Arbitrating in Africa

Sub-Saharan Africa is currently among the fastest growing economic regions in the world and provides a rate of return on foreign investment higher than in any other developing region, according to a recent report by McKinsey & Company. This increased economic momentum continues to create significant business opportunities for both domestic and foreign investors in a wide range of industries in Africa, including telecommunications, energy, infrastructure, financial institutions and mining.

Against the backdrop of this myriad of investment opportunities, potential investors must also weigh up the potential risks and challenges. As indicated by the World Bank's Investing Across Borders 2010 report, one of the important factors driving investment decisions by multinational corporations is the strength of legal frameworks for alternative dispute resolution and the extent to which the judiciary supports and facilitates arbitration. In response, governments seeking foreign direct investment are encouraged to accept the process of international arbitration as an effective means of dispute resolution in order to make their investment climates more attractive and competitive.

One of the key components of a strong arbitration regime is the ease of enforcement of foreign arbitral awards. In this Article, we briefly examine the enforcement regimes for arbitral awards across Africa, which broadly fall into three distinct categories. Finally we review the steps taken by certain African governments over the past 12 months to further facilitate arbitration in Africa though the opening and use of dedicated arbitration centres.

Arbitrating in Africa: Enforcement Regimes for Arbitral Awards

Africa is an incredibly diverse continent. The legal systems in each country, a product of inherited colonial legal systems and more recent political developments, vary widely. However, despite these differences, the enforcement regimes for arbitral awards for the majority of countries across Sub-Saharan Africa fall broadly within three categories:

1. States that are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).
2. States that are party to the OHADA regime.
3. States that are neither party to the New York Convention nor the OHADA regime.

The New York Convention

The New York Convention provides an extensive enforcement regime for foreign arbitration awards, subject only to a limited number of expressly stipulated exceptions. There is no real equivalent for the enforcement of foreign court judgments, which makes the ease of enforcement of arbitration awards one of the key reasons international arbitration is the dispute resolution method of choice for many foreign investors.

More than half of the states in Africa are party to the New York Convention, including Nigeria, Ghana, Cote d'Ivoire, Kenya, Tanzania and South Africa. Click here to view the map that shows all of the African signatories to the New York convention.

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An arbitral award will be made under the New York Convention if it is made in the territory of a state which is a party to the New York Convention. Membership of the New York Convention is therefore of significant importance for investors who may need to conduct arbitration and/or enforce an arbitral award in African countries where, for instance, enforcement is sought against a party that does not hold assets outside Africa or the investor's African counterparty insists upon an African seat of arbitration. Whilst the attitudes of national courts to arbitration and the speed of enforcement varies from country to country, membership of the New York Convention generally provides such investors with an effective and predictable tool to seek recognition and enforcement of arbitral awards in these situations.

Membership of the New York Convention is also good news for domestic parties with counterparties with assets in foreign countries, as it gives African countries reciprocal access to 148 countries across the globe for the recognition and enforcement of domestic arbitral awards.

L'ORGANISATION POUR L'HARMONISATION DU DROIT DES AFFAIRES EN AFRIQUE (OHADA)

OHADA was created by Treaty in 1993 and seeks to provide a harmonised, secure legal framework for the conduct of business in Africa by operating a uniform law regime which upon adoption becomes automatically applicable in its member states. Arbitration law is one of the areas governed by OHADA. The 17 OHADA member states are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo. They are predominately of the civil law legal tradition and French speaking. Please click here to view a map showing the OHADA jurisdictions in Africa.

OHADA has a comparatively modern arbitral regime. The recognition and enforcement of awards within all member states is governed by the Uniform Act of Arbitration 1999, which sets out the basic rules applicable to any arbitration where the seat of arbitration is located in an OHADA member state and supersedes the national arbitration laws.

The Uniform Act recognises a valid arbitral award as final and binding on the parties and provides a mechanism for the enforcement of arbitral awards subject only to one ground for refusal of enforcement (namely, that the award is manifestly contrary to the international public order of the OHADA member states). However, critically, the application of the Uniform Act as regards enforcement is limited to awards made in and sought to be enforced in OHADA member states.

