living in the vicinity did likewise. Cracks were actually noticed in the structure of the dam. The owners paid little attention to these pleas. During one particular season, there were heavy rains. This affected the dams, and one of the dams broke its banks. 150 people were killed and 300 people were displaced. The authorities (The Water Resources Management Authorities (WRMA)), whose role was to supervise the dam, stated that for a year they had been engaging the company on compliance with regulated safety standards. This case study illustrated the social effects the tragedy had caused.

A report by the Kenya Human Rights Commission on the issue found that the human rights" to food, shelter and work, among others, were infringed." They also held that the government was responsible for the plight of the people who had, by now, become "internally displaced persons." That the people's socio–economic rights were infringed. They are now required to access social services, housing, schooling for their children, and "Health".

All these issues are an illustration of legal disputes that may or will arise due to non-compliance by a company and the government on ESG issues.

Governance

The Solai Dam case study also brought out issues of gaps in the law. Kenya has a National Environment Management Act (2003) (NEMA), which ought to have ensured that such tragic incidents do not occur. Before one builds a dam, an impact assessment study is meant to be undertaken on its effect on the environment. The Human Rights Commission called on governance structures to be put in place. That is, the governance of water resources and reforms to the political, social, economic and structural systems are to be enhanced.

"The principles of responsible investments are where a body is governed with sustainability in mind." "If a company, in its dealings, involves or connects to Environment, Social and

Governance, the company would be sustainable. Where this is not taken into consideration, it means a company will be badly governed and cannot be sustainable."

It is not only a matter whether you have law and legislation in place, but implementation is essential. The role of the judiciary is crucial in this aspect.

The Evolving Role of the Judiciary in ESG Implementation

The Judiciary of most countries face a challenge in how to handle ESG matters. It may be a new area, but for this to succeed, these institutions must be prepared. It plays a crucial role in shaping ESG implementation and impact in Africa. In Kenya there is a specific division of the High Court that deals with environmental laws, labour law and dealing with issues of Governance. How boardrooms should be run with governance in place is also essential to ESG.

With emerging issues arising, new legislation is being enacted to ensure that ESG, among other matters, is handled. This may involve judicial training on the issues raised and sensitisation in ESG matters.

In one jurisdiction, outside Africa, the Judges are empowered with *suo moto* jurisdiction. These are powers given to a judge to open a file under his or her own motion to deal with environmental issues. For instance, if the dam situation raises concern to a citizen, a letter could be written to bring to the attention of a judge who would make enquiries as to how such an issue may be remedied.

ESG Disputes and Resolution Mechanisms

The types of ESG-related disputes commonly seen in African courts are those of Human Rights. The rights to social amenities, the rights to employment, education, housing, are becoming issues that require one to have a balanced approach.

The role of alternative dispute resolution in ESG cases is becoming a fast and efficient way to handle and deal with matters requiring dispute resolution.

Judicial Recommendations for the Future of ESG in Africa

ESG is not going away soon. We will have to embrace it. The following are some, but not conclusive, recommendations on its implementation and the future of ESG in Africa:

- That there be proposed improvements to ESG legislation to cover gaps.
- That the judiciary should enhance its judicial capacity in handling ESG cases.
- That ESG principles are integrated into judicial decision-making.
- That there is a potential role for specialised ESG courts or tribunals.
- That judicial officers and ADR are sensitised to emerging legislation on ESG.
- That there should be training on ESG issues.
- That corruption be eradicated in our Judicial systems and worldwide as a whole.

Conclusion

The Judiciary plays a critical role in ESG implementation in Africa. If embraced by all countries, especially in Africa, our development as a nation would be enhanced.

I see a vision for the future of ESG in our African legal systems being one of Justice, Fairness and Sustainability.

PANEL 3

ESG IN COMMERCIAL ARBITRATION

MODERATOR'S/MODERATORS' SUMMARY

Afolasade Banjo

The panel focused on the impact of ESG issues on commercial transactions like supply chain agreements, credit facility agreements (which were extended to cover project finance), joint ventures agreements, and mergers & acquisitions. We started by drawing connections between these transactions from an ESG perspective and concluded by discussing why arbitration is well-suited for resolving ESG related disputes.

Tsegaye Laurendeau shed light on the latest legislative developments around ESG regulations in supply chains and the challenges African businesses face in this context. He also highlighted the kinds of disputes that might arise and how arbitration serves as an effective resolution method.

Natasha Peter explored the growing importance of ESG in the finance industry, referencing the UN Guidelines on ESG standards. She explained how disputes involving ESG obligations in finance are handled and the key role of international arbitration in resolving these issues.

Mary Mutupa discussed the increasing incorporation of ESG considerations into joint venture agreements, particularly in relation to confidentiality and reputational concerns. She shared examples of such disputes in Zambia and how arbitration proved beneficial.

Duncan Bagshaw offered valuable insights on the role of ESG in mergers and acquisitions, emphasising how these factors are shaping deal-making. He discussed potential disputes and how arbitration is positioned to resolve them. He shared an example of an ongoing M&A dispute to highlight the critical role of commercial arbitration in addressing ESG-related issues.

The Panel concluded that arbitration plays a key role in resolving ESG-related conflicts, offering privacy and confidentiality, especially in reputational matters. African businesses are expected to face specific impacts as ESG regulations continue to evolve.

Speaker Paper

COMMERCIAL ARBITRATION: AFRICA, ESG AND SUPPLY CHAINS

Tsegaye Laurendeau

Objectives and Key Developments in Supply Chain ESG Regulations

Supply chains, taken to mean the network of individuals and companies involved in the creation and delivery of a product or service, received newfound publicity during the COVID-19 pandemic due to the impact of their disruption on consumers. It is not just their ability to survive pandemics which supply chains have received attention for, however, as they are now in the crosshairs of national and international regulatory bodies for their ESG credentials—or lack of them.

Items sold and consumed in, for instance, the European Union may be the end product of a supply chain which starts in Africa before stretching through Asia and into Europe. While laws and rules protecting ESG aims (e.g. the prevention of human trafficking, the protection of the environment) have existed for some time in these domestic "downstream" markets, those institutions which have introduced such regulations have faced a tougher challenge in ensuring that such standards are maintained through the "upstream" supply chains and production lines. This means that despite it being illegal in the country in which an item is sold for manufacturers to employ slave labour, there may still be items in shops assembled with parts which have been produced in breach of ESG standards.

The above having been set out, it can be seen that the aims of regulators here is the prevention and mitigation of harm throughout a global supply chain. This can be differentiated from past regulation, which has aimed only at the domestic markets over which a regulator has jurisdiction. In seeking to regulate an entire supply chain, it can be argued that such regulators are in effect extending their jurisdiction globally.

The means by which regulators have attempted to do so can be divided into "soft law", meaning, for example, non-binding guidelines, declarations or principles, and "hard" law, meaning binding and therefore legally enforceable obligations, for example, legislation and treaties.[1]

Significant soft law in the context of ESG regulation includes the OECD Guidelines on Multinational Enterprises, introduced in 1976 and updated most recently in 2023, and the 2011 UN Guiding Principles on Business and Human Rights.[2] These instruments emphasise a focus on processes within companies of identifying and acting on human rights abuses in their supply chains. There is also a focus on the concept of due diligence to encourage companies to take

1 Emily HAY "ESG Clauses and Dispute Risks." Kluwer Arbitration Blog, (2022), p. 1

2 Meulemeester (ed), ESG and International Arbitration: Beyond the Acronyms, (Kluwer Law I International; Wolters Kluwer 2023), p. 66.

a proactive approach to managing their supply chains responsibly.[3] They outline expectations for businesses to conduct human rights and environmental due diligence, embedding processes to identify, assess, and address potential risks of harm, stressing transparency, accountability, and remediation where risks are identified. Although non-binding, they have become benchmarks for responsible business conduct, influencing global standards and practices, and are often referenced in international arbitration and dispute resolution settings to interpret corporate obligations.

These soft law instruments, and the OECD Guidelines especially, advocate for the inclusion of specific ESG-related clauses in agreements with partners through a supply chain, focusing on human rights, environmental protection, and anti-corruption measures. By embedding ESG commitments in legally binding contracts, companies can create enforceable expectations, monitor compliance, and address breaches effectively.[4] While these measures are framed within the broader, non-binding context of the Guidelines, they serve as a practical mechanism for operationalising due diligence and fostering accountability in global supply chains.

In focusing on due diligence and the incorporation of contractual clauses, soft law can be seen as a means of encouraging companies to become "private enforcers" of ESG objectives.[5] This means that adherence to ESG aims is incentivised by the threat of the termination of contracts and loss of orders rather than through state-imposed penalties or prosecution, punishments which can only be enforced through black-letter "hard" law.

At the time of writing, it is evident that the European Union is at the forefront of ESG regulation from the perspective of hard law. Through the European Union Corporate Sustainability Due Diligence Directive ("CSDDD" or "CS3D"), the EU aims to embed sustainability into the core of business operations, imposing specific obligations to identify, prevent, and mitigate adverse impacts. This makes it arguably the most sweeping example of black-letter ESG regulation globally. The Directive entered into force in July 2024, meaning that EU companies (and even non-EU companies with certain net turnovers or royalties within the EU) have between three to five years to comply. These companies will be mandated to conduct environmental and human rights due diligence across entire value chains—meaning their own operations, subsidiaries and business partners. Companies will be required to integrate these due diligence measures into their corporate policies, actively monitor their effectiveness, and report publicly on compliance.[6]

In considering the methods by which the EU will see the Directive implemented—and indeed ESG regulations around the world—it can be seen that it will, to a great extent be through the incorporation of contractual clauses.[7] Through a process known as "contractual cascading," companies can effectively replicate their own ESG obligations onto their suppliers by requiring adherence to the company's sustainability goals and therefore their compliance with relevant regulations.[8]

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3 Ibid, p. 56.

4 Peter Adolf, "Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities", in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, (Kluwer Law International; Kluwer Law International 2023, Volume 89, Issue 4), p. 485.

5 Lisa Bingham and Emily Hay, 'Supply chain disputes and ESG contractual clauses', in Dirk De Meulemeester ((ed), ESG and International Arbitration: Beyond the Acronyms, (Kluwer Law International; Wolters Kluwer 2023), p. 57.

6 Ibid, p. 67.

7 Emily Hay, "ESG Clauses and Dispute Risks." Kluwer Arbitration Blog, (2022), p. 1.

8 Peter Adolf,"Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities", in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, (Kluwer Law International; Kluwer Law International 2023, Volume 89, Issue 4), p. 442

Already, a number of organisations have drafted so-called model clauses for insertion into new or amended contracts in an attempt to guarantee compliance throughout a supplychain.

With regard to the penalties for non-compliance, it is noteworthy that the latest EU directive not only imposes regulatory obligations but also creates civil liability for non-compliant companies, thereby significantly increasing the legal risks faced by businesses operating in the EU or within EU supply chains. The fines imposed for being found liable for a breach will be at their maximum of 5% of the offending company's net global turnover in the previous financial year.[9]
Black-letter ESG regulation exists at the international as well as national levels, however. In the United Kingdom, while there is no single, unified ESG law, under regulations enabled by the Companies Act 2006, for example, large companies are required to disclose energy usage and carbon emissions in their annual reports.[10] These requirements align with broader efforts to incorporate ESG considerations into corporate governance and decision-making, and represent the UK's efforts to adhere to the OECD Guidelines and the UN Guiding Principles.

