

# Helping Zimbabwe Lawyers Face Globalisation



Law Society of Zimbabwe



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Picture on the front cover: Conference 2-3 November 2016 at Mont Clair Resort & Casino, Nyanga, Zimbabwe

# ‘Helping Zimbabwe’s lawyers face globalisation’

## Introduction

This conference, held on 2 and 3 November in Nyanga, Zimbabwe on ‘Helping Zimbabwe’s lawyers face globalisation’, was generously funded by the PPID Activity Fund of the International Bar Association (IBA), and organised by the European Lawyers Foundation and the Law Society of Zimbabwe.

Its focus, after discussion with the Law Society of Zimbabwe, was on those aspects of law and practice which would most help Zimbabwe’s lawyers to ensure that they were able to share in the big ticket legal work following investment in the country. The speakers were all members of the IBA Bar Issues Commission’s International Trade in Legal Services Committee, which has been focusing on these and similar issues.

There was a geographical spread of expert speakers: two from other parts of Africa (a third was unable to come at the last minute), two from Europe, one from North America and one from South America. The topics covered included:

- the IBA instruments on international trade in legal services
- possible forms of cooperation with foreign law firms
- international sub-contracting – what is realistic, how to obtain work on international projects and what international law firms look for in local counsel
- negotiation of international contracts
- creation of joint law ventures
- raising money on international markets
- arbitration of international commercial disputes

One of the aims of the conference was to act as a potential model for future conferences held in other parts of the developing world on the same theme. So the speakers and organisers were alert to its potential as a template, and monitored its progress.

Overall, it is clear from the responses of the speakers and organisers, and most importantly the participants themselves (who were circulated with evaluation forms after the conference), that the conference was highly relevant to local lawyers’ needs. It successfully achieved its aim, of helping Zimbabwe’s lawyers face globalisation. Of course, a conference of a day and a half cannot solve problems, but it can raise them for in-depth discussion, and issue pointers for local lawyers and bars to follow up themselves in the future. In that sense, it is believed that the conference highlighted local needs, and how they can be satisfied. A more detailed analysis of the evaluation forms is attached at Annex C.

The substantive content of the conference contributions is summarised in the pages that follow. The conference programme is attached as Annex A.

## Recommendations

The recommendations arising out of the conference are the following:

### Overall

- (1) Overall, the programme and speakers together formed an excellent model to be offered to other developing countries, where the local legal profession should be in a position to benefit from globalisation, but is losing out to international law firms who take the big ticket work, or from the displacement of local disputes to arbitration seats outside the country through foreign arbitrators. The remaining recommendations relate to improvements which could be made in the future.

### Lessons for BIC ITILS

- (2) The conference highlighted a gap in the BIC ITILS work programme. Of most relevance to Zimbabwe was the transfer of skills resolution, but this resolution is premised on there being foreign lawyers present in a country in order to transfer skills through training programmes or mentoring within firms. But Zimbabwe has next to no foreign lawyers, and so the transfer of skills resolution is not currently useful, and only potentially useful in a different future where foreign law firms will establish permanently. BIC ITILS should contemplate whether there are ways to bridge that gap, beyond holding a conference in a particular country, for example by proposing to the IBA a scheme to broker training and development opportunities in international law firms who are not physically present in other jurisdictions<sup>1</sup>.
- (3) The BIC ITILS association handbook, which is in the process of being prepared, should (and doubtless will) take on board the regulatory and marketing content of the conference. One of its future uses should be as a hand-out for similar conferences. It is clear from the participants' evaluations that the lawyers found the sections on cooperation with foreign lawyers, and what foreign lawyers seek from local lawyers, to be among the most valuable sections.

### Conference content

- (4) Before any such conference takes place, there needs to be a substantive dialogue between the organisers and the local bar as to local needs and levels of experience. There was such a dialogue on this occasion, both through the attendance of the Chief Executive of the Law Society of Zimbabwe at the BIC ITILS meeting in Washington in September, and in subsequent e-mail exchanges. But this should be programmed more formally into the timetable in the future.
- (5) Real-life examples – in this case from Nigeria and Rwanda – about ways in which the transfer and other acquisition of necessary skills to compete with international law firms has taken place in a developing country is vital to the success of the conference. It was not specifically listed as a separate item in the conference programme, even though it was addressed by at least two speakers. This aspect should be properly highlighted in the future in the programme, since it is a major selling point.

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<sup>1</sup> There are interesting models for this e.g. international lawyers for Africa <http://www.ilfa.org.uk/>

- (6) The conference was a mix of regulatory, marketing and substantive law advice – the exact balance should be discussed in advance with the local bar, and maybe specifically highlighted and separated out in the programme, since on this occasion they were all mixed together without attention to their proper place and importance.
- (7) Local speakers are a vital component in answering questions with a local dimension (what can foreign lawyers do in the country? how are international arbitrations currently handled?). They can describe the local law and conditions, as a complement to the more global picture described by the speakers. But it may not be easy to find local speakers, given that the conference addresses skills which may be missing locally. Nevertheless, it is vital to have such speakers. On this occasion, a number of the local speakers made significant contributions. More effort should be made to push the local bar to provide local speakers for all, or nearly all, of the topics.

#### Logistical questions

- (8) Some participants asked for hard copies of the materials (they were all available in advance on the European Lawyers Foundation website), to enable them to prepare for the conference and follow it better. This has a cost, and should be considered.
- (9) Also on the question of logistics, the conference should usually be held in a city with easy transport connections – on this occasion, it was a three hour drive from Harare, in a resort with no surrounding town, which left the speakers feeling stranded at the end.

## Conference report

### Conference first day

**Godfrey Nyoni**, Chair of the Committee on Legal Education of the Law Society of Zimbabwe, welcomed everyone to the advanced commercial legal training on helping Zimbabwe's lawyers face globalisation.

**Sternford Moyo**, Chair of the IBA's African Regional Forum, and former President of the Law Society of Zimbabwe, opened the conference, welcoming the speakers and briefly introducing the topic of the World Trade Organisation (WTO) and its impact on legal services.

He spoke about the principles behind the General Agreement on Trade in Services (GATS). He said that it is difficult to specialise in a small market like Zimbabwe, but lawyers should think about entering other markets. Zimbabwe has a trade representative in Geneva speaking about liberalisation of the country's market, but lawyers are not involved in this discussion, and do not know what he or she is saying. If lawyers do not participate, they will not be able to define the way that legal services are handled. It is like a lawyer who acts for a client without instructions.

Lawyers need to think about how their wishes co-ordinate with the aims of the Southern African Development Community (SADC). They need to think about issues like full or limited licensing, and how lawyers wish to regulate foreign lawyers. The Law Society needs to be fair, reasonable, transparent - but it can regulate. Consideration should be paid to Zimbabwe's state of development. Lawyers should say 'not now', but not 'never' – you can be given up to 10 years if you are not developed.

Opponents of globalisation quote the uniqueness of the legal profession to prevent changes. They quote the public role. Therefore, there needs to be regulation on e.g. fly-in, fly-out (FIFO). One of the questions is how discipline and client protection will be dealt with. Arguments can be made for slowing down liberalisation like 'are these lawyers of a suitable quality and training to come here?'. SADC said it would open, but Malawi is closing its market, South Africa is not really as open as Zimbabwe lawyers think it should be, and so the SADC policy is not working. In Zimbabwe, there is a residence requirement before being admitted by the Law Society.

