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EDITORIAL

Transnational Dispute Management (TDM) Special Issue on Africa

Introduction

It is with great pleasure that we present this TDM Special Issue on Africa. The economic potential of Africa has captured the attention of businesses and investors globally, and this attraction has spilled over into the world of international arbitration. Literature on international arbitration in or relating to Africa is growing, and the number of conferences on the topic is accelerating as well. In May 2016, the International Council on Commercial Arbitration (ICCA) held its 22nd Congress in Mauritius - the first time ever that the ICCA Congress was held in Africa. This was followed by the First International Chamber of Commerce (ICC) Regional Arbitration Conference in Lagos, Nigeria, in July 2016, which, based on anecdotal accounts, was the highest-attended ICC regional conference ever held.

Africa is not new to international arbitration and international arbitration is not new to Africa. African states were among the earliest to ratify both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). Further, as one of the pieces in this Special Issue points out, a long-established tradition and practice of resolving disputes through arbitration in Africa exists in various contexts.[5]

At the same time, however, resolution of Africa-related disputes through international arbitration is growing, and, as a result, a more diverse group of players is taking part in the international arbitral process than ever before. As new parties, counsel, fact and expert witnesses, arbitrators, and judges from Africa take on increasingly active parts in the arbitral process, new challenges will arise and these players will leave their own unique mark on the process. While important strides are being made in this regard, much work remains to be done in terms of achieving a healthy level of diversity in these cases.

These issues are explored more fully in the Special Issue's first set of pieces in Section A. Section B addresses investment treaty arbitration and policy in the African context. Section C follows with a set of articles addressing the impact that robust economic activity between Africa and Asia has had on dispute resolution. Section D focuses in on the important sector of energy and natural resources, which is followed by several papers in Section E addressing important developments in South Africa and the Southern Africa

Development Community (SADC). Section F discusses recent developments in the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (or, in English, the Organization for the Harmonization of African Business Law or OHADA). The remainder of the papers addresses key jurisdiction-specific developments in Section G.

A. Africa's Impact on International Arbitration: Momentum and Challenges

Andrea Carlevaris, Tunde Ogunseitan & Diamana Diawara explore the "Africanisation" of international arbitration. They offer a methodical exposition of the factors that both historically hindered the development of international arbitration in Africa as well those that contributed to the recent advances. They illustrate each point of departure through the use of diverse cases from multiple African jurisdictions. They also critically assess the classical advantages-versus-disadvantages dialogue from a purely African perspective. More importantly, they demonstrate the chronic challenge of lack of African representation by useful statistics and forward remedial thoughts.

Similarly, **Ravi Soopramanien & Shalini Soopramanien** explore how the surge in interest in international arbitration in Africa has nevertheless failed to translate into a proportionate representation of African arbitrators on the international arbitration scene. They seek to delve deeper into the causes and origins of the "diversity gap" in international commercial arbitration, highlight the opportunities and challenges which lie ahead for the continent, and propose a three-pronged reform agenda geared towards African states, institutions, and individuals, with an overall view towards bridging this diversity gap.

In a similar vein, the lion's share of international arbitrations involving African parties to date has been administered by arbitral institutions based outside the African continent, including, most notably, the ICC and the London Court of International Arbitration (LCIA). With the possible exception of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), Africa has in the past been without a well-established, globally known arbitral institution.

This trend, however, may be changing. A growing number of arbitral institutions, focused not just on domestic arbitration but international arbitration as well, is sprouting up on the continent. While some of these entities may not have the support and capacity that will be required to become formidable institutions, others may prove to have the wherewithal to become serious regional or international centers. These include the LCIA-Mauritius International Arbitration Centre (LCIA-MIAC), the Kigali International Arbitration Centre (KIAC), the Nairobi International Arbitration Centre (NIAC), the Lagos Court of Arbitration (LCA), and the China Africa Joint International Arbitration Center (CAJAC). The Cour Commune de Justice et d'Arbitrage (or, in English, the Common Court of Justice and Arb itration or CCJA), which, as discussed further below, is an arbitral institution as well as a court in the OHADA system is also worth watching.

In their piece, **Elizabeth Karanja & Nicola Muriuki** discuss how several African countries have recently taken steps to secure recognition as international arbitral hubs. They review the major arbitral institutions in Africa and highlight some of the successes and challenges that the various centers have faced in seeking international recognition. Their article also explores the common denominators that might indicate prospects for success and whether such institutions have the ability to achieve longevity on the continent and in international arbitral practice generally.

To a great extent, the issues that arise in international arbitration in or relating to Africa will be no different than those that arise in arbitrations around the globe. Converging international arbitration procedures and the predictability and stability afforded by the New York Convention and ICSID Convention help to ensure that this is the case. Yet party autonomy remains a core value of the international arbitral system, and, as such, regional approaches and local culture will continue to shape African-related arbitrations to some degree, just as they do elsewhere.

In this regard, **Victoria Safran** empirically explores the complicating effects of culture in her paper. Recognizing the paucity of empirical studies on the role of culture on the perception and reality of Africa's position in the global international arbitration community, Safran reports the findings of her interviews with eight African jurists from different jurisdictions. Safran's analysis explores such areas as the modernity of the legal infrastructure, institutional capacity, and convergence of cultures.

Florence Karimi Shako contributes a piece that contextualizes commercial arbitration in a transnational legal order in light of the increasing view that arbitration is a transnational system of justice. Shako explores the meaning of culture and analyzes the manner in which culture undergirds international arbitrations in Africa given this transnational context. She argues that cultural considerations must be taken into account in order for international arbitration to survive in the long run in Africa. In reaching this conclusion, Shako analyzes cultural issues such as political and religious considerations, cultural biases and stereotypes, and communication and language issues. Within this analysis, Shako highlights measures that could be put in place to ensure that these cultural issues are considered in African-related arbitrations in order to contribute to the greater success of the arbitral process.

B. Investment Treaty Arbitration and Policy

The next set of articles in the Special Issue focus on investor-state dispute settlement and policy. Africa was an early adopter of investment arbitration, dating to the founding of ICSID 50

years ago. As one of us, Professor Kidane, has noted previously, African countries represented a stunning 75% of the first 20 ratifications needed to bring the ICSID Convention into force in 1966[6] - powerful testimony to Africa's acceptance of the World Bank's argument that participating in ICSID would promote development.[7] The first two cases registered at ICSID were filed against African states, Morocco and the Ivory Coast. Cases against the People's Republic of the Congo (now Congo-Brazzaville) and Nigeria soon followed, as did a rare case started by a state claimant, Gabon. Through the 1970s, two-thirds of ICSID's limited docket involved Sub-Saharan states.[8] Contemporaneously, outside of ICSID, the famous *TOPCO* oil expropriation case was brought against the North African state of Libya.[9]

Like the rest of the world, Africa has seen a marked increase in investor-state arbitration since the turn of the century - and, more specifically, since the Argentine financial crisis that started in late 2001. ICSID averaged one new case per year through the 1970s, two new cases per year in the 1980s, and four new cases per year in the 1990s before jumping to 24 new cases per year in the 2000s and 40 new cases per year so far this decade.[10] ICSID's "case count" is approaching 600 cases and Africa-related cases represent about a fifth of that total, translating to well over 100 ICSID cases against African countries.[11] This total includes 90 cases against 32 Sub-Saharan countries (led by the Democratic Republic of Congo with nine) and 41 cases against five North African countries (led by Egypt's 29).[12]

In his 2014 article, Professor Kidane identified 64 completed cases at ICSID involving an African state as respondent. Of those 64 cases, 34 cases culminated in awards on the merits. Professor Kidane assessed that states prevailed in 44% of these cases, investors prevailed in 41%, and 15% had mixed results. He also noted the wide array of damages awarded to those investors who prevailed, varying from under $1 million up to $74.6 million, apparently with most awards in the modest seven-figure range.[13] Newer cases continue to show this dichotomy, captured in the split between the recent *Getma* award of about $500,000[14] with the blockbuster *Von Pezold* award last year of about $195,000,000.[15]

In contrast with the heavy involvement of Sub-Saharan states as ICSID respondents, ICSID has little experience with Sub-Saharan claimants. The ICSID website lists over 30 cases with Sub-Saharan claimants, but almost all are local subsidiaries of non-African companies - for example, in *Shell Nigeria v. Nigeria*, the ICSID website identifies the claimant as Nigerian.[16] Our review of the ICSID website suggests there have only been four ICSID cases to date with true Sub-Saharan claimants: the long-ago case mentioned above started by Gabon; *Sudapet v. South Sudan* brought by the Sudanese oil company; *Oded Besserglik v. Mozambique* brought by a South African individual; and *AngloGold Ashanti v. Ghana* filed this year by the Ghanaian subsidiary of a South African business.[17]

By another important measure, Africa's participation in ICSID has also been light: only 2% of all ICSID arbitrators are from Sub-Saharan Africa.[18] Perhaps another 3% of ICSID arbitrators are from North Africa.[19] Professor Kidane has previously described the gap between African respondents and African arbitrators as "ICSID's diversity deficit."[20]

Our review of the appointments data yields several additional observations.

