

Arbitration in sub-Saharan Africa

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The region

Sub-Saharan Africa (for the purposes of this article, 'sub-Saharan Africa' excludes the North African countries of Algeria, Egypt, Libya, Morocco, Tunisia and Western Sahara) is a large and diverse region, encompassing legal systems influenced by, and based on, a wide variety of legal traditions (including common law, civil law, customary law and sharia).

The region's economy [The Economist Intelligence Unit forecasts that the sub-Saharan African regional economy will grow by almost 5 percent per annum between 2012 and 2015 and The World Bank is also forecasting similar annual growth percentages: 5.5 percent for 2012.] is currently among the fastest growing in the world and is predicted to grow by almost 5 percent per annum between 2012 and 2015. This level of growth will certainly attract the attention of investors - particularly at a time when more developed economies are enduring a period of either limited growth, stagnation or contraction. Such investors usually seek to include international arbitration agreements in their contracts rather than have their disputes referred to the local courts or domestic arbitration which are generally perceived to be more uncertain due to factors such as corruption, civil unrest and inefficiency. Often the seat of the arbitration is outside Africa and the process is governed and administered by an established institution (such as the International Chamber of Commerce or the London Court of International Arbitration). In these circumstances, the need to consider domestic African laws governing arbitration will arise if it is necessary either to enforce an arbitration agreement or to enforce an award against assets held in a country in the region. In such circumstances it is important to understand the arbitral regime in the country in question.

Arbitral regime across the region

There is no single arbitration law in the Sub-Saharan African region, and individual frameworks apply in different countries. It is not possible in this practice note to address the differences and nuances peculiar to the forty-nine countries in the region and therefore some generalisations are necessary.

The region can be split, for the purposes of summarising the varying arbitral regimes, into four broad groups:

1. Seventeen (The Democratic Republic of Congo is in the process of accession) countries are members of the Organisation for the Harmonisation of Business Law in Africa ('OHADA') and are therefore governed by the Uniform Arbitration Act
2. Eight countries' arbitration laws are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the 'UNCITRAL Model Law')
3. Thirteen countries have their own individual arbitration laws (eg Ghana), and
4. Eleven countries have no specific laws governing arbitration

OHADA

OHADA was established in 1993, with the aim of modernising, standardising and harmonising commercial law in Africa.

Almost all of its seventeen members are former French colonies and are therefore francophone. Unsurprisingly, 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 and supersedes the national laws on arbitration to the extent that any conflict arises. 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, Cote d'Ivoire) which can rule on the application and interpretation of the Uniform Arbitration Act.

[References: Uniform Arbitration Act](#)

United Nations Commission on International Trade Law Model Law (the UNCITRAL Model Law)

The approach adopted in the UNCITRAL Model Law is to treat all arbitral awards uniformly, irrespective of where they are made. Pursuant to Article 35(1) of the Model Law, any arbitral award is to be recognised as binding and enforceable, subject to the provisions in Articles 35(2) and 35(6). Reciprocity of the enforcement of awards is not a condition of enforcement under the UNCITRAL Model Law, nor is the presentation of the arbitration agreement.

[References: UNCITRAL Model Law](#)

The grounds on which recognition can be refused (set out in Article 35(6)) reflect those listed in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention') - see below. Progress with the adoption of arbitration legislation based on the UNCITRAL Model Law has so far been limited but the OHADA Uniform Arbitration Act does mirror many of its provisions.

[References: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 \(the 'New York Convention'\)](#)

Arbitration in Ghana

Ghana is a good example of a state which has adopted its own arbitration law that does not strictly follow either the Uniform Arbitration Act or the UNCITRAL Model Law. The Alternative Dispute Resolution Act 2010 (the 'ADRA') was recently brought into force on 31 May 2010 and comprehensively revised and updated Ghana's existing laws concerning arbitration. The ADRA governs the conduct of arbitral proceedings in Ghana as well as the enforcement of both domestic and international arbitral awards. Ghana's law covers areas that the UNCITRAL Model Law does not, such as the provision for an arbitration management conference, the power of the tribunal to encourage settlement using mediation or other ADR methods at any time during the arbitration.

[References: The Alternative Dispute Resolution Act 2010 \(the 'ADRA'\)](#)

The likelihood of recognition and enforcement of international arbitration agreements and awards in Sub-Saharan Africa are greatly increased in those countries that are either part of OHADA, have adopted laws based on the UNCITRAL Model Law, who have their own comprehensive arbitration legislation (such as Ghana) or are signatories to the New York Convention.

