Kluwer Arbitration Blog

World Arbitration Update: Legal Developments in Sub-Saharan Africa – Africa's Blooming

Yannick Kouassi (Strasbourg University) · Saturday, November 19th, 2022

The second edition of the World Arbitration Update was held from 26 to 30 September 2022. The panels dedicated to the African region were held on September 28, and one of the panels focused on 'Legal Developments in Sub-Saharan Africa'. The panel discussions provided an overview of and updates on the practice of arbitration in Sub-Saharan Africa, with a particular emphasis on the prospects for investors and legal practitioners, as well as associated challenges.

The panel was moderated by Ucheora Onwuamaegbu (ArentFox Schiff LLP). After a brief kick-off presentation by Efemena Iluezi-ogbaudu (Linklaters LLP), the topic was further debated by Ana Carolina Dall'Agnol (University of Oxford; Kluwer Arbitration Blog) Abayomi Okubote (Pennsbury Attorneys & Solicitors; Africa Arbitration Academy), Victoria Kigen, (Nairobi Centre for International Arbitration), and Njeri Kariuki (Chartered Institute of Arbitrators, Kenya).

The State of Arbitration in Sub-Saharan Africa: A Market for the Present and the Future

Efemena Iluezi-Ogbaudu based his presentation on two propositions. First, that the international arbitration market in Sub-Saharan Africa is not only a market for the present but also one for the future, given the entry into force of the Agreement establishing the African Continental Free Trade Area (AfCFTA). Second, even without the AfCFTA, positive developments in the domestic legal framework of Sub-Saharan African States make the countries of the region prime destinations for international arbitration.

In support of the first proposition, Iluezi-Ogbaudu highlighted the consistent rise in foreign direct investment (FDI) inflows in Africa. The Continent's post-pandemic FDI inflows have increased by 130%. He opined that with this investment potential, there will inevitably be more businesses and consequently more arbitrations arising out of business transactions with relation to the Continent. He noted that, historically, this potential is illustrated by commercial and investment landmark arbitration cases like P&ID v Nigeria and World Duty Free Company v Kenya. He also pointed out that increased activity by leading arbitration practices on the Continent shows this potential. Furthermore, with the entry into force of the AfCFTA in January 2021 – albeit with a six month delay due to Covid19 – the future looks bright (developments related to AfCFTA have been discussed on the Blog on several prior occasions). The free trade area aims to primarily liberalize trade over the Continent. Its significance is emphasized by the fact that it establishes the largest free trade area by geographic size and population, making it the second largest in terms of member

states, coming just after the World Trade Organization (WTO).

On the second proposition, Iluezi-Ogbaudu mentioned that changes to the domestic framework and private participation in arbitration show that Africa remains a favored destination for investment arbitration, even without the AfCFTA. The key points in this regard are the reforms conducted by many African states to amend and update their international arbitration legal framework as illustrated recently by Tanzania (which might "giv[e] investors reasons to smile", as commented here), Nigeria and Sierra Leone's recent arbitration acts (which are further analysed below). Long before such changes, South Africa and the Organization for the Harmonization of African Business Law (OHADA) reformed their arbitration acts. He also highlighted the pro-arbitration stance taken by national courts with specific mention being made of Kenyan and Ghanaian courts.

He concluded by pointing out the rise in *ad hoc* arbitration and most importantly the activities of African arbitral institutions or even foreign institutions resolving African disputes to promote international arbitration.

Rise of Arbitration in Africa and its Progressive "Africanization"

Ana Carolina Dall'Agnol focused on an analysis of the legal environment for international arbitration and its capacity to support the arbitral process in Sub-Saharan Africa. She stated that African arbitration options continue to rise. Many of these developments could, in the long-term, lead to a progressive "re-localization" or "Africanization" of international arbitration, as stated by Mbengue and Schacherer.[1)] Indeed, many African states can be said to have adopted modern arbitration approaches. At least ten African jurisdictions have officially adopted the UNCITRAL Model Law, thirty-six Sub-Saharan states are contracting states to the New York Convention, and forty-two have ratified the ICSID Convention.

