Kluwer Arbitration Blog

ICCA Kigali 2025: Is there an African Tradition of International Arbitration? A South African Perspective

Faadhil Adams (University of Cape Town) and Tobias Thaler (Nater Dallafior) · Tuesday, May 13th, 2025

This is the third post in ICCA's series of posts focused on international arbitration in Africa in the lead up to the ICCA-KIAC joint conference "Africa & International Arbitration: Untold Stories," taking place in Kigali on 5 June 2025.

Introduction

Over the last two decades, Africa has experienced robust economic growth, increasing its appeal for trade and investment (see UNCTAD Economic Development in Africa Report 2024). This trend suggests that major disputes have arisen and will continue to arise across the continent. Such disputes will predominantly be resolved through international arbitration, as evidenced by the proliferation of arbitral institutions, promotional organizations, and research institutes that have emerged and expanded in recent years.

Multinational companies seeking to avoid local courts in such disputes may question the prudence of selecting African countries as a seat for arbitration. Is there a tradition of international arbitration in Africa?

This article affirms that there is—at least from a South African perspective. It highlights South Africa's well-established tradition of commercial arbitration, strengthened by the adoption of the UNCITRAL Model Law and the development of modern institutional rules. The article concludes that South Africa's arbitration tradition makes it a strong contender for hosting international arbitration proceedings in sub-Saharan Africa.

The Early Development of Arbitration

Pre-colonial dispute resolution methods in Africa often prioritised reconciliation to maintain community stability and harmony rather than escalating conflicts to courts, as noted by some authors. Traditional South African cultures reflected these values of alternative dispute resolution.

South Africa's tradition of commercial arbitration originated with the English Arbitration Act of

1889, introduced during the colonial era. In 1965, the colonial legislation was superseded by the South African Arbitration Act of 1965, which was modelled on the English Arbitration Act of 1950. The Arbitration Act, together with the common law, governed both domestic and international arbitration. International disputes were largely influenced by domestic practices.[1)]

In 1976, South Africa adopted the New York Convention, and its courts have generally enforced foreign arbitral awards in accordance with the Convention ever since (for example *Fattouche v Khumalo* [2014] ZAGPJHC 102 and *Balkan Energy Limited and Another v Government of the Republic of Ghana* [2017] ZAGPJHC 197).

The early development of arbitration law, supported by a pro-arbitration approach of local courts, contributed to the popularity of arbitration for resolving domestic and international disputes. From an early stage, arbitration has been widely used in South Africa for resolving commercial, labour, and construction disputes.[2)]

The Development of a Solid Tradition of International Arbitration

Since the advent of democracy in 1994, South African courts have consistently upheld an arbitration-friendly approach. The Arbitration Act of 1965 was interpreted liberally and in support of arbitration. This allowed South African law to align with contemporary international standards without requiring legislative reform. Specifically, courts held that they should not intervene in arbitration proceedings and that their power to set aside arbitral awards should be interpreted narrowly, despite allowances for such interference under the Act.

A notable example is *Telcordia Technologies Inc v. Telkom SA* [2006] 139 SCA (RSA). The matter involved an international arbitration conducted under the Arbitration Act of 1965. The Supreme Court of Appeal overturned a High Court judgment in a dispute between a South African state-owned entity and a US corporation. The Supreme Court of Appeal reaffirmed the principle that courts must defer to arbitral awards and proceedings. It upheld the award in favour of the US party.

Further support for South Africa's pro-arbitration stance appears in the Constitutional Court's judgment in *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* [2009] ZACC 6. In considering the constitutional right of access to courts in a fair and public hearing, the Court held that arbitration does not violate this right. Arbitration, as a voluntary and private form of dispute resolution, was deemed compatible with the constitution. The Court affirmed the principle of party autonomy, thereby reinforcing the constitutional legitimacy of arbitration.

Although the Arbitration Act of 1965 did not expressly adopt the doctrine of *kompetenz-kompetenz*—the principle that an arbitral tribunal may rule on its own jurisdiction—South African courts gradually incorporated it through case law. This culminated in the Supreme Court of Appeal's judgment in *Zhongji Development Construction Engineering Co Ltd v. Kamoto Copper Company Sarl* [2014] ZASCA 160, which firmly established the doctrine in South African law.

South African case law thus provides evidence that arbitration law evolved in keeping with international developments, even prior to the formal adoption of the UNCITRAL Model Law.

