DISPUTE
RESOLUTION
& Africa

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Development of International Arbitration in Southern Africa
INTRODUCTION

- High-level overview of development (legal and legislative) with international arbitration in SADC (exclude East/Central African Countries) having regard to –
  - Increased economic activity - extractive industry, infrastructure, energy etc
  - Increased FDI flow in the region
- Specifically –
- Common Law and Civil Law Jurisdictions in SADC – vastly different legal systems, legislation and practices
INTRODUCTION

- Need for harmonisation for the purpose of commercial dispute resolution (regional, continental and international)
- Adoption of Model Law (either the 1985 or the 2006 versions) –
  - increase in uniformity in the arbitration process and legislation evident with over ninety States
  - into legislation and its influence on legislation has since become a norm and where it is not adopted it has become customary to justify the decision not to (example: South Africa)
- In discussing developments of international arbitration – divide as follows –
  - Model Law Countries
  - Common Law: Non-Model Law Countries
  - Civil Law: Non-Model Law Countries
- In preparing – drawing on experience of DLA Piper Africa associated firms
Four Countries in SADC adopted Model Law –
• Madagascar (Civil Law)
• Mauritius (Mixed – French Civil and Common Law)
• Zambia (Common Law)
• Zimbabwe (Common Law)

MADAGASCAR
• Code deviates from Model Law – defining the international nature of disputes and excluding disputes involving the state acting in non-commercial capacity
• Party to New York Convention - Enforcement of both domestic and foreign awards require the issuance of exequatur – court generally enforce foreign arbitral awards
• However courts attitude to arbitrations not favourable – seen as competition to courts
MAURITIUS

- The International Arbitration Act closely adheres to Model Law - some deviations (i.e. referral of all arbitration related court applications to panel of judges)
- LCIA-Mauritian International Arbitration Institute (“LCIA-MIAI”)
- Enforcement of foreign arbitral awards follows closely the New York Convention - Mauritian Supreme Court has exclusive first instance jurisdiction over all enforcement matters
- The Supreme Court in *Cruz City 1 Mauritius Holdings v Unitech Limited and Anor* [2014] SCJ 100 – dismissed an application by Respondents disputing the jurisdiction of the tribunal not complying with any of the grounds of the New York Convention.
- Leading Jurisdiction in Region (South Africa Major Competitor)
ZAMBIA

• Arbitration Act No 19 of 2000 – 1985 Model Law
• Some deviations from Model Law (i.e. applies to domestic and international arbitration in Zambia, oral arbitration agreement, additional grounds to set aside award)
• Courts Attitude - *Leopard Ridge Safaris Limited v Zambia Wildlife Authority* (2008) – hunting concession with arbitration clause – court held no choice but to refer dispute to arbitration
• Party to the New York Convention – foreign arbitral award binding and upon application to competent court shall be enforced – enforcement refused only on the grounds in Convention and additional fraud, corruption, misrepresentation)

ZIMBABWE

• Arbitration Act, 6 of 1996 – 1985 Model Law
• Some deviations from Model Law (i.e. domestic and international arbitrations in Zimbabwe, exclusion of certain matters from arbitration)
Courts no overall jurisdiction to intervene during arbitral proceedings
Artcraft Furniture Mfg v Tokozani (Pvt) Ltd v Tokozani (Pvt) Ltd & Others [2002] – agreement containing arbitration clause, court obliged to refer matter to arbitration
Party to New York Convention - courts will usually enforce arbitral awards
Grounds for refusal as in New York Convention
No cases where High Court has refused to enforce foreign arbitral awards
BOTSWANA

- Arbitration Act, 1959
- Act applicable to both domestic and international arbitrations
- Several differences with Model Law (arbitrators power to determine own jurisdictions, court powers etc.)
- Party to New York Convention

MALAWI

- Arbitration Act, 1967: significant difference with the Model law
- However courts tend to respect arbitration clauses
- Not a Party to the New York Convention
COMMON LAW: NON-MODEL LAW COUNTRIES & THE RULE OF LAW (EXCLUDING SOUTH AFRICA)

- Enforcement of foreign awards same manner as enforcement of a local judgment
- Grounds for refusal of enforcement broadly similar to New York Convention – however wider

**NAMIBIA**
- Arbitration Act 42 of 1965 of South Africa applicable to domestic and international arbitration;
- Not a party to the New York Convention – no legislation for enforcement of foreign arbitral awards
- No development to modernize arbitration legislation in line with Model Law or to adopt New York Convention
ANGOLA

- Angola- domestic and international arbitration is governed by its 2003 Voluntary Arbitration Law ("VAL"), with a number of differences between its legislation and the 1985 Model Law
- Angola is not a signatory to the New York Convention.
  - Awards enforced in terms of the VAL.
  - Foreign awards subject to exequatur proceedings.
  - Forced execution occurs through the Angolan Code of Civil Procedure provides.

MOZAMBIQUE

- 1999 Law on Arbitration, Conciliation and Mediation Code
- Code applies to domestic and international arbitration
CIVIL LAW: NON-MODEL LAW COUNTRIES & THE RULE OF LAW

• The Code adopted elements from the Model Law – arbitration agreements, jurisdiction of arbitrators and courts, the limitations placed on courts and proceedings relating to setting aside and enforcement

• Signatory to the New York convention – prior recognition by the Supreme Court followed by execution through provincial or Maputo City Court for enforcement

SEYCHELLES

• Part civil and Part common law


• Code includes features that comply with the Model Law principles

• Not a signatory to the New York Convention
CONCLUSION

• The resolution of international commercial disputes differs between the various jurisdictions
• Increase intra-regional trade and investment/increase FDI in region
• Imperatives
  – modernization of arbitration legislation (a lot of regional legislation outdated with the time)
  – harmonize with Model Law;
  – adoption of New York Convention