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Sub-Saharan Africa Overview

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1. Introduction

As ongoing international investment interest and economic growth across Africa continues unabated, arbitration is increasingly becoming the preferred mode of commercial dispute resolution and the chosen path of recourse for the protection of investor rights across the continent, both domestically and internationally. Throughout the continent there is an increasing appreciation and acceptance at government level, as well as through the courts, that arbitration is a useful and necessary means of commercial dispute resolution. This is coupled with an increasing appreciation of the need for greater certainty on the part of international investors as to the willingness of the courts and state authorities to recognise submission to arbitral proceedings and their outcome, along with the enforcement of arbitral awards within their particular jurisdictions.

Importantly, it should be noted that the degree to which arbitration is accepted as a means of dispute resolution, coupled with the willingness of the local courts to recognise and enforce arbitration awards, differs from country to country across the continent.

2. Trends on Submission to Arbitration

There is no uniformly adopted, centralised law relating to arbitration across Africa. Most typically, though, the practice on international commercial transactions involving African parties, ranging from project finance, mining and construction to logistics and commodity-related transactions, is for submission of disputes to one of the leading international arbitration bodies for administered arbitration. Most favoured in this regard are the International Chamber of Commerce (ICC) Court of Arbitration and the London Court of International Arbitration (LCIA). In regard to choice of law as well as the seat of the arbitration, where the parties move away from domestic law and jurisdictional application, the most commonly followed jurisdictions are the United Kingdom and France, with London and Paris most commonly chosen as the seat.

While the preference for neutrality, along with the expertise in UK and French law, often lead to the nomination of eminent UK and European jurists as arbitrators, parties from African countries are increasingly nominating domestic jurists with expertise in arbitration to serve on these tribunals. Engaging an arbitrator with a sense of domestic perspective and appreciation of local laws and their enforcement often has the advantage of countering concerns by local courts at the enforcement stage that an enquiry into the merits and conduct of the arbitral process should not be undertaken when challenged. Notably, international arbitration bodies such as the Chartered Institute of Arbitrators, are active across the continent with branches in Kenya, Mauritius, Nigeria, South Africa and Zambia (Egypt forms part of the Middle East and Indian Subcontinent region).

Currently, there are many African states which have wholly or partially adopted arbitration legislation in line with the United Nations Commission on International Trade Law (UNCITRAL) Model Law, being suited for uniform recognition and enforcement of both domestic and international arbitration proceedings. In addition, there are currently 33 African states that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, obliging them to recognise and give effect to arbitral processes undertaken through other signatory states, the most recent of these being the Democratic Republic of the Congo.

South Africa, in particular, has been slow in following the latest best practice in international arbitration and is not considered user-friendly. However, as African economies grow and more infrastructure development and economic activity occurs, South Africa is being seen as an emerging arbitration jurisdiction. To its credit, it has well developed arbitral institutions and many experienced arbitrators in various industries, coupled with a judiciary inherently supportive of arbitration as an autonomous form of dispute resolution. In July 1998, the South African Law Reform Commission (SALRC) considered international commercial arbitration and recommended the application of the UNCITRAL Model Law to international commercial arbitration and the promulgation of a new international arbitration act in South Africa. Two decades later, we are pleased to report that the Justice Department has approved the International Arbitration Bill, based almost exclusively on the Model Law, which was introduced to parliament in April 2016. We remain hopeful that the legislation will be promulgated this year.

From a domestic perspective, however, there is less progress to report. In 2001, the SALRC submitted a comprehensive report on the status of South African domestic arbitration in which it was recommended, amongst other matters, that a new domestic arbitration statute be adopted, combining the best features of the UNCITRAL Model Law and the English Arbitration Act of 1996, while retaining otherwise effective provisions of the existing Arbitration Act. To date, however, the legislature has taken no steps to implement the SALRC's recommendations.