First, hearkening back to the "diversity gap" addressed by Soopramanien & Soopramanien, the ICSID appointments are concentrated among a few individuals. The 35 appointments of Sub-Saharan Africans are led by Judge Abdulqawi Ahmed Yusuf of Somalia (seven appointments) and Judge Keba Mbaye of Senegal (five). Even more concentration can be seen in North Africa, where three arbitrators from two countries dominate: Ahmed Sadek El-Kosheri of Egypt (13 appointments), Azzedine Kettani of Morocco (11), and Georges Abi-Saab of Egypt (six). No other African has more than three appointments.

Second, virtually all of the arbitrators from Africa are men. At most two African women have ever been appointed at ICSID with a total of three appointments: Marie-Madeleine Mborantsuo is Gabonese, and Marie-Andrée Ngwe is a French national and member of the Cameroon bar.[21] As extreme as this statistic is, however, it is comparable to the overall gender imbalance among ICSID arbitrators. As Sergio Puig wrote recently, "[w]hat stands out ... is that around 93 per cent of all the appointments are of male arbitrators, suggesting an extreme gender imbalance. It gets even worse: only two women, Professors Stern and Kaufmann-Kohler combined, held three-quarters of all female appointments...."[22]

Third, most appointments of Sub-Saharan Africans have been made by ICSID itself, rather than by the parties to a case - evidence of ICSID's efforts to address its "diversity deficit."[23] ICSID has appointed 14 Sub-Saharan Africans to ad hoc annulment committees (which are always made by ICSID), including three appointments of Judge Mbaye and all seven of Judge Yusuf's appointments. ICSID appointed another six Sub-Saharan Africans for respondent states that did not make their own appointments. Respondent states have appointed Sub-Saharan Africans 13 times, but only one of these states is located outside the region (Sri Lanka in *AAPL*). Finally, claimants have appointed Sub-Saharan Africans only twice.[24] Similar trends can be seen in North Africa as well. For example, ICSID has made all 11 appointments of Morocco's Azzedine Kettani and respondent states have made all six appointments of Georges Abi-Saab. Even the 13 appointments of Ahmed Sadek El-Kosheri show this trend: one appointment by claimant, one by both parties, three by respondent states, and eight by ICSID. Participation by an African claimant seems to have no impact: Gabon named a Belgian arbitrator, Besserglik chose a Canadian, and Sudapet and AngloGold both picked the same New Zealander. As long as appointments of Africans remain

concentrated in ICSID's hands, the numbers will lag, because ICSID has controlled only 29% of all appointments.[25]

Finally, our research has found only two tribunals (arguably three) with an African majority. In *AAPL v Sri Lanka*, the respondent appointed Samuel Asante of Ghana and the president of the tribunal was Ahmed Sadek El-Kosheri of Egypt. As it happens, *AAPL* is a historically significant case: as the first case to proceed based on a state's consent to ICSID arbitration found in an investment treaty, *AAPL* launched the "BIT revolution."[26] In *Banro v Democratic Republic of Congo*, the claimant appointed a South African and the respondent a Senegalese. Similarly, in *Lahoud v. Democratic Republic of Congo*, where the Lebanese claimant appointed an Egyptian arbitrator, the respondent named Marie-Andrée Ngwe, a French national and member of the Cameroon bar. In those few other cases where a claimant has appointed an African, the respondent African state has failed to reciprocate and thereby establish an African majority.

It is clear, therefore, that the subject of investment arbitration in Africa raises many important issues ripe for exploration in this Special Issue. The authors have delivered timely contributions on these issues.

To begin, **Wolfgang Alschner & Dmitriy Skougarevskiy** recently developed an innovative new methodology for comparing the texts of bilateral investment treaties (BITs). Their methodology measures the extent of textual similarity across BITs, allowing them to determine the extent to which a particular country is able to impose its standardized terms on its treaty partners. In other words, their methodology allows them to determine which countries are "rule makers" and which are "rule takers." In this Special Issue, Alschner & Skougarervskiy apply their methodology specifically to the African context for the first time, shedding new empirical light on African BITs. Their data confirms what readers may intuitively hypothesize: that African states tend to be rule takers when negotiating with capital exporters outside Africa. There are also, however, many intra-African BITs and these tell a different story: power asymmetries do not seem to explain the negotiating outcomes within Africa, as smaller states like Mauritius with a strategic approach to investment policy appear to achieve greater consistency across treaties than do more powerful states like Egypt. The Alschner & Skougarevskiy article thus makes a welcome contribution to the academic literature on BITs, bringing new data analysis to bear with obvious policy ramifications.

Another welcome empirical contribution comes from **Hamed El-Kady** , who draws on UNCTAD's database to situate African BITs in the global network of BITs. El-Kady analyzes this data and identifies various ways in which he believes that current African BITs are ill-suited to Africa's needs. Based on this analysis, El-Kady proposes a three-point action plan intended to improve African BITs and to allow African states to become rule makers instead of rule takers. In this sense, El-Kady's article builds on the previous article by Alschner & Skougarervskiy.

Solomon Ebere zeroes in on an interesting and oft-overlooked multilateral investment treaty that applies in some African states. Ebere analyzes the Organisation of the Islamic Conference's agreement for the promotion, protection, and guarantee of investments among its members. He considers the impact that this little-known investment agreement could have on investor-state arbitrations involving certain sub-Saharan African states and does so in the context of the first published award pertaining to this investment agreement, the protection it affords to investors and states, and the arbitration mechanism it sets forth.

C. The Africa-Asia Nexus

From a focus on investment arbitration, the Special Issue moves on to address an important regional development, namely trade and investment flows between Asia and Africa and the resulting impact (or possibly lack thereof) on the resolution of disputes between parties from these two regions. **Maguelonne de Brugiere & Charlie Morgan** discuss how trade between China and Sub-Saharan Africa over the past two decades has changed the political and economic dynamics of the African continent. In doing so, they examine the impact that increasing Chinese investment in Sub-Saharan Africa in the past couple of decades is having on the availability, choice, and form of commercial international arbitration on the continent. They also examine the evolution of the China-Sub-Saharan Africa investment treaty regime, the broadening of the protections afforded to investors, and the liberalization of the investor-state dispute resolution mechanisms therein.

Ucheora Onwuamaegbu analyzes key trends and provisions of Asia-Africa investment agreements. Onwuamaegbu concludes that African and Asian states are not entering into investment agreements at a high rate and a substantial proportion of the Asia-Africa investment agreements that have been signed remain un-ratified. Onwuamaegbu posits that these trends may be the result of African states entering into investment agreements with countries with which they have historical investment flows instead and/or a tendency to rely on other processes for protecting investments such as local mechanisms and diplomatic protection. These trends suggest a lack of cohesion in the approach adopted by Asian and African states and investors in resolving their disputes, at least to date.

Dr. Nachiketa Mittal offers a novel "Chindia" perspective on investment protection in Africa - that is, the perspective from Chinese and Indian investors. The importance of Chinese investment in Africa is plain; Professor Mittal broadens the lens to encompass Indian investment as well. Some of the arguments advanced here will seem familiar - the need for investment protection, legal stability, reliable institutions, and so forth - but it is

intriguing to see these arguments advanced from the point of view not of the North but of other Southern countries. Professor Mittal's work may be seen as being in conversation with many of the other articles in the Special Issue: expressly addressing the situation in South Africa and calling for reforms there; sharing some of the concerns expressed by Noury, Bruton, & Pan about the stability of investments in Africa (see below); and even contributing to the debate about the future of BITs by suggesting that Southern states may take positions traditionally associated with the North in South-South BITs as they become capital exporters.