Across the channel, in France, the 2017 Duty of Vigilance Act establishes a framework for corporate accountability in ESG matters, particularly regarding human rights and environmental impacts. The law requires large companies operating in France to develop and implement a vigilance plan that identifies risks and prevents severe violations of human rights, fundamental freedoms, health and safety, and environmental damage. This obligation extends to their own operations, as well as their subsidiaries, subcontractors, and suppliers, effectively embedding ESG considerations across global supply chains. Non-compliance can result in civil liability, including fines and obligations to compensate for damages caused by inadequate vigilance.[11]

In Germany, the Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz), which came into effect in January 2023, mandates that large companies ensure responsible practices throughout their supply chains. The Act requires businesses to identify and address human rights and environmental risks, such as forced labour, child labour, and pollution. Companies must assess risks related to both direct and, in certain cases, indirect suppliers. To assist in this, the law encourages the use of standardised questionnaires to evaluate suppliers' ESG performance. Moreover, businesses are expected to incorporate contractual clauses into agreements with their suppliers, ensuring compliance with these due diligence obligations and holding suppliers accountable for ESG-related standards. Non-compliance with the Act can result in significant fines, exclusion from public procurement, and reputational damage.[12]

Potential Disputes and the Suitability of Arbitration

Growing regulatory demands can be expected to be accompanied by a growth in disputes arising from the same regulation. Stemming from the increased emphasis on compliance and accountability, such growth underscores separately the importance of robust contractual mechanisms for dispute resolution. Such a mechanism could include commercial arbitration as a means of dispute resolution, which offers a viable and effective forum for resolving such cross-

9 Article 27(4) of Directive (EU) 2024/1760 Of The European Parliament and of The Council of 13 June 2024 On Corporate Sustainability Due Diligence.

10 See The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018, SI 2018/1155 (UK).

11 Jonathan Barnett, "The Answer My Friend… Is Blowing in the Wind: ESG in EU- Related Supply Chains." Kluwer Arbitration Blog, 21 March 2023, p. 7.

12 Lisa Bingham and Emily Hay, "Supply chain disputes and ESG contractual clauses", in Dirk De Meulemeester (ed), ESG and International Arbitration: Beyond the Acronyms, (Kluwer Law International; Wolters Kluwer 2023), p. 61.

border disputes by providing the flexibility, confidentiality, and expertise required to navigate a shifting and technical ESG compliance landscape.[13]

There is variety in the sorts of disputes which may arise out of new regulation and which lend themselves to resolution through commercial arbitration. The lion's share of such disputes are likely to emerge from relatively straightforward breaches of ESG clauses. In simple terms, through an upstream party's failure to adhere to its obligations to its contractual partner. For instance, if a supplier falls short of agreed environmental standards or fails to conduct proper human rights due diligence, the receiving company may seek damages for breach of contract.[14]

One potential dispute arising from ESG regulations is the misalignment of contracts between parties in a supply chain, particularly when ESG obligations are not clearly defined or consistently enforced throughout the chain. This can occur when a supply chain-leading company establishes ESG requirements but fails to cascade these requirements effectively to suppliers at different levels of the supply chain. If these cascading obligations are not well-defined or are inconsistent between contracts, disputes may arise regarding who is responsible for implementing specific ESG measures, particularly when obligations in upstream or downstream contracts contradict one another.

Another potential source of dispute involves the shifting of responsibility for ESG obligations, especially within multi-tiered supply chains. In this scenario, a supply chain-leading company may attempt to shift responsibility for compliance with ESG standards to its suppliers. Under some regulations, companies are responsible for ensuring that suppliers meet specific ESG requirements, but this responsibility can become unclear when the leading company places undue reliance on the assurances or certifications from lower-tier suppliers. This shifting of responsibility can lead to disputes where the suppliers, who are strictly and directly liable to the buyer for the actions of their partners, are expected to bear the full weight of non-compliance.

Disputes over misrepresentations are also likely, particularly when suppliers fail to accurately report or comply with ESG practices in alignment with the buyer's expectations or the buyer's code of conduct. A supplier may claim compliance with ESG standards or provide inaccurate information about their internal processes, leading to potential legal challenges from the buyer or stakeholders. For example, a supplier may falsely represent its environmental impact or labour practices, violating the agreed terms in a contract or misaligning with the buyer's code of conduct. Disputes may arise over the extent of the supplier's obligations to disclose information and whether the buyer is entitled to rely on the supplier's representations. Such disputes can also trigger claims for damages or even rescission of contracts if misrepresentation is found to have been made in bad faith or with negligent oversight.

Finally, disputes over indemnities for breaches and third-party claims are becoming increasingly common under ESG regulations. Companies may include indemnity clauses in contracts to protect themselves from financial loss or reputational damage resulting from a supplier's failure to meet ESG requirements. However, disputes often arise when a breach of ESG obligations, such as environmental damage or human rights violations, leads to third-party claims, such as lawsuits or regulatory penalties. In such cases, the supplier may be held accountable, but the buyer may seek indemnification under the terms of their agreement, arguing that the supplier should cover the costs of defending third-party claims. Conversely, suppliers may dispute these indemnity provisions, particularly if the breach stems from actions further up the supply chain or outside their control.

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13 Ibid, p. 87

14 Jonathan Barnett, "The Answer My Friend… Is Blowing in the Wind: ESG in EU-Related Supply Chains." Kluwer Arbitration Blog, (2023), p. 7.

Returning to the suitability of arbitration as a means of dispute resolution in respect of breaches of ESG obligations, while its inherent benefits—namely finality, global enforceability and confidentiality—will apply, there are also important limitations to be understood.

A primary challenge is the lack of coercive powers available to arbitral tribunals. Unlike national courts, which can issue injunctions to prevent ongoing harmful behaviour, arbitral tribunals generally lack the authority to compel parties to take specific actions, such as halting environmentally damaging practices or addressing human rights violations in real-time. While arbitration can award damages or issue declarations, it does not have the ability to enforce measures that can immediately stop harmful practices, making it less effective in addressing urgent ESG issues.

Additionally, arbitration may face complexity in consolidating or joining claims. In supply chain disputes, multiple parties across different tiers may be involved, but arbitration typically requires agreement among all parties for consolidation or joinder of claims. Without this consensus, disputes may remain fragmented, requiring separate proceedings that prolong resolution and complicate enforcement. Although some institutional rules, such as Rule 10(b) of the 2021 ICC Rules and Article 22A of the 2020 LCIA Rules, supply chain-related ESG disputes may test the limits of their strength.

The Impact on African Businesses

As new ESG regulations are considered and implemented around the globe, African businesses that are part of global supply chains will face growing exposure to these laws. In the case of companies subject to the new EU regulation, supply chain risks will be pushed further upstream via contractual cascading, to ensure that African companies are held to the same standards as those within the jurisdiction of the regulation. Upstream companies will be required to provide contractual assurances that they obey EU-mandated codes of conduct, overtly in areas like human rights and environmental practices.

Similar assurances will likely be required to be asked of their own business partners, extending the compliance burden throughout the supply chain. In effect, these regulations will have an extraterritorial impact, bringing EU standards into the operations of African businesses and making them susceptible to the same risks and liabilities. This shift will place considerable pressure on African businesses to adapt to increasingly complex regulatory requirements, potentially exposing them to significant legal and financial risks.

African companies, as they navigate the growing influence of EU ESG regulations, must be mindful of two significant pitfalls. First, they should be careful to assess the reasonableness of the ESG obligations they are being asked to adopt, particularly in areas such as emissions targets. These targets may be set by their European business partners, but African countries are not equally situated in terms of economic development and environmental impact. For example, 53% of West Africa's population lacks access to electricity, posing a barrier to economic growth more pressing than any international regulation.[15] It is therefore perfectly reasonable for African businesses to ask questions about just whose targets they are being asked to meet and whether these targets are fair given the local context. Setting expectations that align with Africa's unique landscape is vital to avoiding further unjustified burdens that could stifle growth.

Second, African businesses should ensure they agree to ESG terms with open eyes. Conducting thorough legal due diligence is essential before accepting ESG clauses and obligations in

[15] United Nations Conference on Trade and Development, "World Investment Report 2023: Investing in S Sustainable Energy for All " (2023), available at : <https://unctad.org/system/files/official-document/ditccom2023d1_en.pdf.>, p. 2

contracts with European companies. African parties must be alert to the risk of becoming an insurance policy for their more developed European counterparts, where they might bear the responsibility for risks or compliance failures that should not be their responsibility. It is important for African companies to understand the full scope of the ESG obligations they are taking on, ensuring that they are not unintentionally assuming excessive liability or becoming overburdened with compliance measures that could disrupt their operations or put them at financial risk.

Conversely, it is worth considering that these regulations present an opportunity for African businesses to differentiate themselves in the global marketplace. Companies that adopt and demonstrate robust ESG practices proactively could leverage such compliance as a competitive advantage and enjoy the profits of new relationships with risk-averse downstream partners.

Speaker Paper

WHAT MONEY SAYS WHEN IT TALKS: ESG DISPUTES IN THE FINANCE SECTOR

Natasha Peter[1]

Introduction

The financial sector plays a key role in achieving environmental, social, and governance (ESG) goals. The reason for this is easy to understand: a company's ability and willingness to undertake a project frequently depends on the extent to which the project is bankable. Financial institutions can thus wield considerable power in determining whether a project is carried out, as well as setting the parameters that the project sponsor is required to respect.

The financial sector has developed increasingly sophisticated and detailed guidelines and practices as to the ESG obligations that it expects to see in facility agreements and other finance documents. It is therefore natural that there will be disputes about these ESG obligations. International commercial arbitration practitioners need to consider how best to tackle these intelligently and efficiently.

ESG in the Financial Sector

Lenders are now increasingly aware of their potential to drive significant change in investment activity, and thus increasingly conscious of the need to adopt responsible ESG practices. A key driver of this awareness has been the discussions around mechanisms to tackle climate change. One of the objectives of the central document of the UNFCCC process, the 2015 Paris Agreement on Climate Change, is to make "finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development".[2]

When the Paris Agreement was adopted during COP21, six major Multilateral Development Banks committed a collective USD 100 billion to support climate change action.[3] Then, at COP26, the private finance sector formed the Glasgow Financial Alliance for Net Zero (GFANZ), bringing together existing and new net-zero finance initiatives into a unified strategic forum. As a result of this, amongst other factors, there has been a rapid growth in ESG-linked products in the finance sector. These range from what are referred to as "use of proceeds" instruments, which impose strict requirements for the net proceeds from the relevant bond or loan to be used for

[1] The author would like to thank Mama-Sahale Souare, associate at Trinity International, for her Invaluable assistance with this article.

[2] Article 2.1(c), Paris Agreement, 2015.

[3] Joint Statement by the Multilateral Development Banks at Paris, "COP21 Delivering Climate Change Action at Scale: Our Commitment to Implementation".

the financing of specific environmental projects or assets, to more flexible or ad-hoc instruments.

