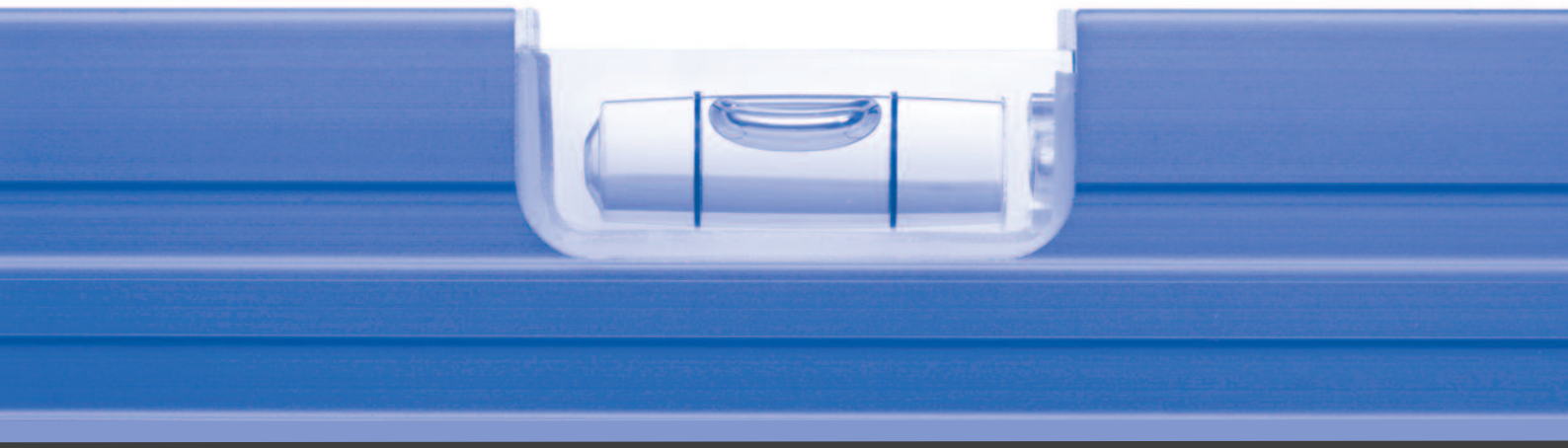

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The International Comparative Legal Guide to:

International Arbitration 2014

11th Edition

A practical cross-border insight into international arbitration work

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Sub-Saharan Africa Overview

Werksmans Attorneys

Des Williams

Introduction

Business is booming in Africa. In recent years, the growth of the African economy has outstripped that not only of developed western economies, but also those in other parts of the world. Most projections show that African countries will soon be amongst the world's fastest growing economies. Growth in Africa is not limited to mining, oil and gas, but is now evident over a broader spectrum of industries; including retail, banking, tourism and mobile telecoms.

Inevitably, accelerated growth and investment in Africa has brought with it an increase in significant commercial disputes and stimulated the development of appropriate dispute resolution methods for the resolution of commercial disputes. It is against this background that arbitration continues to grow in popularity as an alternative to litigation for the resolution of commercial disputes. However, it must be borne in mind that Africa is a hugely diverse continent of fifty-four countries. Although arbitration is well developed in some of these countries, the same cannot be said of all of them. Some general observations can be made in this overview but it is important to bear in mind that none of these observations will be true of all African countries, and that it will always be necessary - in the context of African dispute resolution – to have an understanding of the issues specific to the country involved.

Arbitration

Arbitration is increasingly the favoured dispute resolution method for commercial disputes in Africa. The reasons for the popularity of arbitration are well known and include neutrality (both of the arbitrator and of the venue), flexibility, cost effectiveness and speed. In the African context, neutrality is probably the most significant of these perceived advantages. For international investors reluctant to submit to the jurisdiction of national courts, arbitration provides a solution. Many commercial agreements where one of the parties is African will provide for the submission of disputes to arbitration in accordance with the rules of one of the major international arbitration organisations. However, there is an increasing move towards providing for arbitration in accordance with the rules of one of the major African regional arbitration organisations. The leading international arbitration organisations in the field of African arbitration include the ICC Court of Arbitration and the London Court of International Arbitration (LCIA). Important African regional initiatives include the following:

OHADA

The Organisation for the Harmonisation of Business Law in Africa (OHADA) is a supranational organisation founded in 1993, and is a good example of a regional initiative which encourages effective dispute resolution in Africa. The members of OHADA are predominantly West African countries. OHADA has achieved significant harmonisation of national laws through "Uniform Acts" which supersede contradictory national law. One of these is the Uniform Arbitration Act, which provides an arbitration framework based on the UNCITRAL Model Law. The Common Court of Justice and Arbitration established under the OHADA treaty sits in Abidjan, Ivory Coast.