D. International Arbitration in the Energy and Natural Resources Sector in Africa

Moving from a regional focus to a sector focus, **Sylvia Noury, Leilah Bruton & Annie Pan** highlight trends that point to the continuing need for investment protection by focusing on the especially sensitive sector of energy and natural resources. Noury, Bruton & Pan draw on their personal experience across the continent, identifying trends they see as threatening to investors in six countries: Algeria, Egypt, Mozambique, Nigeria, South Africa, and Uganda. They identify three trends sure to be of interest to energy investors in Africa:

"(1) the unilateral re-interpretation and violation of contractual terms (in particular, the erosion of previously agreed terms when energy and natural resource projects transition from exploration to production), (2) the introduction of adverse tax measures (such as retroactive windfall profits taxes and capital gains tax charges on offshore transactions) and (3) the implementation of 'indigenisation' or 'local content' legislation (including black economic empowerment policies)."

Noury, Bruton & Pan weave these strands together into one overall trend, which they term "resource nationalism." They call for restraint against such nationalism, urging that states "not attempt[] to wring so much out of their resources today that they forfeit the investment they require to reap the benefit of those resources tomorrow. " In other words, the authors remind us of the basic bargain embedded in international investment law: investment protection to attract investment to promote development.[27]

Mark Beeley & Adrianne Goins explain that international commercial arbitration has been often misunderstood and poorly supported in much of Africa, especially in the context of disputes in the oil and gas sector where high financial stakes combine with national interest and divergent nationalities. They note that distrust has resulted from the lack of insight into arbitration proceedings conducted by non-African, private tribunals outside of the continent and that this distrust has manifested itself in domestic court interference in arbitration, which can significantly prolong or even derail the resolution of disputes. The authors go on to explain that there have been a number of efforts in recent years to advance the use of arbitration through both international and regional institutions, especially with regard to energy disputes. They conclude that, although there have been setbacks, the developments are, on the whole, promising.

Saadia Bhatty & Nefeli Lamprou address Africa's international boundary disputes and the impact on investment, particularly in oil exploration and production activity. Bhatty & Lamprou note that foreign investment in Sub-Saharan Africa continues to proliferate even though nearly a hundred active territorial and maritime disputes currently exist across the continent, resulting in large areas with unsettled boundaries. They note that this phenomenon can be explained in part because oil and gas concessions are sometimes granted without the investors being fully aware of an underlying inter-state dispute or due to the fact that boundary conflicts often emerge or intensify following successful exploration activities.

Bhatty & Lamprou discuss as well how states also manage to attract foreign investment on territories with unsettled boundaries by temporarily agreeing with their neighboring state(s) on a joint allocation of resources pending a final determination. Despite these arrangements - which often take the form of joint development agreements - investing in areas with unsettled disputes remains a highly risky business that is misunderstood and frequently overlooked by foreign investors in the energy sector.

E. Developments in South Africa and SADC

At a time of great public debate in the North about the future of BITs and investment arbitration, Africans are discussing similar questions. Notably, South Africa recently terminated some of its BITs and enacted new investment legislation. South Africa's actions mark some of the most important developments affecting the future of investment arbitration in Africa. Similarly significant changes may be on the horizon in the context of international commercial arbitration in South Africa as the country considers a new national arbitration law. Accordingly, this Special Issue has three articles that contribute valuably to understanding and evaluating the changes in South Africa.

Maurice Kenton & Anne-Sophie Petitdemange begin with a focused examination of the new Protection of Investment Act. They examine both the substantive and procedural aspects of the Act, evaluating the extent to which they strike an appropriate balance of interests between investors and the public. They argue that South African law continues to afford valuable substantive rights to investors, while raising questions about the extent to which the Act's approach to dispute resolution may come to weaken these protections in practice.

Diora Ziyaeva & Maria Jonker take a different approach. They situate the Act broadly in the context of South Africa's efforts to modernize

its legal regime governing commercial arbitration, as it tries to develop its arbitral institutions and become a regional seat. Ziyaeva & Jonker thus examine not only the Act itself, but also a new International Arbitration Bill, which may overhaul South African law with respect to international arbitration to conform with the New York Convention and the UNCITRAL Model Law.

Azwimpheleli Langalanga then places the Protection of Investment Act in historical context. He discusses how post-apartheid South Africa initially joined the modern international investment law regime, until it was prompted to reconsider by a uniquely sensitive case: in *Foresti*, the claimants challenged the Black Economic Empowerment program, a cornerstone of post-apartheid policy.

A small step takes us from South Africa to the Southern African Development Community (SADC), where a dramatic reaction to investor-state arbitration has unfolded. SADC had created a court with jurisdiction over "disputes between natural or legal persons and States," regardless of the claimant's nationality. In its first judgment, the SADC Tribunal ruled for white farmers from Zimbabwe in a case they brought against Zimbabwe itself. The Tribunal held that Zimbabwe had deprived the farmers of their land without opportunity for judicial review and had discriminated de facto against them on the basis of race. Soon thereafter, apparently at Zimbabwe's urging, the SADC Summit effectively dissolved the Tribunal and suspended its work pending a treaty amendment to abolish private access.[28]

In the wake of these developments, **Nuno Ferreira Lousa & Raquel Galvão Silva** come forward in the spirit of Mark Twain's famous quip: "The report of my death was an exaggeration." They argue that SADC's Protocol on Finance and Investment continues to protect investors, arguably including investors from outside the SADC region. And they argue that cases under this protocol may be brought (in appropriate circumstances) to ICSID, the ICSID Additional Facility, or ad hoc arbitration under the UNCITRAL rules. This innovative argument will interest anyone considering the extent of international investment protection currently afforded in the 15 countries of the SADC region, including South Africa under the Protection of Investment Act. When a suitable case arises, it will be interesting to see if the tribunal upholds the argument advanced here by Lousa & Galvão.

F. OHADA

From southern Africa, the Special Issue moves to the OHADA region. OHADA is an organization of 17 African countries that seeks to harmonize business laws and implementing institutions.[29] In relation to international arbitration, OHADA adopted the Uniform Act on Arbitration ("Uniform Act") in 1999, which is based on the UNCITRAL Model Law, though it is generally less comprehensive.

The OHADA arbitration regime enables parties to arbitrate under the Uniform Act, providing for (1) institutional arbitration administered by the CCJA or, alternatively, (2) ad hoc arbitration or institutional arbitration by an institution other than the CCJA. Under the OHADA system, the CCJA serves a dual role as an arbitral tribunal and as the court of last resort for OHADA law, which includes serving as the authority responsible for annulling arbitral awards.

To date, coverage of OHADA-related arbitrations has been more extensive in French outlets than in English ones, which is not entirely surprising in light of the fact that OHADA mainly covers Francophone countries. However, a recent notable exception in English-speaking circles occurred earlier this year when the *Getma International v. Republic of Guinea* case garnered considerable attention for OHADA-related arbitration. In this case, the CCJA annulled an award on the basis that the arbitrators exceeded their mandate when they entered into a separate fee agreement with the parties, which substantially exceeded the fees established by the CCJA in its fee schedule. Getma International sought to enforce the award in the U.S. District Court for the District of Columbia, but, in an opinion dated June 9, 2016, the court refused to enforce the award since it had been annulled by the CCJA.[30] The *Getma* case has been criticized from multiple angles, including the CCJA's fee schedule[31] and the actions of the arbitrators,[32] and will undoubtedly continue to be a source of debate.

Four articles in this Special Issue seek to elucidate the OHADA arbitral process and highlight key issues confronting the arbitral process in this region.

Janice Feigher provides an overview of some of the salient issues and challenges confronting the OHADA arbitration framework. In doing so, she explores the two regimes available for arbitration under the OHADA system - arbitration under the Uniform Act or the rules of the CCJA - and the common features and unique aspects of these regimes. In making this analysis, Feigher concludes that, although OHADA arbitration proceedings increasingly involve African parties or interests, reform of OHADA arbitration is necessary if it is to flourish and become a cornerstone of dispute resolution in Africa.

