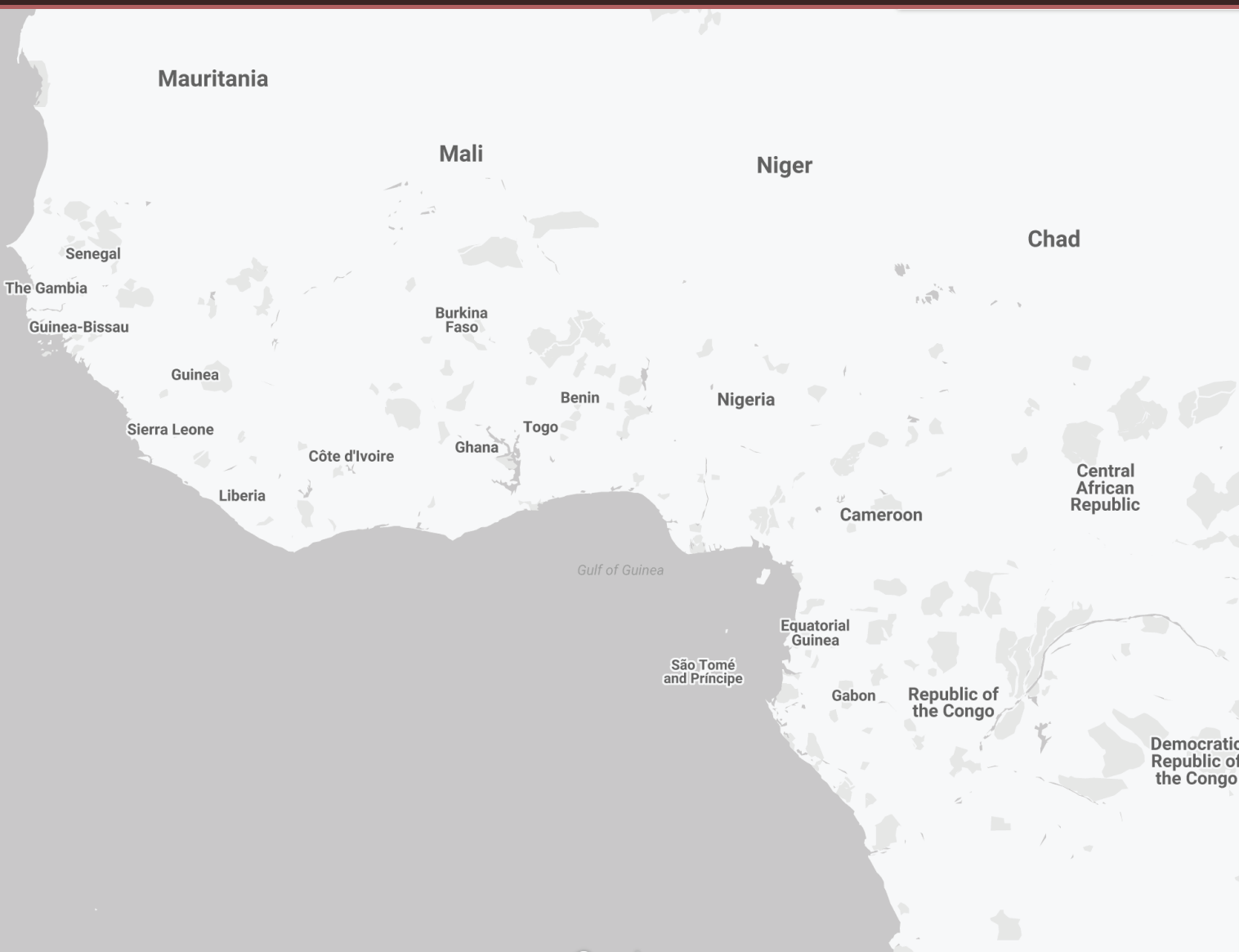


WAIAC

WEST AFRICA
International Arbitration
C O N F E R E N C E



**Project Proposal by I-Arb Africa
to African Development Bank**



Introduction

International commercial and investment arbitration is an alternative method of resolving disputes arising out of commercial transactions among private parties and/or governments across national borders that allows the parties to such disputes to avoid litigation in national courts.