On the "use of proceeds" end of the spectrum, green bonds and loans have historically had a slow uptake in African markets, but they are now becoming increasingly popular,[4] having for example been issued in Nigeria, South Africa, the Seychelles, Morocco and Egypt, with Zambia issuing its first green bond in 2023.[5] For borrowers requiring greater flexibility, there are a range of instruments which permit use of the funds for general purposes, but tie the cost of the loan or bond to the achievement of specific key performance indicators (KPIs).[6] These could range from objectives such as reducing greenhouse gas emissions or improving energy efficiency, to using renewable energy, reducing water usage, or increasing the use of recycled materials. At the other end of the spectrum, ESG standards have also had an influence on lending practices in plain vanilla finance agreements, with financial institutions imposing conditions on borrowers in these instruments as well.

It is important to recognise that, while this dynamic is most often encountered in the environmental sphere, there are also ESG-linked instruments targeted at social, human rights issues and governance issues as well. In all of these fields, financial institutions have taken on the mantle of stewardship and engagement, using their unique leverage to encourage companies to align with particular goals.

ESG Guidance and Standards in the Finance Sector

Given the importance of ESG in investment strategies, lenders have developed various sets of requirements for inclusion in their contractual documents. Typically, Development Finance Institutions (DFIs) and certain commercial lenders will have their own tailor-made schedule of ESG requirements that they will expect borrowers to adhere to. These may cover topics such as anti-corruption, respecting labour rights, environmental protection and so on, together with transparency and reporting obligations to monitor whether the obligations are respected.

In particular, in projects in which the International Finance Corporation (IFC) is a lender, the IFC's Performance Standards on Environmental and Social Sustainability will usually play a large role in shaping the ESG requirements for the project. The IFC estimates that investments totalling USD 4.5 trillion across emerging markets have adhered to IFC's Performance Standards or have been inspired by them in the last decade.[7] Similarly, in projects guaranteed by the World Bank's Multilateral Investment Guarantee Agency (MIGA), clients are required to adhere to MIGA's Policy on Environmental and Social Sustainability.[8]

Behind these requirements are a large number of initiatives, guidelines and other soft law instruments, which have been influential in developing and promoting best practice. These are too numerous to list here, but some of the best-known are as follows:

4 Tom MINNEY, "Green bonds bloom in Africa" (2024) in African Business, available at: <https://african.business/2024/07/african-banker/green-bonds-bloom-in-a africa>

5 See: <https://www.trinityllp.com/green-bond-zambia/>

6 International Capital Market Association, "Sustainability-Linked Bond Principles" 2020, p. 2.

7 International Finance Corporation, World Bank Group. See:< <https://www.ifc.org/en/what-we-do/sector-expertise/sustainability/policies-and- standards>

8 MIGA, Policy on Environmental and Social Sustainability, (2013), para. 6 and MIGA, Guide Understanding MIGA's Environmental and Social Due Diligence Process, (2018).

the numerous United Nations (UN) guidance documents, which in the finance domain include the six UN Principles for Responsible Investment and the six UN Principles for Responsible Banking.[9]

The Equator Principles, which were first introduced in 2003 and are now in their fourth version,[10] subscribed to by over 130 banks and other financial institutions across 40 countries.[11] The principles are intended to serve as a "common baseline and risk management framework for financial institutions to identify, assess and manage environmental and social risks when financing projects", and set out environmental and social standards as conditions for providing project-related loans and project finance advisory services to large infrastructure and industrial projects; and the Green Loan Principles, voluntary guidelines jointly developed by the Loan Market Association, the Asia Pacific Loan Market Association and the Loan Syndication, which are intended to help standardise green lending practices.[12] The Chancery Lane Project has released a set of draft clauses that can be used to incorporate the GLPs into facility agreements.[13]

Alongside these soft law instruments, lenders will also be concerned to ensure compliance with any applicable legal and regulatory requirements in the relevant jurisdiction, for example, relating to the ESG reporting requirements.

As will be appreciated, the dense contractual and legal matrix created by these obligations is a fertile ground for disputes, and mechanisms to resolve these efficiently are essential for the incentivising effect of these standards to function properly.

Dispute Resolution Mechanisms in Finance-related ESG Disputes

While financial institutions tend to be wary of arbitration in the context of domestic facility agreements, international finance agreements do frequently include arbitration clauses. As a result, lenders and borrowers can and do use international commercial arbitration to resolve ESG-related disputes. The types of disputes arising in this context are many and varied: for example, they may concern ESG conditions precedent that the borrower is required to fulfil before it can draw down the loan, repeating representations and warranties during the course of the loan, monitoring and reporting requirements, and so on.

Arbitration may also be pursued if a borrower's breach of ESG obligations causes harm to third parties, such as a breach of human rights or environmental damage, and this in turn leads to reputational damage to, or claims against, the financial institution. There is a growing trend for third-party stakeholders to bring claims against financial institutions and investors, precisely because of the leverage they have with borrowers,[14], and there is therefore a corresponding potential for indemnity claims to be brought by the lender under its contract with the borrower.

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9 The UN Principles of Responsible Investment are investor initiative in partnership with UN Environnement Programme Finance Initiative and UN Global Compact; The UN Principles of Responsible Banking are investor initiative in partnership with UN Environnement Programme Finance Initiative.

10 Equator Principles, Activity Report 2023 (2024), p.15.

11 Equator Principles, Activity Report 2023 (2024) p.38.

12 LMA, the Asia Pacific Loan Market Association and the Loan Syndication, Green Loan Principles (2024).

13 See: https://chancerylaneproject.org/clauses/green-loan-starter-pack/.

Two recent examples are the claim brought by French environmental NGOs Notre Affaire à Tous, Les mis de la Terre, and Oxfam France against BNP Paribas in the Paris Courts, alleging breach of the French Law on the duty of vigilance (articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code) and the claim brought by the Dutch NGO Milieudefensie (Friends of the Earth Netherlands) against he bank ING in the Dutch courts, on the basis of a general duty of care under the Dutch civil code.

However, in the finance sector, arbitration is generally considered a last resort. Parties will often seek alternative solutions, and this is particularly so in the context of ESG breaches, where the ultimate aim of the lender may be to apply pressure to the borrower in order to ensure compliance with its obligations, rather than to obtain financial compensation. Indeed, the contract itself may contain such mechanisms, for example, applying a margin ratchet to penalise the borrower for a breach of its ESG obligations. A dispute-averse approach is in line with the philosophy expressed in the European Union Directive of 13 June 2024 on corporate sustainability due diligence, which cautions that the hasty termination of an agreement for a breach of ESG obligations can cause more harm than good.[15] Similarly, the UN Guiding Principles on Business and Human Rights encourage companies to use leverage before considering termination of relationships.[16]

There are also alternative dispute resolution mechanisms available for third-party stakeholders. For example, in projects involving the IFC or MIGA, there is an ombudsman which provides an independent accountability mechanism to hear complaints from individuals or communities affected by the project.[17]

It will therefore be clear that in this field, perhaps more than in any other, arbitration is only a part of the picture. Alternative dispute resolution may provide a forum for a wider dialogue that changes perceptions and behaviours and therefore achieves compliance with ESG obligations. Even where the dispute is intractable and arbitration is therefore required, the interests and motivations of the parties to the dispute (and non-party stakeholders) are complex, calling for creative procedural and substantive solutions. Those acting as arbitrators in this field will require a broad toolkit, consisting not only of legal and financial acumen, but also of practical on-the-ground knowledge and an ability to listen with sensitivity to the viewpoints of many different stakeholders.

[15] European Union Directive EU n°2024/1760 of 13 June 2024 on corporate sustainability due diligence, preamble, para. 50: "In order to ensure that appropriate measures for the prevention and mitigation of potential adverse impacts are effective, companies should prioritise engagement with business partners in their chains of activities, instead of terminating the business relationship, as a last resort after attempting to prevent and mitigate adverse potential impacts without success."

[16] UN Guiding Principles on Business and Human Rights 2011, Commentary, p. 22: "Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless irectly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences".

[17] The Office of the Compliance Advisor Ombudsman: see https://www.cao-ombudsman.org/

Speaker Paper

UNDERSTANDING ENVIRONMENTAL SOCIAL AND GOVERNANCE (ESG) IN JOINT VENTURE AGREEMENTS AND THE ROLE OF COMMERCIAL ARBITRATION

Mary Mutupa

Introduction

Arbitration offers quick resolution of disputes, it's cost-effective, and the choice of an expert to handle the dispute are some of the unique advantages of choosing arbitration over litigation. Current trends and concerns around ESG disputes in arbitration and best practices are some of the issues to be highlighted in the paper. The paper offers insights into arbitration processes that have successfully addressed ESG disputes and ends with a call to action for arbitration practitioners, governments and companies.

Environmental, Social and Governance (ESG) has continued to be topical and feature in all aspects of international spaces, being discussed is the issue of sustainability and development especially in the wake of the negative impact of climate change, among others. Environmental, Social and Governance (ESG) is closely associated with corporate social responsibility (CSR) as both concepts are aligned with business management and governance practices. Both concepts aim to promote responsible investment and business operations. The recognition of the ESG discourse can be traced back to the United Nation's report dubbed "Who Cares Wins" and the insights from the 2006 Company-Investor Interface on Communicating ESG Value Drivers, which underscored the importance of increasing industry understanding of ESG risks and opportunities to improve the integration of ESGs into investment decision-making.

The discourse on ESGs in Commercial Arbitration has taken centre stage as can be witnessed in the 2024 Annual Conference of the African Arbitration Association, which focused a lot of sessions on ESGs covering several areas. The environmental-related disputes feature factors such as emission of greenhouse gases, climate change, the impact of mining activities, such as hazardous waste management and pollution, deforestation, and energy efficiency in

construction. The social aspects include labour rights, public health, local and indigenous communities' participation and employee relations, among others. Governance issues include board structure, diversity, transparency and accountability, regulatory compliance, stakeholder engagement, among others.

Environmental, Social, and Governance Regulatory Framework

African Countries have continued to show commitment by implementing specific policy guidelines on ESGs. Notable examples of these commitments include:

Zambia:

The government has, in the recent past, adopted the Green Loans Guidelines (Gazette Notice No. 1349 of 2023), which seeks to promote sustainable development, facilitating the financing of projects that address and alleviate the adverse impacts of climate change, biodiversity loss, and land degradation.

Kenya:

The Environmental Management and Coordination Act includes provisions for environmental impact assessments, and the Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual provides listed companies with a guide on how they can "collect, analyse, and publicly disclose important ESG information.

Nigeria:

The Nigerian Stock Exchange released the Sustainability Disclosure Guidelines in 2019, which encourage listed companies to voluntarily disclose ESG-related information in their annual reports.

South Africa:

The country's national strategy for transformation includes sustainability goals and encourages ESG reporting among businesses.

Common ESG Disputes: Selected Cases

Kansanshi Mining PLC- claims on environmental degradation and inadequate compensation for land use; Lumwana Mine- impact of mining activities on local water sources and agricultural land, and the Kazungula Bridge Project – Procurement and land dispute that forced Zimbabwe to pull out of the venture. (Zambia)

Energy: Niger Delta Oil Joint Ventures- environmental damage and social unrest by local communities over oil spills and inadequate corporate governance practices (Nigeria).

The Zambezi River Authority Projects- Joint ventures for hydropower projects faced disputes related to environmental assessments and impacts on local communities. (Zambia)

Governance: *Zambia National Commercial Bank v ZCCM-IH*- Disputes arose over investment terms and profit distribution in a mining joint venture, and *Zambia Sugar v Illovo Sugar*- Disputes related to operational control and financial contributions in a sugar production joint venture.

These cases illustrate the growing importance of ESG considerations in joint ventures across Africa and the role of arbitration in resolving related disputes.

