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## SUB-SAHARAN AFRICA AND INTERNATIONAL ARBITRATION - HOW DOES THAT WORK?

By Kwadwo Sarkodie

### Setting the scene

The past decade has seen a growing recognition of the substantial investment opportunities offered by Sub-Saharan Africa. This has been helped by increasing political stability, and the implementation of investor-friendly economic policies by many African governments. Measures to facilitate, promote and support the resolution of disputes by arbitration form a key element of these policies.

Africa is a diverse continent, and the legal position in each country is a product of the interactions between indigenous traditions, colonial history and more recent political developments. It is not possible here to address in detail the differences and distinctions between and within different Sub-Saharan African states, and some broad generalisations are unavoidable. What can be done, however, is to consider generally some of the key issues in arbitration in Sub-Saharan Africa and some recent developments.

Of course many international arbitrations about Sub-Saharan African projects and contracts end up having very little to do with Africa. It is common for contracts in Sub-Saharan Africa to provide for a foreign seat of arbitration (e.g. London or Paris) and choose international arbitration rules (e.g. LCIA or ICC). Foreign parties also often seek, where possible, to enforce awards in

jurisdictions outside Africa, if assets can be found there.

But, when contracting in Sub-Saharan Africa, there will still be times when a claimant has to conduct and perhaps enforce an arbitration in an African state (possibly under African arbitration rules), for instance where enforcement is sought against a party that does not hold assets outside Sub-Saharan Africa. The contract may also specify an African seat of arbitration or African arbitration rules. Whilst this is currently comparatively rare (particularly in relation to major projects), it is likely to occur more frequently in the future, particularly since this is something that many African governments (often contracting parties in relation to major African projects) are increasingly keen to promote.

### What challenges does Sub-Saharan Africa present?

The challenges and issues particular to arbitrating in Sub-Saharan Africa, and the concerns they give rise to, may well account for the fact that so many “African” arbitrations end up taking place outside Africa. What are these challenges and issues and what recent developments have there been?

### Domestic Courts

Several of the most commonly perceived



**Kwadwo Sarkodie**

Senior Associate,  
Construction & Engineering  
[ksarkodie@mayerbrown.com](mailto:ksarkodie@mayerbrown.com)

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challenges and obstacles in arbitrating or enforcing arbitral awards in Africa relate to the approach and efficacy of the domestic courts in African states. These courts will often have a key part to play in relation to arbitration, potentially ruling on matters such as the existence or validity of an arbitration agreement (and consequent anti-suit injunctions etc.), challenges regarding the constitution or conduct of the arbitral tribunal or the enforcement of an arbitral award.

The lack of an established body of jurisprudence in relation to international arbitration in many Sub-Saharan African countries, coupled, in some cases, with limited judicial familiarity with issues concerning international arbitration, inevitably fuels uncertainty as to the attitude and approach that domestic courts are likely to take. Another issue faced by many national courts in Sub-Saharan Africa is a strain on resources which can lead to backlogs of cases and lengthy delays, even in addressing relatively straightforward matters.

Corruption, whether on the part of arbitrators, the judiciary or court staff, is also a serious concern. Although there is a tendency to generalise about the extent of corruption in African nations, it still remains the case that corruption can often constitute a significant obstacle to the just and effective disposal of disputes by arbitral tribunals and national courts. Any risk of corruption inevitably gives rise to major concerns on the part of a party faced with the prospect of arbitration.

### Enforcement and public policy

A common exemption from the recognition and enforcement of arbitral awards is on the grounds of public policy (for example under Article V(2)(b) of the New York Convention). This is an important factor in relation to arbitrations in Africa, since public policy can be a relatively fluid concept, and may be very widely construed.

This exemption, which may add a further element of uncertainty to the enforcement of awards, can be exacerbated by the wide-ranging cultural, linguistic, religious and political diversity between, and sometimes even within, African states. For example, a significantly different view of public policy could be taken in courts which apply aspects of Sharia'a law (e.g. in Sudan, or certain states of Nigeria) from those which apply the common law.

### Trends and developments

There is a growing recognition among Sub-Saharan African states of the potentially detrimental effect of some of the issues outlined above, and an increasing acknowledgment that support for arbitration represents a key part of providing an investor-friendly climate. A number of states have therefore taken steps which have the potential significantly to facilitate and increase the use of arbitration.

