

Kluwer Arbitration Blog

2023 Year in Review: A Transformative Expedition of Arbitration in Africa

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2023 stands out as a pivotal year marked by substantial advancements in arbitration across the African continent. Despite global challenges such as the lingering impacts of the COVID-19 pandemic and projections of a slow recovery in Foreign Direct Investment (“FDI”) in the continent, African practitioners have demonstrated unwavering resilience and commitment to propelling the field of arbitration forward.

This post highlights several noteworthy developments in Africa’s arbitration landscape. First, it examines the *P & ID* decision involving Nigeria, a landmark judgment delivered by the English court that has sparked extensive commentary from the international arbitration community (Section 1). Next, it provides an analysis of the legal advancements in the continent with a focus on Nigeria and Malawi (Section 2) before proceeding to give a brief update on the African Continental Free Trade Agreement (“AfCFTA”) (Section 3). This post further highlights institutional developments, unravelling the threads of growth and collaboration across the continent (Section 4), noteworthy events that occurred physically and virtually on the continent (Section 5), and cases demonstrating a pro-arbitration stance by African courts (Section 6). It concludes with forward-looking thoughts on developments that can be anticipated during 2024.

1. The *P & ID* Decision: Unraveling an \$11 Billion Award

A pivotal moment in 2023 was the [English High Court’s decision](#) (previously discussed [here](#) and [here](#)) allowing Nigeria to succeed in its challenge of an award on liability and the final award of \$11 billion obtained by fraud and corruption under Section 68 of the [English Arbitration Act](#) (“EAA”). The court found that the awards were obtained by fraud in a manner that was contrary to England’s public policy. This decision has reverberated across the international arbitration community, sparking extensive commentary. Indeed, Honourable Justice Robin Knowles J noted within the judgment that he expected that the arbitration community would debate and reflect on the decision’s profound impact in this area of law and practice.

The substantial award at issue is of a particularly high value and fraud and corruption elements arise in both the procurement of the underlying contracts and also the awards themselves. Moreover, the rarity of successful challenges under Section 68 of the EAA amplifies the

importance of this judgment. An additional intriguing facet worth emphasizing is that it extends well-established legal principles. While English courts have previously recognized that contracts obtained through bribery run contrary to English public policy, this judgment delves deeper. It not only scrutinizes contracts secured through bribery but also extends its purview to awards obtained through fraud and bribery.

Other significant issues which the judgment highlights, include: (a) the detailed drafting required in major high-value commercial contracts involving a state because of the public interests involved; (b) the re-evaluation of the role of the tribunal in getting to the root of the matter, discussed [here](#) and [here](#); (c) the importance of disclosure in international arbitration; (d) the suitability of arbitration as a means of resolving disputes in matters involving states; and (e) confidentiality in significant arbitrations involving a state.

This judgment will continue to remain a focal point of discussion within the arbitration community for a while because of its importance and the multifaceted issues it brings to the forefront.

2. Legal Advancements: Evolution in Arbitration Frameworks

In 2023, pivotal strides were taken to advance the legal landscape of two key jurisdictions in Africa: Nigeria and Malawi.

In Nigeria, the enactment of the [Arbitration and Mediation Act 2023](#) in May 2023, signaled a landmark shift. This legislative overhaul introduces innovative provisions and adopts the 2006 and 2010 amendments to the UNCITRAL Model Law on International Commercial Arbitration Framework into Nigeria's arbitration legislation. The Act also incorporates the Singapore Convention on International Commercial Settlement Agreements Resulting from Mediation.

The Act introduces [innovative provisions](#), among which are those concerning third-party funding in arbitration, arbitrator's immunity, emergency arbitrator, and the establishment of an award review tribunal. This pioneering feature, the award review tribunal, has stirred considerable interest, sparking vibrant discussions and critiques, which have been prominently featured on the blog [here](#) and [here](#).