Athina Fouchard Papaefstratiou provides a critical analysis of OHADA arbitration in her contribution. She reports on the recent process that was undertaken to revise the Uniform Act rules and the establishment of a partnership between the CCJA and the ICC in Paris, which seeks to enhance cooperation between these two organizations and promote, professionalize, and standardize the practice of arbitration in the OHADA region. The article points to certain aspects of the OHADA arbitration system that may merit a re-assessment during the review process and to practices of the CCJA as an arbitration institution that may be worthy of revision in the context of the partnership with the ICC.

Séverine Menétrey focuses on the multiplication of arbitral institutions in OHADA countries, a theme explored on a continent-wide basis by Karanja and Muriuki, as noted above. Professor Menétrey undertook an information-collection endeavor by devising and transmitting a survey to the various arbitral institutions that exist in the OHADA region - a number that has reached 16 (though some exist only formally). She found that the quantitative "success" of the OHADA region's arbitral centers is modest but that a paradigm shift has occurred with respect to the view of arbitration by OHADA Member States since the Uniform Act was passed in 1999. She concludes that the extent to which public authorities have accepted, and often promote, arbitration is a direct result of OHADA.

Finally, **T. Alexander Brabant & Ophélie Divoy** delve into a timely and important topic on the enforcement of arbitral awards under the Uniform Act. They explain how the enforcement in OHADA Member States of awards rendered outside the OHADA zone continues to face several hurdles. In particular, they note that the provisions of the Uniform Act can be the source of significant debate regarding its applicability as the law governing (1) the recognition and enforcement of foreign arbitral awards in OHADA Member States and (2) challenges brought against exequatur orders. They make a call for relevant improvements as part of the revision process that is underway on the Uniform Act.

G. Other Jurisdiction-Specific Developments

The remaining papers address salient topics within the realm of specific jurisdictions. **Ina C. Popova & Nwamaka G. Ejebe** examine Mauritius's effort to become a leading arbitral seat. They address the specifics of the Mauritian legal framework, including what they call the "innovative pro-arbitration adjustments" to the UNCITRAL Model Law, and the Mauritian courts' pro-arbitration enforcement of the legal framework through the discussion of several demonstrative cases.

Albert K. Fiadjoe & Nana Tawiah Okyir address Ghana's most recent *lex arbitri*. Ghana's relatively new law has some very peculiar characteristics, including an attempt to integrate customary law and customary means of resolution of disputes in the context of pluralism. Providing historical context, Fiadjoe and Okyir situate Ghana's *lex arbitri* in the global arbitral order.

Seyoum Yohannes Tesfay tackles a very specific topic - kompetenz-kompetenz under Ethiopian law. The allocation of competence between the courts of the seat and arbitral tribunals is at the core of the operation of the arbitral system anywhere. Tesfay surveys a spectrum of foundational principles and standards of review in jurisdictions ranging from the United States to France and offers his own conclusion of where the Ethiopian law falls within this spectrum.

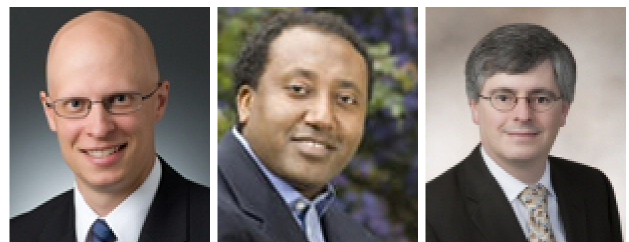
The role of national law and the supervisory jurisdiction of national courts over international arbitration will continue to be a key issue in Africa just as it is elsewhere across the globe. In this regard, **Mabvuto Sakala & Kelly Kapianga** contribute a piece in which they assess Zambia's UNCITRAL-Model-Law-based Arbitration Act from a doctrinal and practical standpoint. Beginning with the historical progression of the rules, they critically examine matters ranging from the Zambian courts' enforcement of arbitration agreements to the enforcement of arbitral awards focusing on the mining and financial sectors. Sakala & Kapianga demonstrate their main propositions using Zambian court cases. In particular, the cases demonstrate instances of both occasions of the courts' interference and restraint.

Dr. Philip Osarobo Odiase offers an analysis of the challenges of enforcement of international and domestic arbitral awards in Nigeria. Dr. Odiase's analysis is both academic and practical. On the academic side, he puzzles over the intractable problem of the exact role of the courts of the state in which the arbitration is seated. He explores not only their procedural supervisory function but also the limits of their review power. At the more practical level, he sheds light on the Nigerian courts' specific challenges in the enforcement of arbitral awards.

Finally, the Special Issue moves away from its emphasis on international arbitration with one piece exploring mediation as a method of alternative dispute resolution on the basis of an important case study. **Kananu Mutea** provides a timely report on the efforts that the Kenyan judiciary has taken, in collaboration with the Law Society of Kenya, to increase efficiency and case management through the introduction of court-mandated mediation in the Commercial Division of the High Court at Nairobi.

* * *

This Special Issue presents diverse views on a number of salient topics affecting international arbitration involving the African continent. These issues will continue to unfold as Africa continues to emerge as a geographic region of importance in the international arbitral community. We hope you enjoy this Special Issue and find it useful in your endeavors.



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[5] Andrea Carlevaris, Tunde Ogunseitan & Diamana Diawara, *The "Africanisation" of International Arbitration.*

[6] Won Kidane, The China-Africa Factor in the Contemporary ICSID Legitimacy Debate, 35 U. Penn. J. Int'l L. 559, 561 & n.6 (2014) ("The fifteen original African contracting states were: Benin, Burkina Faso, Central African Republic, Chad, Republic of Congo, Cote d'Ivoire, Gabon, Ghana, Madagascar, Malawi, Mauritania, Nigeria, Sierra Leone, Tunisia, and Uganda. A total of twenty instruments of ratification were deposited that day. The remaining [five] came from Iceland, Jamaica, Malaysia, Netherlands, and the United States.").

[7] *Id.* at 561-62 (discussing the history); see also Perry S. Bechky, Microinvestment Disputes, 45 Vand. J. Transnat'l L. 1043, 1064-67 (2012) (discussing development as the purpose of ICSID).

[8] Of the first nine cases listed on listed on ICSID's website, registered between 1972 and 1978, six concerned Africa and three concerned Jamaica. See ICSID, Concluded Cases with Details, icsid.worldbank.org.

[9] Texaco Overseas Petroleum Co. v. Libya, Award on the Merits, Jan. 19, 1977, *translated in*17 Int'l Leg. Materials 1 (1978). As this case reveals, ICSID, of course, is not the only forum hearing investor-state arbitrations. But it appears quite dominant in investment cases (especially treaty-based cases) involving Africa. According to the article appearing in this Special Issue by Andrea Carlevaris, Tunde Ogunseitan & Diamana Diawara of the ICC, at 12 n. 44, "[o] ver the past 10 years, only one ICC case on the basis of a BIT was brought against an African State. " Likewise, the website of the Permanent Court of Arbitration lists 27 pending investor-state cases, none of which concerns Africa. Permanent Court of Arbitration, Cases, pcacases.com/web/allcases/.

[10] Our calculations based on annual data in ICSID, The ICSID Caseload - Statistics (2016-2), at 8 (ICSID Caseload).

[11] *Id.* at 11. According to this document, 16% of ICSID cases concern Sub-Saharan Africa and another 10% concern "the Middle East and North Africa."

[12] Our calculations based on data at ICSID, Cases, icsid.worldbank.org (identifying 593 cases as of Sept. 1, 2016, searchable by party nationality).

[13] Kidane, The China-Africa Factor, at 597, 652-673 (Appendix 2). This table lists the damages in awards against African states, including awards of about $15,000 plus local currency, $200,000, $333,000 plus local currency, $750,000 (later annulled), $1.2 million, $2.2 million, £1.8 million, $8.7 million, $9 million, €8.2 million, $12.3 million (which included interest and costs of about $5.7 million and was later reduced by partial annulment), $20 million (which included interest of about $12 million), $27.6 million (which included interest and costs of about $15 million), and $74.6 million. We have focused here only on the awards denominated in dollars and such readily convertible currencies as euros and pounds.