### New York Convention

One aspect of this is the growing trend in Africa of adoption of international standardised arrangements for the recognition and enforcement of arbitration agreements and arbitral awards.

A growing number of African countries are signatories to the New York Convention<sup>1</sup>, which provides that signatory states shall:

- recognise and uphold valid written arbitration agreements; and
- recognise and enforce arbitral awards (subject to certain exceptions – e.g. public policy).

This represents, in many instances, the preferred means by which arbitrating parties seek to enforce international arbitration awards in the Sub-Saharan African states (just over half of them at present) which are currently signatory to the New York Convention.

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### OHADA

The number of countries which are members of OHADA (the acronym, in French, for “Organisation for the Harmonisation of Business Law in Africa”) is also growing. OHADA came into being in 1993, with the aim of modernising, standardising and harmonising commercial law in Africa. Almost all of the OHADA member states are former French colonies (although Equatorial Guinea (formerly Spanish) and Guinea-Bissau (formerly Portuguese) are also members). The OHADA rules and institutions draw strongly on civil law legal traditions and French business law.

OHADA has a “Uniform Arbitration Act”, along similar lines to the UNCITRAL Model Law, which provides for the recognition and enforcement of arbitration agreements and arbitral awards. Arbitral awards with a connection to an OHADA member state are given final and binding status in all OHADA member states, on a par with a judgment of a national court. Support is provided by the OHADA Common Court for Justice and Arbitration (based in Abidjan, Côte d’Ivoire) which can rule on the application and interpretation of the Uniform Arbitration Act.

The enforcement regime under the Uniform Arbitration Act has a narrow definition of public policy. Enforcement of an arbitral award may therefore only be refused on public policy ground where the award manifestly breaches “international public policy”, as opposed to the public policy of individual member states.

### UNCITRAL Model Law

Progress with the adoption of arbitration legislation based on the UNCITRAL Model Law has so far been limited (six states in Sub-Saharan Africa have adopted laws modelled on the Model Law so far) but the OHADA Uniform Arbitration Act (the provisions of which mirror the Model Law) is applicable in each of the OHADA member states.

### ICSID and bilateral investment treaties

The great majority of Sub-Saharan African states have acceded to the ICSID<sup>2</sup> Convention, and most bilateral investment treaties to which those states are party provide for the referral of investment disputes to ICSID for determination. In circumstances where a bilateral investment treaty is involved, this offers a further option for arbitration.

### Specialist commercial courts

Some of the most significant difficulties and potential uncertainties relating to international arbitration in Sub-Saharan Africa concern the support provided by domestic courts. Recent steps taken in some Sub-Saharan African countries to improve this support could address some of these issues. For example, Tanzania (1999), Uganda (1999) and Ghana (2005) have established specialist commercial courts which employ a number of measures directed at better serving the needs of business, including specialised training for judges and support staff (with the facility for assistance by lay experts), bespoke procedural rules and the extensive utilisation of information technology.

These specialist courts are therefore likely to be better equipped (in comparison with other domestic courts) to provide timely and consistent rulings in relation to issues arising out of international arbitrations, and therefore offer the opportunity significantly to improve the support infrastructure for arbitration within the relevant countries.

### Conclusions

There still remain a number of Sub-Saharan African states (for example, Burundi, Eritrea and Sudan) which are not signatories to the New York Convention, do not have arbitration laws based on the UNCITRAL Model Law and are not members of bodies such as OHADA. In

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these states the obstacles in the way of arbitrations and enforcement of international arbitral awards could therefore be more pronounced but the number of states in this category is falling, as more and more states realise the value of promoting and supporting arbitration.

On the credit side, there are a number of countries (for example Nigeria, Kenya and Uganda) where institutions and legislation to support arbitration are comparatively well-developed, and active steps are being taken to develop these further.

Enforcing an arbitration agreement, arbitrating or enforcing an arbitral award within an Sub-Saharan African state will always bring challenges. The picture inevitably varies across the continent but as the obstacles are addressed so the use of arbitration in Africa is expected to continue to grow.

So long as there is an appreciation of the challenges and issues which may arise, and a knowledge of the increasing number of options available in many countries to address them, the risk of problems with dispute resolution by arbitration need not deter those wishing to avail themselves of the lucrative investment opportunities which Sub-Saharan Africa has to offer.

### Endnotes

- 1 1958 Convention on the Recognition and Enforcement of Foreign Arbitration Awards
- 2 International Centre for Settlement of Investment Disputes