**Ben Greer**, member and former Chair of the IBA's Bar Issues Commission's International Trade in Legal Services Committee (BIC ITILS), gave his presentation on the IBA instruments on international trade in legal services. He introduced the IBA, which is the world's leading international lawyers organisation, with more than 190 member bars from more than 160 Countries, and more than 80,000 individual members.

He also introduced the General Agreement on Trade in Services (GATS), which not only covers trade in services, but also trade in professional services, including legal services. It contains provisions on 'domestic regulation' of professional services, and a clause on regulation which says it must be 'no more restrictive than necessary to protect the public interest'.

Regarding the IBA's resolutions on international trade in legal services, there were six overall, but four were of particular interest to its member bars: on core values, establishment, skills transfer and mutual recognition.

The one on core values held that trade agreements purporting to liberalise trade in legal services must respect the need to preserve the core values of the legal profession, which are listed as:

- a role in facilitating the administration of, and access to, justice
- a duty to the courts
- a duty to uphold the rule of law
- a duty to keep client matters confidential
- a duty to avoid conflicts of interest
- a duty to uphold specific ethical standards
- a duty to provide clients with the highest quality of advice and representation
- a duty in the public interest of securing professional independence

The resolution on establishment acknowledges the increasing mobility of foreign lawyers, and speaks about common regulatory principles consistent with core values. It stresses the authority of the host bar to regulate foreign lawyers, on the basis that the rules guarantee fairness and uniform treatment, transparency and a public purpose (effective delivery of services, and rules consistent with the need to protect the public).

Regarding licensing approaches, the establishment resolution proposes two models, 'full licensing' (where the incoming lawyer becomes a full member of the host bar) and 'limited licensing' (where the incoming lawyer practises as a foreign legal consultant).

The resolution on skills transfer recognizes that a regime permitting association of foreign lawyers with local lawyers provides an 'efficient and effective' means of skills transfer. It proposes a model whereby a requirement of training and skills transfer by foreign lawyers as a condition of establishment in the host state could be demanded.

The resolution on mutual recognition articulates 'standards and criteria' for mutual recognition agreements, consistent with international trade norms.

The impact of the resolutions has been as follows:

- they have provided guidance for member bars
- they have helped to shape the conceptual framework of trade negotiations in a manner that acknowledges and preserves the core values, and confirms the essential role of the legal profession
- they propose regulatory models

The resolutions themselves can be found on the IBA's website at

[http://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/BIC\\_ITILS\\_Committee/Default.aspx](http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx)

After **Ben Greer** had concluded his presentation, there was a question about enforcement of the transfer of skills. **Sternford Moyo** and **Ben Greer** explained that the IBA has no power to enforce, and it is up to the local bar to do so.

The next question related to a local problem regarding a recent regulation in Zimbabwe on recognition of foreign law degrees, which might cause problems to those with South African law degrees. It was stated that the Law Society of Zimbabwe was not consulted, and there will be meetings with appropriate authorities. The background is that there has been research in South Africa showing that a basic law

degree is not sufficient for legal practice - therefore, the Zimbabwe authorities have concluded that if the South Africans do not recognise their own law degrees, why should Zimbabwe?

Regarding liberalisation, **Ben Greer** said his home state of Georgia in the USA used to be very liberal. When it restricted its rules, local law firms could no longer hire whom they wanted, and so lost valuable assets. Once the bar began liberalising its rules again over more recent years, foreign law firms entered, and the state's professional infrastructure was much better equipped to provide services in cross border matters of all types under the supervision of the bar.

**Jonathan Goldsmith**, member of the IBA's BIC ITILS from Belgium, spoke about possible forms of cooperation with foreign law firms.

The first point which needed to be settled, which had already come up in questions from the floor, was what foreign lawyers can do in Zimbabwe.

**Godfrey Nyoni** explained the current position, which was that work permits were required for anyone providing legal services in Zimbabwe, and advice could not be offered on Zimbabwe law. The Chair of the Law Society's Compensation Fund added that the Law Society would draw up guidelines for local lawyers to know what foreign lawyers could and could not do.

**Paul Connolly**, a local lawyer from Victoria Falls, gave an example of building a bridge over the Zambezi River, in order to understand the dynamic between local and foreign lawyers in big ticket work, and specifically to obtain an impression of the kind of questions which foreign lawyers might ask of local lawyers – for instance, is there a road to the bridge, and if not, is one feasible; what is the location of the local work force; and so on. If local lawyers are not sufficiently knowledgeable about the ins and outs of big ticket work, they will not be used by the big foreign law firms.

**Jonathan Goldsmith** said that there were benefits in cooperation for foreign law firms and Zimbabwe firms.

For foreign firms, they need local lawyers to provide services that they cannot, or do not want to, provide – for instance, to support investment, debt financing, or infrastructure projects; or as part of a regional advice offering (for instance, to a client wanting to do something across SADC and needing advice on all SADC members); or just in order to advertise to clients that they have a pan-regional capacity.

For Zimbabwe law firms, cooperation with foreign law firms offers, among other things: access to new clients and branding; economies of scale and sharing of back office tasks; and sharing of experience and technology transfer.

There is a variety of forms of cooperation. For instance, for individual lawyers, the bar will need to decide whether it will permit employment of a foreign lawyer by a local lawyer, and employment of a local lawyer by a foreign lawyer. There is also the question of partnership with foreign lawyers.

Law firms have many kinds of link to choose: marketing cooperation (referral networks such as Lex Mundi, best friends); law firm networks and alliances (such as DLA Piper or ENSafrica networks); partial integration models (such as joint ventures or vereins); or full mergers.

There are many regulatory issues for a bar to consider:



- which foreign lawyers should be permitted to enter (for instance, all those who come from WTO countries, or only those who come from countries whose legal systems and methods of qualification have been approved in advance)
- what can foreign lawyers do (for instance, full or limited licences)
- in what kind of structures can they operate (for instance, partnership, limited liability, alternative business structure with non-lawyers)
- what kind of approval process must they pass through
- how will regulatory oversight be maintained, and to what level – for instance, will there be regulatory or disciplinary recognition agreements with home country bars
- what provision will be made for professional indemnity insurance, social security, and compensation fund contributions for the incoming lawyer
- what fees must a foreign lawyer pay for registration
- will the local Code of Conduct apply to the incoming lawyer

Bars should also remember that a mix of domestic regulation and international rules (for instance, from WTO or other trade agreements) will govern any rules for foreign lawyers.

He went on to mention that Zimbabwe has been a member of the WTO since 5 March 1995, but has made no commitments on legal services (as is the case with most African countries). That means that a regulatory regime is more or less in the hands of the competent authorities. He stressed the usefulness of the IBA GATS handbook, available on the IBA's website, for understanding how the GATS works for lawyers.