[14] Getma Int'l v. Guinea, Award, ICSID Case No. ARB 11/29, 194-95 (Aug. 16, 2016). This case is discussed further in this Special Issue by Soopramanien & Soopramanien, Papaefstratiou, and Karanja & Muriuki.

[15] Von Pezold v. Zimbabwe, Award, ICSID Case No. ARB/10/15, 304-05 (July 28, 2015). This award, which arose from Zimbabwe's expropriation of land from white farmers, gave Zimbabwe the option to reduce the damages to about $65 million if it also restored land to the claimants. *Id.* This case is discussed further in this Special Issue by Lousa & Galvão .

[16] It should be noted that an ICSID tribunal may only exercise jurisdiction over a case between one Contracting State and "a national of *another* Contracting State." ICSID Convention, art. 25(1) (emphasis added). For a case like *Shell Nigeria v. Nigeria*, where the claimant is organized under the laws of the respondent state, jurisdiction may be exercised only where, "because of foreign control, the parties have agreed [that the claimant] should be treated as a national of another Contracting State" (in this case, the Netherlands). *Id.* art. 25(2)(b). Accordingly, as a matter of ICSID law, Shell Nigeria cannot validly be considered a Nigerian person notwithstanding its incorporation in Nigeria, but must instead be deemed to have the nationality of its Dutch parent company.

[17] Technically, *Besserglik v. Mozambique* is an Additional Facility case not governed by the ICSID Convention, because South Africa is not an

ICSID Member. By contrast, *AngloGold Ashanti* is governed by the ICSID Convention. The ICSID website does not explain the deemed nationality of the claimant in *AngloGold Ashanti*, but presumably the South African parent owns the Ghanaian subsidiary through an intermediate holding company in a country that is a member of ICSID.

[18] ICSID Caseload, at 18.

[19] *Id.* (identifying 4% of arbitrators from "the Middle East and North Africa"). The country-specific list indicates that a majority of the "MENA" appointments are from North Africa (perhaps 47 to 11, excluding from both sets dual nationals and one notable tri-national). *Id.* at 20.

[20] Kidane, The China-Africa Factor, 35 U. Penn. J. Int'l L at 623.

[21] The authors thank Marie-Andrée Ngwe and Sergio Puig for their help on this point. The Democratic Republic of Congo appointed Marie-Andrée Ngwe once and Marie-Madeleine Mborantsuo has two appointments, one by Gabon as claimant and the other by ICSID on behalf of the Central African Republic as respondent.

[22] Sergio Puig, Social Capital in the Arbitration Market, 25 Eur. J. Int'l L. 387, 404-05 (2014).

[23] Cf. David C aron, ICSID in the Twenty-First Century: An Interview with Meg Kinnear, 104 *ASIL Proceedings* 413, 432 (2010) (" So the short answer is, number one, foremost and always, it's merit. But yes, I certainly hope and look to see if there are candidates from other regions, including women. There are some fabulous candidates who may meet that primary requirement. So yes, it's important to expand the pools, but obviously never just for the sake of diversification. ").

[24] Banro American Resources v. Democratic Republic of Congo, ICSID Case No. Arb/98/7 (Carveth Geach of South Africa); Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso, ICSID Case No. ARB/97/1 (Séna Agbayissah of Togo, though apparently based in Paris).

[25] Puig at 406. This compares with 66% by parties (singly or jointly) and 5% jointly by co-arbitrators. *Id.* ICSID is limited in another respect as well: states name people to the rosters from which ICSID selects and, as of 2012, only 14.7% of the designees were women. Lucy Greenwood & C. Mark Baker, Getting a Better Balance on International Arbitration Tribunals, 28 Arb. Int'l 653 (2012).

[26] Asian Agricultural Products Ltd. v. Sri Lanka, Award, ICSID Case No. ARB/87/3; see generally Jan Paulsson, Arbitration Without Privity, 10 ICSID Rev. 232 (1995).

[27] Cf. Bechky, Microinvestment Disputes, 45 Vand. J. Transnat'l L. at 1064-67 (arguing that investment promotion is only ICSID's intermediate purpose, not its ultimate purpose, which is development).

[28] Mike Campbell (Pvt) Ltd. v. Zimbabwe, SADC (T) Case No. 02/2007, Judgment (28 November 2008). For more about *Campbell* and its political consequences, see Perry S. Bechky, International Adjudication of Land Disputes: For Development and Transnationalism, 7 Law & Dev. Rev. 313, 322-23 (2014).

[29] The member states of OHADA are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Democratic Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

[30] *Getma Int'l v. Republic of Guinea*, No. 14-1616, 2016 WL 3211808 (D.D.C. June 9, 2016).

[31] Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?*, Kluwer Arbitration Blog, February 10, 2016.

[32] Catherine A. Rogers, *When Arbitrators and Institutions Clash, or The Strange Case of Getma v. Guinea*, Kluwer Arbitration Blog, May 12, 2016.

Full article here

AFRICA

Africa's Impact on International Arbitration: Momentum and Challenges

Africanisation of International Arbitration

Andrea Carlevaris
Tunde Ogunseitan
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ICC International Court of Arbitration

Abstract

Sub-Saharan Africa is a region where arbitration has not received much attention over the last few decades. Because of that, the perception has for long been that arbitration is emerging in Sub-Saharan Africa, but for those in the know it "emerged" a long time ago. The increased use of arbitration on the continent as a whole lies not only with the parties' control over the process but also primarily with their ownership of the pace of the proceedings and the confidentiality afforded by arbitration. In a continent where the perception of lack of commercial sensitivity by the courts is an issue, considerations such as costs, neutrality, expertise

of arbitrators and finality have been pointed out as subsidiary advantages.

Despite the interest voiced for arbitration on the continent, Africans seem not to be prone to litigate at home when given a chance. The reasons for this are legacy issues, which will not be tackled in this paper, but the raw statistics indicate that they prefer the well-heeled salons of Paris, London or Brussels. There is also another element to this refusal. Foreign counsel and arbitrators with vast expertise tend to be preferred to home grown talent who are not seen as seasoned or "heavy weight" when substantial amounts are in dispute between the parties, which is often the case in Sub-Saharan African arbitrations involving primarily States and State entities. These explanations for the reluctance of African parties to Africanise their arbitrations should not be dismissed as simple myths as one must recognise the need for training and development for counsel and arbitrators around the continent.

Yet African parties are in the driving seat and they must trust themselves with the development of African arbitration. They must realise that the wealth of knowledge and talent they have built up over the decades can sustain the path and the development of international arbitration on the continent.

✎ Full article here

Spotlight On Africa: Problems of Legitimacy and Inclusivity In International Arbitration

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Shalini O. Soopramanien
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Abstract

The last decade has seen a surge in interest in international arbitration in Africa. A growing number of arbitration disputes has featured African parties. Numerous Africa-based arbitration centers, both domestic and regional, have been established. Across the African continent, modern arbitration laws have been promulgated by, and reforms implemented in, African states. However, this growing appetite for arbitration in Africa has not translated into a proportionate representation of African arbitrators on the international arbitration scene. This paper seeks to delve deeper into the causes and origins of the "diversity gap" in international commercial arbitration, highlight the opportunities and challenges which lie ahead for the continent, and propose a three-pronged reform agenda geared towards African states, institutions and individuals, respectively, with a view to bridging the diversity gap.

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The Proliferation of International Arbitral Institutions in Africa and What the Future Holds for Institutional Arbitration on the African Continent

Elizabeth Karanja
Legal Practitioner

Nicola Muriuki
JMiles & Co.

Abstract

Traditionally, international arbitration has been administered by established institutions such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). However, in recent years various countries have sought to shift attention away from traditional seats such as London to other destinations, and the new focus is on Africa.

With a wealth of natural resources and opportunities for development, Africa has been, and continues to be, a foreign investment destination. As a result, various African countries have set up arbitration centres, with some striving to achieve recognition as an international arbitration destination. Egypt, Mauritius, Nigeria and Rwanda all have established centres and a new centre has recently become operational in Kenya. Other countries, such as South Africa, have also taken recent steps to secure recognition as an international arbitral hub.