It is a process by which parties from different States can have their disputes determined by an impartial tribunal appointed by a commonly agreed method. The outcome is a binding award that can be enforced in other countries as a result of an international law called the New York Convention on the recognition and enforcement of foreign arbitral awards. The authority of an arbitrator derives from an agreement between the parties while a judge is appointed by the State. Because arbitration rests on agreement, the parties can choose a tribunal which suits their specific needs. They may select one or three arbitrators and can specify the qualification of the arbitrators. Parties also have great flexibility to designate the procedure for the arbitration.

Today arbitration is the preferred method for resolving business disputes of an international character, especially in the case of Foreign Direct Investment. The inflow of FDI into the African continent rose from 11 Billion in 2002 to 55 Billion in 2014 (UNCTAD Report 2015). A major factor in the rise of arbitration in Africa is the general reluctance of foreign investors to submit disputes to the local courts of an African country. Some of the major concerns foreign investors have with regards to courts in Africa are: lack of impartiality of judges, corruption, political instability and civil unrest, length of proceedings.

Some of the major reasons that foreign investors relative ease of enforcement because of the existing mechanism under the New York Convention for the recognition and enforcement of awards. As of today, 34 African states have ratified the New York Convention. In addition 10 African countries have adopted UNCITRAL Model Law into their national legislation. The Model Law is a standard arbitration law prepared and adopted by UNCITRAL that seeks to harmonize arbitration regimes worldwide, including enforcement of arbitral awards. In order for it to apply in a particular state it must be incorporated by a State into its own laws. The Model law also provides for effective enforcement of an arbitral award – the courts can only refuse to enforce an award in limited circumstances.

Some of the reason foreign investors choose arbitration is due to perceived neutrality of the arbitral tribunal, control over process, minimized involvement of local courts and choice of forum and relative ease of enforcement of awards.

Another important instrument in cross border trading is a Bilateral Investment Treaty (BIT). A BIT is an international treaty between two countries which protects investments by parties from those states, made in each other's states. BITs generally provide protection from expropriation and guarantee fair and equal treatment, as well as providing for international arbitration as the method for resolving any disputes between the foreign investor and the government. BIT disputes

are often dealt with by the International Centre for the Settlement of Investment Disputes (“ICSID”), which was set up by the World Bank in Washington DC and can provide protection where states are parties to the ICSID Convention – which 48 African States are. Investors and host states must have agreed to submit disputes to ICSID, and this can be done by way of a BIT or contract between parties. Currently there are more than 800 BITs in place in Africa, for the most part entered between African states and non-African states.

This process is not without challenges. In recent years many developing countries, including African states, have spoken out about inequalities in the process of arbitration and bias against them, especially in investment arbitration cases. The appointment of African arbitrators is very minimal, as well as the use of African counsel in the process of arbitration. In addition, the majority of arbitration cases end up in for a outside of Africa, mainly in Paris or London, making the process that much more expensive.

During the past year South Africa has declined to renew 23 of the 41 BITs it had entered into because of its decision to no longer accommodate investor state arbitration. This has led to members of the Southern African Development Community (SADC) developing a new model of BIT, especially in relation to dispute resolution.

A number of new arbitration centers have opened up in Africa, including Rwanda, Mauritius, Nigeria and others are expected to open soon. In Kenya, the Nairobi International Arbitration Centre launched end of 2016 and a center in Djibouti backed by the Inter-Governmental Authority on Development and the Djibouti Chamber of Commerce is in the works.

The increasing number of arbitration centres in Africa shows that countries are seeking to attract foreign investment, while at the same time providing easy access to an independent arbitral forum in the continent. States are also, generally, showing a greater willingness to accede to internationally recognised enforcement regimes and the local courts are becoming increasingly familiar with arbitration as a valid method of resolving disputes. If the 21st Century is indeed to be “Africa’s century”, the development of international arbitration in Africa must be a key part of this.

Thus the need and importance of I-Arb Africa as a platform that follows the happenings and the development of international arbitration concerning Africa and ensuring the participation of Africans in the process.

Where does West Africa stand?

For the purpose of this conference, West Africa countries are OHADA and ECOWAS member states. This means the list covers 22 countries, i.e. Benin, Burkina Faso, Cameroon, Cape Verde, Chad,

Central Africa Republic, Comoros, Democratic Republic of Congo, Gambia, Ghana, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

15 of these 22 countries are signatories to the New York Convention, and all but 1, Equatorial Guinea, are signatories to the ICSID convention. All of the OHADA members states have a uniform arbitration act based on the UNCITRAL Model law. There are currently 28 known arbitration centers with at least 7 of these centers looking to attract international arbitration cases.

