

Not Overrated, Just Misunderstood: Witness Testimony, Cross-Examination, and the African Arbitration Landscape

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Abstract

The debate over whether witness testimony and cross-examination are "overrated" in international commercial arbitration has been conducted largely within Western scholarship. This article addresses it from an underrepresented perspective: the African one. Drawing on the structural characteristics of African commercial disputes, the jurisprudence of African courts across common law and civil law traditions, and the rules of major African arbitral institutions, this article argues that witness testimony and cross-examination are not overrated. The case for retaining them is particularly compelling in the African context, where documentary records are frequently incomplete, state actors are routinely parties, and procedural legitimacy carries political as well as commercial significance. Africa is not a passive recipient of global procedural norms. It has the jurisprudential foundation and institutional architecture to shape them.

I. Introduction

The word "overrated" carries an implicit burden of proof. It is not enough to show that a practice is imperfect; one must show that the value ascribed to it exceeds its real worth. Applied to witness testimony and cross-examination in international commercial arbitration, the claim is that these tools cost more than they deliver and that arbitration would be better served by a more document-centric, tribunal-led approach.

This debate has generated a number of sophisticated contributions, including the Prague Rules Working Group's recommendations,¹ the International Chamber of Commerce (ICC) Commission's report on *The Accuracy of Fact Witness Memory in International Arbitration* (ICC memory report),² and the Queen Mary University of London and White & Case survey series.³ What these contributions share, however, is a perspective shaped predominantly by the dispute types and legal traditions of Western commercial arbitration. The African perspective remains only marginally represented, despite the continent's growing practical experience and analytical capacity. This imbalance has created a gap in the literature that warrants direct and sustained engagement. Moreover, the publication pipelines and conferences that shape this discourse are largely concentrated in traditional Western hubs, reinforcing structural barriers to participation for Africa-based practitioners.

¹ Prague Rules Working Group (2018) *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules). Prague: Prague Rules Working Group. Available at: <https://praguerules.com/upload/iblock/a00/a00568c6787a8bc955f4fdfe93db5a10.pdf>

² International Chamber of Commerce (ICC) Commission on Arbitration and ADR (2020) *The Accuracy of Fact Witness Memory in International Arbitration: Current Issues and Possible Solutions*. Paris: International Chamber of Commerce. Available at: <https://iccwbo.org/wp-content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf>

³ Queen Mary University of London and White & Case LLP (2025) *2025 International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration*. London: School of International Arbitration, Queen Mary University of London. Available at: <https://www.qmul.ac.uk/arbitration/research/>

This article argues that, examined through the lens of African commercial disputes, African legal values, African judicial authority, and African institutional architecture, the case for witness testimony and cross-examination is stronger than the broader debate has appreciated. These tools are not overrated. They have been evaluated against a dispute profile that does not reflect the African reality.

II. Africa's Stake: Why the Debate Is Urgent

1. Africa's Growing Caseload

Africa's presence in international arbitration is substantial and growing. The International Centre for Settlement of Investment Disputes (ICSID) 2026-1 caseload statistics show that Sub-Saharan Africa accounted for 24% of all ICSID cases registered in 2025, the largest regional share that year, compared to a historical average of 15% of all ICSID cases since 1972.⁴ ICSID's historical data also place the Middle East and North Africa at 10% of the overall caseload.⁵ Beyond ICSID, the ICC dispute resolution statistics for 2024 recorded 194 parties from North Africa and Sub-Saharan Africa across 31 countries,⁶ and the London Court of International Arbitration (LCIA) reported in 2025 that African parties made up a larger proportion of its 2024 caseload than parties from the United Kingdom.⁷

Yet Africa remains underrepresented in arbitral appointments: ICSID's published statistics show that, although Sub-Saharan Africa accounted for 15% of all ICSID cases historically as of 2021, Sub-Saharan African nationals accounted for only 3% of appointments of arbitrators, conciliators and ad hoc committee members,⁸ while ICSID's 2017 Africa-focused statistics similarly recorded that approximately 22% of all ICSID cases involved an African State party but only about 4% of all appointments involved nationals from an African State.⁹

This disparity underscores that Africa is not a peripheral participant in international arbitration but a central and affected stakeholder whose underrepresentation limits its influence over the procedures and outcomes that directly affect African parties and states.

