

The Perfect Arbitral Storm in Africa

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Two things are currently unfolding in Africa: significant economic progress and profound political transformation. On the economic front, in the last decade, Africa has been one of the fastest growing continents in the world. Indeed, according to the International Monetary Fund, in the next five years, Africa is expected to be the fastest growing continent, surpassing Asia. *The Economist* notes that “[m]uch has been written about the rise of the BRICs and Asia’s impressive economic performance. But ... over the ten years to 2010, six of the world’s ten fastest-growing economies were in sub-Saharan Africa... Over the next five years Africa is likely to take the lead. In other words, the average African economy will outpace its Asian counterpart.”

On the political front, some parts of North Africa, including Egypt, Tunisia, and Libya, are undergoing revolutionary transformations. The last time there had been a revolution in Libya, numerous disputes led to the three Libyan Oil arbitration cases - Colonel Gaddafi’s least recognized gift to the development of the jurisprudence of international arbitration. Although the nature of the revolutionary transformation in Africa this time around seems different, disputes cannot be less likely. Ironically, prior to the revolutions in Egypt, Tunisia, and even Libya, significant economic growth was recorded in each country. Foreign investment was at an all-time high. The economic transformation has been steady and appears sustainable. Moreover, the political transformation has been relatively less violent than before for the most part. When these factors are coupled with the developed

world's enthusiastic support for the changes, it is not difficult to see that the pacific settlement of disputes of any nature, including commercial and investment disputes, would be the most likely outcome. It is this combination of economic progress and political transformation that I call the perfect storm for international arbitration.

A remarkable new player on the field is also adding to the further perfection of the storm - that player is none other than China. Chinese trade and investment in Africa has been growing at unprecedented and extraordinary levels. To mention just a few examples, between 2000 and 2008, mineral export from Africa to China increased by 5000% while total trade grew by 700%, exceeding the \$100 billion margin.^[fn]See ACET, *Looking East*, vol. II, 11 and 13 (using calculations based on Trade Law Centre for Southern Africa's 2009 calculations). The study is available at <http://acetforafrica.org/publications/post/looking-east-chinas-engagements-with-africa-country-reports/> (October/November 2009).^[fn] It has been more than six years now since Chinese investment in Africa has surpassed that of the World Bank.^[fn]See McKinsey & Company, *Lions on the Move: The Progress and Potential of African Economies: Report*, June 2010, at pp. 15-16. Citing the World Bank's Annual Report of 2008. Full report available at http://www.mckinsey.com/mgi/publications/progress_and_potential_of_african_economies/pdfs/MGI_african_economies_full_report.pdf.^[fn] Given the proliferation in economic relations in the last ten years, a remarkable increase in disputes coming to the fore is fairly predictable as disputes are natural consequences of economic interaction of this scale. According to the latest China-Africa Ministerial Action Plan, arbitration is the preferred means of dispute settlement. It reads in relevant part: "The two sides agreed to properly handle trade differences and frictions through friendly consultation under the principle of mutual understanding and mutual accommodation. The two sides agreed to encourage the usage of national and regional arbitration organs in resolving contractual conflicts between Chinese and African enterprises."

Dean Philip McConnaughay of Penn State Law School, who spent almost ten years in Tokyo and Hong Kong as a resident partner of Morrison & Forester, recalls being challenged by his co-panelists at an American Bar Association forum in the early 1990s when he said that Asia was becoming as attractive a place to arbitrate as the leading Western centers. The challenge was grounded on the argument that the Asian legal infrastructure was inadequate to support a vibrant arbitration

regime and that paving the way would take many years. As it happens, international arbitration found an alternative and largely independent way of flourishing in some parts of Asia. As Dean McConaughay and Professor Tom Ginsburg observed in their book *International Commercial Arbitration in Asia*: “[P]aradoxically...it sometimes seems as if the relationship [] between legal infrastructure development and a suitable environment for international commercial arbitration has been inverse, with Japan (until recently, Korea and Taiwan) continuing to neglect arbitration-specific deficiencies in its otherwise highly developed judicial and legal infrastructure, while China (and to a lesser extent Malaysia, Indonesia, Thailand, and Vietnam) continues to promote arbitration-related improvements despite the relative under-development of its judicial and legal infrastructure. The lesson provided by these latter nations is an important one for developing economies, for it suggests that a nation can provide a means of commercial dispute resolution meeting international standards, and thereby promote both domestic and international investment and exchange, long before it will be able to afford and provide the permanent legal institutions characteristic of highly developed economies.” A case in point is the ascent of the China International Economic and Trade Arbitration Commission (CIETAC) to prominence in the last decade.

Dr. Mohamed Abdel Raouf, who took over the Directorship of the Cairo Regional Center for International Commercial Arbitration (CRCICA) after Dr. Nabil Elaraby left to become the Secretary General of the Arab League, has recently noted that “[t]he year 2010 was an exceptional year as far as CRCICA’s caseload is concerned (66 new cases). In spite of the recent events in the region, the first half of 2011 has witnessed the filing of 30 new cases. It is expected that the recent disruption caused to the performance of some contracts may well give rise to force majeure and insurance related claims.”[fn]CRCICA, Annual Report 2010-11, Letter From the Director, available on the official website of the CRCICA at http://www.crcica.org.eg/publication/annual/pdf/English/11/CRCICA_ANNUAL_REPORT_10-11.pdf. [fn] Indeed, two investment claims ([here](#) and [here](#)) have already been filed against Egypt after the fall of former President Hosni Mubarak. Similar claims are likely to be filed against Libya in the near future.

It appears, therefore, that what Dean McConaughay said a couple of decades back about Asia could be said about Africa today. Arbitral institutions such as CRCICA are already seeing a dramatic increase in the need for their services. It is

time that stakeholders in international arbitration pay closer attention to these developments in Africa.