He went on to describe in more detail one of the IBA resolutions mentioned by Ben Greer earlier, that on transfer of skills, to show how it could be brought about by cooperation between foreign and local lawyers:

*'WHEREAS the extent and the modalities of Skills Transfer in cross-border legal services by Foreign Lawyers in a given Host Jurisdiction necessarily depend, inter alia, on the extent to which Foreign Lawyers in such Host Jurisdiction are permitted to practice law and to associate with Local Lawyers;*

*WHEREAS a regime permitting the association of Foreign Lawyers with Local Lawyers likely provides the most efficient and effective means of Skills Transfer by permitting Local Lawyers to work with more experienced Foreign Lawyers within the same firm, thus enabling them to gain practical experience and substantive knowledge in a way that would otherwise be impermissible due to the risk of breach of confidentiality'*

*'(B) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the course of his/ her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.'*

He also spoke about the position in the EU, where laws on free movement required Member States to permit lawyers to associate with lawyers from other Member States, through the EU lawyers' establishment directive (98/5/EC), Article 11:

*'The host Member State shall take the measures necessary to permit joint practice also between:*

*(a) several lawyers from different Member States practising under their home-country professional titles;*

*(b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.*

*The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.'*

He concluded by mentioning that the IBA was now preparing a handbook to guide bars through the problems relating to association between foreign lawyers and local lawyers.

**Paul Connolly** raised the question of how commercial agreements will incorporate the new currency (bond notes) into existing agreements based on the dollar. There followed a long and interesting discussion on its consequences, including contributions from a lawyer from the Reserve Bank of Zimbabwe.

**George Etomi** (for **Mfon Usoro**, a member of BIC ITILS from Nigeria, who was unable to be present) spoke on the topic of negotiation of international contracts.

He began by describing his own experience in Nigeria in facing the globalisation of legal services. He first said how important it was to have a good mentor, and that he had had a senior lawyer who taught and encouraged him in this field.

Once he was active in the field, he set about forming the Section of Business Law of the Nigerian Bar in 2006, and organised its opening conference. He encouraged the Law Society of Zimbabwe to go along the same route.

He used telecoms as an example of investment. At the beginning, he and his colleagues did not know what bidding meant – now they bid for everything. He found at first that he was asked to do low-paid work in foreign consortia. So he trained himself so that he could win tenders in his own right. The price of success was more work.

Regarding negotiation, the main element is trust. Lawyers should be honest. Concessions did not make you weak. You concede if it is the right thing to do. Lawyers need to have good relations with government, and the government must trust your competency, since the largest consumer of legal services is the government.

Mfon Usoro had prepared detailed slides of all aspects of negotiation, and these are attached as Annex B to this conference report.

**Alison Hook**, vice chair of BIC ITILS from the UK, began her presentation with a discussion of the basic characteristics of money, given the earlier discussion about the nature of the Zimbabwe government's new bond notes.

She outlined the basic characteristics of money as follows:

- durability – will it store value?
- portability – can I move it around?
- acceptability – is it generally acceptable?
- limited supply – its supply is controlled (gold vs sand)
- divisibility - available in different units (ie. your house can only be bought and sold in one lump)
- uniformity – 1 dollar is like another

She also explained Fisher's quantity theory of money:  $MV = PT$ , where:

- M = money supply
- V = velocity of circulation
- P = prices
- T = volume of transactions

She used this equation to explain why apparently similar behaviour by central banks in different parts of the world, in terms of printing money, could have very different effects on economies in practice.

She then went on to describe the potential international legal market for Zimbabwe as follows:

- international businesses entering (or leaving) Zimbabwe (for instance, by investment or joint venturing with local businesses)
- venture capital investments (such as Spear capital in Dendairy)
- government fund raising in international capital markets
- participation in international development funded projects focused on infrastructure (for instance, by the World Bank, International Finance Corporation or African Development Bank, after current problems are resolved)
- regional integration opportunities (SADC-wide)
- Zimbabwean businesses with outward looking ambitions (such as fastjet or esaja.com)

Potential international work for Zimbabwe lawyers will arise when there is revived economic interest in the country's long term growth potential. It will likely come from funds, investors, brands and entrepreneurs; foreign venture capital funds; multilateral and bilateral donors; foreign businesses; and referral law firms. It will likely involve local elements involved in power, transport, utilities and road infrastructure and mining projects, local (and regional) legal advice for investors (not just on usual corporate matters but on environmental and land use and land title issues, employment, risk assessment and mitigation, country of origin compliance checks (for instance under the UK Bribery Act or the US Foreign Corrupt Practices Act) and local due diligence.

International partners want the following from their local counsel:

- evidence of experience or involvement in similar previous projects
- sectoral knowledge, where appropriate

- good service (information flows, prompt action, follow-through)
- transparent billing (which does not necessarily mean the cheapest)
- thoughtful value added (such as thinking round the problem at hand, and not just answering the questions)
- local (and regional) insight

A common complaint is: “Too much of the work goes to foreign lawyers and we just get the crumbs from the table”. Why is this? Some international money is tied to particular advisors – in that case, a foreign lawyer is unavoidable but local lawyers might be able to obtain a higher proportion of the work if they improve the margins. Local lawyers also need to look out for procurement procedures, so as to have access to tenders. There is a frustrating tendency to prefer the foreign option. Sometimes that is because general counsel want a simpler life, and so may manage their interests in countries where they do not have big interests through a single law firm.

The question is how to get more of the cake in future. Here she advised the following:

- prepare your firm – think about service delivery, confidentiality etc and how you can improve efficiency in this area
- develop your networks within the region and in business more generally (for instance, half foreign direct investment in the East African Community comes from Kenya)
- develop your profile and get known outside Zimbabwe - some work goes to foreign lawyers because they (and their track records) can be found online (websites, directories etc).
- develop your expertise – get to know the law, issues, people and businesses in key economic areas
- develop your messages – the services you are selling to potential foreign clients are different to your domestic services
- success for a law firm today requires internal management, sales and marketing, and not only expertise in the law

**Sternford Moyo** said that Zimbabwean law forbids advertising, and does not distinguish between advertising and marketing. This needs to change, since even responding to tenders is caught by this law.

It was also announced that the Law Society of Zimbabwe is now reviewing the Legal Practitioners’ Act, hoping to be ready by the second quarter of next year. But some felt that this was too slow: the obvious anachronisms should be repealed as soon as possible.

**Thierry Ngoga** says that dispute resolution clauses in contracts are very important, because dispute resolution mostly takes place out of Africa, in London and other capitals. If the applicable law is local law, then local lawyers should get more work.

**George Etomi** spoke about the problems of gifts in relation to bribery under the US and UK acts mentioned in the previous presentation.

There was also a short discussion on whether universities should provide more practical law firm management skills during a law degree.

## Conference report - second day

**George Etomi**, member of BIC ITILS from Nigeria, spoke on joint law ventures and the globalisation of legal services. He began by donating a book he had written on business law in Nigeria to the Law Society of Zimbabwe, and invited the participants to attend the Nigerian Section on Business Law conference (he would send around a save-the-date message).

He said that joint law ventures faced many challenges:

- integration challenges
- sufficient expertise within the country
- mistrust and lack of understanding between partners
- client ownership
- market forces

Law firms enter into business arrangements or agreements with other law firms within or outside their jurisdiction to provide legal services. It can be for a particular transaction or for a number of transactions. There are various types of collaboration:

- acting as joint solicitors: two or more firms act jointly as per client's request
- merger: two law firms fuse to become one law firm
- *verein* structure: collection of firms in different countries can present themselves internationally as one single organisation
- joint law venture: two or more law firms pool resources to engage in a defined project or transaction

Globalisation, a challenging economic environment and reforms in the power, construction, agriculture, telecommunications, accounting, banking and other sectors demand more than the conventional structure of a legal practice. Collaborative efforts among law firms have become imperative as clients seek the services of legal experts who are able to offer a better and holistic approach to their transactional needs.

