Choices for African parties in international arbitration:
Seat, Institutions & Arbitrators

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“International Parties do not want to Arbitrate in Africa”

– Senior Arbitration Lawyer
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Why do parties Choose seats and institutions?
Why do parties Choose seats and institutions?
Negotiating Arbitration Clauses

Chart 3: The negotiation stance of corporations on key arbitration issues

- Law governing the substance of the dispute (9/78/5/6/2)
- Law governing the arbitration agreement (9/75/6/6/4)
- Seat of arbitration (6/75/10/6/3)
- Language of the arbitration (15/65/10/6/4)
- Selection of particular administered institutional rules (e.g., ICC Rules, LCIA Rules, AAA/ICDR Rules) (5/74/14/5/3)
- Selection of non-administered ad hoc rules (UNCITRAL) (5/59/17/2/17)
- Process for appointment of arbitrators (2/67/21/5/4)
- Choice of Appointing Authority (if UNCITRAL Rules are selected) (3/59/22/3/13)
- Selection of additional procedural rules (e.g., IBA Rules on the Taking of Evidence in International Commercial Arbitration) (1/56/28/3/12)
- Confidentiality (27/52/12/4/4)
- Extent of disclosure/discovery/document production (10/59/19/3/9)
- Method of allocation of costs (6/63/23/3/6)

Legend:
- Never willing to concede; issue is a deal-breaker
- Willing to concede in limited circumstances if it is a deal-breaker
- Willing to negotiate on these issues if other advantages are secured in main contract, or arbitration clause
- Willing to concede in some circumstances – depending on relative bargaining positions of parties/compelling business reasons (e.g., value of deal, ongoing relationship)
- No particular preference on issue, open to negotiation
- Corporate policy is followed
- Not applicable
Chart 4: The order of choices about the governing law, seat and institution/rules

- Governing law, seat, institution/rules: 26%
- Governing law, institution/rules and seat: 24%
- All issues decided at same time: 23%
- Other combinations: 21%
- Not possible to say/don’t know: 6%

Chart 5: First choice ranking: governing law, seat or institution/rules

- Law governing the substance of the dispute: 51%
- Arbitral institution/rules: 12%
- Seat of arbitration: 9%
- All issues decided at same time: 22%
- Not possible to say/don’t know: 6%
Chart 7: Who makes the ultimate decision about arbitration clauses?

- General counsel: 33%
- General counsel in consultation with external counsel: 15%
- Specialist corporate counsel: 14%
- Commercial/business unit: 11%
- Regional corporate counsel: 11%
- Board: 5%
- Other: 11%

percentage of respondents
Negotiating Arbitration Clauses

Chart 14: Top influences on the choice of the seat of arbitration

- Formal legal infrastructure (e.g. the national arbitration law, track record in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of legal system) - 62%
- Law governing the substance of the dispute - 46%
- Convenience (e.g. location, industry specific usage/prior use by organisation, established contacts with lawyers in jurisdiction, language/culture, efficiency of court proceedings) - 45%
- General infrastructure (e.g. costs, access, physical infrastructure) - 31%
- Corporate policy, standard terms and conditions - 29%
- Location of people (e.g. your organisation’s employees, its legal and other advisors, experts, accountants, secretaries and hearing staff) - 28%
- Location of the arbitration institution chosen for the arbitration - 24%
- Choice of seat imposed by other party - 23%
- Recommendation of external counsel - 22%
Chart 16: Top influences on the choice of arbitration institution

- Neutrality/internationalism: 66%
- Reputation/recognition: 58%
- Arbitral rules: 46%
- Law governing the substance of the dispute: 46%
- Previous experience of institution: 42%
- Overall cost of service: 41%
- Global presence/ability to administer arbitrations worldwide: 39%
- Expertise in certain types of case: 38%
- Free choice of arbitrators (i.e., no exclusive institutional list): 38%
- Seat chosen for the arbitration: 35%
- High level of administration (including pro-activeness, facilities, quality of staff): 33%
- Scrutiny of award by institution: 33%
- Regional presence/knowledge: 32%
- Recommendation of external counsel: 29%
- Corporate policy, standard terms and conditions: 28%
- Advice/recommendations of others: 21%
- Method of remunerating arbitrators (costs per hour): 19%
- Choice of institution imposed by other party: 19%
- Method of remunerating arbitrators (ad valorem): 18%
- Payment to institution required up front: 16%
- Similarity of rules to UNCITRAL Rules: 16%
- Payment to institution required at end of arbitration: 15%

Weighted percentage: 0 to 80
What makes a good seat?