The Role of Commercial Arbitration in ESG Disputes

The nature of arbitration, having a definite and binding outcome in the form of an arbitral award, makes it an ideal mechanism for resolving ESG-related disputes. In addition, commercial arbitration provides a structured and efficient mechanism to address disputes in a quick and efficient and effective manner. Take a look at a few aspects of the enhanced role of commercial arbitration in ESGs.

Neutral Forum – Arbitration offers a neutral setting where parties from different jurisdictions can resolve disputes without the biases that may exist in local courts. This is important in international joint ventures where local legal frameworks may not adequately address ESG concerns.

Expertise in Complex Issues – Arbitrators with expertise in ESG matters can navigate the intricacies of these disputes, ensuring that decisions are informed by relevant industry standards, best practices, and regulatory requirements.

Confidentiality – The confidential nature of arbitration can be beneficial for businesses concerned about reputational risks associated with public litigation. This encourages parties to engage in open dialogue about sensitive ESG issues.

Flexibility and Speed – Arbitration procedures can be tailored to the specific needs of the parties, allowing for more flexible and expedited resolutions compared to traditional court processes. This is crucial in ESG disputes, where timely resolutions are often necessary to mitigate ongoing harm.

Enforceability of Awards – Arbitration awards are recognised and enforceable in multiple jurisdictions under international treaties, such as the New York Convention. This provides an added layer of security for parties seeking to uphold their rights related to ESG commitments.

Encouraging Compliance and Best Practices – The arbitration process can incentivise parties to adhere to ESG standards and practices, as failure to do so may result in disputes that could lead to costly arbitration proceedings.

In view of the above benefits, commercial arbitration serves as an essential tool for resolving ESG disputes, fostering accountability, and promoting sustainable business practices in an increasingly complex global landscape.

Current trends on ESG integrations in Joint Venture Agreements

There is increased pressure for companies involved in joint ventures to elevate ESG commitments. The current trends in ESG integration in joint venture agreements focus on enhancing sustainability, accountability, and stakeholder engagement. A review by Harvard Business Review reports that companies that are serious about elevating EGS performance are considering:

- Increased due diligence by conducting thorough ESG assessments before entering into joint ventures, evaluating potential risks related to environmental impact, social responsibility, and governance practices.
- Inclusion of ESG Clauses – Many joint venture agreements now explicitly include ESG-related clauses that outline commitments to environmental protection, social equity, and governance standards. These clauses often specify measurable targets and reporting requirements.
- Stakeholder Engagement – There's a growing emphasis on engaging various stakeholders, including local communities and investors, in the decision-making

process. This approach helps ensure that the joint venture aligns with broader societal goals.

- Risk Assessment and Management – Companies are increasingly conducting thorough ESG risk assessments prior to entering into joint ventures. This proactive approach helps identify potential ESG-related conflicts and liabilities.
- Transparency and Reporting – Many joint ventures are adopting transparent reporting practices regarding their ESG performance, often in line with global standards such as the International Sustainability Accounting Standards Board (ISSB), among others.

Conclusion

These trends shared above illustrate a growing recognition of the importance of sustainable practices in business ventures. The demand for companies to include environmental, social, and governance standards. This is increased pressure for businesses to integrate ESG in joint venture agreements to enhance the reputation of the Joint Venture. The emphasis on adopting sustainable business practices in joint ventures is being promoted. Therefore, the role of commercial arbitration in ESGs cannot be overemphasised. Companies are being encouraged to incorporate Arbitration Clauses in the Joint Venture Agreements to easily resolve ESG disputes during the business life span. There is a need for the arbitration practitioners to position themselves through the enhancement of knowledge and skills on ESG issues. African Governments need to strengthen legal and policy frameworks as a sign of commitment to making the environment for effective implementation of ESGs.

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PANEL 4

ESG IN INVESTMENT ARBITRATION

SUMMARY

Moderator: Jefferey Kaddu

Panel 4 explored the potential implications and significance of incorporating Environmental, Social, and Governance (ESG) considerations into the investment arbitration landscape. The discussion was anchored around two key themes: the evolving role of ESG in shaping investment disputes, and illustrations of how ESG principles are being integrated in practice.

Across three contributions, panellists examined how ESG considerations intersect with investor obligations, particularly in relation to climate change and sustainability goals. The discussion covered the relevance of ESG standards both before and after an investment is made, as well as how evolving legal frameworks may impact investor responsibilities. The panel offered insight into the shifting expectations placed on investors and states alike, and the broader implications for arbitration practice in the region and beyond.

Speaker Paper

THE CODIFICATION OF ESG STANDARDS RELATED TO AFRICAN STATES

Dr Guillaume Aréou[1]

Introduction

In his separate opinion following the *Gabcikovo-Nagymoros* judgment handed down by the International Court of Justice on 25 September 1997, Judge Weeramantry gave an explanation of the interweaving of the right to development and the right to environmental protection in large-scale projects: "When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases – the right to development and the right to environmental protection – are important principles of current international law".[2]

This case concerned the application and termination of the treaty related to the construction and operation of the *Gabcikovo-Nagymaros* dam system signed between the Czech and Slovak Federal Republic and the Republic of Hungary on 16 September 1977.[3] This treaty provided for the construction and operation of the lock system. The main aim of this joint investment was to produce hydroelectricity, while ensuring that the implementation of the project did not compromise the quality of the waters of the Danube.[4]

In March 2024, the European Union's Council gave its final green light to the Sustainable Investment Facilitation Agreement with Angola.[5] This agreement, the first of its kind, is of particular interest to examine the objectives of both countries, and more globally to the relationships between the European Union and African States.

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1 This article is a written version of my presentation at the Afaa Conference that took place from 9-11 October 2024 in Douala. I will thus keep the oral structure of my presentation.

2 Separate opinion of Vice-President Weeramantry in the case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), judgment of 25 September 1997, p. 89.

3 International Court of Justice, case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia), judgment of 25 September 1997, p. 11.

4 *Ibid.*, p. 18.

5 "European Union - Angola: Council gives final greenlight to the EU's first sustainable investment facilitation agreement", 4 March 2024, https://www.consilium.europa.eu/en/press/press-releases/2024/03/04/eu-angola-council-gives-final-greenlight-to-the-eu-s-first-sustainable-investment-facilitation-agreement/

From the codification of environmental rules also emerged ESG standards. The codification of ESG standards and the development of a specific caselaw related to ESG matters illustrate the shift in balancing obligations between States and private companies.

In this presentation, I will address three points:

- ESG in light of African States and the need to fight climate change;
- How Arbitral Tribunals address corruption allegations in a pending arbitration?
- How domestic and regional laws may impact investors' obligations within their investment in Africa?

ESG in light of African States and the need to fight climate change

My answer to this question will be two-fold.

I will first address this question focusing on what can be done *prior to the investment being made*. I will then examine the application of international standards *after the investment is made*.

One of the means to address the need to fight climate change is to have recourse to green financing. In 2021, the Ivory Coast adopted a framework document on ESG.[6] In this document, the Ivory Coast recalls that since 2012, its social and economic development has been guided by a National Plan of Development on sustainable growth. Among the six strategic objectives of this National Plan are notably the development of the private sector and the investment, and the preservation of the environment.[7]

The Ivory Coast framework document on ESG also elaborates eligible green category to foster green projects. For instance, green loans are available for the modernisation of transportation infrastructure and access to water and electricity. Based on this document, expenses may be included in the Budget Law and classified as ESG eligible for financing through an ESG instrument.

The implementation of complex infrastructure projects through green financing is an important step forward compared to projects that have been performed without such a perspective.

It reminds me of a case I worked on related to the construction of a dam in North Africa. This project aimed at giving access to water and electricity to a large region in a North African state. At the time the contract was concluded, no Environmental Impact Assessment Study had been completed. While the contract was performed, the parties faced water pollution, causing the death of hundreds of fish.

This concrete example demonstrates the usefulness of conducting an Environmental Impact Assessment Study to prevent negative impacts on the environment of infrastructure projects. This case also highlights the shift in the stakeholders' behaviour to prevent and mitigate risks related to the environment prior to the contract's performance.

The Ivory Coast framework document on ESG also excludes from green financing projects with a negative impact on the environment through a list of exclusion criteria. This non-exhaustive

6 Ivory Coast Framework Agreement on ESG, July 2021. The text of the Ivory Coast framework document on ESG is available here: https://www.tresor.gouv.ci/tres/wp-content/uploads/2022/02/esg_ci_juillet_2021.pdf

7 Ivory Coast Framework Agreement on ESG (July 2021), p. 2.

list includes expenses such as the production of fossil combustible and transportation infrastructures dedicated to the transport of fossil energies.[8]

The Ivory Coast framework document on ESG is a clear example of policies implemented to fight climate change through the adoption of green financing projects.

ESG standards may also apply **after the investment is made**.

This is the case where parties disagree on the scope and content of an Environmental Impact Assessment Study. In the *Tethyan* case,[9] the arbitral tribunal had to deal with this issue. This case arose out of a mining concession. The investor alleged that Pakistan adopted measures that reduced the value of its investment and consequently violated the BIT concluded between Australia and Pakistan. The Respondent State contended that the investor neither complied with its own domestic legislation related to the Environmental and Social Impact Study, [10] nor with international principles, such as the International Finance Corporation standards[11] and the Equator principles.[12]

As parties agreed on the international standards to be applied, so did the arbitral tribunal. The Performance Standards on Environmental and Social Sustainability adopted by the International Finance Corporation in 2012 are deemed to apply to IFC clients.

IFC Performance Standard 1 relates to the assessment and management of Environmental and Social Risks and Impacts and applies to all projects where such impacts may arise. It requires a proactive approach from clients. Indeed, where the process related to IFC Performance standard 1 is not adequately implemented by the State, "the client will conduct a complementary process and, where appropriate, identify supplemental actions".[13]

The second set of rules applied in the *Tethyan* case relates to the Ecuador Principles, which brings together 130 financial institutions.[14] Similarly to the IFC performance standards on Environmental and Social Sustainability, the second Ecuador principle relates to the Environmental and Social Assessment. The Ecuador Principles Financial Institutions requires from its clients that the "Assessment Documentation will be an adequate, accurate and objective evaluation and presentation of the environmental and social risks and impacts".[15]

With these international standards in mind, the arbitral tribunal come to a sensible conclusion that "not all risks could be fully assessed and quantified"[16] at an early stage of a project and that those raised by Pakistan were not, according to its detailed analysis, a "'red flag' preventing lenders from providing funding to the project".[17]

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8 Ivory Coast Framework Agreement on ESG (July 2021), p. 14.

9 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case n° ARB/12/1, decision on jurisdiction and liability, par. 556.

10 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case n° ARB/12/1, award, 12 July 2019, par. 120.

11 International Finance Corporation's Performance Standards on Environmental and Social Sustainability (2012), available at: https://www.ifc.org/en/insights-reports/2012/ifc-performance-standards

12 Equator Principles, July 2020, available at: https://equator-principles.com/

13 International Finance Corporation's Performance Standards on Environmental and Social Sustainability (2012), point 33.

14 An exhaustive list of the Equator Principles signatories is available at: https://equator-principles.com/signatories-epfis-reporting/.

15 Equator Principles, July 2020, p. 9.

16 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case n° ARB/12/1, award, 12 July 2019, par. 1401.

17 *Ibid.*, par. 1400.