2. Structural Features of African Commercial Disputes

Several structural features make African commercial disputes qualitatively distinct from those for which document-centric procedures are most adequate.

⁴ International Centre for Settlement of Investment Disputes (ICSID) (2026) *The ICSID Caseload - Statistics, Issue 2026-1*. Washington, DC: ICSID. Available at: <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>

⁵ As above.

⁶ International Chamber of Commerce (ICC) (2025) *ICC Dispute Resolution Statistics: 2024*. Paris: ICC International Court of Arbitration. Available at: <https://iccwbo.org/wp-content/uploads/sites/3/2025/06/2024-Statistics-ICC-Dispute-Resolution-992-1.pdf>

⁷ London Court of International Arbitration (LCIA) (2025) *LCIA's 2024 Annual Casework Report*. London: LCIA. Available at: <https://www.lcia.org/News/lcias-2024-annual-casework-report.aspx>

⁸ International Centre for Settlement of Investment Disputes (ICSID) (2022) *The ICSID Caseload - Statistics, Issue 2022-1*. Washington, DC: ICSID. Available at: <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>

⁹ International Centre for Settlement of Investment Disputes (ICSID) (2017) *The ICSID Caseload - Statistics: Special Focus - Africa (May 2017)*. Washington, DC: ICSID. Available at: <https://icsid.worldbank.org/news-and-events/news-releases/new-issue-icsid-caseload-statistics-published-special-focus-africa>

Incomplete documentary records. In many African infrastructure, extractives, and public procurement disputes, contemporaneous documentation is fragmented or uneven, particularly in transactions involving public entities or parties operating in markets with limited institutional infrastructure. Key decisions may be made through iterative negotiations without formal written records. A document-centric approach to fact-finding risks under-protecting parties whose agreed arrangements were not fully reduced to writing.

State actors and contested factual narratives. African arbitration is characterised by the frequency with which state-owned enterprises, government agencies, and sovereign entities are parties. Disputes involving expropriation, breach of stabilisation commitments, non-payment under public procurement contracts, and disputed regulatory decisions involve factual narratives contested at their most fundamental level. What a minister said, what an official knew, and what assurances were given are precisely the questions that witness testimony and cross-examination are designed to address.

Long project timelines. African infrastructure and natural resources projects frequently span decades and are implemented through complex multi-party structures such as joint ventures, production-sharing agreements, and public-private partnerships. Establishing what happened and whose authority extended to which decisions requires witness evidence in a way that rarely arises in short-form commercial transactions.

The African Continental Free Trade Area (AfCFTA) dimension. The AfCFTA Agreement entered into force on 30 May 2019, and trade under AfCFTA commenced on 1 January 2021. The Agreement is being developed in phases, with Phase II instruments, including the Protocol on Investment adopted in February 2023,¹⁰ expected to contribute to a growing pipeline of intra-African disputes as implementation and ratification proceed. These disputes are likely to arise between parties from different African legal traditions and will involve complex factual questions across jurisdictions with varied regulatory infrastructures. The AfCFTA thereby expands the range of African disputes in which witness evidence will play a central role.

III. The Critiques, Examined Through an African Lens

The **efficiency critique** links dissatisfaction with arbitration's time and cost to the use of multiple witnesses and lengthy cross-examination. This resonates in Africa, where cost sensitivity is acute and where arbitration that becomes too expensive risks excluding African corporates and states from effective dispute resolution. However, the efficiency critique properly supports disciplined witness management, not elimination. In disputes characterised by incomplete documentary records and state-party involvement, the efficiency of a documents-only process is illusory: a tribunal unable to hear and test relevant witnesses is less likely to reach a correct outcome, and the risk of an enforcement challenge on procedural fairness grounds increases. An efficient process that produces a wrong or unenforceable result is not efficient at all.