This article reviews the major arbitral institutions in Africa and highlights some of the successes and challenges the various centres have faced in seeking international recognition. It explores the common denominators which might indicate prospects for success, and discusses whether such institutions have the ability to achieve longevity on the continent and in international arbitration practice generally.

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African Voices on Cultural Issues Impacting the Role of Africans and Africa in International Arbitration

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Introduction

Through interviews with eight individuals having expertise in the field of international arbitration and representing five different African nations, this article aims to explore various factors that are commonly described as "cultural" factors that may influence, positively or negatively, the roles of Africa and Africans in the international arbitration community. The paper considers both (a) elements of the legal cultures of various African

nations, and (b) elements of the legal culture of the international arbitration community, that might be contributing factors.

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Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa

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Abstract

International arbitration is gaining traction in Africa as an ideal method of dispute resolution for commercial disputes between parties from different jurisdictions. As cross-border commerce, trade and investment increases in the African continent, so does the potential of international arbitration. Although this is welcome economically, the convergence of culture creates unprecedented complexities when disputes arise. Although sometimes overlooked, culture plays a critical role in international arbitration as cases often involve parties from different countries. The author contextualises commercial arbitration in a transnational legal order as arbitration is increasingly viewed as a transnational system of justice. This paper further explores the meaning of culture and analyzes the manner in which culture undergirds international arbitrations in Africa, given this transnational context. The author argues that cultural considerations must be taken into account in order for international arbitration to survive in the long run in Africa. This paper analyzes cultural issues such as political and religious considerations, cultural biases and stereotypes, communication and language issues, inter alia. Within this analysis, the author highlights measures that could be put in place to ensure that these cultural issues are considered in African-related arbitrations in order to contribute to the greater success of the arbitral process.

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Investment Treaty Arbitration and Policy

Rule-takers or Rule-makers? A New Look at African Bilateral Investment Treaty Practice

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Abstract

Who are the rule-takers and rule-makers in the African BIT universe? Using computational measures of textual similarity this paper provides a nuanced empirical answer to this question. First, we find that African states tend to be rule-takers in North-South relations, yet enjoy greater agency in negotiations of South-South BITs. Only a few African countries, however, use their greater say in intra-African negotiations to include public policy exceptions in BITs. Indeed, recent North-South BITs contain more policy space than their Southern counterparts in Africa. Second, rule-makers and rule-takers also exist within the African South-South BIT landscape. Yet, in contrast to North-South relations, negotiation outcomes seem to be shaped more by expert knowledge than by power asymmetries. Powerful states like Egypt fail to dominate negotiations, while small-island-state Mauritius with its strategic investment policy agenda succeeds in setting the terms of investment agreements. This paper thus provides a more nuanced view of the African treaty landscape, points to new areas of research and highlights the importance of technical expertise in achieving coherent treaty networks.

✎ Full article here

Towards a More Effective International Investment Policy Framework in Africa

Hamed El-Kady
UNCTAD

Abstract

The international legal framework for investment in Africa, consisting of over 840 bilateral investment treaties (BITs) of which 155 are intra-African and a myriad of regional agreements, is in need of reform. The provisions included in these investment treaties limit the right of host states to regulate investment; promote investment only indirectly through investment protection; have been drafted on the basis of developed countries' models with little or no modifications (this also holds true for intra-African BITs), and include broad investor-State dispute settlement (ISDS) mechanisms allowing foreign investors to bypass domestic courts and bring international arbitration proceedings that may

impact African countries' right to regulate key public policies, such as health, the environment or other social policies. Many African countries and regional groupings are reviewing their stance on BITs, drafting new BIT models and guidelines, and considering alternative approaches, notably through regional initiatives. These developments present a real opportunity to consolidate and modernize the African network of BITs to make it more manageable for host states and more conducive to economic development. This paper proposes an action plan consisting of three points to consolidate the African investment policy regime to make it more effective, less convoluted, and more conducive to economic development: 1. focusing on the regional dimension of investment policy making and replacing intra-African BITs with African regional investment agreements; 2. strengthening and modernizing national legal frameworks on investment; 3. ensuring better coordination among African countries when reviewing and reforming investment policies.

✎ Full article here

The Phoenix of Multilateral Investment Treaties: The Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference - What Impact on Sub-Saharan Africa?

Solomon Ebere
Derains & Gharavi

Abstract

The Organisation of the Islamic Conference, a union of 57 Muslim States, has produced an agreement for the promotion, protection and guarantee of investments among its members. This little-known investment agreement was ratified by numerous States around the globe, including many in sub-Saharan Africa. It is now well-documented that this part of the world increasingly attracts foreign direct investment, notably from investors of other signatories to this investment agreement. However, very little, if anything, has been written about the impact this investment agreement could have on investor-state arbitrations involving a sub-Saharan African State. The purpose of this paper is to examine, in light of the first published award pertaining to this investment agreement, the protection it affords to investors and States, as well as the arbitration mechanism it sets forth. This agreement could play a meaningful role by providing investors with valuable protections and an avenue for redress they might not otherwise have, whilst binding them to certain norms of conduct applicable in the host State. However, this agreement could also lead to further forum shopping and the multiplication of arbitration proceedings against some of the least developed States in the world.

✎ Full article here

The Africa-Asia Nexus

Chinese Investment in Sub-Saharan Africa: Is it Changing the Face of International Arbitration in the Region?

Maguelonne de Brugiere
Charlie Morgan

Herbert Smith Freehills LLP

Abstract

Trade between China and Sub-Saharan Africa over the past two decades has uncontestably changed the political and economic dynamics of the African continent. This article examines the impact that increasing Chinese investment in Sub-Saharan Africa in the past two to three decades is having on the availability, choice and form of commercial international arbitration in the continent. It also examines the evolution of the China-Sub-Saharan Africa investment treaty regime, the broadening of the protections afforded to investors and the liberalisation of the investor-state dispute resolution mechanisms therein.

✎ Full article here

The Dispute Resolution Trends in Treaties Affecting African/Asian Investors and African/Asian States

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Abstract

This article explores salient trends and provisions of the investment agreements between Asian and African states. While investment agreements have been a key feature of Asian countries' foreign-investment expansion strategies in some respects, African states are not entering into investment agreements with Asian states at a high rate, and a substantial proportion of Asia-Africa investment agreements that have been signed remain un-ratified. These trends may be the result of African states entering into investment agreements instead with countries with which they have historical investment flows and/or a tendency to rely on other means for protecting investments, including local mechanisms and diplomatic protection. All of this points to a lack of cohesion to date in the approach adopted by Asian and African states and investors in resolving their disputes.

✎ Full article here

Arbitration in Africa: 'Chindia' Perspective

Dr. Nachiketa Mittal
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Abstract

The global economy thrives on foreign investment. The rising world economies have created a huge demand for investors to explore business with them. Traditional bilateral ties of securing investments have been taken over by mutually negotiated Bilateral Investment Treaties (BITs). This has generated a new debate of security of investors in the host country. African and Asian nations are growing players in this geo-political and economic landscape. Their mutual concerns and expectations revolve around conducive legal infrastructure for amicable, speedy, transparent and effective dispute resolution of investment disputes. China and India have emerged as key stakeholders in the Asian investors circle investing in African nations. International investment arbitration is increasingly becoming dear to both China and India while they make inroads in African investment markets. Modernization of arbitration regime with a promise of investment security and quick dispute resolution could be a decisive factor affecting progress of investment in Africa in future.

Full article here

International Arbitration in the Energy and Natural Resources Sector in Africa

Resource Nationalism in Africa - The Next Wave? Trends in Investor-State Disputes in the Energy and Natural Resources Sector in Africa

Sylvia Noury
Leilah Bruton
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Abstract

This article examines the prevailing trends in investor-state disputes in the energy and natural resources sector in Africa. In particular, it explores the variety of measures that governments have deployed over the last decade to maximise their title to, returns on, or profit from, their nation's natural resources, and the impact that has had on foreign investors. The authors will draw in particular upon their experiences of disputes in Nigeria, Egypt, Algeria, Uganda, Mozambique and South Africa to highlight three main trends in resource nationalism on the continent, namely (1) the unilateral re-interpretation and violation of contractual terms (in particular, the erosion of previously agreed terms when energy and natural resource projects transition from exploration to production), (2) the introduction of adverse tax measures (such as retroactive windfall profits taxes and capital gains tax charges on offshore transactions) and (3) the implementation of 'indigenisation' or 'local content' legislation (including black economic empowerment policies). The article concludes with reflections on the types of disputes that may arise in the future in the energy and natural resources sector in Africa.