The organisational structure of legal practice has experienced steady and continuous growth worldwide, mainly driven by international trade, business flows and the emergence of transnational firms which require supporting legal services. Many law firms have established offices in a number of jurisdictions to take advantage of economic growth within emerging markets. However, for some jurisdictions, including most African countries, there are high barriers to practice for foreign lawyers. Law firms must explore alternative means of providing cross border legal services to circumvent these high barriers. Joint law ventures are a popular alternative practiced by international law firms

Joint law ventures fall into the following types:

- joint venture agreements
- law firms sign an agreement that regulates and sets out the obligations and duties of each party
- law firms remain separate legal entities but act together to share strengths and increase competitive advantages

If a joint venture entity is created, an entity created or incorporated; those participating in the joint venture are made shareholders. All legal services are conducted through the entity. It is governed by a “shareholders’ agreement” and “memorandum of understanding”. It is best suited to law firms that wish to collaborate for an extended period

The advantages for foreign law firms are:

- it is an alternative to “outsourcing” – there is no requirement to remunerate local law firms
- it provides access to domestic markets

The advantages for local law firms are:

- profit sharing is dictated by the joint venture agreement or shareholder agreement, reducing the risk of exploitation
- it gives exposure to the best practices of elite international law firms
- it increases reputation through association with international law firms

And it benefits clients by giving them access to higher quality legal services.

The disadvantages are the following:

- where a joint venture agreement is used, the parties to the venture have unlimited liability for debts and obligations stemming from the venture, except where the agreement expressly limits this
- the joint venture entity option can be extremely capital intensive
- there may be potential for conflicts and disagreements between law firms on the best approach for the transaction

As for the challenges to be faced along the way, he outlined the following:

- legality of joint law ventures - before embarking on one,, the parties must consider whether such an arrangement is legal within that jurisdiction
- integration challenges – different law firms have different practices which might conflict and hinder efficiency
- client ownership – the legal profession is hinged greatly on retaining clients, and in a bid to retain clients after the expiration of the joint law venture, conflicts may arise.
- market forces - fluctuation in exchange rates can have a great effect on the return on investment
- lack of mutual trust - where there is no meeting of minds between parties, the process of working together may become strained

He cited Singapore as a popular jurisdiction among international law firms for joint law venture practice. Since the early 2000s, 11 international law firms have undertaken such ventures, and of the 11 initially signed, 5 remain in operation. Some of these international law firms include: Clifford Chance (UK), Linklaters (UK), Allen & Overy (UK), Baker & McKenzie (US), and White & Case (US). The joint venture model emerged after consultation with the government and local law firms, in order to stimulate access to the market. The model was based on an entity comprising lawyers and staff from the foreign law firm working in conjunction with local law firms.

He made the following recommendations:

- law firms need to be sensitised to the advantages of joint law ventures and the options available within Africa
- governments need to be sensitised to the advantages of allowing law firms to engage in joint law ventures
- law firms should be encouraged to implement more internationally accepted standard practices for better integration
- law firms should not be limited to the idea of joint law ventures with international law firms from non-African regions
- increased law firm collaboration within Africa should be encouraged

**Juan Javier Negri**, member of BIC ITILS from Argentina spoke about raising capital on international markets.

He began by saying that he came from similar country, which was agricultural and not central. But he was not Anglophone and came from a civil law system.

He defined various important terms:

- capital markets: markets where securities are bought and sold, usually overseen by some state authority
- securities: negotiable instruments that can be easily traded on capital markets, such as stocks and bonds (and their derivatives, such as futures contracts, options, or mutual funds)
- bonds: securities allowing holders to become creditors of the issuer (whether a company or a government), taking no ownership but enjoying the right to have their money paid back with interest

Some typical bonds include:

- straight fixed-rate bonds, having a designated maturity date, when principal is promised to be repaid; fixed coupon payments are paid to bondholders
- floating rate notes, medium-term bonds with coupon payments indexed to a reference rate (like three-month or six-month US dollar LIBOR)
- convertible bonds allow the holder to exchange them for a pre-determined number of shares of the issuer
- bonds with equity warrants are a straight fixed rate bond with a call option, entitling the holder to purchase shares at a pre-stated price over a predetermined time period
- zero-coupon bonds are sold at a discount from face value and do not pay interest over their life
- stripped bonds are zero-coupon bonds resulting from stripping coupons from a coupon bond, resulting in a series of zero coupon bonds
- dual currency bonds are straight fixed rate bonds issued in one currency and paying interest in such currency, but at maturity principal is repaid in a second currency
- composite currency bonds are straight fixed rate bonds denominated in a currency basket (SDRs, for example).

- Eurobonds are denominated in a currency other than the home currency of the country or market in which they are issued, frequently grouped together by the currency in which they are denominated: Eurodollar bonds, Euro yen bonds, etc
- foreign bonds are issued by a foreign borrower in the capital market of country X and denominated in country X's currency
- sovereign bonds are issued by a government or a governmental entity enjoying sovereign immunity (that is, they cannot be sued unless such immunity is waived). The existence and scope of sovereign immunity is not determined by the laws of the sovereign, but by those of the country where bonds are issued.

Eurobonds are highly flexible because issuers may choose the country of issuance based on the regulatory environment, interest rates and depth of such country's market. Typically, they are issued in bearer form. Dollar-denominated Eurobonds make up over 80% of the international bond market. The US dollar is the most popular bond currency. Eurobonds are brought to market more quickly than bonds issued in the United States (because they are not offered to US investors and require no registration).

Stocks or shares represent a partial ownership interest in a company. Governments do not issue shares. Shareholders are owners, while bondholders are creditors.

He then went on to define markets:

- primary markets are where newly issued stocks or bonds are sold to investors, often through a process called underwriting. This is a favourite means for governments and corporations to raise capital. These securities are often purchased by pension funds, hedge funds, sovereign wealth funds, and a few wealthy individuals and investment banks that trade on their own behalf
- secondary markets, on the other hand, negotiate existing securities that are re-sold and bought among investors or traders, either on an exchange market (usually regulated) or over-the-counter (unregulated). The existence of secondary markets encourages investments in primary markets because investors may quickly liquidate their investments in the secondary markets and cash in should the need arise

Regarding the United States Securities Act of 1933, he said it was: 'An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes'.

In the United States, the 1933 Securities Act or "Truth in Securities Act" issued after the 1929 stock market crash and during the Great Depression mandates that any offer or sale of securities using the means and instrumentalities of interstate commerce be registered with the Securities and Exchange Commission (SEC), unless an exemption exists. Since 'means and instrumentalities of interstate commerce' is extremely broad, it is virtually impossible to avoid registration by attempting to offer or sell a security without using an 'instrumentality' of interstate commerce.

The Truth in Securities Act attempts to ensure that investors receive accurate and sufficient information before they purchase any security. The Act adopts a 'full disclosure philosophy': it is possible to sell a bad security as long as all factual information is accurately disclosed.



Any issuer required to register under the 1933 Act must submit a registration statement, including a prospectus providing information about itself, its business, the particular security and its audited financial statements. The company, the underwriter and all individuals (including lawyers) who prepared the registration statement are liable for any inaccuracy. This extremely high level of liability exposure requires an enormous 'due diligence' effort to ensure that all documents are complete and accurate.

Not all securities offerings must be registered. Some exemptions include:

- private offerings to a specific type or limited number of persons or institutions
- offerings of limited size
- exemptions under SEC's Rule 144, permitting the public resale of restricted and controlled securities without registration.