The **document-sufficiency critique**, that most commercial disputes have enough written records to be decided on documents alone, rests on assumptions that do not hold across significant portions of African commercial practice. Customary law scholarship observes that in many African customary systems, agreements were entered orally without the need for formalised wording. The distinction between

¹⁰ African Union (2018) *Agreement Establishing the African Continental Free Trade Area (entered into force 30 May 2019)*. Kigali: African Union. Available at: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf

"official customary law," meaning written or codified norms, and "living customary law," meaning the unwritten practices parties actually observe, applies directly to commercial contexts. The written text of a contract can be an imperfect proxy for the reality that parties understood and performed. A witness can speak to that reality in ways that documents cannot.

The **civil law critique**, that cross-examination imposes a common law template on parties from civil law traditions, acquires distinctive complexity in Africa. Anglophone African jurisdictions including Nigeria, Kenya, Ghana, and Tanzania operate within common law traditions. Francophone jurisdictions including Côte d'Ivoire, Senegal, and Cameroon operate within civil law traditions influenced by French law and the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) framework. Certain jurisdictions, notably Mauritius and South Africa, operate within genuinely mixed systems. A single African arbitration may involve parties from both traditions, arbitrators from diverse legal backgrounds, and institutional rules designed to be neutral between them. African practitioners who routinely navigate this interface have developed a pragmatism about procedural hybridity that pre-empts more doctrinaire debates arising elsewhere.

IV. African Legal Values: Orality and Procedural Legitimacy

These observations apply to those systems and traditions in which they are grounded, not as universal features of a single African culture. Africa comprises 54 states, or 55 when counted in accordance with African Union membership and reflects a wide diversity of legal and commercial contexts.

Orality in African customary legal systems. Customary law scholarship consistently notes the oral character of many African customary legal systems, where rules and norms were preserved and transmitted orally. In commercial environments shaped by oral tradition, parties' practices reflect traditions of oral agreement and spoken commitment. A witness can speak to the living reality of how parties operated under a contract, even where the written text is incomplete or tells a different story. That is precisely the value of witness evidence in disputes where text and practice diverge.

Ubuntu and legitimacy through dialogue. Ubuntu is an influential normative framework in parts of sub-Saharan Africa that foregrounds communal participation, dialogue, and relational consensus as the basis for legitimate decision-making. Where it is a relevant cultural frame, it supports a practically important claim: legitimacy is generated through the opportunity to speak, to be heard, and to have contested accounts tested in open exchange. The oral hearing, when carefully managed and issue-focused, carries a legitimacy dividend that a documents-only process cannot replicate. This is particularly significant where the opposing party is a state or state-owned enterprise: a government that accepts an adverse award after a process affording a genuine opportunity to present and test evidence is in a substantially stronger political position than one facing an award rendered on documents alone.

Orality and multilingualism. Many Africa-connected arbitrations often involve parties operating across French, English, Portuguese, Arabic and multiple African languages. In such cases, an oral hearing conducted with adequate interpretation may give parties a more direct and meaningful opportunity to participate. This due process concern can also have enforceability consequences: Article V(1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 permits a court to refuse enforcement where a party was unable to present its case,¹¹ while Article

¹¹ United Nations Commission on International Trade Law (1958) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*. New York: United Nations. Available at: <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/new-york-convention-e.pdf>

18 of the UNCITRAL Model Law on International Commercial Arbitration requires that each party be given a full opportunity to present its case.¹²

V. African Courts: Jurisprudence on Witness Evidence

Nigeria. In *Kano State Urban Development Board v Fanz Construction Co Ltd*,¹³ the Nigerian appellate courts treated serious evidential irregularity in arbitration as capable of undermining an award. The case raised the question whether the arbitrator's exclusion of material evidence amounted to misconduct warranting setting aside the award, and the Supreme Court ultimately allowed the appeal and set the award aside. This confirms that witness-handling is part of procedural justice in arbitration and that its denial is capable of undermining an award.