A brief highlight of the major arbitration related developments of the past year will indicate that arbitration is an important matter that needs to be addressed on a regional level. The GETMA case, an investment arbitration case concerning a logistics company that brought a claim against the Republic of Guinea, has been one of the most talked about arbitration cases in 2016. With an award of over €0 million against the state of Guinea, the claimant sought to enforce the award at the CCJA, which canceled the award. The Washington DC court followed suit. The case has brought to the forefront issues related to arbitrators fees, ethical rules among other matters.

2016 was also the year that Equatorial Guinea had its first known investment arbitration case under the additional facility rules at ICSID. The case was later dismissed by the majority tribunal. In addition information about an arbitration award amounting to 134 million euro, roughly 1% of the country's GDP, against Equatorial Guinea came to light as the claimants applied for recognition of the award in a Washington DC court early 2016. Details of the case reveal a lack of proper legal representation on the side of the government and the negative impact it has.

The government of Mali ordered the closure of gold mines owned by a South African company, Rangold, due to a conflict with tax on more than \$200 million. In a previous but similar dispute, Rangold had secured an arbitration award granting it a refund of \$29.2 million of taxes unduly levied by the state of Mali. The situation in Mali is a small indication of the rising number of tax related investment arbitration cases.

In a court decision issued in October 2016, a Chad judge ordered that Exxon Mobile pay \$75 billion in fines for unpaid royalties to the government, roughly 7 times the gross domestic product (GDP) of the country. Exxon has indicated that it disagrees with the decision and will challenge it. It is expected that an arbitration dispute can arise from this issue.

Project context

In 2014 West Africa was the largest recipient of foreign direct investment despite a 10% decline. The region received \$12.8 billion, and with such influx of foreign investment into the region, disputes are part of the cost of doing business. With foreign investors preference for international arbitration as a means of resolving disputes, it is timely that a platform bringing together all stakeholders, i.e. Governments, legal counsel & investors, be established.

The West African International Arbitration Conference (WAIAC) is a platform for international arbitration private and government practitioners in Western Africa to expand their knowledge, network, promote their work and discuss developments in international arbitration in the region and across Africa. Built with the understanding the need to attract foreign investment for economic development by African countries while maintaining key national interests, WAIAC presents an opportunity for African stakeholders to exchange best practices, monitor developments and influence policy decisions.

Every year, we plan to take WAIAC to a different country in the region. For the first edition, we are bringing the WAIAC to Abidjan, Cote D'ivoire in April (27 & 28) or May (4 & 5). This year's WAIAC focus will be on investment arbitration and BIT negotiations in the region.

WAIAC is one of the 4 annual regional conferences that I-Arb Africa organizes across Africa. It will build on the success of the East Africa international Arbitration Conference (EAIAC – www.eaarbitration.com) and the Southern Africa International Arbitration Conference (SAIAC – saiac.iarbafrica.com). The purpose of the conferences is to provide a physical networking ground in addition to the web based platform (www.iarbafrica.com). Both the conference and the website are designed to be an information sharing and networking platform for arbitration practitioners (private and government), judges and other interested parties from all regions of Africa to meet and share experiences amongst each other and with international practitioners.

WAIAC will use the same model of EAIAC and SAIAC: to have a mix of lawyers working in the international arbitration groups of leading global international law firms and Africa-based lawyers with experience of international arbitration.

We would propose to reach out to a similar team of speakers as the East African International Arbitration Conference and the Southern Africa International Arbitration Conference, which included lawyers specialising in international arbitration based in Europe, the US, the Middle East, Asia and different parts of Africa.

Below is an exemplary list of some of the previous speakers from EAIAC and SAIAC:

Hon. Githu Muigai, *Attorney General of Kenya*

Hon. Lazaro S. Nyalandu, *Minister of Natural Resources, Tanzania*

Chief Bayo Ojo, *arbitrator and former Attorney General of Nigeria*

Dr. Joy Kategkwa, *Director, UNCTAD Africa regional office*

Hon. Justice Emmanuel Ugirashebuja, *President, East Africa Court of Justice*

Hon. Justice Shaheda Peeroo, *Supreme Court Judge in Mauritius (Ret.)*

Hon. Justice Edward Torgbor, *arbitrator and former High Court Judge in Kenya*

Prof. Makane Mbengue, *arbitrator and professor of international arbitration*

Prof. Zachary Douglas, *arbitrator and professor of international arbitration*

Josias Van Zyl, *Investor at Swissborough Ltd. (Mining company)*

Peter Muliisa, *Manager of Legal Services & Board Affairs, Uganda Revenue Authority*