The *Tethyan* case reveals first that international standards related to environmental protection are helpful to determine a case and build a caselaw on this issue, and second that these international standards will continue developing, helping States to better regulate Environmental Impact Assessment Studies at both domestic and international levels.

How Arbitral Tribunals address corruption allegations in a pending arbitration?

This question relates to governance matters. I will use two examples.

In my first example, the corruption allegations have been raised by the Respondent State in its first submissions. A private investor initiated ICC arbitration proceedings against an African State for non-payment related to the construction of roads, bridges, and public buildings.[18] The multiple contracts were performed for many years without the African State raising any allegation of corruption.

Once the private investor submitted its request for arbitration, the African State initiated two criminal proceedings, the first one before domestic jurisdiction and the second one in Switzerland.

To support its allegation of corruption, the African State also initiated parallel proceedings related to tax and customs matters.

The arbitral tribunal took these corruption allegations very seriously and conducted an in-depth analysis of the arguments raised by the Respondent State. One of the issues the arbitral tribunal had to deal with was whether it should order a stay of proceedings. While an answer to this question depends on the seat of the arbitration, arbitral tribunals shall also take into account the celerity of the arbitration proceedings.

In the case at end, the arbitral tribunal decided not to grant a stay of proceedings because the criminal proceedings were ongoing and no final decision had been rendered.

The second example I would like to address concerns a corruption allegation raised by a Respondent State *after* the arbitral tribunal rendered its award.

In this case, a private investor concluded several contracts with an African State for the construction of a business centre.[19] Similarly to my first example, no corruption allegation has been raised by the African State during the contract's performance.

The Paris Court of Appeal had then a different issue to examine: was the African State estopped from raising an allegation of corruption at this stage of the dispute? To answer this question, one has to analyse whether the documents in support of the allegation of corruption are new and whether these documents could have been reasonably produced in the arbitration proceedings.

While the Paris Court of Appeal annulled the award, it was made public that the parties reached a settlement agreement in June 2024.[20]

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[18] Paris Court of Appeal, 5 April 2022, n° RG 20/03242. The judgment is available here: https://www.cours-appel.justice.fr/sites/default/files/2022-04/05.04.2022%20RG%2020-03242_0.pdf

[19] Paris Court of Appeal, 25 May 2021, n° RG 18/18708. The judgment is available here: https://www.cours-appel.justice.fr/sites/default/files/2021-05/25%20mai%202021%20CCIP-CA%20RG%201818708.pdf

[20] Gabon settles wedding gift case ahead of cassation ruling, *Global Arbitration Review*, 12 June 2024: https://globalarbitrationreview.com/article/gabon-settles-wedding-gift-case-ahead-of-cassation-ruling

How domestic and regional laws may impact investors' obligations within their investment in Africa?

As lawyers, we witness a two-fold movement. The first one is the codification of the due diligence duty, which can be seen at both domestic and regional levels. The second trend we observe is the evolution of a next generation of investment treaties towards a better consideration of environmental issues.

In 2017, France adopted a law on Corporate Duty of Vigilance,[21] the first ever of its kind, which "corresponds to the concept of human rights due diligence outlined in the United Nations Guiding Principles".[22]

The main objective of the French law is to establish a legally binding obligation upon private companies to identify and prevent adverse human rights and environmental impacts caused by their activities.[23] The French Law does not only apply to parent companies but also to companies it controls directly or indirectly and to subcontractors and suppliers with whom it maintains an "established business relationship".[24] Consequently, the French law on Corporate Duty of Vigilance may have an *indirect effect* on investments made within the African continent.

The first emblematic decision related to this law relates to the judicial proceedings filed against Total Energies. In 2018, several associations and local authorities have questioned Total Energies about the content of its vigilance plan. Judicial proceedings started in January 2020, and a battle followed on procedural grounds. In its last judgment of 18 June 2024,[25] the Paris Court of Appeal overturned the first instance decision and declared the claims against Total Energies admissible. The most interesting part of the proceedings remains to be seen with the debate on the merits, if it ever occurs.

To achieve the objective of identifying and preventing adverse environmental impacts, the French Law requires private companies to implement a vigilance plan. For instance, private companies must establish a mapping that identifies, analyses, and ranks risks. This first step is important as it will allow companies to identify risks that may have an adverse impact on the environment. In its 2022 Duty of Vigilance Plan, Vinci established a risk map and identified about 15 inherent environmental risks[26]. The first risk raised by Vinci concerns the intensification of extreme weather events. Several Vinci business lines are impacted by this risk, such as Vinci Highways, Vinci Concessions, Vinci Energies and Vinci Construction.[27] These risks, associated

French Corporate Duty of Vigilance Law n° 2017-399, 27 March 2017, available here: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/. An English translation of the French Corporate Duty of Vigilance Law is available at: https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf
D. Cassel, Chapter 2 – The 'hardening' and 'broadening' of norms on business and human rights *in Navigating the New Contents of International Public Policy – Compliance in Environment and Human Rights*, Dossier XXI – ICC Institute of World Business Law, Lauro Da Gama, Maria Inès Sola, Patrick Thieffry (Eds.), ICC, 2023, p. 41.

[23] Art. L225-102-4 of the French Code of Commerce, available here: ttps://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000006161273?ini=true&page=1&query=code+de+commerce&searchField=ALL&tab_selection=code&anchor=LEGIARTI000043978824#LEGIARTI000043978824

[24] For a detailed explanation of the scope of application of the French Corporate Duty of Vigilance law and the caps it establishes, see European Coalition for Corporate Justice, Frequently Asked Questions, 24 March 2017, available here: https://respect.international/wp-content/uploads/2017/10/french-c corporate-d uty-of-vigilance-law-faq.pdf

[25] Cour d'appel de Paris, Pôle 5 - Chambre 12, 18 juin 2024, n° RG 23/14348, affaire *Amnesty International France et autres c. TotalEnergies*.

[26] Vinci Duty of Vigilance Plan (2022), p. 273, available here: https://www.vinci.com/publi/vinci/extract/vinci-2022_duty_vigilance-plan.pdf

[27] *Ibid.*, p. 274.

with climate change, are already a reality when performing construction contracts. Extreme meteorological events may, for instance, delay the delivery in terms of the contract.

Another risk raised by Vinci in its Duty of Vigilance Plan is the expansion of areas of water stress. This risk has two main effects. First, the contract's performance may be delayed because the construction industry is a major consumer of water. On the other hand, once a road or a building is built, the drought may cause severe deformation. One last environmental risk that may be highlighted is the pollution of ecosystems.[28] In complex construction projects, private companies may use products such as oil. These products must be used properly and removed from the site to prevent pollution.

The due diligence duty is now also consecrated at the European Union level.[29] In May 2024, the Council of the European Union approved the directive on corporate sustainability due diligence.[30] Similar to domestic legislations, Article 1 of the European Union directive provides for companies to identify and assess adverse environmental impacts. The directive also prescribes to companies "to adopt and put into effect a transition plan for climate change mitigation" to ensure "the transition to a sustainable economy".[31] This directive will also have an *indirect effect* on investments made by European companies in Africa.

The codification of a due diligence duty now goes beyond national legislations since the last generation of BIT also includes such an obligation. Article 34.1 of the European Union – Angola Sustainable Investment Facilitation Agreement provides that "the Parties recognise the importance of investors implementing due diligence in order to identify and address adverse impacts, such as on the environment and labour conditions, in their operations, their supply chains and other business relationships".

The last generation of investment treaties, such as the European Union–Angola Sustainable Investment Facilitation Agreement, and the codification of ESG standards, are likely to give rise to exponential disputes related to governance matters.

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28 *Ibid.*, p. 275.

29 Germany adopted a similar law with the enactment of the Supply Chain Due Diligence Act (2023). See D. Cassel, Chapter 2 – The 'hardening' and 'broadening' of norms on business and human rights *in Navigating the New Contents of International Public Policy – Compliance in Environment and Human iRghts*, Dossier XXI – ICC Institute of World Business Law, Lauro Da Gama, Maria Inès Sola, Patrick Thieffry (Eds.), ICC, 2023, p. 44 s.

30 European Union Directive n° 2024/1760 on corporate sustainability due diligence, available here: h https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401760. For an explanation of the European Union Directive on corporate sustainability due diligence, see https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en

31 Article 1.1 (c) of the European Union Directive on corporate sustainability due diligence.

PANEL 5

ARBITRATING PARTIES - MASS CLAIMS- MASS ARBITRATION- THIRD PARTIES

SUMMARY

Moderator: Chief Gbola Akinola

Panel 5, entitled "Arbitrating Parties – Mass Claims, Mass Arbitration, and Third Parties," explored the growing complexities of ESG-related disputes in arbitration, particularly in the context of large-scale claims and the involvement of third parties. As ESG obligations become more prevalent in corporate governance, arbitration must adapt to address new challenges in consent, procedural requirements, and transparency.

The discussion began with consent, where panelists examined how dispute resolution clauses in contracts are often not designed with ESG considerations in mind, creating uncertainty when ESG-related claims arise. The conversation then turned to the exhaustion of internal remedies, a crucial prerequisite in many ESG disputes, raising questions about whether claimants must first seek redress through corporate grievance mechanisms before resorting to arbitration.

The panel also unpacked the complexities of shareholders' ESG claims, particularly in mass arbitration settings where balancing corporate interests with broader ESG concerns can be legally and procedurally challenging. The role of third parties, such as affected communities, NGOs, and supply chain actors, was also considered, with speakers reflecting on how arbitration could evolve to account for their interests without undermining contractual frameworks.

Finally, transparency, data access, and public interest emerged as key themes, with discussions on how greater openness in ESG-related arbitration could improve legitimacy and accountability while still protecting sensitive corporate information.

This panel provided a critical lens on how arbitration must evolve to meet the demands of an ESG-driven legal landscape, offering insights into emerging trends and potential reforms.

PANEL 6

REMEDIATION AND DAMAGES

SUMMARY

Moderator: Babajide O. Ogundipe

Panel 6, entitled "Remediation and Damages," focused on the approaches to resolving ESG-related disputes, with a particular emphasis on remediation versus traditional damages. The panelists examined how remediation, rather than financial compensation, is increasingly being favored as a more effective remedy in ESG cases.

The discussion began with human and social rights compensatory damages, where the speakers explored how damages are being used to address violations of social and human rights, but also highlighted the limitations of financial awards in truly remedying harm. They then moved to environmental compensatory damages, considering the evolving standards for compensating environmental harm, with an emphasis on long-term restoration and the challenges of assigning monetary value to environmental damage.

Finally, the panel addressed governance remediation, focusing on how companies can be required to change their governance structures or processes as part of the remediation in ESG disputes. This highlighted the growing recognition that structural changes may be necessary to prevent future harm and foster long-term sustainability.

With insights from three speakers, this panel provided a comprehensive examination of the different forms of remediation available in ESG cases and the growing preference for solutions that go beyond simple financial compensation.

Speaker Paper

AS AN INDUSTRY, SHOULD WE UNDERSTAND MORE ABOUT WHAT DEFECTS ARE AND HOW TO MEASURE THEIR REMEDIATION AND CONSEQUENT DAMAGES?

Damian James

Introduction

Construction projects rarely run perfectly from beginning to end without fault or flaw. They often encounter issues such as delay or disruption, or defects in construction or design. Where defects arise, we also encounter the matter of damages and the correct assessment of damages. Whilst, on the face of it, damages may seem like something relatively simple to assess, they come with a range of complexities and complications that need careful consideration in their assessment.

