

## **Law And Dispute Resolution In Africa: Problems And Prospects\*\***

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### **Introduction**

Greetings. I salute the Dean of Law at Lead City University, the organizing committee, the Senate and the Vice Chancellor for this epoch-making conference. I thank you for giving me a platform to share some thoughts with you by way of this keynote speech. You have given me a daunting task, yet only twenty minutes! I will only be able to ignite a few thoughts that I hope will start a movement that will affect our perspectives and approaches to law, dispute resolution and our roles in pushing for positive impact of law on society.

Despite best endeavours, schisms leading to disputes will continue to rise among the peoples of the world. Disputes have been a common bane of man from precolonial traditional African societies, to modern Africa. Africa is home to dispute resolution mechanisms often run by African chiefs, kings and elders, now commonly christened customary arbitration. History is also replete with dispute resolution in traditional African societies through wars. It is amazing that despite the best endeavours by multilateral and regional bodies, some recent disputes have been or are being resolved, albeit, through wars. Africa, an emerging market with abundance of natural and human resources demography of young persons, is the toast of many investors. But for the COVID period (2019/2020), when Foreign Direct Investment (FDI) into Africa reduced, FDI into Africa has consistently witnessed significant increase yearly in the last ten years. Post-COVID data shows that FDI into Africa witnessed a strong rebound in growth of 147 percent to an estimated \$97 billion compared with \$39 billion in 2020.<sup>1</sup> The probability is that the rise in businesses and investments will simultaneously witness increase in disputes.<sup>2</sup>

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<sup>1</sup> See UNCTAD yearly reports eg. [https://unctad.org/system/files/official-document/wir2021\\_en.pdf](https://unctad.org/system/files/official-document/wir2021_en.pdf).

<sup>2</sup>CauseAnd Effect–TheArbitrationBackingAfrica’sInvestmentBoom’(TheLegal 500).<https://www.legal500.com/special-reports/cause-and-effect-the-arbitration-backing-africas-investment-boom/> accessed 12 March 2021.

This timely conference aims to discuss various issues that may promote or impede the resolution of disputes in Africa in a lawful manner. Law abhors self-help and extra judicial means of resolving disputes.<sup>3</sup> As such, I expect that the conference will interrogate laws, the implementation, interpretation and effect of laws and the legal system and offer insights to how these can be improved.

Given the constraints of time, I will only highlight seven issues that emerge from the theme of this conference. They are: the Impact of Academic Writing and Bar/Bench Interaction; the dearth of Data/Statistics; Courts and the Judicial system, Customary Arbitration, Commercial and Investment Arbitration (including arbitrability and challenges to arbitral awards), Faith-Based Dispute Resolution and finally, the appalling demand for foreign publications for promotion in African universities.

### **Impact of Academic Writing and Bar/Bench Interaction**

Given this is a conference in an academic institution, I hope we can ignite the fire of academic freedom and boldness to critic laws passed by law makers, the administration of laws by regulators and the adjudication of laws by the law courts. Law makers, regulators and law courts do not get it right all the time. Academics must ensure that we spotlight error and gaps. But this must not be done with arrogance. It must be done with incisive trepidation and magisterial temerity that will occasion law and regulatory reform and a reversal of court decisions based on academic writing. We must aim to write in such a way that the Supreme Court will cite us and agree to reverse previous decisions. This will improve dispute resolution.

My testimony is that Justice Kayode Eso who presided over the *Plateau Publishing Co v Chief Chuks Adophy*<sup>4</sup> wrote me a letter in 1986 when I was a Youth Corper commending my review of that first copyright decision of the Supreme Court. His Lordship stated that he wished the court had had the pleasure of reading my analysis before they made their decision. Unfortunately, I have misplaced this treasured letter. The point I am making is that academic writing must aim *inter-alia* to

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<sup>3</sup> *Military Governor of Lagos State v. Ojukwu* NSCC 1986 (pt. 1) vol. 17 p.304; *Duwin Pharmaceutical & Chemical Co. Ltd v Beneks Pharmaceutical & Cosmetics Ltd & Ors* (2008) LPELR-974(SC); *Shining Star Nigeria Limited & Anor v Ask Steel Nigeria, Limited & Ors* (2011) LPELR-3053(SC); *Okochi & Ors v. Chief Amukali Animkwai & Ors* (2003) LPELR-2455(SC).