Status Quo of International Arbitration—Modern Arbitration Law

In 2017, South Africa adopted the UNCITRAL Model Law through the enactment of the International Arbitration Act of 2017, incorporating the Model Law with only minor amendments. This legislative development aligned South African international arbitration law with the prevailing international standards. It confirmed South Africa's status as a reliable and modern seat for international arbitration and provided a framework for supporting proceedings seated outside the country.[3)]

The effectiveness of any arbitral seat depends, however, not only on its legislative framework, but also on the way it is applied and interpreted by the courts. In South Africa, binding precedent has continued the pro-arbitration trend established prior to the adoption of the Model Law. Courts have provided interpretive guidance where necessary, while affording due deference to arbitral tribunals in other instances.

In two recent cases, the High Court rejected baseless attempts to contest the enforcement of international arbitral awards (*Vodacom International Limited and Another v Mabanga* [2019] ZAGPJHC 551; *Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* [2021] ZAGPJHC 350). These judgments confirm the courts' reluctance to permit interference with valid arbitral awards.

Further support for the doctrine of *kompetenz-kompetenz* was affirmed in *Ircon International Limited v Tension Overhead Electrification (Pty) Ltd and Others* [2020] ZAGPJHC 345. In this judgment, the High Court refused to stay arbitral proceedings after the tribunal had already ruled on its jurisdiction. The Court held that despite its refusal to grant the stay of proceedings, jurisdictional challenges could still be raised at the enforcement stage.

In *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC and Another* [2019] ZAGPJHC 250, the High Court granted an anti-suit injunction to uphold an arbitration agreement. This judgment illustrates the courts' willingness to take supportive measures to protect the integrity of arbitration agreements.

Together, these cases reflect the South African courts' consistent, restrictive interpretation of grounds for refusing enforcement and setting aside arbitral awards. This pro-arbitration approach is expected to continue.[4)]

South Africa's Arbitration Institutes and Their Modern Arbitration Rules

The country's emergence as a hub for international arbitration in sub-Saharan Africa is further driven by the Arbitration Foundation of Southern Africa (AFSA), South Africa's principal commercial arbitration institute. Founded in 1996, AFSA offers administered dispute resolution services and has increasingly adopted an international focus. Since the enactment of the International Arbitration Act of 2017, AFSA has administered over 170 international cases, underscoring its growing global reach.

AFSA's international focus was enhanced with the adoption of its updated International Arbitration Rules in 2021, based on the 2014 LCIA Arbitration Rules. These rules were drafted by an expert

panel, including Maxi Scherer, Lise Bosman and Ndanga Kamau, ensuring alignment with modern arbitration practices and offering state-of-the-art and cost-effective procedures.

Linked to AFSA is also the China-Africa Joint Arbitration Centre (CAJAC), which offers a distinct brand of commercial arbitration, blending influences from both South Africa and China—Africa's largest trading partner. CAJAC's arbitration rules incorporate international standards while reflecting South Africa's arbitration traditions and China's international arbitration practices.

Finally, the tradition of international arbitration is further supported by the Arbitration and Dispute Resolution Unit (ADRU) of the University of Cape Town, which undertakes research and educates the forthcoming generation in international arbitration.

Conclusion

South Africa has a long-standing tradition of commercial arbitration, with a history spanning more than a century. South African courts have consistently demonstrated an arbitration-friendly approach. Since the democratic era, courts have maintained a restrictive interpretation of grounds for refusing enforcement or setting aside awards, reinforcing a strong pro-arbitration stance—a trend that is expected to continue.

This tradition of international arbitration was further strengthened by the adoption of the UNCITRAL Model Law in 2017, introducing a modern and user-friendly arbitration framework. In addition, efficient institutional arbitration bolsters this framework: the 2021 AFSA International Arbitration Rules align with modern arbitration practices, offering state-of-the-art and cost-effective procedures.

In conclusion, South Africa's well-established arbitration tradition, combined with its modern arbitration law and institutional rules, firmly positions it as a preferred seat for international arbitration in sub-Saharan Africa.

Follow along and see all of *Kluwer Arbitration Blog*'s coverage of ICCA Kigali 2025 here.

References

?1 *Nkuke v Kindi* 1912 Cape Provincial Division 529; Bulter and Finsen, *Arbitration in South Africa: Law and Practice* 1993).

?2 Patrick Michael Mace Lane and R. Lee Harding, National Report for South Africa (2018 through 2023), in *ICCA International Handbook on Commercial Arbitration* (Lise Bosman, ed), p.5.

?3 Lise Bosman, Chapter 1.10: South Africa, in *Arbitration in Africa: A Practitioner's Guide* (Lise Bosman, ed), p.118.

?4 Ibid.

This entry was posted on Tuesday, May 13th, 2025 at 8:05 am and is filed under Africa, ICCA Kigali 2025
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.