AFSA/Africa ADR

The Arbitration Foundation of Southern Africa ("AFSA") is a South Africa-based arbitration organisation. In 2010, AFSA was instrumental in the establishment of Africa ADR as a non-profit corporate partnership between participating African arbitral institutions, business and the legal profession, that aims to facilitate trade and commercial interaction between countries in the region and those who invest in African countries. Africa ADR is supported by a number of leading South African law firms and by other arbitration organisations. These include AFSA, the Mauritius International Arbitration Centre ("MIAC"), the Centre d'Arbitrage Du Congo (CDA) and the Centro de Arbitragem Conciliação e Mediação (CACM).

The Lagos Court of Arbitration (LCA)

There has been strong support for arbitration in Nigeria and this support gave rise to the Lagos State Arbitration Law of 2009. The LCA is supported, owned and operated by the private sector. Initial government support was limited to the endowment of the physical structure for the court and other infrastructure necessary to support the objective of making Lagos a hub for arbitration in Nigeria and the West African sub-region.

The Cairo Regional Centre for International Commercial Arbitration

This is an independent non-profit international organisation established in 1979 under the auspices of the Asian/African Legal Consultative Organisation in pursuance of a decision taken at the Doha session in 1978 to establish regional centres for international commercial arbitration in Asia and Africa. The Centre plays an important role in the administration of commercial arbitrations in the region.

The Mauritius Chamber of Commerce and Industry

Mauritius has taken significant steps in recent years to promote itself as a regional arbitration centre, and in 2008 enacted an International Arbitration Act which is based on the UNCITRAL Model Law on Arbitration ("the Model Law"). The Permanent Court of Arbitration established a presence in Mauritius in 2010. This was followed by the setting up of the MIAC by the LCIA in 2011.

Although arbitration is growing in popularity in Africa, there are still factors which impede the development of African regional arbitration organisations and the recognition of specific African cities as suitable arbitration venues. These include the level of infrastructure and logistical support, perceptions regarding safety and security, the level of court interference in arbitration in specific jurisdictions, and the level of arbitration experience and expertise of local lawyers. There are often also specific local issues which affect the development of arbitration, South Africa being a good example. South Africa is often considered to be an obvious regional arbitration centre, particularly as arbitration is popular in the country. However, the development of South Africa as a regional arbitration centre has been delayed by political issues and, more particularly, the suggestion that arbitration is inimical to judicial transformation in South Africa. The issue is one that was referred to by the Law Commission in its Domestic Arbitration Report in 2001, in which reference was made to the danger of a perception "particularly among black lawyers, that some white members of the legal profession see arbitration as a form of 'privatised litigation' enabling them and their corporate clients to avoid courts which increasingly comprise black judicial officers".

Notwithstanding this perception, there has been strong support for arbitration from the Supreme Court of Appeal and the Constitutional Court. These courts have confirmed that South Africa will continue to show a high degree of deference to arbitration awards and that there will be minimal judicial intervention when reviewing international commercial arbitration awards. It has also now been confirmed that a new International Arbitration Act will probably be enacted in 2014. It is therefore expected that the long overdue reform of South African arbitration law will soon be implemented. A clear move towards the implementation of internationally recognised arbitration procedures will probably result in Cape Town and Johannesburg joining Abidjan, Lagos, Cairo and Mauritius as important African regional arbitration centres.

Enforcement of Arbitration Awards in Africa

Twenty-seven African states are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Courts of signatory states are required to give effect to agreement to arbitrate and to recognise arbitration awards in other contracting states.

The African signatories to the New York Convention are Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Ivory Coast, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, South Africa, Tunisia, Uganda, Zambia and Zimbabwe.

The twenty-seven countries referred to above are generally the more arbitration-friendly African countries. The relative ease of obtaining recognition and enforcement of foreign arbitral awards in those countries has undoubtedly enhanced their reputation as arbitration-friendly jurisdictions.

Investment Treaty Arbitration

The 1965 Washington Convention on the Settlement of Investment Disputes ("the Convention") has been ratified by forty-three of the fifty-four African states. Eleven states have signed but not ratified the Convention and six states (including South Africa) have not signed the Convention.