Kenya. In *Nairangu & 61 Others v Attorney General & 2 Others* [2004] eKLR,¹⁴ the Kenyan High Court held that the failure to afford the plaintiffs an opportunity to question witnesses during cross-examination constitutes a legitimate basis for challenging an arbitral outcome.

South Africa. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6,¹⁵ the Constitutional Court affirmed that private arbitration is grounded in party autonomy and consent but stressed that the arbitration agreement is ordinarily subject to an implied condition that the arbitrator will proceed fairly and afford each party a proper opportunity to present its case. An arbitral award is therefore vulnerable to being set aside where misconduct or a gross procedural irregularity in the conduct of the proceedings is shown, including a denial of a fair opportunity to be heard.

OHADA / Francophone Africa. Under the OHADA arbitration regime, which operates across 17 African member states through institutions including the Common Court of Justice and Arbitration (CCJA), failure to respect the *principe du contradictoire*, the requirement that each party must know and be able to respond to the case against it, is a recognised ground for challenging an award.¹⁶ CCJA case law interprets this principle as requiring both knowledge of the proceedings and a genuine opportunity to respond to the opposing case.¹⁷ Although not identical to common law cross-examination, it serves a closely related function in witness-heavy disputes by ensuring a meaningful opportunity to confront and contest the opposing party's evidence and arguments. Accordingly, rather than prioritising document-centric arbitration, African civil law practice often incorporates more orally

¹² United Nations Commission on International Trade Law (2008) *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006*. Vienna: United Nations. Available at: https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

¹³ *Kano State Urban Development Board v Fanz Construction Co Ltd* [1990] 4 NWLR (Pt 142) 1 (SC). Available at: <https://www.acerislaw.com/wp-content/uploads/2020/11/KANO-STATE-URBAN-DEV-BOARD-VS-FANZ-CONSTRUCTION-CO-LTD-1990.pdf>

¹⁴ *Nairangu & 61 Others v Attorney General & 2 Others* [2004] KEHC 721 (KLR); [2004] eKLR. High Court at Nyeri, Civil Case 268 of 1987, judgment delivered 21 March 2005. Available at: <https://new.kenyalaw.org/akn/ke/judgment/kehc/2004/721/eng@2004-03-21>

¹⁵ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; Constitutional Court of South Africa, decided 20 March 2009. Available at: <https://collections.concourt.org.za/server/api/core/bitstreams/2a7efcde-300d-4e39-adcb-3af7a33f17ff/content>

¹⁶ Organisation for the Harmonisation of Business Law in Africa (OHADA) (1999) *Uniform Act on Arbitration. In: Compilation of Treaties and Uniform Acts: Official Translation*. Ouagadougou: OHADA. Available at: <https://jusmundi.com/en/document/pdf/rule/en-ohada-organisation-for-the-harmonisation-of-corporate-law-in-africa-uniform-act-on-arbitration-1999-ohada-uniform-act-on-arbitration-1999-thursday-11th-march-1999>

¹⁷ Common Court of Justice and Arbitration (CCJA) (2015) *Judgment No. 104/2015, Req. No. 094/2014/PC dated 21/05/2014, Judgment of 15/10/2015*. Available at: <https://www.ohada.com/documentation/jurisprudence/ohadata/J-16-97.html>

oriented processes that fulfil a comparable legitimacy function through effective adversarial engagement.

This body of African jurisprudence rejects the marginalisation of cross-examination and instead endorses it as a core component of procedural fairness subject to disciplined and fair control.