What are defects?

Defects are, unfortunately, a regular feature of construction projects. When they arise, the law will rightly step in to put an "injured party" in the position it would have occupied but for the breach. The background to defects stretches back over many years. One of the first cases on the subject was *Yarmouth v France* (1887) 19 QBD 647.[1] In this remarkable case, a horse was determined to be a "defective plant" for the purposes of a claim by an employee against an employer, because of the horse's vicious nature.

There are generally accepted to be two fundamental types of defects. The first is the "patent" defect, and the second, the "latent" defect. Patent defects are more easily identifiable. They can be seen on inspection and are usually rectified early in the life of a project, often before practical completion is given.

A latent defect may be more difficult to identify. As such, it may only come to light some time after a building is completed. This is why many standard contracts allow for a "defect liability"

[1] See: <https://www.isurv.com/directory_record/3712/yarmouth_v_france> and detailed at: <<https://www.fenwickelliott.com/research-insight/articles-papers/construction-law-terms-a-z/defect> (retrieved 08/10/2024)

period, during which the contractor will be held liable for any defects that come to light. It may also be required to rectify them at the contractor's cost. Alternatively, and where disputes arise, the employer may seek to get the defects rectified by a different contractor. The employer then seeks to recover the costs of rectification from the original contractor.

In the case of construction contracts, this is normally a matter of a claim against the contractor for damages to recover the cost of construction or reconstruction of the building project. The big challenge here is identifying the "quantum" or measure of damages correctly due. Which is where a quantum expert may be helpful. A quantum expert will typically be experienced in the field of surveying and measurement of quantities. They will be best placed, using a mix of experience, knowledge and expertise, to identify the correct sum to be assessed in the award of damages.

This need for quantum assessment is particularly relevant if defects become apparent after the defect's liability period. There is generally no right for the contractor to return to the site to undertake remedial work at this point. As a result, the client may employ others to correct the defect and then go on to claim damages from the contractor.

What is, and what isn't a defect?

There is no common or universal definition of a "defect". In broad terms, it is work that does not meet a specification or standard required by a contract due to fault(s) in the work, materials or design, or because of deficiencies in the quality of the work.[2]

Contracts usually state the requirement for workmanship that would lead to a defect. In UK, Joint Contracts Tribunal (JCT) states:

> *The contractor shall carry out and complete the works in a proper and workmanlike manner, as well as in compliance with the contract documents and various statutory requirements*."

The Joint Building Contracts Committee (JBCC) notes in their practice note that:

> *Uncertainty often prevails regarding the assessment of damages in respect of claims that employers have against contractors for defective work. The employer is entitled to have the defective work rectified and/or claim damages in terms of the contract and/or common law. Standard-form contracts generally provide for specific procedures related to defective work claims made during the pre-determined contractual completion stages and after the issuing of the final completion certificate. The success of a defective work claim after the issuing of the final completion certificate is complicated by various factors, inter alia that the contractor may no longer be in business; there is no financial hold on the contractor because of the expiration of the construction guarantee; and the difficulty often to establish whether the defective work is as result of a design or specification shortcoming/oversight, normal wear and tear or caused by the contractor or his subcontractors.*
>
> *The systems, tools and techniques are available for an industry willing to embrace good practice in order to improve industry performance and project outcomes. Vigilance on the part of the principal agent appointed to represent the employer is required to avoid later arguments as built environment professionals often fail to enforce the contractual requirements. In so doing they leave the building*

[2] LEXIS NEXIS See: <https://www.lexisnexis.co.uk/legal/construction-law/issues-construction-contracts/> (retrieved 07/10/2024).

owner/employer with no other option but to institute a claim for damages for breach of contract due to delivery of defective work by the contractor.

Continuous professional development for professionals practising in the construction industry is therefore vital to understand and correctly apply the provisions contained in the particular contract. This will not only assist in the ability to correctly execute procurement requirements, but also the ability to effectively manage contracts from a supply chain management and built environment perspective.[3]

The assessment, management and avoidance of defects is clearly a significant problem for construction. The mere fact that contract drafting bodies have devoted so much time to tackling the issues surrounding defects and damages is arguably indicative of the scale of the problem faced by the industry.

The assessment of the quantum for defect claims becomes further complicated when issues such as "betterment" are added. There are also regional and specific issues, one of which in particular we will assess further in this paper.

Betterment

This is a concept that causes some concern and leads to many complex arguments in construction disputes. Essentially, where the end user has received the benefit of an improvement to their building or product in the rectification of defects, that user should not be entitled to recover the full value of that betterment. Damages won't be the same as if nothing had happened – there will potentially be deductions from damages where betterment occurs.

In the very simplest of terms, damages = cost of cure + diminution in value – betterment. However, as with many things in law, it isn't as simple as it might at first seem. The opportunities to claim a reduction in damages as a result of betterment are extremely limited.

Some key cases where betterment has arisen include:

- *Harbutts Plasticine v Wayne Tank and Pump* - In this case, it was determined that you cannot claim a reduction due to betterment if that betterment is a result of external factors having changed, even if the client gets a better factory as a result.[4]
- *The Baltic Surveyor* - set out rules for betterment claims - they need to be exceptional. Betterment needs to provide no financial benefit to the claimant, or, where there is no way of determining value, needs to try and put a value on it as best as possible.[5]

Having said that, there have been cases that have been successful in claiming betterment, particularly where a quantum expert has been employed to separate different elements of quantum in the claim.

The use of a quantum expert for assessment in cases of betterment has been well-exercised. For example, in *J Sainsbury v Broadway Malyan, Ernest Green Partnership Ltd,*[6]*,* the court accepted the opinion of the quantum expert. The expert asserted that had the accommodation

[3] See:<https://www.jbcc.co.za/advisory_notes/JBCC%20ADVISORY%20NOTE%202021.0_Defects%20before%20and%20after%20Final%20Completion%20Ed%206.2 2.pdf> (retrieved 07/10/2024).

[4] Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd [1970] 1 QB 447, [1970] 1 All ER 225, [1970] 2WLR 198, [1970] 1 Lloyds Rep 15.

[5] Voaden v Champion (THE "BALTIC SURVEYOR" AND "TIMBUKTU"), [2001] 1 Lloyd's Rep. 739.

[6] J Sainsbury v Broadway Malyan, Ernest Green Ltd, [1998] EWHC Technology 302.

size been reduced (reflecting the original building size), then the cost of reconstruction could have been reduced by £150,000.

In *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*,[7] betterment allowed for improved performance of replacement generating equipment on the basis that the original contract would never have achieved the efficiency of the replacement kit.

To add to (or arguably reduce) the complexity of betterment claims, the Bacon Woodrow formula suggests that a fairer result can be obtained by allowing for interest saved on capital investment over time on the new asset.[8] The formula is expressed as follows:[9]

$$B = C\left[\frac{(1+R)^b - 1}{(1+R)^L}\right]$$

where C = Cost of undertakers' works
R = Rate of interest
L = Number of years of estimated full life of apparatus
b = Number of years of expired life of apparatus
B = Financial benefit

UK – Grenfell – Implications worldwide?

In the UK, an additional complication has entered the fray. The disaster at the Grenfell Tower led to a raft of changes in the law in the UK. The resultant claims for defective cladding and its remediation have been unprecedented.

A government report last year stated that:

> *Overall, 1,603 buildings (42%) have either started or completed remediation works. Of these, 777 buildings (20%) have completed remediation works. The total number of buildings reported to have started or completed remediation works has doubled since the end of December 2022.*[10]

Assessing the cost and allocating liability on this has been a phenomenal task. The new law includes an opportunity for an "interested party" to seek a contribution order in law. This contribution towards remediation comes from other parties involved in the development of properties affected by the remediation requirements. In *Triathlon Homes v Stratford Village*

[7] British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673.
[8] See: <https://www.hauc-uk.org.uk/resources/diversionary-works-calculator> (retrieved 07/10/2024).
[9] See: <https://www.fticonsulting.com/uk/insights/articles/construction-damages-rectification-defects-issues-betterment> (retrieved 08/10/2024).
[10] See: <https://www.thefpa.co.uk/news/data-shows-two-thirds-of-buildings-with-cladding-defects-still-to-begin-remediation> (retrieved 08/10/2024).

Development Partnership,[11,] the court held that the property owner (Triathlon) was entitled to recover costs from the developer (SVDP) to the order of £18 million.

Whilst these issues are specific to one particular jurisdiction, the authors are aware that other regions are now looking to the English courts and legal system to identify what areas may be useful for their own planning and safety management. It seems likely that similar legislation may follow, particularly in areas with a common law foundation for their legal system.

Conclusion

Much like the Facebook status of many a teenager, when it comes to the assessment of damages, it's complicated. There are a number of different factors to consider – changing costs of materials, currencies, labour rates, etc, will all have an impact on the assessment of damages. Issues and doctrines such as betterment make it even more complex, and the implications of the UK's approach to Grenfell and subsequent legislation may mean there's yet more to come as other jurisdictions watch to see what the UK do and potentially follow suit. It will be interesting to see what happens in the coming years, but a certainty is perhaps that nothing is certain in the world of construction and law.

11 See:https://www.judiciary.uk/judgments/triathlon-homes-llp-v-stratford-village-development partnership-and-others/> (Retrieved 8th Oct 2024).

PANEL 7

COSTS AND FUNDING ISSUES

SUMMARY

Moderator: Orphée Haddad

Panel 7, entitled "Costs and Funding Issues," addressed the financial challenges that arise in ESG-related arbitration, focusing on potential imbalances in resources among parties and the limitations of third-party funding (TPF).

The panelists explored the financial imbalance that often exists between claimants and respondents in ESG disputes, where one party may possess significantly greater resources, creating disparities in access to legal representation and resources. This imbalance can raise concerns about the fairness and equality of the arbitration process.

The discussion then shifted to the limitations of third-party funding (TPF), particularly how the sparse financial reward in ESG claims can deter funders from becoming involved. The Panel considered how ESG claims often focused on social and environmental outcomes rather than financial compensation, a model not very attractive in terms of funding. This has the knock-on effect of making it more difficult for claimants to pursue disputes, especially in resource-heavy or long-term cases.

This panel highlighted critical issues surrounding the intersection of costs, access to justice, and the role of financial resources in ESG arbitration, offering valuable insights into the potential reforms needed to address these challenges.

Speaker Paper

COSTS AND FUNDING ISSUES IN ARBITRATION

Godson Ugochukwu

Introduction

Rising costs are a growing concern in global dispute resolution, particularly arbitration, creating barriers to access to justice for financially constrained and well-resourced parties alike. While arbitration costs are not new, their increase has caused concern, especially in Africa, where local parties often struggle to cover these costs.

This report explores arbitration cost challenges in Africa, emerging funding mechanisms like Third-Party Funding (TPF) and Contingency Risk Insurance (CRI) and offers suggestions for improving access to arbitration.

Overview of The Costs of Arbitration in Nigeria

The decision to commence arbitration proceedings in Africa is influenced by the significant financial burden involved. Arbitration costs can be categorised into two areas:[1]

- Costs of Arbitration Proceedings: This includes arbitrators' fees, registration, and administrative fees.
- Party Costs: This includes legal fees, expert fees, hearing costs, and travel expenses.