<sup>4</sup> *Plateau Publishing Co. v. Chief Chucks Adophy* [1986] 4 (pt. 36) NWLR 205.

bring about change. We cannot do this through harsh or condescending language, rather, through persuasive reasoning. Our teaching, research and writing must identify the wheat and remove it from the chaff.

Justice Aderemi JSC (of blessed memory) put it succinctly when he opined that “THE BAR and the BENCH are inseparable. . . . The BAR, in my view, is therefore the mother of the BENCH. The BAR is also a reflection of the BENCH.”<sup>5</sup> Unfortunately, the Bar and the Bench do not always relate like inseparables. My experience suggests that where the Bar approaches the Bench, where the Bar cultivates the Bench with dignity and respect, we can get the Bench to institute reforms that will be beneficial to both the Bar and the Bench. I can cite several examples of my engagements with the Bench urging reforms to court rules and administration with attendant implementation of recommendations. Two examples will suffice: the administration of the cabotage rules for admiralty practice at the Federal High Court with the Chief Judge Babatunde Belgore of blessed memory and the relevant rules of the Federal High Court on intellectual property practice which the then Chief Judge Mustapha incorporated on the eve of the passage of the rules of the court. I am certain some of the delegates at this conference can testify that the Bench listens when approached with dignity. Academics may be at the frontier of such engagement if we balance our critical writing with finesse.

### **Data/Statistics**

The culture of Africans: we do not ask questions - why things happen or how it can be prevented, rather we often link events to things without necessarily investigating the causal effect or establishing a valid causal link. For most African lawyers, our training often lacks depth in empirical research.<sup>6</sup> We are experts at doctrinal and library-based research. We often do not interrogate the link or impact or effect of law, policy or processes on the society or on events. This means, we may not be well equipped to analyse raw data. This gap must be bridged!

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<sup>5</sup> Hon. Justice Pius Olayiwola Aderemi, “The Bench and The Bar: Inseparable Partners in the Dispensation of Justice,” in Bankole Sodipo & Femi Fajolu (eds), *Contemporary Issues in Arbitration, Labour Law and Power Sector*, 2020 (Swan Publishers, Lagos).

<sup>6</sup> This point was alluded to in the following inaugural lectures: Bankole Sodipo, *The Oracle, Intellectual Property & Allied Rights, The Knowledge Economy and The Development Agenda*, Inaugural Lecture Babcock University, Babcock University Press, Ilishan (2015); 63. Ayo Atsenuwa, *In Search of Transformative Justice: The Proselytism of Legal Feminism 2014 Inaugural Lecture*, University of Lagos Press.

There is a dearth of data in Africa. How many disputes are filed in the courts? How many are settled by the courts? How long do they take on the average? What is the average cost of litigation to the parties and to their lawyers? What is the economic impact of litigation on the parties and their lawyers? How many disputes are resolved through traditional dispute resolution mechanisms like the courts of Chiefs and Kings/Obas?

Without statistics, it is difficult to plan aright! Planning without data is planning based on conjecture. It often lacks the requisite precision needed in 2022. Planning without data is not sustainable. Without statistics, it is impossible to assess the impact of and predict/prepare for a sustainable system that will address law and dispute resolution in Africa. I hope law teachers and the Bar, will take up this challenge.

### **Courts and the Judicial System**

Our courts are over-burdened and over worked. There is a dearth of statistics. We often celebrate when the number of judges at the Court of Appeal or the Federal High Court or State High Courts is increased. An in-depth survey must be conducted to ascertain how many courts we need at all levels. For instance, perhaps the Federal High Court needs at least 250 judges and the High Court of Lagos needs at least 150 judges. We respect the judges and the judgments of the Nineteen sixties, seventies and eighties. How many cases did the judges have in their dockets compared to today's congested courts?