Restrictions apply to the minimum length of time for which such securities must be held, the maximum volume permitted to be sold and the issuer's consent to future resales.

Registration-exempt securities under Rule 144 sold during any subsequent 3-month period generally cannot exceed any of the following limitations:

- 1% of the stock outstanding
- the average weekly trading volume in the securities on all national securities exchanges for the preceding 4 weeks
- the average weekly trading volume reported through the NASDAQ consolidated transactions reporting system
- A notice of resale must be filed if securities sold under Rule 144 in any 3-month period exceed 5,000 shares or if their aggregate sales price exceeds \$50,000

Rule 144A has become the principal safe harbour on which non-U.S. companies rely when accessing the U.S. capital markets, because it avoids the registration requirements of the Securities Act. Rule 144A applies to certain private resales of minimum \$500,000 units of restricted securities to qualified institutional buyers (QIBs). QIBs generally are large institutional investors that own at least \$100 million in investable assets. Offers to non-QIBs through general solicitations may be made following a 2012 amendment to the 144A rule.

Rule 144A increased market liquidity, because institutions can now trade formerly restricted securities amongst themselves avoiding restrictions imposed to favour the public. Rule 144A promotes the sale of securities by foreign companies in the US capital markets. Companies registered with the SEC or foreign companies providing information to the SEC do not need to provide their financial statements to buyers.

Regulation S is another safe harbour which allows offerings of securities deemed to be executed outside of the United States not to be subject to the registration requirement. Regulation S provides two safe harbours: an issuer safe harbour and a resale safe harbour. In both cases, Regulation S requires that offers and sales be made outside the United States and that no offering participant (which includes the issuer, the banks involved and their respective affiliates) engage in 'directed selling efforts'. If there is substantial U.S. market interest for the securities, Regulation S requires that no offers and sales be made to U.S. persons (including U.S. persons physically located outside the United States).

The following are US persons under Regulation S

- any natural person resident in the United States
- any partnership or corporation organised or incorporated under the laws of the United States
- any estate of which any executor or administrator is a U.S. person
- any trust of which any trustee is a U.S. person
- any agency or branch of a foreign entity located in the United States
- any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person
- any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organised, incorporated, or (if an individual) resident in the United States
- any partnership or corporation if:
  - organised or incorporated under the laws of any foreign jurisdiction, and
  - formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organised or incorporated, and owned, by accredited investors (as defined in Rule 501(a)) who are not natural persons, estates or trusts

Section 902(k)(2) further defines some persons who are explicitly not U.S. persons. Unlike other definitions of a U.S. person, the Regulation S definition of a U.S. person does not include U.S. citizens not resident in the U.S.

He then went on to describe the role of the issuer's Zimbabwean legal advisor. In the event that a Zimbabwean issuer wishes to tap international capital markets, there will be many tasks to be performed by the issuer's domestic counsel. In general terms, these are:

- assisting in the selection between shares or bonds;
- helping determine whether a foreign issue requires domestic registration in Zimbabwe
- preparing the prospectus on all Zimbabwean legal matters, both law and practice.
- reviewing agreements between issuer and (i) investment bank; (ii) underwriters; (iii) paying agents; (iii) service of process agents, etc.
- most importantly, providing the intervening banks with a sound, unqualified, clean legal opinion regarding the legality of the transaction and its compliance with all domestic legal requirements

The following are the matters typically covered by a domestic legal opinion:

- may the issuer validly select a foreign law to govern the issuance?
- does the issuer enjoy sovereign immunity?
- may it be validly waived?
- may the issuer validly submit to foreign jurisdiction?
- will a foreign judgment be enforced in Zimbabwe?
- under what requirements?
- are there exchange controls in Zimbabwe that (a) may force the issuer to bring into the country the proceeds of the issuance or (b) prevent or complicate repayment?

He gave a sample of further questions which are likely to be put to the issuer's Zimbabwean lawyer:

- if the issuer is a state-owned entity, does it enjoy any particular benefits?
- are there any public policy principles involved?

- what happens if the issuer provides a public service?
- what would be the bondholders' position in case of bankruptcy?
- what is the tax status of payments made by the issuer?
- do withholdings apply?

Similar matters will have to be covered by the Zimbabwean counsel to the banks involved.

He ended with a quote by the English solicitor, Philip R Wood, QC, who wrote: 'The law is the one universal secular religion which everybody believes in, although they may differ, and usually do, about the scope and content of the codes of this religion. Unlike many other religions, belief in the law, the role of law and the rule of law, does not require a belief in the supernatural. This religion does not require a showing of commitment to the codes in the form of rituals or attendance at churches or temples or in the form of other outward marks of identity. This religion is not regional or local but is universal. Because much law appears to be driven by emotion, and because its enforcement is sometimes pugnacious and bellicose, it is one of the primary tasks of lawyers to instil rationality, common-sense and a measured coolness, as well as tolerance.'

**Sternford Moyo** then gave the Zimbabwean answers re the questions posed above regarding the matters typically covered by a domestic opinion.

In the question and answer session that followed, there was a question for **George Etomi** about how conflicts of interest between clients are dealt with in a joint law venture. He replied that there was no clear answer, and it has to be dealt with case-by case.

In answer to another question about possible conflict between the law firm partners during a case, he said that the client should not be abandoned. The conflict needs to be dealt with, and then consideration given as to whether to work with the lawyers again.

**Susan Mutangadura**, a local lawyer, spoke on the Zimbabwean landscape regarding the arbitration of international disputes.

She said that the law of arbitration in Zimbabwe could be found in the Arbitration Act (Chapter 7:15) and the Arbitration (International Investments Disputes) Act (Chapter 7:03). Before that there had been the Arbitration Act (Chapter 7:02), and prior to that common law principles had applied to the arbitration of disputes.

The international instruments to which Zimbabwe had signed up were the following:

- Geneva Protocol on Arbitration of September 24, 1923
- Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (which amended the Geneva Protocol in certain respects)
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958
- 1965 Convention on the Settlement of Investments Disputes between States and Nationals of other States (ICSID Convention 1965)

Regarding the Arbitration Act (Chapter 7:15), it was enacted to give effect to domestic and international agreements, and to provide a better and more efficient means of having disputes submitted to

arbitration and the enforcement of awards of arbitrators. It sought to apply the model law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the UNCITRAL laws). It also gave effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

S4 of the Arbitration Act provides that any dispute which the parties have agreed to submit to arbitration may be determined by arbitration. S6(2) states that the Act 'shall apply to every arbitration agreement, whether made before, on or after September 13, 1996.' S4 details matters that shall not be capable of determination by arbitration

On May 20 1994, Zimbabwe ratified the 1965 Convention on the Settlement of Investments Disputes between States and nationals of other States (ICSID Convention). It was brought into domestic legislation by the schedule to Section 2 of the Arbitration (International Investments Disputes) Act (Chapter 7:03) in 1995. It applies to the investment disputes between a country and the investors of another country who have made investments in that first country.

There has been a Commercial Arbitration Centre for some 15 years or more. A new Arbitration Centre was recently established under retired Justice Chinengo.