High costs, particularly for low-value claims, often deter parties from initiating arbitration. Total expenses, including tribunal and legal representation fees, can far exceed estimates, making arbitration unaffordable for many.[2]

Arbitral Cost Structure

The UNCITRAL Rules provide a framework for understanding arbitration costs:[3]

- Arbitrators' Fees: These vary depending on the institution and are usually based on the amount in dispute.
- Party Costs: According to a report by the ICC, party costs—including legal fees, expert witness fees, and administrative expenses like translation and hearing costs—can account for up to 83% of total arbitration costs.

1 Aceris Law LLC, Overview of Arbitration Costs (accessed 8 September 2024).
2 International Chamber of Commerce (ICC), Report on Decisions on Costs (2021).
3 United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules (2013).

Some of these costs might be mitigated by choosing arbitration centres in Africa, which often charge lower fees than global hubs like Paris or London. However, legal fees and party costs remain the most significant expenses.[4]

Disproportionality in Arbitration Costs

Studies show that arbitration costs are often disproportionate to the value of the disputes involved. For instance, the CIArb Costs of International Arbitration Survey revealed that legal fees can consume up to 74% of party costs, sometimes far exceeding the value of the dispute itself.[5] Additional expenses, such as expert fees and travel, further inflate the total arbitration bill.

The ICC Report on Decisions on Costs similarly highlights that arbitrator and administrative fees can sometimes surpass the dispute's value, particularly when tribunals fail to apply cost-control techniques.[6]

Costs Charged by Leading Arbitral Institutions

Leading arbitral institutions have varied fee structures, typically based on the dispute's value or hourly rates. Notable figures include:

- ICC: Administrative and arbitrator fees can range from USD 30,000 to over USD 1 million, depending on the case value.
- LCIA: Arbitrators charge up to GBP 500 per hour, with administrative fees starting at GBP 1,950.
- SIAC: Arbitrator fees are based on dispute value, with reimbursable expenses often adding to the cost.
- SCC: Sliding fee scales, where high-value disputes may result in considerable expenses.

<u>Findings From the 2022 Africa Academy Survey</u>

The Africa Arbitration Academy (AAA) conducted a comprehensive survey on arbitration costs and funding in 25 African jurisdictions, with key findings including:

- Cost Drivers: Counsel fees and the nature of the disputes (mainly construction and commercial) were identified as the primary drivers of arbitration costs.
- Limited Funding Options: While legal aid was available in 71% of jurisdictions, its scope was limited. TPF and contingency fee arrangements were recognised as alternative funding mechanisms but remained underutilised.
- Cost-Efficient Jurisdictions: South Africa, Nigeria, Kenya, Rwanda, and Egypt were rated as the most cost-efficient jurisdictions for arbitration, with cities like Kigali, Nairobi, and Cairo highlighted for their strong arbitration infrastructure.

Third-Party Funding (TPF): An Emerging and Promising Solution

TPF has emerged as a promising solution to the high costs of arbitration. Under a TPF arrangement, an external financier provides funds to a party in return for a share of the potential

4 International Chamber of Commerce (ICC), Report on Decisions on Costs (2021).
5 Chartered Institute of Arbitrators (CIArb), Costs of International Arbitration Survey (2021).
6 International Chamber of Commerce (ICC), Report on Decisions on Costs (2021).

award or settlement. TPF offers financially constrained parties an opportunity to pursue claims they might otherwise abandon.

Historically, TPF was met with scepticism due to concerns over public policy, especially the doctrines of maintenance and champerty under English common law. However, attitudes have shifted, and several African jurisdictions, including South Africa and Nigeria, are beginning to regulate and embrace TPF. While not yet widely regulated, TPF is gaining recognition as a viable option to alleviate financial constraints in arbitration.

Benefits of TPF:

- Access to Justice: It enables parties to pursue legitimate claims without financial barriers.
- Risk Mitigation: The financial burden shifts from the party to the third-party funder, allowing the party to focus on the case's merits.

Contingency Risk Insurance (CRI): A Complete Mechanism

CRI provides insurance coverage to parties against the risk of an adverse arbitration outcome. While TPF offers upfront funding, CRI protects against financial losses in the event of an unfavourable award. The combination of TPF and CRI can significantly reduce the financial risks involved in arbitration.

Comparing TPF and CRI:

- Funding vs. Insurance: TPF offers funding for arbitration, while CRI protects against potential losses.
- Payment Structure: TPF involves the funder taking a share of the award, while CRI requires paying an insurance premium.
- Timing: TPF comes into play before or during arbitration, whereas CRI manages losses after the award.

Practical Application Combining of TPF and CRI:

A strategic approach for managing arbitration costs in Africa could involve combining TPF and CRI. TPF provides upfront funding, while CRI protects against adverse outcomes, allowing parties to manage both immediate and long-term financial risks. This combined approach strengthens negotiating positions and enables parties to pursue arbitration without being hindered by financial limitations.

Legal Precedents on Legal Precedents on Inability to Afford Arbitration Costs

Recent European court decisions have highlighted the issue of financial constraints limiting access to arbitration. For example, the Court of Appeal of Córdoba (CAC) in Spain ruled that an arbitration agreement was unenforceable due to a party's inability to afford arbitration costs, citing a violation of access to justice rights. Similar rulings have been made in Poland, indicating that this trend could influence African jurisdictions in the future.

Recommendations for The Future of Arbitration for The Future of Arbitration in Africa

To improve access to arbitration in Africa, several measures should be considered:

- Regulate and Promote TPF: African countries should adopt frameworks to regulate TPF as a mainstream funding option;
- Increase use of African Arbitration Institutions: Reliance on African institutions can improve cost-efficiency;
- Leverage Technology: Virtual hearings and digital document management can reduce arbitration costs;
- Promote Cost-Efficient Jurisdictions: Countries like Nigeria, South Africa, and Egypt should continue building their reputations for cost-effective arbitration.

Conclusion

Arbitration costs pose a significant challenge in Africa, but innovative solutions like TPF and CRI, alongside greater reliance on African arbitration centres, can make arbitration more accessible. With the right frameworks and strategies, Africa can position itself as a cost-efficient and competitive hub for arbitration.

PANEL 8

ENVIRONMENTAL ASPECTS OF DISPUTE RESOLUTION

SUMMARY

Moderator: Salma El-Nashar

Panel 8, entitled "Environmental Aspects of Dispute Resolution," focused on the growing importance of environmental considerations in the arbitration process and how these aspects can be integrated into dispute resolution mechanisms. The panel discussed the various ways in which arbitration can align with environmental sustainability goals.

The discussion began with an exploration of the environmental aspects of dispute resolution, examining how traditional arbitration practices are evolving to address environmental concerns, such as reducing carbon footprints and increasing resource efficiency in proceedings.

Panelists then delved into the Green Protocol for Arbitral Proceedings, which provides a framework for conducting arbitrations in a more environmentally sustainable way, including guidelines for reducing paper use, minimizing energy consumption, and promoting virtual hearings as alternatives to travel-intensive in-person meetings.

The panel concluded by discussing the Model Green Procedural Order, a proposed tool designed to incorporate environmental best practices directly into the procedural rules of arbitration. This order aims to provide parties and arbitrators with a structured approach to implementing sustainability measures throughout the arbitration process.

With insights from three expert speakers, this panel highlighted the increasing role of environmental considerations in dispute resolution and offered practical solutions for embedding sustainability into arbitration practices.

Speaker Paper

ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL GOVERNANCE: LEGAL FRAMEWORKS AND GLOBAL PRACTICE

Joyce Aluoch

Introduction

Environmental Conflicts: Definition and Causes

Dispute resolution often intersects with environmental considerations, particularly in conflicts involving land resources, land use, pollution, and sustainability issues. Key aspects of environmental aspects of dispute resolution include:

- Environmental Impact Assessments (EIA);
- Compliance with Environmental Laws and Regulations;
- Indigenous and Local Community Rights;
- Public Participation;
- Scientific and Technical Evidence;
- Restorative Justice and Environmental Rehabilitation;
- Transboundary Disputes;
- Environmental Dispute Resolution(ADR).

Dispute Resolution processes that incorporate these environmental aspects help to ensure that outcomes are equitable, sustainable, and in line with broader ecological and legal frameworks.

Managing Environmental Conflicts Through ADR

ADR is an umbrella term which encompasses a set of processes which are used for managing disputes without resorting to adversarial litigation. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs), among others.

ADR Mechanisms have been recognised at the global level under the Charter of the United Nations. The Charter provides that parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. It has been correctly

observed that international standards recognise access to justice as both a human right and a means to protect other universally recognised human rights. Access to justice is at the heart of the United Nations' 2030 Sustainable Development Goals, and SDG16 particularly seeks to foster Peace, Justice and Strong Institutions, with States committing to provide access to justice for all, recognising it as a key indicator of peaceful and inclusive societies.

At the national level in Kenya, the Constitution of Kenya recognises access to justice as a fundamental human right. It requires the State to ensure access to justice for all people, and if any fee is required, it shall be reasonable and shall not impede access to justice.

The role of ADR mechanisms in managing environmental conflicts, as stated above, is recognised at both global and national levels. At the global level, "The Rio Declaration on Environmental and Development" envisages the use of ADR mechanisms in managing environmental conflicts. Principle 10 of the Declaration states:

> "Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall participate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

It has been argued that Principle 10 of the Rio Declaration encourages the use of ADR processes in managing environmental conflicts through its emphasis on three pillars, namely:

- Information related to the dangers to the environment should be available to the public.
- The public should participate in the decision-making process.
- Methods and channels of accessing justice should be available to all individuals.

In addition to the Rio Declaration, the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) also encourages the use of ADR techniques in managing environmental conflicts. The Convention urges states to pursue the management of disputes through negotiation or by any other means of dispute settlement acceptable to the parties to the dispute. It also permits parties to pursue binding methods like arbitration and adjudication if the amicable methods have failed to work.

The Paris Agreement also represents global efforts towards managing conflict through ADR mechanisms. It aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty. Adoption of the Paris Agreement saw the application of ADR mechanisms, especially negotiation, to respond to climate change, which is a major problem. The 2015 United Nations Climate Change Conference (COP 21) in Paris saw 195 nations participate in negotiating a framework to curb emissions and take common action on climate change.

At the national level in Kenya, the Environment and Land Court Act No. 19 of 2011 (ELCA) encourages the Environment and Land Court (ELC) to embrace the use of ADR mechanisms in managing environmental conflicts. The Act provides that ELC may adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other means of Alternative Dispute Resolution including conciliation, mediation and traditional dispute and conflict resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution. In addition, the Community Land Act (CLA) of 2016, Kenya, also encourages settlement of disputes relating to community land through ADR methods, including traditional dispute and conflict

resolution mechanisms where it is appropriate to do so. In particular, the Act recognises the use of mediation and arbitration in resolving disputes relating to community land.

From the above, it is clear that the role of ADR mechanisms in managing environmental conflicts is well entrenched in law. Certain benefits of ADR processes make them suitable for use in resolving environmental problems. The processes, such as negotiation, conciliation, mediation, are informal, cost-effective, and give parties the freedom to come up with their own creative and long-term solutions to environmental problems.

ADR mechanisms can also encourage effective management of environmental conflicts by consensus-building and participatory approaches towards conflict management. Mediation can foster community involvement in the conflict management process through the use of peace committees, NGOS, etc.