Other interesting developments brought by the Act are the recognition and enforcement of interim measures, the shift from conciliation provisions to mediation provisions, and the introduction of arbitration proceedings rules that contain interesting provisions that seek to streamline and expedite arbitration-related court proceedings. This Act, aligns Nigeria's arbitration framework with global standards, in particular, harmonizing Nigeria's standards for setting aside arbitral awards with international standards and fostering a more favorable environment for dispute resolution.

Malawi adopted a new legislative framework for international commercial arbitration on 7 December 2023. The Malawi Parliament adopted the [International Arbitration Bill 2023](#), without modification. The Bill reflects the joint proposals made to the Government by the Arbitration Foundation of Southern Africa International ("AFSA") and the Malawi Law Society. This Bill brings Malawi's legislative framework in line with international best practices for the resolution of commercial and investment disputes.

This legislative framework will among other things, domesticate the Model Law on International

Commercial Arbitration, as adopted by the UNCITRAL Model Law, and give effect to the obligations of Malawi to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which Malawi acceded to on 4 March 2021, and became effective on 2 June 2021.

3. AfCFTA Implementation: Catalyst for Cross-Border Investment

On 19 February 2023, the African Union Heads of State adopted the Protocol on Investment to the AfCFTA, a pivotal component of the AfCFTA. Simultaneously, the Protocols on Intellectual Property and Competition were adopted, setting the stage for increased cross-border investments. The AfCFTA’s potential to reduce tariffs and facilitate trade presents opportunities for resilient and sustainable investments, addressing environmental and climate concerns.

As of the date of this writing, there is no publicly available information on the implementation of the investment protocol by any of the member states. However, various events and discussions with stakeholders have delved into the investment protocol, exploring its framework, and the essential steps required for its effective implementation to elevate Africa’s investment landscape. Conferences have also probed the tax implications of the AfCFTA, the role of arbitration within the agreement and its broader impact on the legal profession in Africa. It remains to be seen how the member states will navigate the implementation of AfCFTA protocols and address disputes arising from increased trade under its purview.

In 2024, it is anticipated that these actionable measures will be undertaken to advance the integration of trade within the AfCFTA, in particular, the removal of non-tariff barriers, establishment of a centralised AfCFTA National Implementation or Coordination office, improving trade and market information accessibility, and strengthening institutional capacity.

In pursuit of bolstering intra-Africa trade, Egypt hosted the third intra-Africa trade fair (sealing business deals worth \$43.8 billion) and an AfCFTA business forum was held in South Africa creating a platform for businesses, investors, and governments to collaborate and shape the future of African trade.

4. Institutional Development and Collaboration

The collaboration between local and international arbitration institutions continues to increase. In June 2023, the Lagos Chamber of Commerce International Arbitration Centre (“LACIAC”) entered into a Cooperation Agreement with the Permanent Court of Arbitration. The two organizations will collaborate to promote the resolution of international disputes through arbitration and other alternative dispute resolution methods in the region.

The AFSA International joined the membership of the International Federation of Commercial Arbitration Institutions (“IFCAI”). IFCAI has 52 member organizations worldwide, including reputable organizations such as the London Court of International Arbitration (“LCIA”) and the ICC International Court of Arbitration. This partnership will promote the exchange of information on all aspects of arbitration and facilitate the sharing of best practices and new solutions in arbitration. The importance of this development was discussed in a recent interview featuring

Svetlana Vasileva, the Secretary General of AFSA.

This increased collaboration with global and regional organizations is anticipated to enhance the reputation and caseload of African institutions globally.

The most recent development is the [Cairo Regional Centre for International Commercial Arbitration \(CRCICA\) Rules 2024](#) which came into effect on 15 January 2024. These rules replace the previous CRCICA Arbitration Rules 2011. The updated rules include modern features such as online arbitration filing, remote hearings, the law applicable to arbitration agreements, consolidation of arbitrations, early dismissal of claims, multiple contracts, third-party funding and emergency arbitration.