Full article here

Arbitration of Energy Disputes in Africa

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Abstract

International arbitration has been often misunderstood and poorly supported in much of Africa. This is especially the case with disputes in the oil and gas sector, where high financial stakes combine with national interest and a mix of nationalities. Distrust has resulted from the lack of insight into arbitration proceedings conducted by non-African, private tribunals outside of the continent. This distrust has manifested itself in domestic court interference in arbitration, which can significantly prolong or even derail the resolution of disputes. In recent years, however, there have been a number of efforts to advance the use of arbitration, through both international and regional institutions. These efforts have been effective on balance, including with regard to energy disputes. The number of African signatories to the New York Convention has increased, and multilateral and regional arbitration centers have begun to effectively counter-balance the distrust of arbitration through training and other programs. Though there have been setbacks, the developments are, on the whole, promising.

Full article here

Pitfalls of Investing in Sub-Saharan African Regions with Unsettled Boundaries: How Foreign Investors May Minimize and Manage Investment Risk

Saadia A. Bhatty
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Clyde & Co

Abstract

Currently, nearly a hundred active territorial and maritime disputes exist across the African continent resulting in large areas with unsettled boundaries. Yet, foreign investment in Sub-Saharan Africa, and in particular oil exploration and production activities, continues to proliferate. This can be explained in part because oil and gas

concessions are granted without the investors being fully aware of an underlying inter-state dispute, or due to the fact that boundary conflicts often emerge or climax following successful exploration activities. States also manage to attract foreign investment on territories with unsettled boundaries by temporarily agreeing with their neighbouring state(s) on a joint allocation of resources pending a final determination. Despite these arrangements - which often take the form of joint development agreements - investing in areas with unsettled disputes remains a highly risky business that is misunderstood and frequently overlooked by foreign investors specifically in the energy sector.

Against this background, this paper's aim will be to, inter alia, identify the specific risks and pitfalls of entering into investment contracts in zones with unsettled boundaries in Sub-Saharan Africa, and to highlight some of the risk management tools available to foreign investors, in particular, the incorporation of contractual provisions guaranteeing their protection in case of any disruption to their operations pursuant to the emergence of a boundary dispute. To this end, investors should aim to include strict termination and suspension clauses and survival clauses, and spell out any state assurances given at the time of contracting. They should also insert an effective dispute resolution clause giving them the option to pursue claims against the contracting state before an international arbitral tribunal in case of a dispute. All of the above should be done in consideration of the idiosyncrasies of the African continent as a whole, as well as of the legal regime applicable to the particular states where the investment is made.

Full article here

Developments in South Africa and SADC

South African Protection of Investment Act: A Balance of Interests?

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Abstract

The new Protection of Investment Act, the most recent development in a long-running narrative involving foreign investment in South Africa, was adopted on 15 December 2015, following two years of intense debate. It provides the framework for investor protections in South Africa and will eventually replace a number of South Africa's bilateral investment treaties, which have been (or will be) terminated. Among the Investment Act's stated purposes is the protection of investment "in a manner which balances the public interest and the rights and obligations of investors", while the preamble highlights the desire to secure "a balance of rights and obligations of investors to increase investment in the Republic". But, to what extent is a balance of interests truly achieved? While much commentary discusses aspects of the new Investment Act, this article sets out to analyse each of the individual provisions of the Investment Act to attempt to answer this question, examining in turn the dispute resolution mechanism and the substantive protections. Presently, the Investment Act could favour the state's interests. Though it has more to offer in terms of substantive rights than might seem immediately apparent, its dispute resolution provision has the potential to substantially limit investors' protections. It remains, nonetheless, to be seen how the Investment Act will be applied in practice and the significance of South Africa's investment treaties remaining in force.

Full article here

Legal Trends and Developments of International Arbitration in South Africa

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Dentons

Maria Jonker
Consultant

Abstract

For better or worse, recent developments in South African policy in respect of international commercial and investor-state arbitration will affect the future of arbitration in the country. Firstly, the South African government has taken substantive steps to transform the country's investment protection regime. A second driver of change is the ongoing modernization of commercial arbitration law, distinguishing domestic and international arbitration and reforming recognition and enforcement of arbitral awards. Thirdly, development of the arbitration institutions in South Africa plays an increasingly significant role in developing South Africa as an international arbitration hub. This paper unfolds the salient issues relating to international arbitration in South Africa, analyzing these current trends and their potential impact on dispute resolution nationally and regionally.

Full article here

An Historical Appreciation of South Africa's Evolving Foreign Investment Regulatory Policy

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Abstract: Many policy discussions and seminars have been held and papers written on the recent developments in South Africa that review the country's foreign investment regulatory regime. However, there has been less discussion or writing on a historical analysis of South Africa's

decision to embark on the review. This paper approaches South Africa's decision not to renew its bilateral investment treaties from a historical perspective. The paper traces South Africa's signing of BITs that were incongruent with the country's black economic empowerment program and transformative agenda in general. Further, the paper outlines the Foresti case, which jolted South Africa into reviewing its BITs after foreign investors challenged the country's core policy aimed at redressing past injustices by creating a more economically inclusive society. In conclusion, the author cautions against South Africa's approach of taking a more reclusive approach in negotiating its policy space. The author, instead, submits that the best place in which South Africa should have negotiated its policy space should have been within new generation BITs.

➷ Full article here

The Southern African Development Community and its Protocol on Finance and Investment

Nuno Ferreira Lousa
Raquel Galvão Silva

Linklaters

Abstract

This paper examines the scope of application of the SADC Protocol on Finance and Investment, its substantive protection and the dispute resolution mechanisms made available to investors. It focuses specifically on the protection afforded to foreign investors and nationals of both member and non-member States of the SADC Community. The discussion explores the reasons that have contributed to the recent amendments to the jurisdictional scope of the SADC Tribunal and identifies its implications as well as the options still available to foreign investors wishing to enforce their rights under the SADC Protocol on Finance and Investment. The paper suggests that despite the suspension and later changes made to the rules of jurisdiction of the SADC Tribunal, foreign investors may still resort to ICSID or to ad-hoc arbitration under the UNCITRAL Rules and points out the main advantages and disadvantages of each option in terms of jurisdictional and enforcement challenges in the context of investments made in the SADC region.

➷ Full article here

OHADA

Salient Issues in the OHADA Arbitration Framework

Janice Feigher
Norton Rose Fulbright

Abstract

OHADA was created by its founding members with the aim of developing economic activity and investment on their territory. The legal harmonisation achieved by OHADA purports to provide comfort to investors and economic operators by providing them with a certain level of foreseeability and reliability. In this context, the OHADA arbitration framework offers parties of the OHADA Member States doing business together or with foreign investors the possibility to arbitrate under two separate regimes, the Uniform Act or the rules of arbitration of the Common Court of Justice and Arbitration. Both forms of OHADA arbitration present a number of common features as well as a series of specificities.

Just over 15 years after the creation of the OHADA arbitration dual system, statistics and available case law show that whereas arbitration proceedings increasingly involve African parties or interests, reform of OHADA arbitration is necessary if it is to flourish and become a cornerstone of dispute resolution in Africa.

This article addresses the most salient issues and challenges with respect to the two regimes constituting the OHADA arbitration framework. It does not have the ambition of exhaustively describing all the rules contained in the Uniform Act and CCJA Rules.

➷ Full article here

OHADA Arbitration - A Critical Analysis

Athina Fouchard Papaefstratiou
Lazareff Le Bars

Abstract

OHADA arbitration (either ad hoc, under the Uniform Arbitration Act; or institutional, under the aegis of the CCJA) counts a successful existence of nearly two decades. Recently, a revision process of the regulatory framework of OHADA arbitration was introduced, and a partnership between the CCJA and the ICC was launched, aiming to enhance cooperation between the two organisations and to promote and standardise the practice of OHADA arbitration.

