The Nigerian Institute of Chartered Arbitrators Annual Conference Report: Making Arbitration and ADR Work for Africa

By:

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The Nigerian Institute of Chartered Arbitrators (NICArb) held its 2020 Annual Conference and Investiture Award Ceremony, virtually for the first time in the history of the institute, from the 18th to the 20th of November 2020. It was themed: Making Arbitration and ADR Work for Africa. The Conference sought to "explore possibilities for making Africa's arbitration (and ADR) landscape better positioned to work for Africa, and leverage on the gains of global arbitration ecosystem. Making Arbitration Work for Africa demands the commitment of critical stake holders–government, supranational and inter-governmental organisations, the private sector, and innovation leaders".

The focus of the Conference was to promote Alternative Dispute Resolution (ADR) as a viable mechanism for dispute resolution in Africa and to discuss

ways to ensure that disputes originating from, and terminating in Africa, are resolved within the continent. This will in turn boost the African economy and promote arbitration law and practice in the region.

The importance of this year's conference was further underscored by the fact that it was the first virtual conference of the NICArb, and the biggest conference of Alternative Dispute Resolution (ADR) in Africa with a wide array of both local and international speakers. The conference therefore leveraged the institute's promotion of capacity building and comprehensive arbitration training programs and regional affiliation. No less than 10 live and showcase sessions as well as networking and business development opportunities were offered to participants during the conference.

Keynote speeches were delivered by George Kahale III, (Chairman, Curtis Mallet-Prevost, Colts and Mosel LLP, Washington DC), on rethinking Investment Treaties and Sustainable Development for Africa, and Martina Polasek, (Deputy Secretary General ICSID, Washington D.C), on "exploring the institutional opportunities in mediation of Investor-State Disputes in Africa: an ICSID perspective". The highlights of the discussions surrounding the presentations in the various sessions were as follows.

AfCFTA and its implication on arbitration (ADR) Development in Africa: Challenges, Opportunities and Expectations.

The coming into force of the Africa Continental Free Trade Agreement (AfCFTA) will raise the profile of African businesses and the dispute resolution space and lead to the outcome of sophisticated interstate dispute settlements in the region. The AfCFTA Investment Protocol can respond to criticisms of the traditional Investment State Dispute Settlement (ISDS) particularly on the definition of investment, categorisation of investors, and investor obligations. It can also play a role in increasing investment in Africa and assist the AfCFTA in becoming a game changer for commerce and dispute resolution in the continent.

The AfCFTA will promote the free movement of goods in the continent and enhance competitiveness but ADR and arbitration is critical for investors to

have confidence. It is therefore important that AfCFTA's dispute resolution mechanism across Africa is strengthened. ADR must take a conveyor belt approach in order to offer appreciable service delivery to support the new AfCFTA. While ad hoc arbitration is well suited to high value or complex claims, it is less suited to small consumer rights claims and AfCFTA's dispute resolution mechanism needs to recognize this.

A specialized arbitral institution or center should be established in AfCFTA countries and the arbitration center should have automated ADR systems with monetary thresholds. The courts should adopt a narrow interpretation of the arbitral process, vis-a-vis public policy to enable the center functions effectively.

Making Arbitration Work for Africa: Rethinking Investment Treaties and Sustainable Development for Africa - African States and the Investor-State Dispute System ("ISDS")

The session examined the extent to which international investment treaties incorporate traditional investment standards and address national priorities and propose a roadmap for reform. ICSID is broadening the range of ADR options available at ICSID, and African states are encouraged to get involved in the ICSID mediation rules-making process. In addition, African States should create awareness and capacity, build on the legal framework and enact laws that give legal status to mediated settlements and demonstrate international commitment by joining the Singapore Convention. African states should not disavow ISDS, but rather push for reform of the ISDS process, and a reimagination and where needed, a re-negotiation of bilateral investment treaties.

Realizing the Full Value of ADR in Energy and Environmental Disputes in Africa

The panel examined the evolving role of arbitration and ADR in resolving energy disputes, with focus on developments, challenges and opportunities for maximizing the full value of ADR in Nigeria's energy sector. On sustainability, Africa needs to be able to meet its own needs without compromising the needs of the future generations and for this, investment needs to be redefined and

Africa has to reassess its position in investor-state relationships. The underrepresentation of Africa in international dispute arbitration management is part and parcel of the African development problem.

The legitimate expectations of investors in renewable energy projects facing the political risk of policy inconsistency, strengthens the case for states to provide some form of grandfathering for such investors. It was stressed that parties to the arbitration should consider adopting specific rules that are consistent with environmental and development goals (i.e. international best practices) and select arbitrators with expertise in environmental and climate change in claims arising from such areas.

The Nexus between Arbitration and Mediation: A Peep into the Singapore Convention on Mediation

The entry into force of the UN Convention on International Settlement Agreements Resulting from Mediation heralds a major expansion of the international ADR field and elevates mediation from the disadvantage of party-discretion, into a place of justiciability by way of enforcement in national courts. Will the Convention, in practice, succeed in reforming international mediation outcomes Speakers stressed that mediation should be further developed within the Nigerian and African context as it is gaining an increasing interest in investor-state disputes and the COVID19 pandemic makes agreement and mediation more compelling. Mediation also has other additional benefits such as (1) reducing cases in which disputes would lead to the termination of relationships, as well as (2) flexibilities parties have in the mediation process.

Review of the Institutional and Legal Framework for Arbitration in Africa: A Way Forward?

The panel engaged with the ICSID with a view to forging common causes of action to elevate the institutional practice of arbitration in Africa and reduce the export of African disputes to ICSID and other institutions, in appropriate cases, in order to conserve national resources, grow national and continental capacity, and address underrepresentation issues. To ensure the growth of Med-Arb process, arbitral institutions must ensure they have flexible rules that are in line with the times and deal with issues such as conflict of interest, and access to

privileged information.

