Kluwer Arbitration Blog

Africa, stand up for Africa

Rubin Mukkam-Owuor (JMiles & Co.) · Saturday, March 10th, 2018

It is trite that economic growth in Africa and the scale of investment into the region has thrust international arbitration to the forefront of dispute resolution on the continent. Indeed, the proliferation of African international arbitration centres (there are more than 40 currently in existence) is testament to the fact that African governments are alive not only to an international preference for arbitration as a mechanism for the resolution of disputes, but also to the potential of arbitration as an economic activity, with local lawyers, hotels, conference centres, and transcribers set to benefit.

It is also well-known that while Africa-related arbitration is on the rise, this is not reflected in an increase in the appointment of African arbitrators, or in the popularity of African seats. This is borne out in the oft-quoted statistics published by the ICSID, ICC and LCIA.

Misunderstood

There is a false perception that arbitration as a practice is under-developed in Africa, and that there is a lack of expertise in arbitration on the ground. There is also a perception that African governments may not be pro-arbitration, and that enforcing international arbitral awards in African countries is difficult.

Evidence shows that the reality is quite different. In fact, there are very many well-qualified and experienced African arbitration counsel and arbitrators, and some of the arbitration centres on the continent are well-established and have a reasonably large international arbitration case load. The Cairo Centre for International Commercial Arbitration (CRCICA) is a notable example in this regard. Many African countries' arbitration laws are based on the UNCITRAL model law, and have been through reform in the last 10 years. 36 of the 54 African countries are party to the New York Convention, while 47 are signatories to the ICSID Convention.

As for enforcement, though there is insufficient data from which to establish a trend, African courts generally do not take an adverse approach to enforcement. Au contraire, we have seen the upholding of arbitral awards by local courts, even when it is against a state-owned company, the most high profile example of which is probably the Tanzanian courts' enforcement of a $65 million award against the Tanzania Electric Supply Company (TANESCO) in the Dowans case. Between 2011 and 2014,

the Kigali International Arbitration Centre (KIAC) issued three arbitral awards against government parties, and not a single one of these were challenged in the Rwandan courts. The exclusion of the public policy argument as a ground on which to refuse enforcement of a foreign arbitral award in the laws of Nigeria and Tanzania show a strong commitment to honouring international arbitral awards. Even where grounds exist in local legislation to avoid enforcement (such as in South Africa – there is a specific provision requiring approval of the Minister of Economic Development for the exequatur of certain foreign arbitral awards), we have seen that these provisions are interpreted narrowly in practice so as to permit enforcement.

Notwithstanding the above, the exclusion of African counsel, arbitrators, seats and centres from amongst internationally preferred choices has led to a lack of African experience in these spheres, for which there is no substitute. This must be urgently resolved, so that African experience can catch up to African demand for arbitration services, and start shaping the very dispute resolution mechanism that will increasingly impact the continent.

One solution is to build a track record by actively promoting the use of African counsel, arbitrators, seats and centres in arbitrations originating within Africa ("intra-African arbitration"). This is a good starting point, and would demonstrate to the outside world that African parties have faith in African arbitration, and therefore they should too.

Gaining Experience: (i) counsel; (ii) arbitrators; (iii) seats; and (iv) centres.

Counsel

An analysis of the ICSID cases involving East African state parties shows that all of them, save for one involving Burundi, involved the state being represented by an international law firm (ILF). In many cases, these ILFs partnered with co-counsel who were based locally. This should be formalized in the legal policy of African states, such that partnership between ILFs and locally-based firms is mandatory in any arbitration involving the government. This will enable the transfer of knowledge and skills, and the opportunity to gain from the wealth of experience which ILFs have to offer, in order to build local capacity. The ICSID cases involving Kenya seem to evidence that this policy has been adopted in Kenya. This has been taken to an extreme in Nigeria, where the Legal Practitioners Act has once before been interpreted as precluding parties from being represented by international counsel, and requiring that all oral advocacy be conducted by Nigerian counsel in order to avoid potential challenges to the resulting arbitral award.

Arbitrators

There is a strong case for appointing an African arbitrator in any arbitration which involves African parties and/or a contract which is substantially performed in Africa. Arbitrators from the same cultural background as the parties, who understand the local conditions, are in the best position to resolve these disputes. There is no dearth of training afforded to African arbitrators, with the African Legal Support Facility and Africa International Legal Awareness carrying out various trainings, and many

conferences having taken place in African cities, particularly over the last four years. That said, training is no substitute for experience in a live arbitration. African arbitrators should be allowed to observe ongoing arbitration proceedings (with the necessary restrictions in place of course), to gain experience.

Seats

Although generally, the suitability of African countries as arbitral seats has not yet been tested, there are specific improvements which can be made to ensure that they are viable seats. Concerns surrounding bureaucracy and delay can be dispelled by allowing arbitration-related matters to be fast-tracked to experienced specialist judges. This has worked particularly well in Mauritius. It is also important that English is universally accepted for use in court – for example, the mandatory use of Arabic in court submissions in Morocco has limited its attractiveness as an arbitral seat in non-Arabic language arbitrations. It is also critical that local arbitration laws are modern and keep up with developments in international arbitration law – for obvious reasons, this is often cited as one of the most important factors in choosing a seat.

Mauritius and Egypt have shown themselves to be sound choices for African arbitral seats, and their use in intra-African arbitrations should be promoted.

Centres

Part of the reason that no one African arbitration centre has gained traction, is that there are simply too many of them. Limited resources should be channeled efficiently for the development of three or four regional centres, which are fully equipped with state-of-the-art facilities and information technology. If establishing a regional centre faces too much red-tape, then governments should consider simply promoting those African institutions which have successfully established themselves (such as the CRCICA, Mauritius International Arbitration Centre and the KIAC which have all struck the right balance between being supported by their respective governments, without control or interference from them), and making them the default choice in their contracts. This removes an item from public expenditure, and may have benefits in terms of the political leverage to be gained from encouraging the use of one or more of these centres.

The Arbitration Foundation of South Africa (AFSA) has potential to become a powerhouse in international arbitration in southern Africa. Its strong domestic arbitration caseload demonstrates that it has gained the trust and acceptance of the local community, and this should be a good springboard from which to build an international arbitration centre.

If these centres were promoted in intra-African arbitrations, then they would build a track record of international arbitrations (albeit from other African countries), and gain enough credence to administer non-African arbitrations.

Telling the World

Africa must be cognizant of its bargaining power. In the scramble for resources, investors will be forced to accept local or regional arbitral systems and/or African

seats, or risk losing deals. Indeed, in a survey conducted by Simmons & Simmons in 2015, 72% of respondents said that they would consider using local or regional arbitral systems, and 58% said they would use an African seat.

In order to correct the misconception that Africa is not arbitration-friendly, it is incumbent on us to take active steps to increase awareness. We must build up the capacity of our arbitration centres, then market them aggressively. We must make legislative reforms an agenda priority, then publicise them widely. In all these efforts, it is important to act quickly and capitalize on the current interest in the continent, as this will eventually wane.

If we are successful, perhaps what might emerge is a more mature African arbitration jurisprudence, and evolution of an African-centric style of arbitration, or at the very least, one in which Africa has had an influence.

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