Kluwer Arbitration Blog

Arbitration in Africa: Past, Present, and Future

Alexis Martinez, Emma Mason (Squire Patton Boggs) · Wednesday, January 13th, 2016

"A course in international arbitration that does not cover the Libya oil arbitration cases of the 1970s would probably be considered incomplete by most standards." (Arbitration in Asia and Africa: Profiles of Selected Arbitral Institutions, Won Kidane, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library, Volume 23, p.367)

This quote, set against the recent spate of opinion pieces, including on this blog site, heralding the rise of arbitration in Africa inevitably leads one to ask: (i) why a continent, considered by many to have been the springboard for the unprecedented modern growth in arbitration in Europe and Asia (Arbitration in Asia and Africa: Profiles of Selected Arbitral Institutions, Won Kidane, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library, Volume 23, p.367) recently went through a significant increase in the number of international arbitrations, and (ii) what is the current state of arbitration in Africa today.

The first question can be answered by looking at the growth of Africa's economy over the past decade and accompanying developments. The average GNI per capita in Sub-Saharan Africa more than tripled between 2003 and 2014. This, in turn, led to an increase in the level of foreign investment in the continent and, inevitably, to an increase in international disputes. Combined with some multinational companies' desire to avoid local courts (Guerilla Tactics and How-to Counter Them in National Litigation: Experiences from African Legal Systems, Stephen Wilske and Gunther J. Horvath) and a strong arbitration tradition in international trade, it is unsurprising that international arbitration in Africa or involving African companies is on the rise.

The remainder of this blog post will address the second question through: (i) a brief analysis of two factors that influence corporations when choosing the arbitration seat, namely the legal framework and the arbitral institutions, and (ii) the use of African arbitrators by national and international parties.

The arbitral legal framework in Africa is a mix of old and new law with each country having its own unique blend. However, as a general overview, it has been said that there are three generations of African arbitral laws (Arbitration in Asia and Africa: Profiles of Selected Arbitral Institutions, Won Kidane, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library, Volume 23, footnote 1 at p.370) many of which still exist in some shape or form today and must therefore be taken into consideration by any party involved in or seeking to commence arbitration in the continent. First generation arbitral laws are those

emanating from the colonial era. Second generation arbitral laws typically find their roots in French and UK arbitral laws such as the 1950 Arbitration Act and the French Civil code and are thought to have been heavily influenced by the proliferation of arbitration in Europe. Third generation arbitral laws are thought to have been heavily influenced by the UN General Assembly's efforts to achieve a recognised standard for arbitral laws and include, amongst others, the UNCITRAL Model Law (or an adaption thereof) (the "Model Law") or the Organisation for the Harmonisation of Business Law in Africa's ("OHADA") Uniform Act on Arbitration (the "UAA").

As at the time of writing, ten African countries had implemented the Model Law which contains principles generally accepted to be crucial to international arbitration practice. However, the authors are not aware of any African countries that enacted the Model Law "as is". Therefore, a party looking to select a seat in a country that enacted the Model Law should consult local counsel to check for deviations. For example, the Egyptian Arbitration Act No. 27 of 1994 is based on the Model Law but deviates from it in a number of ways, including a provision that if the parties to the arbitration agreement have not agreed the language of the proceedings, then the default language is Arabic.

There have been similarly positive harmonization steps taken by the 17 African countries signatory to the OHADA Treaty. The UAA was adopted in 1999 and is based on the UNCITRAL model law, sharing many of its principles. It applies to any ad hoc arbitration seated in an OHADA signatory country and supersedes any previously existing national law (although the UAA remains subject to any national law that does not conflict with its provision).

Therefore, while Africa, like its European counterpart, does not have a harmonised arbitration law that applies to the continent as a whole, it is clear that Africa is rapidly improving in one of the most important factors affecting choice of seat. This should give comfort to foreign investors that, in the event of a dispute, an arbitration seated in Africa will be governed by laws that are in accordance with internationally recognized principles.

