

INSIDE ARBITRATION: SPOTLIGHT INTERVIEW: JONATHAN RIPLEY- EVANS

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Legal Briefings

Jonathan is head of Herbert Smith Freehills' South Africa disputes practice. Based in our Johannesburg office since February 2018, he has established a market-leading reputation and is a key figure in South Africa's developing international arbitration community. He is also an experienced litigator, an accredited mediator and arbitrator. Jonathan was promoted to the partnership on 1 May 2022.

Your practice covers the full range of dispute resolution processes, including litigation, arbitration and mediation. What does your litigation and mediation experience bring to your arbitration work?

Working as a litigator has taught me the real benefits of arbitration. Many of the things that frustrate me – and my clients – about litigating in South African courts can be addressed by referring the dispute to arbitration. One of the biggest frustrations with litigating in Africa is inefficiency; it can be years before a client gets effective justice through the court process. There is also the 'straitjacket effect' in litigation: parties are constrained by the need to follow the procedures dictated by the court, and the courts themselves focus on process over outcome. Finally, there are significant concerns about political interference with the courts in much of Africa.

Most of these issues can be overcome or mitigated by referring the dispute to arbitration in accordance with international best practice. For example, parties. Parties to arbitration have a high degree of flexibility to adapt the procedure to their case. Arbitrators typically deliver an award in a shorter timeframe than the courts and parties are free to select arbitrators who are independent and impartial. It is easier to get to the heart of a dispute using arbitration.

I'm also a big advocate of mediation. I was exposed to the process early in my career, which encouraged me to qualify as a mediator. Many commercial disputes are appropriate for mediation, even more so with African disputes. In many African cultures, disputes are resolved informally through forms of conciliation. Parties can be uncomfortable with the adversarial approach of a court case or arbitration. Often, those more formal processes break down because they involve procedures developed in the West that are not suited to the prevailing cultures on the African continent. This often leads to results an African party perceives as unjust. Mediation can play an important role in bridging that gap between delivering justice and the perception created by the outcome of the process. Mediation has a bright future in Africa.

There are a lot of disputes stemming from cash flow constraints on businesses, mostly because of Covid. Economies are under pressure, and that has led to an increase in disputes appearing to be manufactured by the opponent to bring about delay or avoid payments because of their own cash flow problems. In the public/administrative space, there is a lot of judicial review activity, mostly stemming from irregularities in the procurement process.

Renewable energy disputes are also on the rise, mainly relating to the construction side of the projects. Many of these disputes also appear to be linked, in some way, to the consequences of Covid.

Africa, with the exception of Nigeria and Kenya, is generally considered a less developed arbitration market than Europe and Asia. Is that the case? How does South Africa compare?

Both Kenya and Nigeria have active arbitration markets and have produced several high-profile practitioners and arbitrators. However, many of those arbitrations are domestic, rather than international. There is often a marked difference in the two procedures. Domestic arbitration procedures tend to mimic domestic court procedure, which is not as effective as international arbitration in resolving the underlying disputes.

South African arbitration is similar. The market is active, but still relies heavily on domestic procedure, and we often see the appointment of retired judges as arbitrators. International arbitration still has some catching up to do, but there are encouraging signs. South Africa has taken a few important steps toward ensuring it is regarded as a safe seat, where parties are confident in the arbitral law and the supervisory courts, as well as the quality of the arbitrators.

You are a member of the Arbitration Foundation of Southern Africa (AFSA) International Court and were instrumental in drafting the new AFSA International Arbitration Rules. What have the reforms brought to the table?

We were fortunate to have put together a drafting committee comprising first-class international arbitration lawyers. The committee was chaired by Professor Dr. Maxi Scherer, and included Ms. Chiann Bao, Prof. Lise Bosman, Dr. Remy Gerbay, Ms. Ndanga Kamau, and Ms. Jennifer Kirby.

The committee assumed the huge task of redrafting the AFSA Commercial Arbitration Rules to ensure alignment with South Africa's new arbitral law, which is based on the Model Law, and international best practice.

The new rules established the AFSA Court, which is unique from a South African perspective and plays an important role in overseeing the arbitral process. The procedure under the new rules is more flexible, giving arbitrators more autonomy than the previous regime. We also introduced a number of procedural aspects found in the leading international rules, including emergency arbitration and an expedited procedure.

There is evidence diverse tribunals produce better quality decisions. While there are high-profile African practitioners in the international arbitration sphere, we are a long way from equal representation. What are your thoughts on how to achieve better representation, and what would it mean for the parties you represent?

Where parties come from different countries, cultures or legal systems, it is important their disputes are decided by arbitrators from diverse backgrounds. Diverse panels are less likely to be constrained by a particular legal background or cultural viewpoint; they can stress test each others' inherent biases. That should improve the quality of the award.

Those of us who practise arbitration in Africa must actively promote African arbitration. We can start by encouraging our clients to arbitrate locally, rather than defaulting to better-known seats like London or Paris. It is also incumbent on us to appoint more African arbitrators. There are so many excellent arbitration lawyers all over Africa, who would make excellent arbitrators. But they are trapped in a vicious circle: without experience, parties won't appoint them, and they can't get experience unless parties appoint them.

African practitioners need to support each other, reinforce the message and bolster the local arbitration community. If we, as Africans, aren't appointing our fellow Africans, how can we convince parties from the rest of the world to appoint them? We need to lead the way on this.

One practical step would be to focus on developing young arbitrators. Over time, initiatives that help younger practitioners to secure their first few appointments will go a long way to increasing the number of Africans sitting as arbitrators. It is also important for parties and their lawyers to push beyond the comfort zone of appointing the 'usual suspects'. We need to appoint newer arbitrators who may have had fewer appointments, but still have strong arbitration experience as counsel. This isn't just the case in Africa but applies to international arbitration all over the world.

Can you name a highlight of your career?

Representing Lonmin in the three-year-long judicial commission of inquiry set up by the then President of South Africa, Jacob Zuma, following the shooting of 34 miners by police officers at the Marikana mine. Close behind is the instruction to represent one of the accused in a high-profile corruption trial involving the same ex-President. Another highlight was my involvement in drafting the new AFSA Rules. That was a huge process and a great development for African arbitration!

What's your hobby?

I have been an enthusiastic photographer for about ten years now. This became a challenge under the lockdown regulations as I was confined to my house for extended periods. That, together with my five-year-old son's recently acquired interest in the cosmos, provided the perfect excuse to try my hand at astrophotography. It's a steep learning curve but it's the ideal hobby for someone with a busy job and young family as I can only do it late at night when everyone else is asleep and I finally get some free time!

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