**Thierry Ngoga**, a member of BIC ITILS from Rwanda, spoke about the arbitration of international commercial disputes.

He began with the link between international arbitration and legal representation. Limitations on the parties' choice of legal representatives contradicts the basic concept of arbitration as a flexible and self-tailored dispute resolution system. Freedom of legal representation is recognised in most national arbitration laws, and by most institutional arbitration rules. Despite this, laws in a few jurisdictions require that counsel in locally-seated arbitration be locally qualified. That is true in Turkey, Thailand and was formerly true in Singapore, Japan and a few other jurisdictions. There are difficulties also in India. There, the law appears to allow foreign lawyers to appear in arbitration, but this is being challenged to the Supreme Court in the case of Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position will be clearer when that case is decided

In the Mauritius Arbitration Act (section 31), it is stated that: 'Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not be qualified to practise law in Mauritius or in any other jurisdiction.'

A good practice occurs in Rwanda where in five international arbitration cases the parties have been represented by foreign counsel but preferred to work with local counsel, since the seat of arbitration was Rwanda in those 5 cases. He said that to become a 'safe arbitration seat' it was important to allow wide choice of representation. The important thing was to focus much on the seat of arbitration in the original contract, which would define the applicable law, and so increase the amount of cake for all.

He then showed the following illustrations about the origin of arbitrations and arbitrators:

## Nationality of arbitrators appointed in Africa ICSID cases

So far ICSID has administrated **541 cases**



**120**

cases concerned at least one African party, representing **22%** of all cases.

In the process of administering the **120 cases**,

**400** arbitrators have been appointed.

Of the 400 arbitrators, the **top three** appointed nationalities are: **French, Swiss and US**. Representing **43%** of total appointments.



**53%**

of the appointed arbitrators for Africa cases hold a European nationality



**only 10%**

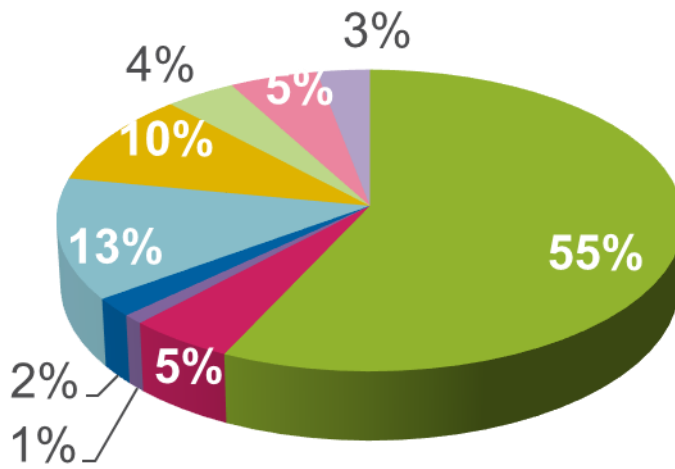
of the appointed arbitrators for Africa cases hold an African nationality

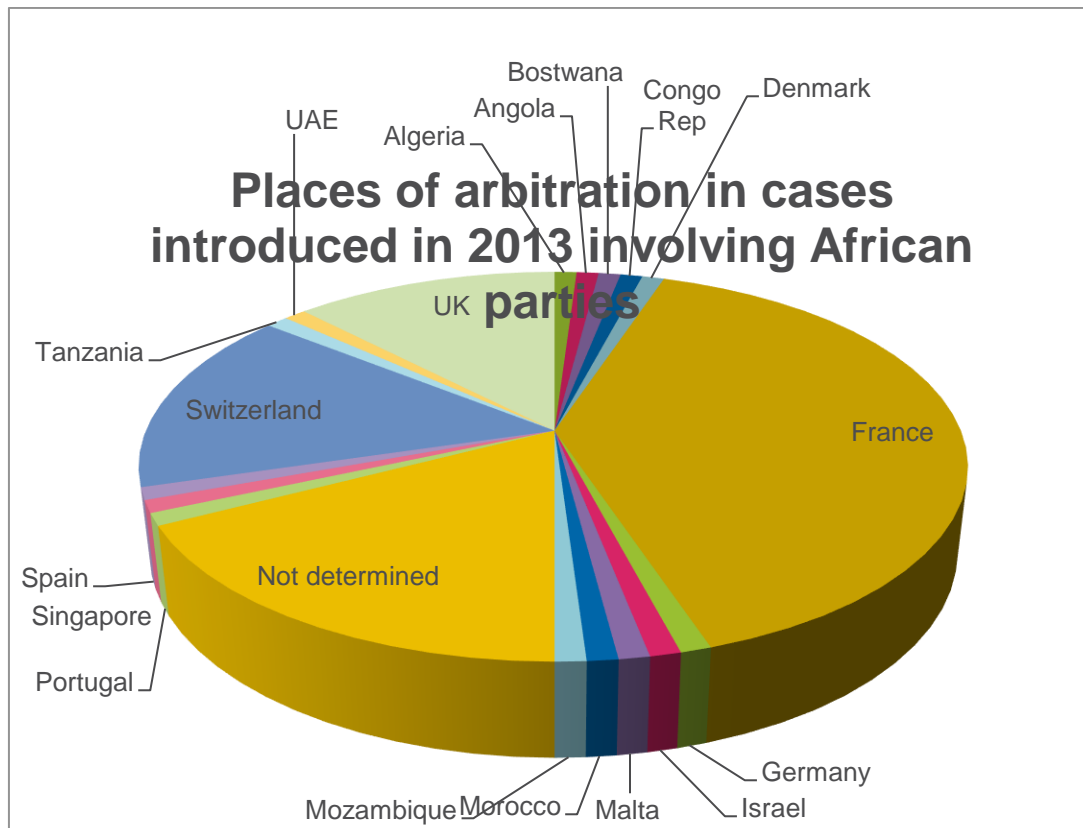
@iarbafrica

## ICC: Origin of Arbitrators

(2014)

- North & West Europe
- Central & East Europe
- North Africa
- Sub-Saharan Africa
- North America
- Latin America & Caribbean
- Central & West Asia





Currently, 95% of arbitration involving an African party takes place out of the continent with counsel and arbitrators other than Africans, as quoted by Justice Yusuf in his 2016 keynote speech to the ICCA.

**Thierry Ngoga** also quoted a past president of the ICCA, Jan Paulsson, who said in 1987: ‘When the entire centre of gravity of an investment contract from its negotiation to its performance is in an African country and has resulted in the creation of an enterprise whose physical plant, corporate records and personnel are located in that country, the concept of arbitration in Europe or North America may be not only artificial but truly burdensome.’

He mentioned some of the barriers to arbitrate in Africa, as cited in the literature:

- the interference of the courts
- corruption
- lack of awareness of ADR in commercial matters;
- limited training of professionals (the issue of capacity building)
- poor legal and regulatory frameworks
- lack of data on enforcement in Africa

He felt that African lawyers needed to admit some of the weaknesses and work hard to improve. There had been an effort in the last decade to change perception of Africa. He felt it was time to test African jurisdictions and African arbitrators.

Sample data for arbitrating commercial disputes in sub-Saharan Africa in 2011 showed that the time to enforce an arbitration award in Africa varied from 55 days in South Africa to over a year in Ethiopia (375), Tanzania (425), and Ghana (436). The time to enforce an award in Rwanda varies between 3- 6 months (Arbitration User's Perception Survey 2015), with 6/9 cases in Kigali International Arbitration Centre having African arbitrators.

The average dispute resolution time of ICSID cases since 1 July 2003 is 3.2 years or 1,171 days (GAR Journal vol. 4, Issue No 5). And other countries rate as follows: Sri Lanka (720), Pakistan (806), and Philippines(948).

These times have an impact on the seat determination by parties, and sharing the cake in the future may require making your seat "safe".