3. Regional Initiatives

The establishment of the Organisation for the Harmonization of Business Law in Africa (OHADA) in 1993 by 13 Central and West African states, now grown to 17, has been a strong driver for

the adoption of international arbitration, as well as key elements of the UNCITRAL Model Law by member states. OHADA has developed the Uniform Arbitration Act. Its purpose is to, amongst other things, regulate the recognition and enforcement of arbitration agreements and awards, its provisions superseding national law on arbitration (to the extent that any conflict arises). OHADA was established expressly to facilitate and encourage both domestic and foreign investment in the member states, and is principally based on a modernised French legal model in regard to process and effect, along with the establishment of a supra-national court seated in Abijan, Ivory Coast, to ensure uniformity in judgments and recognition of process.

Pursuant to a legislative initiative in 2009, the Lagos Court of Arbitration (LCA) was launched in 2012 and has since become a Nigerian and West African regional hub for both arbitration and mediation proceedings.

Although it recognises UNCITRAL and OHADA, Ghana is a good example of a country that is following its own arbitration path through the adoption of the Alternative Dispute Resolution Act, 2010. This Act has comprehensively revised Ghana's existing laws on arbitration and enforcement of both domestic and international arbitral awards.

Following the establishment of a permanent Court of Arbitration, the Mauritius International Arbitration Centre Limited (MIAC) was established in 2011 pursuant to an agreement between the LCIA and the Government of Mauritius. Following its establishment, MIAC is actively promoting itself across Africa as a preferred alternative to the traditional international arbitration bodies for African international arbitration.

The Association of Arbitrators (ASA) and the Arbitration Foundation of Southern Africa (AFSA) are the two pre-eminent South African arbitration bodies, administering both domestic and international arbitrations in the SADEC region, albeit largely from a domestic support base. Africa ADR is an initiative driven by the AFSA, as well as a number of other regional arbitration bodies including MIAC, the Centre du Arbitrage, based in the Democratic Republic of the Congo (CDA), and the Centro de Arbitragem Conciliação e Mediação, based in Mozambique.

Arguably the most important development in recent years is the creation of the China Africa Joint Arbitration Centre Johannesburg (CAJAC) in co-operation with AFSA, Africa ADR (AFSA's external arm), the ASA and the Shanghai International Trade Arbitration Centre in late 2015. It will serve as an international arbitration venue for disputes involving parties from China and Africa. It is envisaged that CAJAC will operate from both South Africa and China and will hear disputes relating to business in Africa in Johannesburg and disputes relating to business in China in Shanghai, respectively.

4. Investment Treaty Arbitration

Bilateral investment treaties (BITs) have, since the 1990s, been a core element of African foreign policy to encourage investor confidence and certainty as to the business environment, typically including submission by the affected state to international arbitration tribunals. In addition, 43 African states (South Africa being a notable exception) are party to the 1965 Washington Convention on the Settlement of Investment Disputes (ICSID) as administered by the World Bank. African states have historically featured prominently and regularly as respondents in ICSID proceedings. Within a more favourable international investment climate, many African states are questioning their participation in ICSID and ongoing willingness to conclude BITs including the South African Government, which recently recorded its intent to reverse its historic willingness to conclude such agreements with more than 30 investor states. Coupled with this policy change is a renewed resolve by the South African Government to revisit its domestic legislation on international arbitration and bring it in line with international best practice with the intention to allow foreign investors suitable recourse through localised arbitration.

To this end, The Protection of Investment Act 22 of 2015 (the "Protection of Investment Act"), was passed in late 2015 with the principle aim of strengthening South Africa's ability to attract foreign investment, increase exports and maintain a balance between the rights and obligations of all investors in South Africa. Though it has yet to come into force (at the time of writing), the Protection of Investment Act will, by and large, replace the BITs between South Africa and other countries, which typically provide for arbitration as the preferred method of dispute resolution. The Protection of Investment Act provides for the settlement of investment disputes by arbitration, but only after all domestic remedies have been exhausted. This will certainly impact on the resolution of disputes.

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