As to recent empirical data, numbers corroborate the increase of arbitration in Africa. According to the 2020 SOAS survey, there were ninety-one arbitral institutions in the whole Continent. However, it should be noted that – as pointed out by Ana Carolina Dall'Agnol –, asymmetrically, the number of cases involving African parties is still small and steady. While statistics from institutional reports show that in 2020 cases involving African parties represented 6.8% of ICC's caseload, 11.7% for the LCIA, and 15% for ICSID, African institutions like the Arbitration Foundation of Southern Africa (AFSA), the Kigali International Arbitration Center (KIAC), and the Nairobi Center for International Arbitration (NCIA) respectively reported an incremental growth in their caseload.

The role of domestic courts in supporting the development of international arbitration was duly mentioned by Dall'Agnol. Three main factors can affect the choice of an African jurisdiction as the seat of an arbitral tribunal. Time and cost as interlocking aspects constitute the first factor. In this regard, Dall'Agnol referred to the Africa Arbitration Academy survey on costs and disputes funding in Africa, which showed that the duration of the process is one of the main factors affecting the costs of litigation. As was commented in the Blog previously, "there is huge appetite and market opportunity for [third-party funding]", which might solve the concerns of parties regarding costs. The second factor relates to the expertise and pro-arbitration approach of national judges while dealing with arbitration matters, while the third resides in the issue of making decisions on arbitration-related matters rendered by African courts publicly available.

Legislative Activity: a State Driven Process?

Dr Abayomi Okubote focused on some of the essential features of two recent developments in international arbitration on the Continent, namely the 2022 Nigeria Arbitration and Conciliation Bill and the 2022 Sierra Leone Arbitration Act. As part of the drafting committees of each of these bills, Dr. Abayomi indicated that one of the main and unique features of the Nigerian Bill is the institution of an Award Review Tribunal that is entitled, when opting in, to review awards rendered by an arbitral tribunal.

As for Sierra Leone, two years after its accession to the New York Convention, it passed a bill on 2 August 2022, which has subsequently been enacted on 6 September. The bill reflects the UNCITRAL Model Law and makes provisions for issues such as third party funding, interim relief, confidentiality, recognition, and enforcement of foreign awards. Most importantly, the new Sierra Leone Arbitration Act establishes the first Sierra Centre for International Arbitration with its own rules.

Further, Dr. Okubote elaborated on the AfCFTA and its forthcoming Protocol on investment, focusing on the four objectives set to inform the future text namely: (i) Africanization (requirement to have substantial activities in Africa), (ii) systemic approach to investment (promotion of Africa as a preferred destination for investments), (iii) sustainability (incorporation sustainability criteria), and (iv) codification (instead of harmonization considering the diversity of the Continent).

Ultimately Dr. Okubote was invited to present the Africa Arbitration Academy's Model BIT (AAA Model BIT). The AAA Model BIT, which was released in July 2022, has as its main objective to promote, encourage investment, and enhance sustainable development in Africa. The AAA Model BIT was elaborated as a comprehensive non-binding document that states may use and adapt to their needs when drafting their specific BITs. The AAA Model BIT incorporates the most innovative practices, such as the protection of traditional knowledge, and the right of indigenous communities to file *amicus curiae* briefs.

At the backdrop of the AfCFTA and AAA Model BIT being praised as important milestones, Dall'Agnol shed an important nuance on two critical questions: would the AfCFTA be able to support resilient and sustainable investment in the next decades, which will likely be marked by increasing environmental and climate pressure? As to the AAA Model BIT, she focused on the Joint Treaty Management Committee (JTMC) to point out that, as a state-driven process, the operation of the JTMC might leave investors outside of dispute management and resolution. This may either encourage the prevention of investor-state disputes, or on the other hand, lead investors to resort to international commercial arbitration as an alternative. From the perspective of the state-parties to the BIT, the JTMC could also encourage states to engage in joint investment treaty interpretation, as has been suggested by Methymaki and Tzanakopoulos in regard to similar mechanisms set forth in other recent international investment agreements.[2)]