The present article aims at pointing to certain particularities of the OHADA arbitration system, be it with respect to the Uniform Arbitration Act, the CCJA rules or the interplay between the two, which may be worth re-assessing in the current reviewing process, or practices of the CCJA as arbitration institution which should be revised in the context of the partnership with the ICC.

Full article here

The Multiplication of Arbitral Institutions in OHADA Countries

Séverine Menétrey
University of Luxembourg

Abstract

The OHADA states adopted a Uniform Act on Arbitration on 11 March 1999. The Uniform Act Arbitration has led to a significant multiplication of arbitration institutions in OHADA countries. This article seeks to collect more information about these arbitrations centers. The quantitative "success" of the OHADA zone's arbitral centers is modest but a veritable paradigm shift has occurred in the OHADA State Parties' view of arbitration since 1999. The extent to which public authorities have accepted, and often promote, arbitration is a direct result of OHADA.

The question is whether the growing number of arbitration centers in the OHADA zone serves a growing local need or if it is simply part of the global trend.

Full article here

The Enforcement of International Arbitral Awards in OHADA Member States - The Uniform Act on Arbitration is Not the Smooth Ride it Was Designed to Be

T. Alexander Brabant
Ophélie Divoy

DLA Piper

Introduction

An arbitration award, regardless of the quality of its reasoning and the terms of its decision, loses much of its value if it is not enforceable.

A critical component of the harmonization and modernization of business law across OHADA member States was the enactment of the Uniform Act on Arbitration. The Act replaced the existing arbitration laws of OHADA member States, the scope of which was often limited to domestic arbitration. For some OHADA member States, the Uniform Act on Arbitration filled the void where there was no existing arbitration law.

The main purpose of the Uniform Act on Arbitration is to foster a secure legal framework for the recognition and enforcement of arbitral awards, not only between the OHADA member States, but also for those awards rendered outside the OHADA zone. This is a key feature needed to further the objective of stimulating both domestic and foreign investment in the OHADA member States.

In practice, however, the enforcement in OHADA member States of awards rendered outside the OHADA zone still faces numerous hurdles. The provisions of the Uniform Act on Arbitration can be the source of significant debate regarding its applicability as the law governing (1) the recognition and enforcement of foreign arbitral awards in OHADA member States, and (2) challenges brought against exequatur orders. One can only look forward to a future reform of the UAA for which work is in progress as of the date of this paper.

Full article here

Other Jurisdiction-Specific Developments

Mauritius's Emerging Prominence in International Arbitration

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Abstract

Mauritius's multicultural society, welcoming business climate and regional economic importance make it a natural candidate for the development of international arbitration. Efforts have been underway in recent years to modernize Mauritius's arbitration regime and make it an attractive arbitral seat, culminating in the Mauritius International Arbitration Act, revised in 2013 ("IAA"). This article explores, first, the key features of the IAA and its adaptations of the UNCITRAL Model Law, and second, the Mauritian courts' evolving application of the IAA. Recent decisions by the Supreme Court reflect that Mauritian jurist have embraced the IAA's non-interventionist approach with respect to enforcing foreign arbitral awards, granting interim measures, and enforcing arbitration agreements. As Mauritius becomes more prominent in the international arbitration community-evidenced by initiatives such as the Mauritius International Arbitration Centre, the Mauritius Transparency Convention, and ICCA Mauritius 2016-Mauritius may well set the pace for other African jurisdictions in developing their own arbitration systems.

Full article here

The Alternative Dispute Resolution Act of Ghana Deconstructed: Providing a More Positive-Sum Approach to Conflict Resolution

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Abstract

The passage of the Alternative Dispute Resolution Act, 2010 has brought about a positive transformation in the conflict resolution landscape of Ghana. This is especially against the background of a hitherto adversarial system of conflict resolution that was manifestly a zero sum game between disputants based on the efficacy of each party's legal representative.

The object of this article is to do a brief, yet analytical contextual appreciation of the 2010 ADR Act. The article discusses some essential uniqueness of the Act while providing reflections on the tensions inherent in the implementation of these unique features. The significant role the court, which traditionally was opposed to ADR, is given in the Act would also be addressed.

The article concludes with reflections including more limitations and an assessment on the further prospect of the Act in the space Of Public Private Partnerships in Ghana.

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Kompetenz-kompetenz of Arbitral Tribunal: 'Legitimacy' Buries Efficacy of Arbitration in Ethiopia

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Summary

Two competing goals permeate international commercial arbitration - ensuring arbitration is consent-based on the one hand, and an effective alternative to litigation in courts on the other. This article evaluates the extent to which Ethiopian law balances these objectives.

To this end, it uses kompetenz-kompetenz, a doctrine deemed to hold the key to unlock the mysteries associated with striking the right balance between the two. Particularly, the basis and scope of this doctrine under Ethiopian law is compared with how the doctrine is understood and applied in selected jurisdictions of significance to international arbitration. Moreover, SALINI Costruttori S.P.A (Italy) v. Addis Ababa Water and Sewerage Authority, an international arbitral case, in which an Ethiopian Court and ICC Tribunal lock horns, is used to analyse the state of Ethiopian law. It finds that Ethiopian law is so lopsided in favour of legitimacy of arbitration that little room is left for the arbitral tribunal to decide on challenges directed at its own jurisdiction. This, it finds, is a major impediment to the success of arbitration as an alternative dispute settlement mechanism in Ethiopia. It then comes up with options to right this imbalance between legitimacy and efficacy of arbitration.

✎ Full article here

An Evolving Judicial Role in Commercial Arbitration in Zambia

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Introduction

In recent years, Zambia has experienced a steady increase in the number and complexity of matters referred to arbitration both in Zambia and abroad. Zambia domesticated the UNCITRAL Model Law through the enactment of the Arbitration Act, No. 19 of 2000 (the "Arbitration Act"), which also domesticated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitration is particularly prevalent in Zambia's dominant copper mining industry, as the Mines and Minerals Development Act requires many mining-related disputes to be determined through arbitration, as does the Petroleum (Exploration and Production) Act. Arbitration is also a common dispute resolution mechanism in commercial lending transactions between Zambian borrowers and international lenders, in public-private partnerships and project financing, and other growth sectors of the economy.

As the use of arbitration as a dispute resolution mechanism has expanded in Zambia, so too has the body of case law interpreting the Arbitration Act and international arbitration principles in the Zambian context. Generally, Zambian courts have displayed a willingness to refer to arbitration disputes which are the subject of a valid agreement to arbitrate. The courts have also sought to preserve the nature of arbitral proceedings and limit the exercise of their powers, for example by refusing to extend the time to apply to set aside an award, or to stay execution where these remedies are not provided for in the Act. The courts have also readily enforced arbitral awards and have usually refused to set them aside except on clear grounds enumerated under the law.

✎ Full article here

Enforcement of Commercial Arbitration Awards in Nigeria More Than Just a Dalliance

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Abstract

In recent times there has been an increase in the volume of commercial arbitration referral in Nigeria. Arbitration is preferred above all other dispute settlement mechanisms in Nigeria simply because of its speed coupled with the fact that its award is final and binding. Despite this development, there are situations where a party to arbitration may be constrained to seek the aid of the regular Court. For instance, where there is a need to enforce arbitral award or challenge its validity. Under the circumstances, parties may find themselves constrained to conduct time-consuming litigation before the regular courts contrary to their original agreement to settle any dispute that might arise between them privately and speedily.

Due to delay associated with enforcement of arbitral award in Nigeria, arbitration has over the years been inadvertently transformed from a final binding settlement mechanism into a preliminary step to full-blown litigation. It is against this backdrop that this paper examines the enforcement of both domestic and international arbitral awards in Nigeria.

↳ Full article here

Court Mandated Mediation: Kenya's Approach

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Abstract

There is an exponential increase in multi-sectoral commercial investment in East Africa, and having an efficient and predictable environment to resolve differences with consideration of the cost and time taken is a concern that investors have. Kenya, which is the gateway into East Africa, has taken meaningful steps to improve investor confidence in the judicial system, including creation of courts with specialism in commerce and admiralty.

This paper discusses the efforts that the Kenyan judiciary has taken, in collaboration with the Law Society of Kenya, to increase efficiency and case management through the introduction of court mandated mediation in the Commercial Division of the High Court at Nairobi. It considers data from the Judicial Training Institute and the Commercial Division of the High Court.

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