I am often amused when fellow arbitrators and mediators say they have abandoned the court system out of frustration as if they can take solace without the courts. Arbitral awards, mediation settlement agreements and the like, need the courts if one of the parties fail to honour same. Non- litigation dispute resolution often needs interim orders from courts. Arbitration statutes restrain courts from intervention in arbitration, however, the statutes have provisions permitting intervention in pre-constitution of panels (grant of stay), during the hearing and for the purpose of enforcement of awards. We cannot abandon the courts! We need to devote time and resources to push for urgent reforms of our court systems.

Tax payers' monies and funds from Central Bank are used to intervene when banks have crisis. They argue that the economy will collapse without such intervention. Yet, no serious attention or

intervention is offered to the legal system by any African government. The public has largely lost confidence in court systems in Africa. Yet the court remains the pivot on which the society runs. The court systems in Africa needs similar intervention measures in terms of monies spent to improve African court systems. The infrastructure of the courts must be improved with modern information and communication gadgets, the number of courts and judges must be increased and more practicable solutions proffered for the service and enforcement of processes.

African states do not have a regional treaty for the enforcement of judgments emanating from our courts. A discussion of the law and dispute resolution in Africa is incomplete without giving some attention to the recognition and enforcement of judgments especially in the light of the Africa Continental Free Trade Agreement (AfCTA). The OHADA system of enforcement among French African states is exemplary.

### **Customary Arbitration**

Statistics elude us on the ratio of disputes that are resolved through customary mechanisms in Africa. It may not be surprising if customary arbitration and customary dispute resolution accounts for a significant portion of disputes resolved in Africa. In the light of this, it may be time for us to consider if the enforcement of such decisions cannot be further strengthened.

### **Arbitration and Alternative Dispute Resolution in Africa**

Evidence shows that there is a growth of arbitration across Africa with increase in the number of African arbitration entities,<sup>7</sup> arbitrators of African origin and the number of disputes arising from Africa in arbitration institutions worldwide.<sup>8</sup> The market is changing positively<sup>9</sup> with the increase in

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<sup>7</sup> The President of the ICC Court of Arbitration stated that there are over 90 Arbitration Centres in Africa. (see her speech at the 6th ICC African Arbitration, June 2022, Lagos).

<sup>8</sup> Emilia Onyeama, "2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats," <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>; Micheal Ostrove, Ben Sanderson and Andrea Lapunzila Veronelli, 'Global Arbitration Review - The Middle Eastern And African Arbitration Review' (Globalarbitrationreview.com 2018) <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/developments-in-african-arbitration>.

<sup>9</sup>[https://icsid.worldbank.org/sites/default/files/documents/The\\_ICSID\\_Caseload\\_Statistics.1\\_Edition\\_ENG.pdf](https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf) Micheal Ostrove, Ben Sanderson and Andrea Lapunzila Veronelli, 'Global Arbitration Review - The Middle Eastern and African Arbitration Review' (Globalarbitrationreview.com, 2018) <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/developments-in-african-arbitration> accessed 11 March 2021.

FDI in Africa<sup>10</sup> and number of African parties in international arbitration.<sup>11</sup> At least 42 African states are party to the New York Convention<sup>12</sup> whilst at least 49 African states are either signatories of or are contracted to the International Convention on the Settlement of investment Disputes (ICSID Convention) a convention which provides for conciliation and arbitration procedures.<sup>13</sup> One of the advantages of arbitration in Africa is the New York Convention, the possibility of enforcement of awards made in one country in another treaty country.