VI. African Arbitral Institutions: A Comparative Assessment

Institution	Hearing entitlement	Witness statements	Remote evidence
Cairo Regional Centre for International Commercial Arbitration (CRCICA), Egypt (2024) ¹⁸	Tribunal shall hold a hearing if requested by any party; otherwise the tribunal decides whether to hold hearings or proceed on documents (Art 28(1))	May be presented in writing and signed by the witness, unless the tribunal directs otherwise (Art 27(2))	Hearings may be held in person, remotely by videoconference or other appropriate means, or in hybrid form, as decided by the tribunal after consulting the parties (Art 28(2))
Nairobi Centre for International Arbitration (NCIA), Kenya (2019) ¹⁹	Each party has the right to be heard orally before the tribunal on the merits of the dispute, unless the parties have agreed on a documents-only arbitration (Rule 22(1))	No express provision; the tribunal retains broad discretion over the admissibility, relevance and form of evidence (Rule 25(1)(d))	Hearings or any part thereof may be conducted via videoconference, telephone or other electronic means, with the agreement of the parties or at the discretion of the tribunal (Rule 22(5))
Mauritius International Arbitration Centre (MIAC), Mauritius (2018) ²⁰	Oral hearings are contemplated; where a hearing is held, the tribunal shall give the parties adequate advance notice of the date, time and place thereof; the tribunal decides whether to hold hearings or proceed on documents (Art 28(1))	May be presented in writing and signed by the witness, unless the tribunal directs otherwise (Art 27(2))	Tribunal may direct witnesses, including expert witnesses, to be examined via videoconference or other telecommunications means not requiring physical presence at the hearing (Art 28(4))
Lagos Chamber of Commerce International Arbitration Centre	Tribunal shall hold a hearing if requested by any party; otherwise the tribunal decides whether to hold	Shall be presented in writing and signed by the witness, unless the tribunal	Tribunal may direct witnesses, including expert witnesses, to be examined via videoconference or other telecommunications means

¹⁸ Cairo Regional Centre for International Commercial Arbitration (CRCICA) (2024) *CRCICA Arbitration Rules 2024*. Available at: https://thecima.org/wp-content/uploads/2025/08/cr_arb_rules_en.pdf

¹⁹ Nairobi Centre for International Arbitration (NCIA) (2019) *NCIA Arbitration Rules (2019)*. Available at: <https://jusmundi.com/en/document/rule/en-ncia-nairobi-centre-for-international-arbitration-arbitration-rules-2019-ncia-arbitration-rules-2019-thursday-21st-march-2019>

²⁰ Mauritius International Arbitration Centre (MIAC) (2018) *MIAC Arbitration Rules 2018*. Available at: <https://miac.mu/wp-content/uploads/2025/09/MIAC-Arbitration-Rules-2018.pdf>

Institution	Hearing entitlement	Witness statements	Remote evidence
(LACIAC), Nigeria (2016) ²¹	hearings or proceed on documents (Art 23(3))	directs otherwise (Art 34(2))	not requiring physical presence at the hearing (Art 35(4))
Common Market for Eastern and Southern Africa (COMESA) Court of Justice (2018) ²²	Tribunal shall hold a hearing if requested by either party at any stage of the proceedings (Rule 11(3)); if requested at the preliminary meeting, the tribunal shall fix a hearing date; in the absence of a request the tribunal may proceed on documents (Rules 22(1)-(2))	May be presented in writing and signed by the witness, unless the tribunal directs otherwise (Rule 22(10))	Tribunal may direct witnesses, including expert witnesses, to be examined via videoconference or other telecommunications means not requiring physical presence at the hearing (Rule 22(7))
Arbitration Foundation of Southern Africa (AFSA) International (2021) ²³	Tribunal shall hold a hearing if requested by any party; in the absence of a request, the tribunal may of its own motion schedule a hearing (Art 21(2))	May be presented as a signed written statement (fact witnesses) or signed written report (expert witnesses); any party may request that a witness whose written testimony is relied upon attend for oral examination (Arts 22(3) and 22(5))	May be presented as a signed written statement (fact witnesses) or signed written report (expert witnesses); any party may request that a witness whose written testimony is relied upon attend for oral examination (Arts 22(3) and 22(5))