In the Global Competitiveness Report 2015–16, when dealing with strength of institutions, Rwanda is no. 17 out of 140 countries, after Canada no. 16. Rwanda is ahead of countries such as Australia (18), Belgium (22), Germany (20), France (29), Israel (41), Spain (65) and United States (28). Other well positioned African countries include Mauritius (34), Botswana (37) and, South Africa (38).

In the same report, the ranking of judicial independence, favouritism in decisions by government, efficiency of legal framework in settling disputes etc., some African countries, including Rwanda, Botswana etc., have a higher ranking than some developed countries.

He suggested the following steps for Zimbabwean lawyers, in order for the country to appear on the map of international arbitration:

- position Zimbabwe as an arbitration safe seat, by ensuring that there are the following: good quality legal representation, application of the 1958 New York Convention, a model law, supportive courts, and a clear enforcement regime
- try out arbitral institutions in Africa (some of them have been tried)
- start with contract negotiation & drafting ( seat-applicable law, avoid pathological clauses), to reduce the 95% of arbitration cases from Africa dealt with outside Africa
- learn more than one International languages (for young people)
- be aware that arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as tourism, hotel facilities, zero tolerance to corruption, entry facilities (visa), safety, internet facility, transport etc...

In conclusion, he said that it was important to think and rethink the re-localisation of arbitration dispute resolution mechanisms, especially the re-localisation of arbitration to Africa for a future equitable share of the cake, and to reduce progressively the 95% of arbitration involving African parties taking place outside the continent.

The lesson from some African countries, which have tried out African arbitrators and African arbitral centres, is encouraging. Change is possible, it is happening, and the mission of legal practitioners is to contribute towards making it happen more quickly than in the past for the cake to be shared properly.

In answer to a question, **George Etomi** said that there are major contracts between governments and foreign companies, and the way of dealing with arbitration can be a political question. The Lagos Court of Arbitration is becoming stronger, but sometimes even though the applicable law is Nigerian, the venue is England, to avoid the government putting pressure on the parties.

**Thierry** Ngoga added that the first step was training of local lawyers, to raise awareness of arbitration in Africa.



## Annex A



the global voice of  
the legal profession



Law Society of Zimbabwe



# **HELPING ZIMBABWE'S LAWYERS FACE GLOBALISATION**

**2-3 NOVEMBER 2016**

**VENUE: MONT CLAIR RESORT & CASINO, NYANGA, ZIMBABWE**

**ADDRESS VENUE: JUILIASDALE, NYANGA**

# 2-3 NOVEMBER 2016

2 November 2016

## Helping Zimbabwe's lawyers face globalisation

Chair: Sternford Moyo, former President of the Law Society of Zimbabwe, Chair of the IBA's African Regional Forum

- 8.30 Registration**
- 9.00 Welcome**
- Godfrey Nyoni, Chair of the Training Committee of the Law Society of Zimbabwe
- 10.00 The IBA instruments on international trade in legal services**
- Sternford Moyo  
Ben Greer
- 11.00 Coffee break**
- 11.15 Possible forms of cooperation with foreign law firms**
- Jonathan Goldsmith  
Paul Connolly
- 12.00 Discussion**
- 12.30 Lunch**
- 14.00 Negotiation of international contracts**
- Mfon Ekong Usoro (presented on her behalf by George Etomi)
- 15.00 International sub-contracting – what is realistic, how to obtain work on international projects and what international law firms look for in local counsel**
- Alison Hook
- 15.45 Discussion, and close of the first day**

**3 November 2016**

**Helping Zimbabwe's lawyers face globalisation**

Chair: Promise Ncube, Chair of the Compensation Fund, Law Society of Zimbabwe

**9.00            Creation of joint ventures**

George Etomi

**9.45            Raising capital in international markets**

Juan Javier Negri

**10.30          Coffee break**

**10.45          Arbitration of international commercial disputes**

Thierry Ngoga

Susan Mutangadura

**11.30          Discussion**

**12.00          Closing Remarks and Conclusions**

Wellington Magaya, Council Member of the Law Society of Zimbabwe

## Annex B

### Slides of Mfon Usoro on 'Negotiation of international contracts'

#### Negotiation strategy:

##### Plan a negotiation

- consider benefit of reaching an agreement.
- identify and prioritize issues.
- agree on issues for concession.
- gather information about the other party.
- select a team and lead negotiator.

##### Adopt a Problem Solving Approach (Win-Win strategy)

- Don't focus on positions or deal breakers but on interests.
- Focus on ways to solve a problem.
- Everyone feels they have helped each other.

##### Use simple language

- use plain, simple language and avoid colloquialisms.
- avoid assumptions about people's language capabilities.

##### Ask questions and listen

- Effective in gathering information and assessing the other party.
- Listen carefully to their responses.
- Appreciate the power of silence.

##### Build strong relationships

- develop a personal relationship with your counterpart.
- this is valued and aids agreeing on issues.
- Maintain personal integrity
- trust is vital to conclude a deal.
- difficult to build but even harder to rebuild when destroyed.

##### Conserve concessions

- must be carefully formulated and tactically made.
- signals anxiety/loss of control when offered recklessly.
- cooperative attitude, counteroffer.

##### Be patient

- politeness builds trusting relationship,
- consider time zones and culture.
- takes patience to obtain information from the other party.

##### Be aware of cultural differences

- greetings, manner of introduction/exchanging business cards,
- physical distance between each other
- attitudes towards overt power display.

## Stages in negotiation

### (1) Preliminary Stage

- Establish limits and goals, and
- Establish negotiator identities and tone for interaction

#### Client preparation

- Determine the needs of the client,
- Set and agree on expectations,
- Agree on your limits.

#### Assess your team's capacity

- Knowledge of subject matter
- Negotiation skills
- Strengthen your team with foreign experts if required.

#### Counsel preparation

- Knowledge of the subject-matter very critical
- Understand the real-cost of non-settlement to client
- Understand the real-cost of non-settlement to the other party
- Accurate assessment of strength and weaknesses of own side and the other party
- Understand and appreciate importance of foresight and flexibility
- Importance of establishing good impression and reputation.
- Coordinating strategy/inter-party communications
- Appoint a spokesperson
- Setting the stage
- Whose office?- Own office; Opposing counsel; Office Facilities
- Assessing negotiator personalities and authority to make decisions
- Prior familiarity or unknown negotiator
- Establish negotiation tone.

### (2) Information Stage (Questions, Offers, Responses)

#### Questions

- obtain information about the skills, resources and experience of counsel regarding the type of transaction.
- ascertain the other's needs and objectives.
- do not allow opponent to use evasive tactics to avoid disclosure of pertinent information.
- listen and be patient to absorb as much information as possible.
- enables you to seize control of the bargaining process.

#### Offer

- Methods of presenting demands and message conveyed
- Most or least important first?
- Key Issues or ancillary Issues?

### (3) Competitive/Distributive Stage

- articulate own side's specific demands, diligently advance the interests of own client and obtain as much as possible.
- focus is on outcome of negotiations
- Make principled concessions
- articulate in the language of party's needs or interests not "positions" or "deal breakers".
- amount and timing is crucial.
- should be made in response to appropriate counteroffer.
- planning flexibility and patience.