Enforcement of arbitral awards

The route via which one seeks to enforce an arbitral award in Sub-Saharan Africa will largely depend upon:

- the particular country where enforcement is sought
- what its arbitral regime is, and
- whether it is a signatory to any convention

Some twenty-six countries in the region (more than half of the total) are party to the New York Convention, which offers an effective tool for the enforcement of arbitral awards. The Convention provides for the recognition and enforcement of international arbitral awards in a broad range of circumstances, subject only to a limited number of expressly stipulated exceptions (set out in Article V). The Convention states that signatories shall:

- recognise and uphold valid written arbitration agreements, and
- recognise and enforce arbitral awards

Reliance on the Convention represents, in many instances, the preferred means by which arbitrating parties seek to enforce international arbitration awards in those states.

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)). This is an important factor in relation to arbitrations in the region, since public policy can be a relatively fluid concept, and may be very widely construed.

To enforce an award under the OHADA Uniform Arbitration Act, a party must obtain an exequatur (an exequatur is a legal document issued by a sovereign authority allowing a right to be enforced in the authority's domain of competence) from a judge in an OHADA member state; the grounds on which an application for an exequatur can be refused are very limited. For instance, the public policy exemption is limited to international public policy which is narrower than the domestic public policy exemption provided for by the New York Convention. A party seeking to oppose an award enforced under the Uniform Arbitration Act would need to make a separate application to nullify (Article 31(4)). Once obtained, an exequatur can be enforced in another OHADA member state.

In countries which have their own arbitration laws, the position on enforcement differs in each country. Ghana is an example of a country with a relatively well-developed law in relation to arbitration. It is a signatory to the New York Convention, the provisions of which are directly referenced in Ghana's arbitration legislation (the ADRA, as discussed above). This offers good prospects for enforcement under the terms of the Convention. Clearly, the position is different, in say, The Gambia which is not a signatory to the Convention but whose laws make some provision for arbitration.

Of the eleven countries which have not enacted legislation governing arbitration, only one, Lesotho, is a signatory to the Convention. Therefore, there are still ten countries (eg, Burundi, Eritrea, and Sudan) which are not signatories to the Convention, do not have arbitration laws at all and are not members of OHADA. In these countries arbitration and enforcement of any agreement or award is likely to be subject to further difficulties. However, the number of countries in this category is falling, as more and more realise the value of promoting and supporting arbitration.

Features of arbitration in the region

Excessive delay, the risk of disruption caused by civil unrest, politically motivated decisions and corruption are features or risks that are often cited when discussing arbitration in or concerning Sub-Saharan Africa. *IPCO (Nigeria) Limited v. Nigerian National Petroleum Corporation* and the *Dowans Holdings SA v Tanzania Electric Supply Company Limited* are English judgments which give a flavour of some of the issues commonly associated with arbitration in the sub-Saharan African region.

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 should it be necessary for parties to seek their assistance.

Some jurisdictions in the region have sought to counter this by implementing judicial training and/or establishing specialist courts. For instance, specialist commercial courts have been established in Tanzania (1999), Uganda (1999) and Ghana (2005) aimed at better serving the specific needs of business. These have the potential to support arbitration by providing timely and consistent rulings in relation to issues arising out of international arbitrations. The Tanzanian High Court's (Mushi J) judgment in the *Dowans* case, in which it was held that it would not be appropriate to interfere with the findings of the Arbitrators, provides an encouraging example of the courts' willingness to uphold and support arbitration.

References: *IPCO (Nigeria) v Nigerian National Petroleum Corporation* [2005] All ER (D) 385 (Apr) and [2008] All ER (D) 249 (Apr)

Dowans Holdings SA v Tanzania Electric Supply Company [2011] All ER (D) 20 (Aug)

Summary

Enforcing an arbitration agreement or an arbitral award in a sub-Saharan African state will always present challenges. Such challenges may be compounded where enforcement is being sought against a state or quasi-state entity. The picture inevitably varies across the region and the key lies in analysing the arbitration laws of the particular country in question to assess the risks.

Ideally, this risk analysis should be carried out at the outset of any project. If possible, parties should seek to establish whether the entity with whom they are contracting has any other assets in countries which are perhaps more 'arbitration friendly', against which enforcement can be sought. If such an assessment is not possible, parties should at least familiarise themselves with the risks and pitfalls of arbitrating disputes connected to the region where recourse to the local courts for assistance with their arbitration agreement or enforcement of an award is likely to be necessary.

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