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INTERNATIONAL ARBITRATION IN THE SUB-SAHARAN AFRICAN CONTEXT

By Kwadwo Sarkodie

The recent US-Africa summit is just the latest manifestation of growing global recognition of the long-term potential and opportunities offered by Sub-Saharan Africa.

The region's exponentially-increasing working, urbanised and consumer populations present unprecedented investment opportunities across a range of sectors. Sustained and rapid GDP growth in a number of key economies commands attention worldwide. Demand for Sub-Saharan Africa's natural resources continues unabated, against a background of growing political stability and increasingly investor-friendly economic policies.

Despite all of this, however, Sub-Saharan Africa continues to hold risks for the unwary. The development of political, legal and regulatory structures and institutions has tended to lag behind economic growth. For any investor, a sound and well-developed risk-management strategy is essential. International arbitration has a key role to play in any such strategy.

Of course, international arbitration in connection with Sub-Saharan African projects and contracts can end up having very little to do with the region itself. It is common for international contracts in the region to provide for a foreign seat of arbitration, administered by a body or arbitration centre from outside the continent. Foreign parties will often seek to enforce awards in jurisdictions outside Africa, provided that assets can be found.

However, an increasing trend on the part of governmental or quasi-governmental contracting parties is to specify a local seat of arbitration, local arbitration rules and/or the involvement of a local arbitration centre. Some of the key challenges and developments are explored below.

Domestic courts

Some of the most prominent concerns over arbitrating and enforcing arbitral awards in Sub-Saharan Africa relate to the approach and efficacy of the domestic courts. Indeed, to a large extent, concerns over the domestic courts are what make provision for arbitration so common for investments in the region.

Even where arbitration is provided for, local court support may well still be needed, for example, to enforce or uphold both the arbitration agreement and any award. As might be expected, the position varies across the region.

There is an overall trend of pro-arbitration court decisions apparent in a number of African jurisdictions. For instance, the courts of Tanzania and Nigeria have in recent years delivered robust decisions supporting the enforcement of international arbitral awards. What is yet to emerge, however, is a sufficient number of decided cases in any one jurisdiction to establish a consistently pro-arbitration track record.

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An established body of jurisprudence in relation to international arbitration is therefore lacking in many Sub-Saharan African countries. Successive and protracted appeals are common in many jurisdictions, particularly in high-profile commercial cases. These factors, coupled, in some cases, with limited judicial familiarity with international arbitration and the political sensitivity often inherent in large transnational disputes, can fuel uncertainty.

Another challenge is presented by the fact that national courts in Sub-Saharan Africa often face a strain on resources, which can lead to delays.

Specialist commercial courts

Some of these issues may be mitigated by the development of specialist commercial courts that employ measures directed at better serving the needs of business. Uganda, in 1999, and Ghana, in 2005, have established commercial courts which incorporate specialised training for judges and support staff (with the facility for assistance by lay experts), bespoke procedural rules and extensive utilisation of information technology. This offers the potential to better equip these courts to provide timely and consistent rulings in relation to issues arising out of international arbitration.

Arbitration centres

If the proportion of international arbitrations being conducted and administered in Sub-Saharan Africa is to increase, the development of local institutions and arbitration centres will play a key role.

In this regard, a significant development in recent years has been the establishment in Mauritius of the LCIA-MIAC Arbitration Centre. This forms part of wider efforts, which include the introduction of an up-to-date and comprehensive legal framework governing arbitration, on the part of Mauritius to develop a regional arbitration hub.

Efforts to promote Mauritius as a seat of arbitration, and LCIA-MIAC as an administering institution, have included the hosting in Mauritius, since 2010, of a biennial international arbitration conference. In 2016, Mauritius shall become the first African country to host the International Council for Commercial Arbitration World Congress.

Similar institutions under development in other jurisdictions have the potential to follow Mauritius' lead. These include the Lagos Court of Arbitration in Nigeria, the Kigali International Arbitration Centre in Rwanda, and the Nairobi Centre for International Arbitration in Kenya.

The New York Convention and UNCITRAL model law

A growing number of African countries are signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, which provides that signatory states shall:

- Recognise and uphold valid written arbitration agreements; and
- Recognise and enforce arbitral awards, subject to certain exceptions, such as public policy.

This generally represents the preferred and most common means by which arbitrating parties seek to enforce international arbitration awards in the Sub-Saharan African states. Just over half of them at present currently accede to the New York Convention. The most recent Sub-Saharan African states to sign the convention were Burundi, on 9 May 2014, and the Democratic Republic of Congo, on 26 June 2014.

A further avenue for the development and standardisation of arbitration law is via the United Nations Commission on International Trade Law (UNCITRAL) Model Law. Eight states in Sub-Saharan Africa have adopted laws modelled on the Model Law so far.

This number may well rise shortly, as South Africa is currently considering updating its arbitration legislation on the basis of the Model Law.

OHADA

OHADA, an acronym in French for "Organisation for the Harmonisation of Business Law in Africa", was established by treaty in 1993, with the aim of modernising, standardising and harmonising business law in Africa. OHADA draws strongly on civil law legal traditions, and almost all member states are former French colonies, apart from former Spanish colony Equatorial Guinea, and Guinea-Bissau, a former Portuguese colony.

The OHADA legal framework provides for two regimes by which an arbitration award may be recognised and enforced. The first adheres to the OHADA "Uniform Arbitration Act". This act provides, along similar lines to the UNCITRAL Model Law, for the recognition of arbitration agreements and enforcement of arbitral awards where the arbitral seat is in an OHADA member state.

The second regime provides for enforcement when the arbitration is subject to the administration of the OHADA Common Court of Justice and Arbitration. This court, based in Abidjan, Ivory Coast, provides overall supervision and rules on the application and interpretation of the Uniform Arbitration Act.

Enforcement under either regime may be challenged only in a narrow set of circumstances, and a restrictive view is taken of the exception for public policy, signalling a pro-arbitration approach. Enforcement may be refused only on public policy grounds where the award manifestly breaches "international public policy", as opposed to the public policy of individual member states.

ICSID and bilateral investment treaties

The great majority of Sub-Saharan African states have acceded to the International Centre for Settlement of Investment Disputes (ICSID) Convention. Most bilateral investment treaties to which those states are party provide for the referral of investment disputes to ICSID for determination. This offers a further option for arbitration in respect of contracts with state entities, provided that a bilateral investment treaty is in place between the home state of the investor and the host state, and the transaction in question is a qualifying investment under such treaty.

Despite the undoubted risks and challenges, familiarity with, and provision for, arbitration in a number of countries in Sub-Saharan Africa is on the increase. This is being facilitated and supported by active steps on the part of a number of governments and bodies across the region, reflecting growing acknowledgment of the importance of arbitration in encouraging transnational commerce and investment.

What is therefore vital is an appreciation of the effective role which arbitration can play in mitigating risk, the challenges which may arise when arbitrating in Sub-Saharan Africa and the increasing range of measures and options which may serve to address such challenges. For an investor, this offers an effective route towards minimising and managing risk while participating in, and benefiting from, the Sub-Saharan African growth story.

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