#### Dealing with adversities or deadlock

- change strategy, change negotiation focus or setting.
- take a break.
- when negotiations breakdown, immediate action should be taken to prevent the situation from becoming irretrievable.
- avoid the temptation to respond an 'eye for an eye' when the meeting reconvenes.
- do not insist on an apology when order is restored.
- do not allow a breakdown to continue if the consequences of not reaching agreement are worse than the last deal on the table.

### (4) Closing Stage

- combination of relief and anxiety, very competitive stage.
- very critical as majority of concessions tend to be made during the concluding portion of negotiations.
- overly anxious participants may forfeit much of what they obtained in the earlier stage if they are not vigilant.
- concessions decrease in size and must be reciprocated.
- avoid unreciprocated and excessive position changes.
- must be patient and maintain calculated silence.
- permit the final phase of the process to develop in a deliberate fashion.
- maintain momentum towards settlement
- suggest a face saving way out from stalemates

### (5) Cooperative/Integrative Stage

- After agreement has been reached
- review the terms agreed upon to ensure there are no misunderstanding.
- this is the time to rectify any discrepancies.
- take control of the drafting.
- if the opponent drafts the final terms, review very carefully to ensure
- language correctly reflects the agreed positions of parties,
- nothing is omitted or
- smuggled in.

#### Tactics in negotiation

Tactics (deceptive/manipulative/to gain advantage)

- There is a time to listen, a time to talk, a time to think, a time to decide, and a time to act. Take them in their turn.
- While listening, suspend critical judgment.
- Do not try to change the views of the other side; focus on the benefits of your own.
- Sometimes a hostile audience needs to blow off steam. Let them; they will be less hostile afterwards.
- Always draw out thinking when an audience is objecting.
- Ask questions concerning their underlying thinking, on the premise that you want to better understand their position. What you really want is for them to more carefully examine their own thinking.
- Questioning someone's judgment requires great tact. Preface such questions by acknowledging that something is true; ask the question; then give a reason for asking.
- Better to understate than overstate. Overstatement may give the other party a feeling of being manipulated.
- Back away from blunders quickly and completely. Have a strong place to go i.e. your next argument. If a fact was inaccurate, substitute an accurate one. If an analogy was faulty, find another that is not.
- Choose the venue for negotiation where you have the opportunity to do so.

### Negotiating international contracts

Characteristics of International Contracts

- Cross border, multi-jurisdictional, different legal systems, sometimes parties with uneven bargaining powers etc.

Adopt International Terms/Rules/Standard Forms to govern contract

- INCOTERMS, UCP 600, FIDIC, BALTIME, NYPE, BARECON
- Provides for rights, obligations, liabilities of parties including clauses on foreign laws, export/import and currency exchange controls, treaties, transit issues, inspection of goods, insurance, tariffs, dispute resolution and jurisdiction.

Peculiarities

- a variety of internationally negotiated clauses which aid, smooth negotiation and execution of contract.
- meaning, obligations and liabilities of parties specified and widely accepted

Risks involved

- Reliance on major variations of standard terms.
- Clauses raise certain legal issues which if not well negotiated upon, may lead to harsh consequences.

Boiler plate clauses

- dangerous practice to use precedents without editing and negotiating
- give greater certainty to the parties as to how their carefully negotiated

contracts will be interpreted.

### Representations and Warranties

- a statement of fact (a statement of intention, opinion or law) which is relied upon by the recipient and forms part of the inducement to contract which gives rise to legal liability if untrue.
- warranty is a contractual promise for which the remedy for breach is damages and not repudiation of the contract.
- note that a clause may be a condition even though called a warranty in the contract.

### Indemnity Clause

- Shifts the obligation to pay damages from one person to another when facts of a particular case make it unfair to hold one party completely or partially responsible for the loss to a third party.
- Issues to consider when negotiating an indemnity clause:
  - The determination of the extent of loss or breach of the contract obligations which will necessitate some indemnity;
  - What occurrences will be fair to provide for reciprocal indemnities?
  - Determining the limits of the indemnity available; and
  - Criteria for arriving at reasonably incurred costs for which a party is entitled to indemnity.

### Force Majeure Clause

- frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as war, strike, riot or “act of God”, prevents one or both parties from fulfilling their obligations under the contract.
- Not intended to excuse negligence or other malfeasance of a party.
- Issues to consider during negotiations:
  - Extent,
  - Notice to the other party,
  - Effect on agreement (delay or termination?)
  - Obligation to mitigate effect,
  - Events that constitute force majeure

### Change of Control

- gives protection to a party if the controlling shareholding of the other party is transferred.
- breach triggers right to terminate the agreement.
- issues to consider during negotiations:
  - definition of what constitutes “change of control”
  - are there are rights or obligations which can adversely be affected by any “change of control”.



### Dispute Resolution Clause

- Litigation
- Governing laws, courts with jurisdiction
- ADR
- Arbitration
- Governing law, Arbitration rules, venue, appointment, binding/final
- A combination of ADR and Litigation

### Market disruption clause

### Tax gross-up Clause

### Business Day/Calendar Days etc

### Conclusion

- Advance Preparation
- Have a list of foreign firms to engage where necessary,
- Do not be afraid to participate in negotiations,
- Learn from your seniors and opposing counsel,
- Always be calm and polite,
- Be flexible,
- Remember always that we are advocates for our clients and do not become personally involved,
- Your job is to advise not to take positions or make decisions for the client,
- Make friends with the library and absorb as much knowledge as you can about the transaction.

### References

- Craver, Charles B, Effective Legal Negotiation & Settlement (Fourth Edition,) 2001.
- Iboronke, B. A., Legal Practice Skills & Ethics in Nigeria, 2004

## Annex C

### Analysis of evaluation forms

35 evaluation forms were handed in at the end of the session (11 women, 15 men, and 9 who did not declare their gender).

It was regrettably not feasible to undertake an accurate scoring of the various questions asked for the preparation of this report, because the forms were photocopied overnight in the hotel, and the photocopies, not the originals, were handed to ELF. The '5' rating (in the range of '1 to 5', with '5' being the best rating) is missing from most of them, cut off at the end of the page. A number of questions are therefore unrated, and it is impossible to know whether that is because the delegate did not rate the question, or whether the answer is a '5'. It was not worthwhile in terms of resources to obtain the originals from the Law Society of Zimbabwe.

Nevertheless, the mass of the ratings which were visible were at the high end of the scale.

The written comments were also clear. They were overwhelmingly positive, with the word 'eye-opening' as a description of the conference appearing most often (about half a dozen times on separate forms). Interestingly, some sessions like Juan Javier Negri's talk on raising capital on international markets appeared a number of times under 'least useful for your work' – but then appeared about the same number of times under 'most useful for your work'. Overall, Alison Hook's talk on 'International sub-contracting – what is realistic, how to obtain work on international projects and what international law firms look for in local counsel' drew the most positive comments.

However, superlatives and general approbation do not help in planning changes to the next conference on the same subject, if any, and so here were the few suggestions for improvements:

- it would have been good to have all the papers in hard copy as part of the package, as opposed to having to access them on a website;
- the slides and teaching materials should have been placed on a memory stick and distributed as part of the conference stationery, to increase interaction with the presenters;
- is the IBA the best forum for our capacity development? Some of the IBA content could have been replaced by more applicable regional-centred material;
- there is a need to give opportunities to young lawyers to make presentations on other areas;
- some of the presenters could have been assisted with audio equipment as they were not audible (another delegate specifically mentioned George Etomi as being soft-spoken);
- discussion of model problems would be appreciated in the future to stimulate engagement with the presenters