Most African states, including those that have not signed the Convention, are party to bilateral investment treaties ("BITs") which provide for the submission of disputes to arbitration. In cases where the states involved have signed the Convention, the BITs usually provide for the submission to the International Centre for Settlement of Investment Disputes ("ICSID"), which is an international institution facilitating the arbitration of international investment disputes between investors and the host states in which they invest. ICSID awards are directly enforceable in ICSID member states. In the case of those states that have not signed the convention, BITs do provide for the submission of disputes to arbitration - usually under the ICSID additional facility rules which deal with disputes where one of the parties is not a signatory state or is not a national of a signatory state. South Africa is an example, as it is party to a number of BITs but is not a signatory state and is unlikely to sign the Convention. In cases where the parties to a BIT have not signed the Convention, an arbitration award obtained under the BIT will be enforceable against a state that has ratified the New York Convention. It is important for investors in African countries to establish whether the countries in question have signed a BIT and if so, whether an arbitration award obtained under the BIT will be enforceable either under the Convention or the New York Convention.

The UNCITRAL Model Law and Arbitration Rules

One of the aims of the United Nations Commission on International Trade Law ("UNCITRAL") is to reduce legal obstacles to the flow of international trade and to modernise and harmonise trade laws. The UNCITRAL arbitration rules 1976 ("the rules") and the UNCITRAL Model Law (1985, amended in 2006) ("the Model Law") are important legal instruments which have assisted the development of international commercial arbitration worldwide; including in Africa specifically. Although the Model Law has only been adopted (either wholly or in part) by ten African countries, its influence is more widespread. For example, although OHADA has not adopted the Model Law, the OHADA Uniform Arbitration Act is based on the underlying principles and features of the Model Law. The significant influence of the Model Law has undoubtedly been an important contributor to the harmonisation of international arbitration practice and procedure in African countries.

Conclusion

It is beyond the scope of this overview to refer in any detail to the features of arbitration in relation to specific African countries. That information will best be obtained from the country chapters in this section of the guide. However, it is fair to state that arbitration is becoming increasingly popular in Africa and that as African economies continue to grow, it is probable that arbitration will continue to grow as the most important mechanism for the resolution of commercial disputes in Africa. The development of arbitration in Africa will undoubtedly continue to be encouraged and facilitated by the developments referred to above; including, particularly, the development of regional arbitration organisations and the widespread adoption of fundamental principles of international commercial arbitration as embodied in the Model Law.

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Des Williams has been chairman of Werksmans Attorneys since 2005. He has been with the firm since 1974 and headed its Litigation Department from 1994 to 2005.
He is experienced in all fields of commercial litigation and alternative dispute resolution, including international litigation, arbitration and mediation. He has been involved in many of the largest and most complex litigation and arbitration matters in South Africa.
Clients include South African Breweries, Glencore, Nkwe Platinum and Katanga Mining.
Des is named in Chambers Global: The World's Leading Lawyers for Business for his expertise in dispute resolution; appearing in the 2014 edition for both dispute resolution and construction. He is named among the world's leading arbitration specialists in The International Who's Who of Commercial Arbitration, 2013. He is also named as a leading lawyer in arbitration and mediation, construction and litigation by Best Lawyers International; in commercial litigation and in arbitration by the International Who's Who Legal; in dispute resolution by the Legal500 and in dispute resolution by PLC Which Lawyer.
Des is the South African member of the Court of Arbitration of the International Chamber of Commerce (ICC), a member of the Council of the International Chamber of Commerce South Africa (ICCSA), a former co-chair of the Litigation Committee of the International Bar Association (IBA), and a former member of the IBA's Legal Practice Division Council.
He has authored several articles, is a contributor to books, journals, newsletters and reviews and regularly appears as a sought-after speaker at local and international conferences.
Des has a B.A. LL.B., LL.M. and Higher Diplomas in Company Law and Tax from the University of the Witwatersrand.

WERKSMANS
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Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm serving multinationals, listed companies, financial institutions, entrepreneurs and government.

Operating in Gauteng and the Western Cape, and connected to an extensive African legal network through LEX Africa, the firm's reputation is built on the combined experience of Werksmans and Jan S. de Villiers, which merged in 2009.

LEX Africa was established in 1993 as the first and largest African legal network and offers huge potential for Werksmans' clients as it provides a gateway to Africa to companies seeking to do business on the continent. Each LEX Africa member firm specialises in corporate and commercial law and dispute resolution combined with intimate knowledge of the local customs, business practices, cultures and languages of each country.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, Werksmans is distinguished by the people, clients and work that it attracts and retains.

Werksmans' more than 180 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm's success is built on a solid foundation of insightful and innovative deal structuring and legal advice, a keen ability to understand business and economic imperatives and a strong focus on achieving the best legal outcome for clients.

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