### *Arbitrable Breaches/Disagreements*

Not all breaches of obligations by parties are arbitrable despite the presence of an arbitration clause in an agreement between the parties. Where there is an admission of liability but the debtor refuses to pay, there is no dispute that is justiciable that can be referred to arbitration, rather, the parties can sue to enforce the admission.<sup>14</sup> That is, “there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as when a party admits liability but simply fails to pay, or when a cause of action has disappeared owing to the application.”<sup>15</sup>

There is some controversy on the issue of what is arbitrable. Agabje JSC has held that “**The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction.**”<sup>16</sup> His Lordship further held that “**Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement,**

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<sup>10</sup> See UNCTAD yearly reports eg. [https://unctad.org/system/files/official-document/wir2021\\_en.pdf](https://unctad.org/system/files/official-document/wir2021_en.pdf).

<sup>11</sup> 'LCIA Releases 2018 Annual Casework Report' (Lcia.org, 2018) <<https://www.lcia.org/News/2018-annual-casework-report.aspx>> accessed 11 March 2021.

<sup>12</sup><https://www.newyorkconvention.org/countrieshttps://www.nortonrosefulbright.com/en/inside-africa/blog/2021/03/enforcement-of-awards-across-africa--42-of-africas-54-states#:~:text=HomeBlogTeam%20to%20the%20Convention.> The remaining 12 non-parties are: the Gambia, Guinea-Bissau, Chad, Congo (Brazzaville), Equatorial Guinea, Eritrea, Eswatini, Libya, Namibia, Somalia, South Sudan, and Togo.

<sup>13</sup><https://icsid.worldbank.org/news-and-events/news-releases/now-available-special-issue-icsid-review-africa>; Théobald Naud, Ben Sanderson and Andrea Lapunzina Veronelli. “Recent Trends in Investment Arbitration in Africa,” <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2019/article/recent-trends-in-investment-arbitration-in-africa#:~:text=First%2C%2049%20states%20on%20the,not%20ratified%20it%20to%20date>.

<sup>14</sup> *Sakamori Construction (Nig) Ltd v Lagos State Water Corporation* (2021) LPELR-56606(SC), (2022) 5 NWLR (Pt.1823) 339 at 374-375 paras B-E. *Kano State Urban Development Board v Fanz Construction Ltd* (1990) 4 NWLR (pt. 142) 1 at 35; *M.V. Lupex v N.O.O & S. Ltd* (2003) 15 NWLR (pt. 844)1 at 23; *United World Inc. v M.T.S. Ltd* (1998) 10 NWLR (pt. 568) 106; *Fasz International Ltd v. HNB Trustees Ltd* (2010) All FWLR (pt. 547) 659.

<sup>15</sup> *Kano State Urban Development Board v Fanz Construction Company Limited* (1990) LPELR-1659(SC).

<sup>16</sup> *Kano State Urban Development Board v Fanz Construction Company Limited* (1990) LPELR-1659(SC) relying on *Halsbury's Laws of England* 4th Edition 256 paragraph 503.

nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering. Equally, **disputes leading to a change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give a judgment in rem.**”

Following the foregoing Supreme Court decision, some have argued that no aspect of crime or divorce proceeding can be arbitrated.<sup>17</sup> I am aware that the Lagos Multidoor Court and the Ogun Multidoor Court resolve crimes and aspects of divorce (such as custody and alimony) through mediation. I am glad to note that these issues will receive further attention during this conference.

I am glad to note also that the issue of arbitrability of intellectual property disputes will be discussed during this conference. Will an award by an arbitrator that an invention is patentable or a trade mark is registrable be binding on the Registrar of Patents/Designs or Trade Marks? Is this one where an arbitrator cannot in the penchant words of Agbaje JSC, grant an award as a judgment in rem?

