International Arbitration and Southern and Central Africa

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LCIA-MIAC Registrar
Introduction and Health Warning!

• The broad landscape: Improving, but with some growing pains.

• Caution:
  - Not possible to generalize.
  - Many different approaches and legal systems across Africa
  - What can be seen from outside is only half the story
Key indicators of international arbitration development:

Adoption of New York Convention – note “quirks”

Yet to adopt the NYC:
- Western Sahara
- The Gambia
- Guinea-Bissau
- Sierra Leone
- Togo
- Libya
- Chad
- Sudan and South Sudan
- Sudan
- Ethiopia
- Eritrea
- Somalia
- Congo (Brazzaville)
- DR Congo
- Burundi
- Angola
- Namibia
- Cape Verde
- Sao Tome e Principe
- Malawi
- Swaziland
- Comoros

Quirks:
- South Africa
- Zimbabwe
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Key indicators of international arbitration development:

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- Congo (Brazzaville)

Quirks:
- South Africa
- Zimbabwe
Key indicators of international arbitration regimes:

**UNCITRAL Model Law-based Laws in Africa**

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
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<tr>
<td>Egypt</td>
<td>1994</td>
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<td>Kenya</td>
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<td>Madagascar</td>
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<td>Zimbabwe</td>
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<td>OHADA Countries</td>
<td>1993-</td>
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Key indicators of international arbitration regimes: examples

The Uganda Arbitration and Conciliation Act 2000

- UNCITRAL Model Law-based
- “CADR” (Centre for Alternative Dispute Resolution)
  - authority for appointments (in default of agreement)
  - resolves challenges to arbitrators
- High Court of Uganda
  - interim measures
  - challenges to awards
Kenya Arbitration Act 1995:

- UNCITRAL Model Law-based (1985 version)
  - Institutional or ad hoc
  - No prescribed procedures for challenge of arbitrator
  - Challenge to awards does **not** include ‘breach of natural justice’
  - Public policy widely interpreted: see Ringera J in *Christ of All Nations v Appollo Insurance Co Ltd*, public policy includes an award inconsistent with the constitution of other laws of Kenya

- NCIA Act 2013
Key indicators of international arbitration regimes: examples

South Africa:

• Arbitration Act 1965
  – Based on old English Act
  – Generally considered unfavourable
  – But role of Courts?
• Draft Arbitration Act: since 1998
• Expected 2016?
• Not party to the ICSID Convention
Key indicators of international arbitration regimes: examples

South Africa and investment treaty arbitration

Breakaway or trendsetter?

• Promotion and Protection of Investment Bill – published 2013
• Notice to terminate BITs with Spain, Belgium, Luxemburg, Germany
• Spirit: “[BITs] allow legal and business community to challenge regulatory changes which the government considers to be in the public interest.”
• Minister of Justice (in 2013): “The general perception is that the current system of international arbitration tends to be somewhat biased towards the commercial interest of investors. Conversely, national courts are probably more likely to be sympathetic towards … public interest arguments”
Key indicators of international arbitration regimes:

ICSID Convention

Not signed:
Angola, Djibouti, Equatorial Guinea, Eritrea, Libya and South Africa

Signed but not ratified:
Ethiopia, Guinea-Bissau, Namibia and São Tomé and Príncipe
Key indicators of international arbitration regimes:

Some emerging/existing regional and international arbitration institutions
OHADA

- L’Organisation pour l’Harmonisation en Afrique du Droit des Affaires
- Overview, Member states
- The arbitration regime
- The CCJA: make-up and functions
- Effectiveness and success? The problem of “lowest common denominator”? 
Other international treaties and international arbitration:

- Often include investor-state protections for investors and dispute resolution
- A useful fall-back for investors
- But not of general use for risk management in contracts
- Include: ECOWAS Energy Protocol (Article 26); COMESA Treaty (Article 28); SADC Treaty Protocol,
Other international treaties and international arbitration:

- Example: Southern African Development Community Treaty, Protocol on Finance and Investment:

**ARTICLE 5**

**INVESTMENT PROTECTION**

Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.
Other international treaties and international arbitration:

ARTICLE 28
SETTLEMENT OF INVESTMENT DISPUTES

1. Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.

2. Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to:

   (a) The SADC Tribunal;

   (b) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the ICSID Convention and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
Other international treaties and international arbitration:

(c) An international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

3. If after a period of three (3) months from written notification of the claim there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

4. The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex.
How to encourage arbitrations to be held in Africa?

- Addressing concerns
  - Court interference in arbitration, through legislation and education;
  - Court efficiency and quality when recourse to courts is necessary, through legislation and procedural improvements;
  - Separation of institutions from political and domestic interference;
- Improvement of facilities for hearings, including ancillary services like transcription
- Encouraging African parties and governments to push for it to promote relevance
- Tapping into Africa-interested organisations, e.g. AfDB
The Mauritius approach:

- International Arbitration Act 2008 (amended 2013)
  - ‘Tweaked’ UNCITRAL Model Law
  - Negative effect of Competence-Competence
  - More detail on interim measures
  - Arbitrability of ‘Global Business’ Company matters
  - All Court matters heard by special 3-judge SC bench
The Mauritius approach (cont):

- New York Convention: languages and reciprocity reservation removal
- Role of PCA
- Designated Supreme Court judges
- Separate procedural regime for international arbitration matters in court
The Mauritius approach (cont):

- Promoting local expertise
- Supporting other jurisdictions in the region
- LCIA-MIAC
- Growing body of case law
  - Liberalis Ltd anor v Golf Devl'p Int'l Holdings 2013 SCJ 211
  - Cruz City 1 Mauritius Holdings v Unitech Limited & Anor 2014 SCJ 100
  - Barnwell Enterprises Ltd v. ECP Africa FII Investments [2013] SCJ 327
The future?

• Harmonisation of laws?
• Body of Africa-specific jurisprudence
• Refining particular concepts like public policy interpretation across countries?
• Addressing perceptions
  – A clique of usual suspects?
  – Improper back-scratching?
  – Excluding the Developing World?
THANK YOU!

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