Speakers highlighted that International/transnational businesses have direct consequences on the lives and fortunes of indigenous peoples in Africa particularly in the extractive industries. Traditional dispute resolution through litigation has not been helpful in disputes arising between transnational companies and indigenous peoples. The judicial system in Africa is already overstretched and underfunded. Therefore, arbitration should be broadened to include non-commercial disputes particularly in the area of minor criminal offences and human rights matters in the extractive industries.

Innovation and Current Trends in International Arbitration

The discussions underscored the fact that Africa is the fastest growing economic belt of the world underscored the discussion on the need for Africans to build capacity to be able to serve the African dispute resolution market under the new normal. The notion that African nations are struggling to catch up with innovation and technology is merely a stereotype, as Africa does have in-house capacity. Africa as a market has plenty of room for collaboration and is not slow and the chase towards digitization is not peculiar to Africa alone.

The New Normal: Positioning Africa's Post-COVID Arbitration Landscape through Digitization and Data

A significant financial investment in robust internet infrastructure in not only Africa, but across the world, is needed to drive the new normal of remote hearings in arbitration and ADR processes. The asymmetry in internet penetration across the world is a challenge to the development of a strong remote conferencing tradition in arbitration, mediation and other ADR initiatives. As regards ADR, speakers pointed out that African parties are well able to adapt to the use of technology and have generally embraced virtual ADR meetings and hearings. Parties now appreciate the ease of virtual hearings and accept digitization as travel cost is eliminated and other expenses are minimized. The continent has been able to adjust to the events around the world through virtual hearing.

Closing the Gender Gaps in the African Arbitration/Alternative Dispute

Resolution landscape

Bridging the gender gap in the African arbitration and ADR landscape can be either an opportunity or a temptation. The clear distillation of policy and action imperatives will make the difference. Gender mainstreaming continues to hold significant promise for addressing imbalances and underrepresentation in industry, education and the workplace. Affirmative action has been shown to produce unsatisfactory effects at times, including in particular, the concept of reverse discrimination. The panel examined the opportunities for a more inclusive engagement of women and girls in arbitration education and practice in Africa, especially in light of the cultural and traditional constraints prevalent in much of modern Africa.

Gender diversity is a business strategy in and of itself, and businesses should problematize gender diversity. The question of underrepresentation of women needs to be addressed and women need to become visible by showing themselves as capable and competent specialists in their chosen fields. A major strategy for unlocking the needed visibility for women, as it is with any professional calling, is to get involved in unpaid public interest work, especially advocacy. This creates visibility and credibility, both in terms of competence and character.

Mainstreaming Arbitration as a Preferred Resolution Mechanism for Maritime Disputes in Nigeria

The development of the Blue Economy will create the demand for mainstreaming arbitration as a preferred resolution mechanism for maritime disputes in Nigeria. The two factors that will help unlock the huge potential of the Blue Economy are (1) the Africa Integrated Maritime Straight (AIMS) and (2) the African Continental Free Trade Agreement. It was noted that the maritime industry in Nigeria is growing increasingly wary of arbitration, and would rather adopt and encourage the use of mediation. If arbitration is selected as a dispute resolution forum, it should be simplified, and avoid the pitfalls of courtroom litigation – strict rules of evidence, stalling, and acute adversarial posturing of parties.

Treading Uncharted Ground: Examining the Prospects of Arbitration in

Aviation and Transportation Disputes

Nigeria must equally catch up on the growing trend of aviation arbitration. There are opportunities for arbitration in aviation disputes, particularly involving private jets and these should be developed. Hitherto, these disputes have been litigated in the courtrooms, bearing the brunt of the perennial delays associated with that track of dispute resolution.

The decision of the Court of Appeal in *Shell Nigeria Exploration & Production Company v. FIRS* (Appeal No. CA/A/208/2012) was commented, concluding that tax matters resulting from oil and gas matters cannot be arbitrated because of section 251 of the Constitution. It was argued that this decision creates ambiguity and raises questions such as: are all matters listed in section 251 now un-arbitrable, including maritime and aviation disputes.

As part of this development towards ADR in aviation and transportation matters, there must be a sufficient pool of lawyers who understand aviation and transportation law, in order to address the needs arising in that sector. In addition to legal expertise, it was stressed that a finance and investor perspective is needed to temper the conversation around dispute resolution in complex commercial transactions such as transportation infrastructure projects. Transportation and aviation contracts and projects are capital intensive, and it takes a great deal of time, expertise and effort to conceive and deliver them. Although Nigeria’s foreign trade is dominated by foreigners, because of the prevailing import dependency, Nigerians should be empowered to participate as actors and not spectators in the maritime sector.

In concrete terms, the federal government of Nigeria is on the right path on its recent proposal to privatize airports, in view of making them more efficient and customer friendly. This will create more room to expand the uncharted grounds of arbitration in aviation and transportation disputes in general.

Conclusion One of the objectives of the first Annual Conference was to promote Alternative Dispute Resolution (ADR) as a viable mechanism for dispute resolution. The topic “Making Arbitration and ADR work in Africa” was not only timely but designed to contribute significantly to the ongoing conversation about Africa and ADR. At the end of the conference, the Institute

will compile insights from the various sessions into a body of knowledge for charting a sustainable course for ADR and arbitration policy, law and practice in Nigeria and Africa. The videos from the Conference can be found here.

RAPPORTEURS: Kemi Olafuyi, Lucy Babafemi, Ibukun Ajomole, Kayode Akindele, Victoria Udoh, Dooshima Adaguusu and Nnenna Nwomeh.

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