One of the vexed issues of arbitrability is taxation. Based on a couple of authorities, sweeping statements have been made that where an agreement relates to tax and a dispute arises, the tax issue is not arbitrable. The oft-cited authority for this proposition is Agim JCA (as he then was) who held:

Generally, a matter regulated by statute or a matter of public interest cannot be settled by arbitration. Petroleum profit tax being a matter regulated by statute and being a matter of public interest, a dispute concerning it cannot be settled by arbitration. .... The illegality and lack of jurisdiction” of the arbitration tribunal to adjudicate a tax matter “render the proceedings and award void at all times. So, all the proceedings and award can be challenged at any time, even while it is pending or determined and even after the award is made.<sup>18</sup>

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<sup>17</sup>See for example, Uzoma H Azikiwe, Festus Onyia, “Arbitrability in Nigeria,”

[https://globalarbitrationreview.com/print\\_article/gar/chapter/1169345/nigeria?print=true](https://globalarbitrationreview.com/print_article/gar/chapter/1169345/nigeria?print=true).

<sup>18</sup> *Eso Exploration and Production Nigeria Limited & Anor v. Federal Inland Revenue Service (FIRS) & Anor* (2017) LPELR-51618(CA). See also *Shell (Nig.) Exploration and Production Ltd & Ors v. Federal Inland Revenue Service*. [4], [1] Appeal No. CA/A/208/2012 delivered on 31st August 2016. The full judgment can be accessed on <https://www.dropbox.com/s/li75oiwwzn3rkjd/SHELL%203%20ORS%20v%20FIRS%20%28CA-A-208-2012%29%20JUDGMENT.pdf?dl=0>.

May I suggest that this is a general rule to which there can be some exceptions. First, I will urge us to consider the following scenario: the law obliges me as landlord, to pay tax on rents but my tenant agrees with me that his rents is net of tax, or that he will pay the requisite tax required by law. Will a dispute on who is to pay the tax (landlord or tenant) not be arbitrable where the tenant agrees to pay under contract but argues that the obligation is not his?

Second, there is evidence that tax disputes have been arbitrated and arbitral awards enforced in other African common law countries.<sup>19</sup> Are those decisions not persuasive in Nigeria? A couple of those decisions were cited in a Nigerian case but they were not fully discussed by the courts. This conference may shed some light on this.

### *ADR in Specialist Areas*

I note with relish, that consideration will be given to specialist areas of ADR such as medical malpractice, labour and workplace disputes, marriages, boardroom/corporate governance, Fintech, Metaverse, block-chain, cryptocurrency and disputes of like nature. It is heart-warming that emerging issues surrounding investor state dispute settlement will be discussed especially as some developing countries including African states are becoming disillusioned with investment treaties whether bilateral or multilateral.<sup>20</sup> We need investments if Africa is to develop. Investors need comfort. We must not throw out the baby with the dirty bath water especially in the light of the African Continental Free Trade Area Agreement (AfCFTA). It is hoped that delegates to this

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<sup>19</sup> <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/040413-uganda-wins-404-million-tax-arbitration-case-against-heritage-oil-attorney-general>;  
[https://www.rigzone.com/news/oil\\_gas/a/137916/total\\_seeks\\_arbitration\\_over\\_uganda\\_tax\\_dispute/](https://www.rigzone.com/news/oil_gas/a/137916/total_seeks_arbitration_over_uganda_tax_dispute/);  
[http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C4329/DS11654\\_En.pdf](http://icsidfiles.worldbank.org/icsid/icsidblobs/OnlineAwards/C4329/DS11654_En.pdf); Mukalere Hope Mwangale and Tajudeen Sanni, "International Tax Arbitration and Petroleum Dispute Resolution: A Case Study Of Uganda," [https://www.researchgate.net/publication/337715812\\_INTERNATIONAL\\_TAX\\_ARBITRATION\\_AND\\_PETROLEUM\\_DISPUTE\\_RESOLUTION\\_A\\_CASE\\_STUDY\\_OF\\_UGANDA](https://www.researchgate.net/publication/337715812_INTERNATIONAL_TAX_ARBITRATION_AND_PETROLEUM_DISPUTE_RESOLUTION_A_CASE_STUDY_OF_UGANDA); for Tullow oil tax dispute that was litigated and arbitrated against the Ugandan government, see <https://www.tulloil.com/media/press-releases/tullow-settles-capital-gains-tax-dispute-uganda/>.