Noella Lubano, *Partner at Oraro & Co.*

John Miles, *Founding Partner at JMiles & Co.*

Francis Gimara, *President of the Ugandan Law Society*

Alice Namuli, *Partner at KATS Law firm, Uganda*

Leon Gerber, *Head of Africa Practice, Herbert Smith Freehills South Africa*

Steven Finizio, *Partner, WilmerHale, London*

Thomas Snider, *Greenberg Traurig, Washington DC*

Heads of the following arbitration centers: **Kigali International Arbitration Center (Rwanda)**, **Mauritius International Arbitration Center (Mauritius)**, **Nairobi International Arbitration Center (Kenya)**, **Center for Arbitration and Dispute Resolution (Uganda)**, **Lagos Court of Arbitration (Nigeria)**

Suggested Partners for WAIAC:

Strategic partners:

- Regional organization: OHADA, ECOWAS
- Arbitration centers: Common Court of Justice and Arbitration (CCJA), International Center for Arbitration and Mediation (ICAMA), Lagos Court of Arbitration (LCA), Centre d'Arbitrage du GICAM, Court of Arbitration of Côte d'Ivoire, Ghana Arbitration Center.
- National law societies
- Ministry of Justice/Attorney General Chambers

Proposed speakers: The speakers at the conference will need to have expertise and practical experience of international arbitration and on the themes discussed. I-Arb Africa will prepare the program for the event and provide ALSF with a detailed program and list of speakers once the proposal is approved.

Objectives

- Bridging the language barrier and establishing an annual platform for experience sharing of francophone and anglophone arbitration practitioners and enthusiasts
- Creating a platform for African Arbitration centers to promote themselves, exchange experience and get a better understanding of the Western African market
- Creating awareness among governments to the trends regarding international arbitration in their region and other African regions with the aim of working towards a regional consensus and/or model regarding arbitration policy/laws
- Launch the first bilingual online arbitration platform about Africa to continue capacity building and networking among arbitration practitioners across the continent
- Collect data and international arbitration related information in the region
- Publish annual report on the state of arbitration in West Africa based on presentations and interviews during the conference

AfDB intervention

As African states aim to attract foreign investment to increase their economic development, they not only need quality legal advisory services at the negotiation stage but they also need it at the dispute

stage as disputes are part of the cost of doing business. As an international organization seated in Abidjan born to spur sustainable economic development and social progress for member states through mobilization of investments and technical assistance, the African Development Bank is the ideal host for the launch of WAIAC.

As a host, the AfDB will provide the venue for the conference. In addition, we would like to invite the Secretary General to make the keynote address for the event. We will also provide opportunities for the AfDB to participate in panels where it will be able to showcase its work with African governments and establish a closer link with African private legal practitioners with a view of enhancing their capacity and enrolling them in the process of providing quality legal service to their own governments.

Information about I-Arb Africa

I-Arb Africa is a subscription based practitioner-oriented international arbitration electronic database. It tracks international arbitration disputes concerning African parties in commercial as well as investment arbitration. It is a platform with content such as blogs, news and journal articles focusing on analysis and recent developments international arbitration as it relates to Africa. The aim of the platform is to promote Africa and Africans in arbitration by providing an online space for african professionals to make themselves visible.

I-Arb Africa is a product of African Legal Solutions Ltd., a company duly registered in Seychelles addressed at 1st Floor, Eden Plaza, Eden Island, Republic of Seychelles.

Detailed budget

As WAIAC will be the first bilingual international arbitration conference, we expect that there will be a large interest from practitioners and governments. As with all of our other conferences, we expect speakers and participants to cover their own expenses. However, there may be exceptional cases where we could offer to cover costs for certain speakers.

Item	Details	Cost
Venue	Accommodates 100-150 people at a central location. Venue could be at a conference room of AfDB	To be covered by host

Remark: All of the costs to be covered by AfDB will be done so directly by AfDB. We will be seeking sponsorship from law firms (foreign & African) to cover additional I-Arb Africa related costs.

