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# Kluwer Arbitration Blog

## Watch Out, Africa is Here! – The East African International Arbitration Conference 2019

Sadaff Habib (Beale & Company LLP) · Tuesday, October 29th, 2019

This August, Kenya hosted the 7<sup>th</sup> annual East African International Arbitration (EAIAC) conference. This year's theme was *Government Contracting and Investment Disputes: Lessons for States and Investors*. The conference explored the full spectrum of government contracting from procurement and PPPs (public-private partnerships), tender disputes, dispute mitigation in government contracts, investment arbitration and arbitrating with governments in African centres. It was a delight to be involved in an interesting flurry of debate and discussion on arbitration in Africa and to meet so many reputable African practitioners.

The main takeaway from the conference is that East Africa has come far in the past 15 years in international arbitration. However, there still remains a lot to be done for African countries to establish themselves as favourable seats of arbitration and for local arbitration centres to be included in contracts. Gauging the progress and enthusiasm the future does look optimistic. Below is a snapshot of key themes and topics that were discussed.

### What is Being Done to Bring Confidence in Arbitration in East Africa?

Mr Allen Gichuhi, the President of the [Law Society of Kenya \(LSK\)](#), remarked that it is key to make arbitration a cost-effective mechanism that will appeal to users. Also, strength in numbers is beneficial to push Kenya and East Africa as an arbitration hub. This is being done through the LSK partnering with organizations such as the [Chartered Institute of Arbitrators](#) to jointly promote and advance alternative dispute resolution. There are currently 600 advocates who are registered as arbitrators with the CIArb.

Training is an essential component and the LSK aims to provide cost effect ADR training by partnering with associations such as the Nairobi International Arbitration Centre. On becoming a better arbitrator, Mr Gichuhi commented you do this by networking and advancing ideas.

### *The Kenyan Arbitration Story*

The Chief Justice of Kenya and keynote speaker, the Honourable David Maraga, highlighted that

arbitration in Africa has benefited from the adoption of the UNCITRAL Model Arbitration Law by African countries. Arbitration has become a preferred mechanism for settling disputes in the region and has gained popularity especially as most judicial disputes are open to public scrutiny whereas arbitration provides settlement of disputes without such disclosure.

Kenya's Arbitration Act of 1968 initially did not apply to international trade. This changed with the enactment of the Arbitration Act of 1995 which adopted the UNCITRAL Model Law. Arbitration also found a foothold in the Kenyan Constitution when it was revised in 2010. Article 159 (2) of the Kenyan Constitution 2010 states:

*“In exercising judicial authority, the courts and tribunals shall be guided by the following principles” and includes at (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted, subject to clause (3)”.*

The Kenyan Courts are promulgated as supportive of arbitration. Section 35 of the Kenyan Arbitration Act 1995 provides that a party seeking to challenge the award can do so through the High Court within 3 months of the date of receipt of the award. Section 35 provides limited grounds to challenge the award, similar in many respects to the [New York Convention](#) to which Kenya became a signatory in 1989. The Section 35 grounds include: the subject matter of the dispute not being arbitrable under the laws of Kenya, the award which goes against public policy, and evidence that the award is tainted with corruption, bribery, undue influence or fraud.

### ***Arbitration as the Solution for Judicial Backlog***

A way that ADR forms, such as arbitration, have assisted Kenya is by helping the judicial case load. In April 2016, more than Ksh 6.5 million worth of assets were released on successful conclusion of the mediation of a case which had been in court for 15 years. It took 30 days to resolve the case by mediation.

One of the speaker commented that there are currently Ksh 32 billion worth of disputes in Kenya going through mediation. Efforts are also being made to fast track the arbitration process. It is also promising to know that the latest World Bank report ranked Kenya as 61 amongst 190 economies where the preferred mode of dispute resolution is arbitration. There has been a stark improvement in the past 15 years. Kenya aspires to be in the top 50 countries by 2020.