<sup>20</sup> Mmiselo Freedom Qumba "Africa and investor-state dispute settlement: Mixed reactions, uncertainties and the way forward," *South African Journal of International Affairs* 2021 p.1,  
[https://www.researchgate.net/publication/350848004\\_Africa\\_and\\_investorstate\\_dispute\\_settlement\\_Mixed\\_reactions\\_uncertainties\\_and\\_the\\_way\\_forward](https://www.researchgate.net/publication/350848004_Africa_and_investorstate_dispute_settlement_Mixed_reactions_uncertainties_and_the_way_forward), Meredith A. Strike, "Investor-State Dispute Settlement in Sub-Saharan Africa: Suggestions for Reform," *African Journal of International and Comparative Law*, 27(1) 2019, p.150  
<https://www.eupublishing.com/doi/abs/10.3366/ajicl.2019.0263?journalCode=ajicl> .



conference will proffer sustainable solutions to the issues of dispute resolution adumbrated at this conference and not just offer criticisms.

### *Arbitration and Enforcement of Awards*

At the recently concluded 6<sup>th</sup> African International Chamber of Commerce (ICC) Arbitration Commission Conference in Lagos (June 2022), some leading companies expressed grave reservations about the continuous use of arbitration for dispute resolution.<sup>21</sup> Arbitration boasts of timely awards yet many African nations witness delays to the enforcement of awards. Some companies now opt for litigation rather than arbitrate and then litigate for years to no avail to enforce awards. *AIC v Federal Airports Authority of Nigeria (FAAN)*<sup>22</sup> exemplifies this issue. There was a delay of 6 years (due to pre-arbitration litigation) before the arbitration was commenced and there has been a delay of at least fourteen years in the bid to enforce the arbitration (due to enforcement litigation). The English court ordered that FAAN post security of \$24 million if they are to challenge the award of \$48.13 million. I argued at the ICC conference and I have published a paper that we must explore the posting of security for costs/damages of a percentage of any arbitral award as a condition to challenge arbitral awards.<sup>23</sup> Perhaps delegates at this conference have better arguments. It is hoped that a practical solution will be offered at this conference as dispute resolution in Africa will be a farce if parties find it difficult to enforce arbitral awards.

### **Faith Based Dispute Resolution**

I want to commend faith-based dispute resolution mechanisms to delegates. Africa is a continent that has large faith-based population. I understand some faiths including Islam have measures for dispute resolution. At the Christian Lawyers Fellowship of Nigeria CLASFON, we have been taught lessons on dispute resolution based on how Abraham resolved his dispute with Lot. This is worth considering as part of measures to curbing dispute resolution in Africa.

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<sup>21</sup> See for example: Jean-Christophe Honlet and others, 'The Law Reviews - The International Arbitration Review' (*TheLawReviews.co.uk*, 2020) <https://thelawreviews.co.uk/title/the-international-arbitration-review/africa-overview>.

<sup>22</sup> [2020] EWHC 3873.

<sup>23</sup> Bankole Sodipo, "Curbing frivolous challenges to arbitral awards through security for cost," 2(1) 2021 *African Journal of Arbitration and Mediation*.

### **Demand for Foreign Publications for Promotion**

To be a professor, it is good to have a fair spread of publication, local and international, else, you may be a local champion without international recognition. However, I dare say that the emerging rules for promotion in universities that rank foreign publications higher than local publications or certain foreign publications higher than those respected by peers in the field must be revisited. Foreign publications are often inaccessible or unaffordable in Africa. I may prefer to publish locally because I want particular views to reach a wider audience. If the organisers publish the papers delivered at this conference through their university press, it may carry a lower ranking point than if they publish it through a European publisher. Same content, different ranking. This practice must be reviewed!

### **Conclusion**

I am confident that this conference will offer sustainable solutions on various aspects of dispute resolution in Africa. Perhaps delegates should take up the challenge of how to implement the suggestions they make, rather than making the suggestions only. Happy deliberations.