**African Development Bank Criteria:**

- Modern set of Rules, comparable to the standard guaranteed by the ICC, LCIA, Swiss Rules or similar modern arbitration Rules
- Arbitration friendly environment at the seat of the Institution (notably regarding the laws of the seat of the Institution, if such is the place of arbitration)
- Arbitration friendly State Court intervention (if seat of Institution is the place of arbitration)
- Parties are free to choose the place of arbitration
What makes a good seat?

The "Safe Seat Principles" 2015

“The intention has been to identify those key characteristics to make a particular place an appropriate and effective arena in which to conduct international arbitration.

This will help States, for example, to amend their laws; arbitral institutions, for example, to provide for appropriate hearing rooms and associated facilities; colleges and law schools, to encourage an education which teaches arbitration and international dispute resolution; and professional bodies to help provide a framework for the ethical conduct of international arbitration at work...”
What makes a good seat?

1. Law

- A clear effective, modern International Arbitration law which shall recognise and respect the parties’ choice of arbitration as the method for settlement of their disputes by:
  - (a) providing the necessary framework for facilitating fair and just resolution of disputes through the arbitration process;
  - (b) limiting court intervention in disputes that parties have agreed to resolve by arbitration.
  - (c) striking an appropriate balance between confidentiality and appropriate transparency, including the growing practice of greater transparency in investor state arbitration.

**Kenya: UNCITRAL Model Law based, so satisfies these (except no special provisions on confidentiality?)**
2. Judiciary

- An independent Judiciary, competent, efficient, with expertise in International Commercial Arbitration and respectful of the parties’ choice of arbitration as their method for settlement of their disputes.

Kenya: Optimism, but some cases cause concern?

See e.g. *Indigo EPZ Ltd v Eastern and Southern African Trade and Development Bank*
What makes a good seat?

3. Legal Expertise

- An independent competent legal profession with expertise in International Arbitration and International Dispute Resolution providing significant choice for parties who seek representation in the Courts of the Seat or in the International Arbitration proceedings conducted at the Seat.

- **Kenya: An embarrassment of riches! But note the need to bring on younger practitioners.**
4. Education

- An implemented commitment to the education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of International Arbitration and to the further development of learning in the field of arbitration.

Kenya: This can always be improved, particularly through cooperation between NCIA and other institutions e.g. LCIA-MIAC or KIAC to increase participation in programmes in the region.
5. Right of Representation

- A clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the Seat.

- **Kenya Arbitration Act Cap 49:** “25(5) At any hearing or meeting of the arbitral tribunal of which notice is required to be given under subsection (3), or in any proceedings conducted on the basis of, the parties may appear or act in person or may be represented by any other person of their choice.”
6. Accessibility and Safety

- Easy accessibility to the Seat, free from unreasonable constraints on entry, work and exit for parties, witnesses, and counsel in International Arbitration, and adequate safety and protection of the participants, their documentation and information.

There is work to be done here. Visa issues. Automatic visas for parties in NCIA arbitrations? Also perhaps guaranteed ability to work. No VAT?

Safety is obviously a very sensitive and wide issue. Perceptions need to be addressed – Kenya is a relatively safe place but not necessarily perceived that way. Obama’s visit both positive and negative: good he came, bad he had so much security.

Also should not ignore the risks and make sure they are being addressed.
7. Facilities

- Functional facilities for the provision of services to International Arbitration proceedings including transcription services, hearing rooms, document handling and management services, and translation services.

Kenya: watch this space?
8. Ethics

Professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel.

This principle is a highly difficult one. Who sets the standards? What rules are being referred to? If they are optional, international rules then they are not a feature of any jurisdiction specifically.
What makes a good seat?

9. Enforceability

- Adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries.

Kenya is a signatory to the NYC.

*Tanzania National Roads Agency v Kundan Singh Construction Limited [2013] eKLR* – cause for concern?
What makes a good seat?

10. Immunity

A clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

Kenya: Yes, since addition of section 16B to the 1995 Act
The immeasurable factors in any choice of seat and institution:

– Neutrality

– Independence
Examination of NCIA

- Nairobi Centre for International Arbitration Act 2013
- Board
- Members of the Court
- Funding: section 17
Section 22. (1) The Court shall have exclusive original and
appellate jurisdiction to hear and determine all 'disputes referred to
it in accordance with this Act or any other written law.

Section 25. The Board shall make Rules for —

(a) the recognition and enforcement of arbitral awards and all
proceedings consequent thereon or incidental thereto;

(b) the filing of applications for setting aside arbitral awards;

(c) the staying of any suit or proceedings instituted in
contravention of this Act;

(d) determining the criteria and qualifications for the
appointments of the President. Deputy Presidents and members
of the Court;

(e) generally all proceedings of the Court.
CONCLUSION

- Africa is ready for international cases
- International Parties: better get ready?
- African Institutions: "Marketing is too important to be left to the marketing department."

- David Packard
Thank you

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