It is worth noting that 10 of the 17 OHADA member states are also parties to the New York Convention, including Cameroon, Gabon, Côte d'Ivoire and Senegal. Accordingly, in these countries, the requirements set out under article 5 of the New York Convention will apply for the recognition and enforcement of foreign, non-OHADA awards.

However, for the majority of OHADA member states that are not party to the New York Convention, the territorial limitations of the OHADA enforcement regime for arbitral awards may impact upon the attractiveness of their investment climate for foreign investment.

NON-CONVENTION COUNTRIES

In countries which are neither party to the New York Convention nor an OHADA member state, foreign investors seeking to enforce a foreign award must rely on the enforcement provisions of national arbitration laws, which, by and large, tend to be more onerous than the enforcement regime under the New York Convention, often including requirements such as reciprocity of enforcement by the award-holder's home state and with wider scope for refusal of recognition.

Foreign investors will therefore need to invest more resources in investigating the position in these countries, and issues such as the judicial attitudes to arbitration become more significant.

A few African countries have recently informally indicated an intention to become signatories to the New York Convention in the near future, including Angola and the Democratic Republic of Congo, perhaps as a result of the significant foreign direct investment inflows to these countries and a desire to signal their commitment to improving the transparency and predictability of their legal environments.

ARBITRATING IN AFRICA: OPEN FOR BUSINESS

Hand in hand with the need for stronger and more predictable enforcement regimes for arbitral awards in Africa, is the need for more arbitration hearings to be held on the continent. The regular application and testing of arbitration laws will develop the arbitration experience of domestic courts and increase public awareness of arbitration in commercial matters, which in turn may alleviate current challenges such as the time it takes to enforce arbitral awards in certain countries.

Over the past year there have been a number of new arbitration centres springing up in countries across the continent in efforts to strengthen the legitimacy of international arbitration in Africa.

In the continuing spirit of improving its legal system and attracting investors, **Rwanda** launched its own arbitration centre, the Kigali Centre for International Arbitration (KIAC), on 31 May 2012. The KIAC was the first dedicated centre for the administration of international arbitration in the East Africa Community (comprising Burundi, Kenya, Tanzania, Rwanda and Uganda) with the ambition of serving not only the business and investment community of Rwanda, but of the entire region, including the Common Market of Eastern and Southern Africa (comprising twenty countries stretching from Libya to Zimbabwe). For more information about the KIAC, please see our recent article about its launch and Hogan Lovells' involvement with the project.

There has been a recent addition to the number of arbitration institutions in **Nigeria**, with the launch of the Lagos Court of Arbitration (LCA) on 9 November 2012. The LCA was established by the Lagos State government under the Lagos Court of Arbitration Law of 2009, in recognition of the magnitude of commercial activity in Lagos and to promote the resolution of disputes by arbitration and other alternative dispute resolution mechanisms in Lagos State.

The official launch of the much heralded LCIA-MIAC Arbitration Centre in **Mauritius** took place on 9 December 2012. The first of its kind in Africa, the LCIA-MIAC is the product of a union between the LCIA, one of the longest-established arbitral institutions in the world, the Mauritius International Arbitration Centre (MIAC) and the government of Mauritius. With similarities to the LCIA-DIFC model adopted in Dubai, the LCIA-MIAC is able to offers its users all the services offered by the LCIA in the UK, drawing on the extensive experience, expertise and support of the LCIA in the efficient and cost effective administration of arbitration and other ADR procedures.

Not far behind, in January 2013 the president of **Kenya** approved and brought into law the Nairobi Centre for Arbitration Act 2012 which provides for the creation of an alternative dispute resolution centre in Nairobi for the administration of both domestic and international arbitration. After Rwanda's KIAC, Kenya's arbitration centre will be the one of only two international arbitration centres in the East African Community.

Finally, at the First International Conference on Arbitration in December 2012, organised by the Bar Association of Angola and held in Luanda, the Minister of Justice and Human Rights of Angola announced plans to set up a number of experimental arbitration centres in the country in 2013. Although further details have yet to be provided, it is intended that the new arbitration centres will handle both commercial and consumer disputes.

These developments are an encouraging indication of the efforts being made to promote the use of arbitration across Africa and to provide opportunities to resolve commercial disputes locally, potentially saving parties time and costs. If successful, such initiatives should lead to the development of arbitral jurisprudence and expertise within these countries, for the benefit of foreign and domestic parties alike.

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