Finally, it is my submission that the suitability of ADR mechanisms in managing environmental conflicts can be enhanced by addressing the inadequacies found in some ADR mechanisms, such as lack of formal recognition and enforcement of outcomes. Because of this, there is a need for all countries to enact sound legal policy frameworks for effective utilisation of ADR to ensure full access to justice in all areas. This will promote legitimisation of ADR mechanisms, thus enabling their advantages to be realised across different sectors, including environmental governance. An example can be found in Kenya, where the adoption of the Alternative Justice Systems Framework Policy is a vital step in mainstreaming a wide range of conflicts, including environmental conflicts.

As I conclude, I wish to note that in the dynamic intersection of law and technology, artificial intelligence (AI) is emerging as a powerful tool that promises to transform various aspects of legal practice. One area where AI's impact is particularly profound is dispute resolution. Traditionally, dispute resolution processes such as mediation and arbitration have relied heavily on human decision-making and interaction. However, with the advent of AI, these practices are undergoing a significant shift.

With its ability to process vast amounts of data and learn from patterns, AI offers new possibilities for resolving disputes more efficiently and effectively. From automating routine tasks to predicting outcomes using machine learning, it can assist in analysing big data. AI will certainly reshape the dispute resolution (including environmental disputes), landscape.

Closing

CONCLUDING REMARKS

Dr SYLVIE BEBOHI EBONGO

Présidente du Comité d'organisation de la 5ème Conférence Annuelle AfAA

1. The 5th annual conference of the African Arbitration Association (AfAA) was an opportunity for our joint Association to discuss Environmental, Social and Governance ('ESG') issues in international arbitration and, more specifically, how they arise in the African context. It is clear from the choice of theme for this conference that arbitration no longer has any borders, or that it now has very few.

1. La 5ème conférence annuelle de l'Association Africaine pour l'Arbitrage (AfAA) a été l'occasion, pour notre Association commune, de discuter des questions Environnementales, Sociales et de Gouvernance (« ci-après ESG ») dans l'arbitrage international ; et plus spécifiquement, de la manière dont elles se posent dans le contexte africain. On l'a compris, avec le choix de la thématique de cette conférence, l'arbitrage n'a plus de frontières ou en présente désormais très peu.

2. What was discussed over the two days?

2. De quoi a-t-il été question pendant ces deux jours ?

3. While it may seem obvious to arbitration practitioners working on ESG disputes what this acronym stands for, this perception is not the same for all the practitioners who attended the two-day conference. The presence of judges from the various jurisdictions, lawyers, non-lawyers and students who took part in this 5th annual AfAA conference is to be particularly appreciated. The difficulty of defining the acronym ESG was apparent from the opening lecture.

3. Alors qu'il peut paraître évident pour les praticiens de l'arbitrage, travaillant sur les litiges ESG de savoir ce que signifie ce sigle, cette perception n'est pas la même pour l'ensemble des praticiens qui étaient présents durant ces deux jours de conférence. Il faut notamment saluer la présence des Magistrats des différentes juridictions, des avocats, non- avocats, mais aussi Etudiants qui ont été parties prenantes à cette 5ème conférence annuelle de l'AfAA. On a perçu la difficulté de définition du sigle ESG, dès la leçon inaugurale.

4. This impression remained from the first panel, as practitioners familiar with ESG issues confirmed that there is no universal definition of the acronym. The concept and its implementation vary from region to region. The inclusion of environmental considerations in investment law has emerged with the new generation of Bilateral Investment Treaties (hereinafter BITs), which seek to strike a balance between investment protection and environmental sustainability, and encourage greater transparency in investor-state arbitration. The same applies to social issues in arbitration, which are specific because of poverty, glaring social inequalities and governance issues linked to corruption, political instability, etc. This is what the first panel revealed to us, setting the context for ESG issues in arbitration in Africa.

4. Cette impression s'est poursuivie dès le premier panel, puisque les praticiens habitués aux questions ESG, ont confirmé qu'il n'existe pas de définition universelle du sigle. Le concept et son implémentation varient selon les régions. La prise en compte des considérations environnementales en droit des investissements notamment est apparue avec la nouvelle génération des Traités Bilatéraux d'Investissement (« ci-après TBI ») par la recherche d'un équilibre entre la protection de l'investissement et la durabilité de l'environnement environnementale et qui encourage davantage de transparence dans l'arbitrage investisseurs/Etats. Il en de même des questions sociales dans l'arbitrage qui sont particulières du fait de la pauvreté, des inégalités sociales criardes et des questions de gouvernance liées notamment à la corruption, l'instabilité politique etc. C'est ce que nous a révélé le premier panel qui a permis de fixer le contexte des questions ESG dans l'arbitrage en Afrique.

5. This was followed by a discussion on the role of ESG considerations, including a clarification of each term and the interactions between the different concepts.

5. S'en est suivie une discussion sur le rôle des considérations ESG, avec notamment une clarification de chaque terme et des interactions entre les différents concepts.

6. We then moved on to the very heart of the subject as it arises in the two main families of arbitration, namely commercial arbitration on the one hand and investment arbitration on the other. It emerged from the discussions that ESG issues enter commercial arbitration through several commercial transactions: supply chains, credit agreements, joint venture agreements and mergers and acquisitions.

6. Puis, nous avons plongé au cœur même du sujet tel qu'il se présente dans les deux grandes familles de l'arbitrage à savoir l'arbitrage commercial d'une part et l'arbitrage des investissements d'autre part. Il est ressorti des échanges que les questions ESG s'invitent dans l'arbitrage commercial par le truchement de plusieurs transactions commerciales : chaines d'approvisionnement, accords de crédit, accords de joint-venture ou fusions acquisitions.

7. In terms of investment arbitration, ESG issues take on even greater importance because African States are generally host States to investments and therefore at the forefront of ESG disputes. This is particularly the case thanks to the new generation of BITs mentioned above, which enable middle- and low-income countries, such as most African countries, to raise issues relating to investor breaches of their environmental obligations. States or their communities (civil society) can now make counterclaims on the grounds that investors have breached their environmental obligations and commitments, obtaining an investment through corruption can prevent investors from accessing international protection, and ESG standards can be used by States as a pretext to justify certain measures taken against investors. All these issues are assessed by arbitral tribunals on a case-by-case basis, depending on the reasonable nature of the measures and their proportionality with the public interest pursued.

7. En matière d'arbitrage des investissements, les problématiques ESG prennent encore toute leur importance parce que les Etats africains sont généralement Etats hôtes des investissements et donc au-devant de la scène des litiges ESG. Il en est ainsi, notamment grâce à la nouvelle génération des TBI sus évoquée qui permet aux Etats à revenu moyen ou faible comme le sont la plupart des Etats africains, de soulever des questions de violation par les investisseurs de leurs obligations au titre du respect des questions environnementales. Les Etats ou leurs communautés (société civile) peuvent désormais présenter des demandes reconventionnelles du fait de la violation par les investisseurs de leurs obligations et engagements environnementaux, l'obtention d'un investissement par la corruption peut empêcher les investisseurs d'accéder à la protection internationale, les normes ESG peuvent servir de prétexte aux Etats pour justifier certaines mesures prises à l'encontre des investisseurs. L'ensemble de ces questions étant évalué par les tribunaux arbitraux au cas par cas, en fonction du caractère raisonnable de ces mesures et de leur proportionnalité avec l'intérêt public poursuivi.

8. This overview of the first day shows that ESG issues are now an essential part of international arbitration. As soon as they are identified and examined by arbitral tribunals, they give rise to a right to reparation and an award of damages. Here again, the challenge is enormous, given the variety of methods of reparation and of awarding damages.

8. On a compris avec tout ce panorama de la première journée que les questions ESG sont désormais incontournables dans l'arbitrage international. Dès lors qu'elles le sont et font l'objet d'examen par les tribunaux arbitraux, elles ouvrent droit à la réparation et à l'octroi des dommages-intérêts. Ici encore, on a compris que le défi était énorme tant les méthodes de réparation et celles liées à l'octroi sont variées.

9. Arbitrating all these issues has a cost. There is always the question of financing the resulting procedures, particularly in view of the imbalance that may exist between the parties: powerful investors versus low- or middle-income countries and financially disadvantaged communities. One solution to the lack of financial resources is often to turn to third-party funders, which is not without its difficulties, since third-party funding is a process that obeys precise allocation rules, which are not always obvious to these States or communities.

9. L'arbitrage de toutes ces problématiques a un coût. Se pose encore et toujours la question du financement des procédures qui en résultent, au regard notamment du déséquilibre qui peut exister entre les parties : investisseurs puissants contre Etats à revenu faibles ou moyens, communautés financièrement défavorisées. Une des solutions pour remédier au manque de moyens financiers est souvent le recours aux tiers financeurs qui n'est pas sans difficultés, puisque le financement par les tiers est un processus qui obéit à des règles précises d'attribution, qui ne sont pas toujours évidentes pour ces Etats ou communautés.

10. Our work ended on the various aspects of environmental disputes in arbitration, which today give rise to a large amount of litigation in the field of international arbitration. We were also able to understand that the players in the world of arbitration must make their contribution to the edifice, in the way they conduct arbitrations, by adopting a reflex for greener arbitrations; indeed, a whole ecosystem has been created by ESG standards, which even affects the attitudes of practitioners called upon to deal with these issues.

10. Nos travaux se sont terminés sur les différents aspects des litiges environnementaux dans l'arbitrage qui donnent lieu aujourd'hui à un large contentieux dans le domaine de l'arbitrage international. Nous avons pu également comprendre que les acteurs du monde de l'arbitrage, doivent apporter leur pierre à l'édifice, dans la manière avec laquelle ils conduisent les arbitrages en adoptant un réflexe pour des arbitrages plus verts ; en effet, tout un écosystème a été créé par les normes ESG qui innervent même les attitudes des praticiens appelés à connaître de ces questions.

11. By the end of the two-day conference, it will have become clear that environmental, social and governmental issues will now play a major role in the international arbitration industry. They are therefore of prime concern to arbitration practitioners, but above all to the States that conclude treaties and international transactions in which these issues are addressed. They also concern our various jurisdictions, which must understand them if they are to deal with the disputes that arise from them or the appeals that result from them.

11. On l'aura donc compris au bout de ces deux journées de conférence, les questions Environnementales, Sociales et Gouvernementales occupent désormais la part belle dans l'industrie de l'arbitrage international. Elles interpellent donc les praticiens de l'arbitrage au premier plan, mais surtout les Etats qui concluent des Traités et des transactions internationales dans lesquelles ces questions sont abordées. Elles concernent également nos différentes juridictions qui doivent les comprendre, pour pouvoir traiter le contentieux qui en est issue ou les recours qui en résultent.

12. ESG issues are of primary concern to the African continent, since they arise there more than elsewhere, and should therefore invite us, African practitioners more specifically, to become aware of the diversity of litigation and therefore of the opportunities open to us because of the advent of these issues in international arbitration.

12. Les questions ESG interpellent au premier rang le continent africain, puisqu'elles s'y posent plus qu'ailleurs et doivent donc nous inviter, praticiens africains plus spécifiquement, à prendre conscience de la diversité du contentieux et donc des opportunités qui s'offrent à nous du fait de l'avènement desdites questions dans l'arbitrage international.

AfAA thanks Programme Committee members, speakers and delegates, and looks forward to welcoming you to the 6th Annual AfAA Conference, to be held in Cairo, Egypt, on 10-12 October 2025