Across the institutional rules surveyed, witness evidence is treated as a standard procedural tool that tribunals may structure and, where appropriate, limit, with several rules now expressly accommodating remote or hybrid testimony. A number of institutions, including CRCICA, MIAC, LACIAC, AFSA and COMESA, require the tribunal to hold an oral hearing where duly requested by a party, thereby limiting the risk of documents-only proceedings being imposed by tribunal preference. AFSA further exemplifies a structured approach to witness management by permitting tribunals to require advance identification of witnesses and the substance of their evidence, and by allowing parties to seek oral examination of witnesses whose written testimony is relied upon. Taken together, these frameworks indicate a convergence among African and Africa-facing institutions towards procedural safeguards that preserve meaningful witness confrontation while normalising technology-enabled hearings.

VII. Practical Steps: Disciplining, Not Discarding, Witness Evidence

²¹ Lagos Chamber of Commerce International Arbitration Centre (LACIAC) (2016) *LACIAC Arbitration Rules 2016*. Available at: <https://jsumundi.com/en/document/rule/en-laci-lagos-chamber-of-commerce-international-arbitration-centre-arbitration-rules-2016-laci-lagos-chamber-of-commerce-international-arbitration-centre-arbitration-rules-2016-friday-1st-january-2016>

²² COMESA Court of Justice (2018) *Arbitration Rules of the COMESA Court of Justice (2018)*. Available at: <https://comesacourt.org/wp-content/uploads/2019/11/COMESA-COURT-ARBITRATION-RULES-2018.pdf>

²³ Arbitration Foundation of Southern Africa (AFSA) (2021) *AFSA International Rules (2021)*. Available at: <https://arbitration.co.za/arbitration/international-arbitration/international-rules/>

Front-load evidentiary design. At the first case management conference, tribunals should require parties to explain why each witness is necessary and what specific issue each addresses. This prevents witness inflation and aligns oral evidence with genuinely contested issues.

Design witness statements for African dispute realities. Where oral agreements and relational commercial arrangements are significant, statements should capture what the documentary record does not, anchored where possible to contemporaneous materials, with personal knowledge clearly separated from inference.

Implement memory safeguards. The ICC memory report recommends earlier capture of recollection, neutral and open-ended questioning, and avoidance of group preparation where contamination risk exists. In African arbitrations involving large project organisations or state entities, where witnesses are often prepared collectively, this risk is particularly acute.

Constrain cross-examination to genuine necessity. Tribunals should impose time limits and issue-scoping requirements at the outset and actively manage examination that strays into collateral matters. Better-targeted cross-examination produces more accurate fact-finding at lower cost.

Use remote hearing technology as an access tool. All major African institutional rules expressly permit remote witness examination, expanding access to witnesses who might otherwise be excluded by distance, travel cost, visa constraints, or security considerations.

VIII. Conclusion: Africa as Norm-Shaper

Witness testimony and cross-examination are not overrated in international commercial arbitration. The efficiency critiques call for disciplined management. The reliability critique calls for better design. The civil law critique does not speak cleanly to the African context, where both the *principe du contradictoire* and the common law right of cross-examination point in the same direction: parties must have a genuine and structured opportunity to present and test factual evidence.

The case for retaining these tools is grounded in the structural realities of African commercial disputes: incomplete records, state actors, oral tradition in many customary systems, long project timelines, and the growing pipeline of AfCFTA-generated disputes. It is confirmed by African courts, which have independently concluded that access to witness evidence and the opportunity to test it are procedurally significant protections. It is supported by African institutional rules, which largely anticipate witness evidence, protect the right to a hearing, and increasingly enable technology-facilitated oral participation.

Africa's contribution to the global debate is to move to the next stage: codifying best-practice witness governance in African institutional frameworks, producing Africa-grounded scholarship, and engaging actively in the international forums where procedural norms are made.

The right response to the overrated critique is not to downgrade witness testimony and cross-examination. It is to run them better, and for Africa to be clear, on the global stage, about why they matter.

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