***Ad hoc* Arbitration Here to Stay**

Njeri Kariuki gave an insight into the evolution of *ad hoc* arbitration in Sub-Saharan Africa. *Ad hoc* arbitration is in her view a precursor in Sub-Saharan Africa. She built her assertion on the experience of the Kenyan branch of the Chartered Institute of arbitrators, which has become the default appointing authority in many contracts over the years. In the last decade, the growth in such

appointments has been phenomenal. The 2020 SOAS Survey reported more than 300 such appointments for Kenya and Nigeria. In the latter, The International Centre for Arbitration and Mediation of Abuja (ICAMA) has been identified as the leading institution in ad hoc arbitrations in Nigeria.

Finally, when asked about the future of ad hoc arbitration in the region, Kariuki believes that despite the rise of arbitral institutions, ad hoc arbitrations will continue to flourish thanks to the confidentiality they offer to parties. However, there is still an important concern regarding corruption, which could eventually lead stakeholders to prefer institutional arbitrations over ad hoc arbitrations.

A Mapping of Institutional Arbitration from a South, West and East Regional Perspective

Pointing out to Africa as a continent composed of multiple regions, **Victoria Kigen** started with South Africa. She elaborated on the experience of the Arbitration Foundation of South Africa (AFSA) as the leading arbitration center. It has achieved a degree of success and a keen desire to develop further. The center has established a special legal exchange with China, and it launched in this regard the China-Africa Joint Arbitration Center based in South Africa in August 2015 (commented here).

As for West Africa, Kigen focused on Nigeria and Ghana. Regarding Nigeria, she mentioned that, as the home of various arbitral institutions, Nigeria hosts the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), the Regional Centre for International Commercial Arbitration – Lagos (RCICAL), the Maritime Arbitrators Association of Nigeria (MAAN), Lagos Court of Arbitration (LCA). In respect of Ghana, there are two major arbitral institutions: namely the Ghana Arbitration Center (GAC) and the Ghana Association of Certified Mediators and Arbitrators (GHACMA).

In East Africa, Kigen mentioned the Kigali Arbitration Center (KIAC), which provides for domestic and international panels of arbitrators; thus, seeking to attract international renown arbitrators. Kenya is also a leading jurisdiction in the region as evidenced by the amendment of the Arbitration Act in 2009, and the subsequent establishment of the Nairobi Center for International Arbitration (NCIA) by an Act of Parliament in 2013.

Coming to the specific features expected by users of African arbitral institutions, Kigen echoed the 2020 SOAS Survey key findings, and underlined the need for those institutions to provide multilingual staff, adequate power supply, stable internet particularly for virtual hearings, as well as functioning and attractive websites. They should also be independent of governments or any other organizations.

Conclusion

From the discussions, it is evident that arbitration in Africa is blooming at the national, regional, and continental level. Based on new empirical evidence (SOAS and Africa Academy Surveys), past, present, and ongoing projects (the AAA Model BIT and the future AfCTA Investment Protocol), as well as personal experiences of the speakers as drafters of key legislation and representatives of institutions, the panel highlighted the exponential growth of arbitration in Sub-Saharan Africa over the last decades. However, despite the unquestionable rise of arbitration in

Sub-Saharan Africa, there are still some issues that need to be tackled for the rise to be qualitative: such as a matching of cases that are still thin versus the number of institutions, costs, corruption for *ad hoc* adjudication, or a state led process sidelining investors. As conversations such as those held in the panel continue to foster a critical analysis, and a further "Africanization" is settling, those challenges can be overcome by Africa's ownership of its blooming.

For additional coverage of World Arbitration Update click here.

References

?1 Makane Moïse Mbengue, Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime', Journal of World Investment & Trade 18 (2017) 414-448.

?2 Eleni Methymaki, Antonios Tzanakopoulos, ‘Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation’ in Andreas Kulick (ed.), *States’ Reassertion of Control Over International Investment Agreements and International Investment Treaty Dispute Settlement*, Cambridge University Press, 2017, 155-181.

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