5. 2023: A Vibrant Year for African Arbitration Events

In 2023, the African continent witnessed a myriad of dynamic events, conferences, and virtual discussions that significantly contributed to the discourse surrounding international arbitration. The 7th ICC Africa Conference emerged as a focal point, addressing cutting-edge topics such as the role of Artificial Intelligence in International Arbitration, legislative changes in African arbitration frameworks, enforcement of arbitral awards, and the evolving landscape of third-party funding.

The East African Arbitration Conference, hosted in Zanzibar, Tanzania, facilitated insightful discussions on crucial issues, including the economies of international arbitration and the role of arbitration in AfCFTA. Meanwhile, the Nairobi Arbitration Week played a pivotal role in advocating for the advancement of the Nairobi National Alternative Dispute Resolution Policy. The week-long event not only served as a platform for conversations on Alternative Dispute Resolution but also showcased Nairobi as a sustainable hub for dispute resolution. Discussions ranged from the role of the judiciary in promoting arbitration to diversity and inclusion, trade and commerce, third-party funding, the construction industry, and climate justice.

Key virtual events towards the year's end focused on advancing African arbitration through prominent arbitration seats on the continent. Two notable events, "[the Battle of the African Arbitration Seats](#)", hosted by the LACIAC in November 2023 and "[the Battle for the Top Arbitral Seat in Africa: Who Will Win?](#)" hosted by the SOAS Alternative Dispute Resolution Centre and the Arbitration Fund for African Students in December 2023, brought practitioners from key jurisdictions in Africa, including Nigeria, the OHADA region, Egypt, Kenya, and South Africa, into the debate. These discussions provided valuable insights into the development of arbitrations in their respective regions and delved into why these regions are poised to become the next top seats in Africa that can compete internationally. The debates also prompted practitioners to introspect on key areas in their jurisdictions that require enhancements to increase their attractiveness as international arbitration seats. Collectively, these events marked 2023 as a year of robust engagement and advancement in international arbitration across the African continent.

6. Favourable Attitude of Local Courts Towards Arbitration

The Supreme Court in Nigeria recently dismissed the challenge of enforcement of an arbitral award while emphasizing the finality of arbitral awards. (See *NNPC v. Fung Tai Eng. Co. Ltd* (2023) 15

NWLR (Pt. 1906) 117).

The High Court in South Africa rejected an appeal against an order recognizing and enforcing an arbitral award while emphasizing the public policy consideration that arbitration awards, which give effect to arbitration agreements, should generally be enforced by South African courts (See *GFE MIR Alloys and Minerals SA (Pty) Ltd v Momoco International Limited* [2023] ZAGPJHC 946).

Outlook for 2024

As we look ahead to 2024, several trends and transformative events are anticipated in international arbitration globally and within Africa. The use of artificial intelligence in arbitration and how this will be regulated, increased gender diversity, continued advocacy for the use of African seats, and a rise in climate-related disputes are expected. In Africa, the interplay of the AfCFTA, FDI, and disputes will likely continue to evolve. Increased intra-regional collaboration, diverse representation, and reliance on African institutions and practitioners are crucial for addressing Africa-related disputes.

In conclusion, 2023 has been a dynamic year for arbitration in Africa, marked by legal advancements, institutional growth, and global collaborations. As practitioners navigate emerging challenges and opportunities, the resilience and adaptability witnessed this year position Africa for continued leadership in the international arbitration arena.

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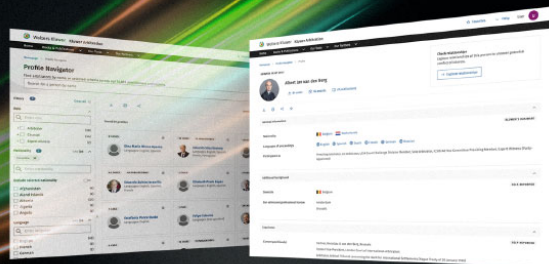
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