Nonetheless, against this positive backdrop, one must note that the majority of arbitrations involving an African party still take place outside of the continent (Arbitration in Asia and Africa: Profiles of Selected Arbitral Institutions, Won Kidane, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library, Volume 23, footnote 1 at p.367). Illustratively, the percentage of referrals to the LCIA from African parties increased from 5.5% in 2012 to 7.6% in 2013. What therefore, one might ask, is the reason for this? While some of the answer may lie in deep-seated prejudices created by stereotypes of the African judicial system, issues remain. For example, the conflict of interest created by the dual role of the CCJA, which is both an arbitration institution administering proceedings under the UAA, and a court hearing challenges to the validity of arbitral awards. Or issues as to the enforceability of arbitral awards, as OHADA awards are only enforceable if the award is made and enforced in an OHADA country, a number of African countries are not parties to the New York Convention, and of the 34 African countries signatory to the New York Convention, some countries, such as the Democratic Republic of Congo, reserved the right to refuse to enforce certain foreign arbitral awards. Finally, the question of the interference of the courts lingers. For example, the recent Tanzanian High Court decision in Dar-es-Salaam on 23 April 2014 to grant an interim injunction in ICSID proceedings where the parties had not expressly agreed court had the authority to do so (in the self-contained ICSID system, unless the parties agree otherwise, only the tribunal may grant provisional measures).

Given that modern arbitration in Africa is still in a relatively fledgling stage it is perhaps not surprising that the 2015 edition of Chambers and Partners "Most In Demand Arbitrators – Global Wide" doesn't feature a single African arbitrator. However, given that it is widely accepted practice that an appointer will seek to select an arbitrator whom he believes will be sympathetic to his case, it is surprising that African parties appear to share foreign investors' reluctance to appoint African arbitrators. The authors would argue that it would favor the continued development of African arbitrators were Africa itself to begin to consistently endorse its "home grown" talent.

However, there are many reasons to be positive about the growth of arbitral institutions in Africa. Africa possesses established arbitration institutions, including the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") initiated in January 1979, the Lagos Regional Center ("RCICAL") which was set up in 1989, and the Cour Commune de Justice et d'Arbitrage ("CCJA") in Cote d'Ivoire established in 2001 by the OHADA. Recent times have also seen an exponential increase in the number of and sophistication of available arbitral institutions in Africa including, in 2012 alone, the Kigali Centre for International Arbitration ("KIAC"), the Lagos Court of Arbitration, and the LCIA-MIAC Arbitration Centre (a collaborative union between the LCIA in London, the government of Mauritius, and the Mauritius International Arbitration Centre). These modern arbitral institutions are attracting attention and international recognition. For example, the CRCICA was awarded the Regional Arbitration Centre of 2013 by GAR "in recognition of its great strides" and in 2014 one of the directors of the CRCICA was appointed vice president of the International Council for Commercial Arbitration ("ICCA"). The CRCICA administers a large and increasing number of cases: 74 in 2014, and 72 in 2013, with the largest amount in dispute being $176,000,000. These institutions are adopting modern arbitral trends such as introducing emergency arbitrator provisions. An increasing case load and a proven track record of administering high value proceedings can only serve to provide comfort to foreign investors and encourage them to select an African arbitral institution.

Overall, thanks to economic growth, arbitration in Africa has seen a clear increase in the number of accessible international institutions and the number of arbitration proceedings being heard. This growth, in combination with past and present efforts of African countries to harmonise their arbitration laws will likely support further growth in the continent. Though there is undoubtedly some way to go, it is not inconceivable that in the near future a course on modern international arbitration would be incomplete without a mention of the rise and rise of arbitration in Africa in the 21st Century.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

2024 Summits on Commercial Dispute Resolution in China

17 June – Madrid
20 June – Geneva

Register Now →

This entry was posted on Wednesday, January 13th, 2016 at 12:00 pm and is filed under Africa, Appointment of arbitrators, Arbitral seat, Arbitration, Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.