Nairobi is the center for international arbitration in the region. Kenyan courts are doing their best to liaise with the LSK to single out arbitration disputes going to court to conclude them in the shortest possible time. It is therefore not surprising that investors not only prefer Kenya for investment but also as a seat of arbitration.

### **Is the East Africa's Investment Outlook Optimistic?**

The key drivers for growth in the region are continued investment infrastructure and growing

consumption. Unfortunately, not all regions are doing well. For example, Burundi and Somalia are lagging behind because of the lack of peace and general instability in these nations.

Speakers considered that the focus in the region should be on financing trade to public and private sectors and to support trade you need infrastructure. Key barriers to investment include:

- Intra Africa trade is minimal as there is more trading outside the continent than inside. Most African countries have uncontrollable public spending and often consider tax money as an indefinite source of income.
- Another barrier is corruption. It is almost like a second tax. African economies have not been as successful in prosecuting and convicting corrupt practices.
- Africa economies are heavily dependent on agriculture and agriculture is weather dependent. Efforts need to continue towards diversifying to manufacturing industries.

The enactment of the [African Continental Free Trade Agreement](#) last year is one of the most positive things to have happened to the region and speakers are optimistic that the agreement will have a positive impact on trade.

### **Foreign Direct Investment and State sovereignty**

In 2018, East Africa was the biggest regional attractor of FDI especially Kenya and Tanzania. The immediate outlook although positive raises concerns. African States are concerned about enacting new legislation because it may cause them to be in breach of BITs. There is a concern regarding exercising their State sovereignty. Most BITs protect rights of investors without imposing obligations creating a serious imbalance in power. Such provisions also preclude States from initiating investment treaty arbitration against investors. This has caused some countries such as Tanzania to denounce investment arbitration.

The key aspects of BITs that States should consider include the non-discrimination of foreigners and their preferential treatment, national treatment, most favoured nation treatment, fair and equitable treatment, umbrella clauses, expropriation and compensation clauses, investor obligations and dispute resolution mechanisms.

### ***Room for Improvement***

Investors are keen to know that disputes if arising can be resolved quickly. Having said that confidence needs to increase in the use of African country governing laws and seats. For example, the East and South Africa Development Bank in its contracts, as a matter of policy, refers to the English Law as the governing law with the LCIA and ICC as arbitration centres. The Bank was set up in 1985 and these policies still stand. The African arbitration ecosystem, unfortunately, has not ignited enough confidence to scrap the use of ICC and LCIA as arbitration centres and replace them with local centres. Africans wait for the day when the Bank's contracts refer to local institutions and local governing laws.

## Africans in African Arbitrations?

Interestingly, 15% of the cases in ICSID are from sub-Saharan Africa; out of these only 2% of the cases had African arbitrators. In 2019 only 2 arbitrators from Africa were appointed in ICSID cases compare to 18 from France alone.

Whilst there has been an improvement in African local counsel appointment, and Kenya took the lead in appointing local counsel in ICSID cases, a lot still needs to be done to involve local expertise. To resolve this gap in African appointments various bodies such as the East African Law Society, the LSF Academy, the International Lawyers for Africa (ILFA) are actively engaged in training young practitioners. Arbitration conferences such as EAIAC are also great platforms for African practitioners to network and assess the needs and requirements of the market.

The EAIAC Committee remarked:

*“Organizing EAIAC continues to be a very demanding yet extremely rewarding experience for us. Each year we see the platform growing and becoming a discussion and networking place for arbitration **practitioners** in East Africa and beyond. At its 7th year, EAIAC 2019 has been our best yet with a diverse representation of stakeholders from private sector, arbitration **practitioners** and government entities, thereby realizing our aim to bring all concerned stakeholders in one room to discuss current and future developments in arbitration in the region”.*

The conference concluded with an awards ceremony, the first of its kind for the conference, which recognized leading African practitioners in the region. It is hoped that creating a platform to showcase in-house African talent will make a change in the above statistics. The future remains optimistic!

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