

COMMERCIAL ARBITRATION IN AFRICA: PRESENT AND FUTURE

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Legal Briefings

Africa's economy is growing. The International Monetary Fund forecasts growth at 4% for sub-Saharan Africa for 2016 and at 3.6% for North Africa. But with volatile commodity prices, growth is not guaranteed, and investment is required or sought across all sectors of the economy in all African countries. In this article partners Paula Hodges QC, Peter Leon, Craig Tevendale and Chris Parker consider the importance of Dispute Resolution in Africa in fostering investment and as a source of investment in its own right. They also analyse the growth and development of arbitration in Africa and discuss whether parties should seek to resolve their disputes “on-shore” in Africa or “off-shore”.

DISPUTE RESOLUTION: FOSTERING INVESTMENT AND A SOURCE OF INVESTMENT IN ITS OWN RIGHT

Much has been written about the factors that affect investment in emerging market jurisdictions. One factor that is relevant – some might say crucial – to the decision to invest is a country's legal system and legal structure. A country will be a more attractive venue for investment if it has:

- a clear and predictable legislative framework regulating the sector in which the investment is to be made, suggesting a predictable regulatory environment;
- an efficient, effective, impartial judicial system; and
- State acknowledgment of investor concerns regarding a predictable investment environment and enforcement of the rule of law, and awareness of preferred

international practice with regard to resolution of disputes.

This third criterion requires that the state in question recognise that domestic courts may not always be the preferred or appropriate method of dispute resolution for international or domestic investors. This in turn requires acceptance of arbitration as a forum for dispute resolution. Arbitration is regarded as a sign of a country being open for business and aware of investor concerns and market practice.

Accepting arbitration is not only important to encouraging wider investment into a state's economy. A market in dispute resolution, particularly arbitration, is a source of economic activity; it can be a driver for growth and prosperity in its own right. If a state can be a "safe" place to arbitrate (as a seat of arbitration) or a suitable venue for holding hearings, there will be foreign companies and law firms spending significant money there. Conference centres, hotels, translators, transcribers and local lawyers can all benefit.

It is not just about being an attractive location to resolve disputes linked to your own country. Once established as an "arbitration-friendly" jurisdiction, it is possible to attract international disputes from across Africa and, in due course, across the world. Just as many disputes related to Francophone Africa are currently often resolved by arbitrations seated in Paris, in future these disputes may increasingly be resolved in a Francophone African country.

Many African countries have recognised this potential for investment and opportunity and there are efforts across the continent to develop and grow arbitration as an industry. Whilst there are a number of countries with ambitions to develop as the epicentre of "African dispute resolution", the crown has not yet been won and many are vying for it, including Egypt, Rwanda, Kenya and Morocco. The island of Mauritius, within Africa yet geographically equally close to many countries in Asia, is also a contender. We must not forget that the continent is huge: there is certainly room for more than one arbitration hub.

Acceptance of arbitration by a state can come in many forms. It could mean:

- **Allowing domestic or international arbitration for international parties when contracting with the state:** For example, states with plentiful hydrocarbon or other natural resources may allow international oil companies to enter into agreements with the state oil company which contain an arbitration clause. However, this does not necessarily mean that the arbitral procedure allowed for is fit for purpose.
- **Allowing arbitral awards to be enforced:** By signing and ratifying or acceding to the New York Convention. However, this is not enough in and of itself. An investor will require some comfort that the local judiciary will support arbitration and uphold the New York Convention, interpreting its provisions in accordance with accepted international practice.
- **Actively encouraging arbitration in that country:** This may take the form of developing a modern domestic and international arbitration act (which may be based on the UNCITRAL Model Law or other modern arbitration legislation). It may also involve support or funding of locally established arbitral institutions and/or welcoming and supporting international arbitral institutions. Again, ensuring the judiciary is trained in, and supportive of, arbitration is very important.
- **Becoming a safe venue to hold an arbitration hearing:** To become a safe venue to hold arbitration hearings, investors will want reassurance that bringing their hearing into the country will not open them up to interference by the courts of the state. Parties will also want safe and easy travel into and out of the jurisdiction, ability of parties to freely choose their own counsel to represent them in the arbitration, good "business quality" hotels and necessary infrastructure.
- **Becoming a safe seat:** This requires all of the above, together with comfort that the local judiciary will actively support, or at the very least not interfere with, the arbitral process. This reputation is built over time by demonstrating a pro-arbitration stance, with independent and impartial decisions on both challenge to arbitral awards and requests for judicial involvement to support arbitral proceedings.

THE GROWTH AND DEVELOPMENT OF COMMERCIAL ARBITRATION IN AFRICA

The potential benefits to a state in developing their judicial system and “accepting” arbitration are clear and the race to develop as the centre of African arbitration is undoubtedly on. But has this translated into growth and development in arbitration in Africa in recent years?

First though, it is important to be clear about what we mean by “arbitration in Africa”. This could mean the choice of arbitration (over other methods of dispute resolution) to resolve disputes related to African projects, contracts or other investments, or arbitrations involving African parties, or arbitrations taking place or seated in Africa.

At the moment at least, we are seeing growth in arbitrations related to Africa. However, often these disputes are between or involve international investors. Whilst African parties are involved in arbitrations, there has not been a huge rise in disputes being resolved by arbitration domestically or internationally between solely African parties. However, some arbitrations are certainly being commenced between African parties, and local African institutions are picking up much of this work. For example, the Kigali International Arbitration Centre has registered 52 cases since its creation, and its caseload includes arbitrations between and involving parties from across the continent.

In terms of the international arbitral institutions, 2014 witnessed a rise in the number of disputes from Sub-Saharan Africa being resolved at the International Chamber of Commerce, but this level was not sustained in 2015. The number of parties from North Africa has remained stable in 2014 and 2015. Nigerian and South African parties are the most frequent African users of ICC arbitration, representing half of all parties from the continent. The expectation in the longer term though is that this will change and that arbitration will gain considerable ground on the continent – both in terms of the choices which African parties make for their dispute resolution forum and the scope for those parties to choose to resolve their dispute by arbitration on their continent. This is particularly the case in certain jurisdictions where we have seen continuing investment and development in arbitration.

Herbert Smith Freehills' Guide to Dispute Resolution in Africa highlights changes to legislation, attitude and approach across a number of jurisdictions in the past few years. We have seen government-led programmes to develop their jurisdictions as centres for dispute resolution, such as in Kenya, Rwanda and Mauritius. Countries are modernising their arbitration legislation, for example South Africa. The OHADA states have sought to foster and grow a consistent and stable arbitration framework. Meanwhile other states have reached out internationally to ratify or accede to the New York Convention to signal their receptiveness to arbitration. The most recent example is Angola.

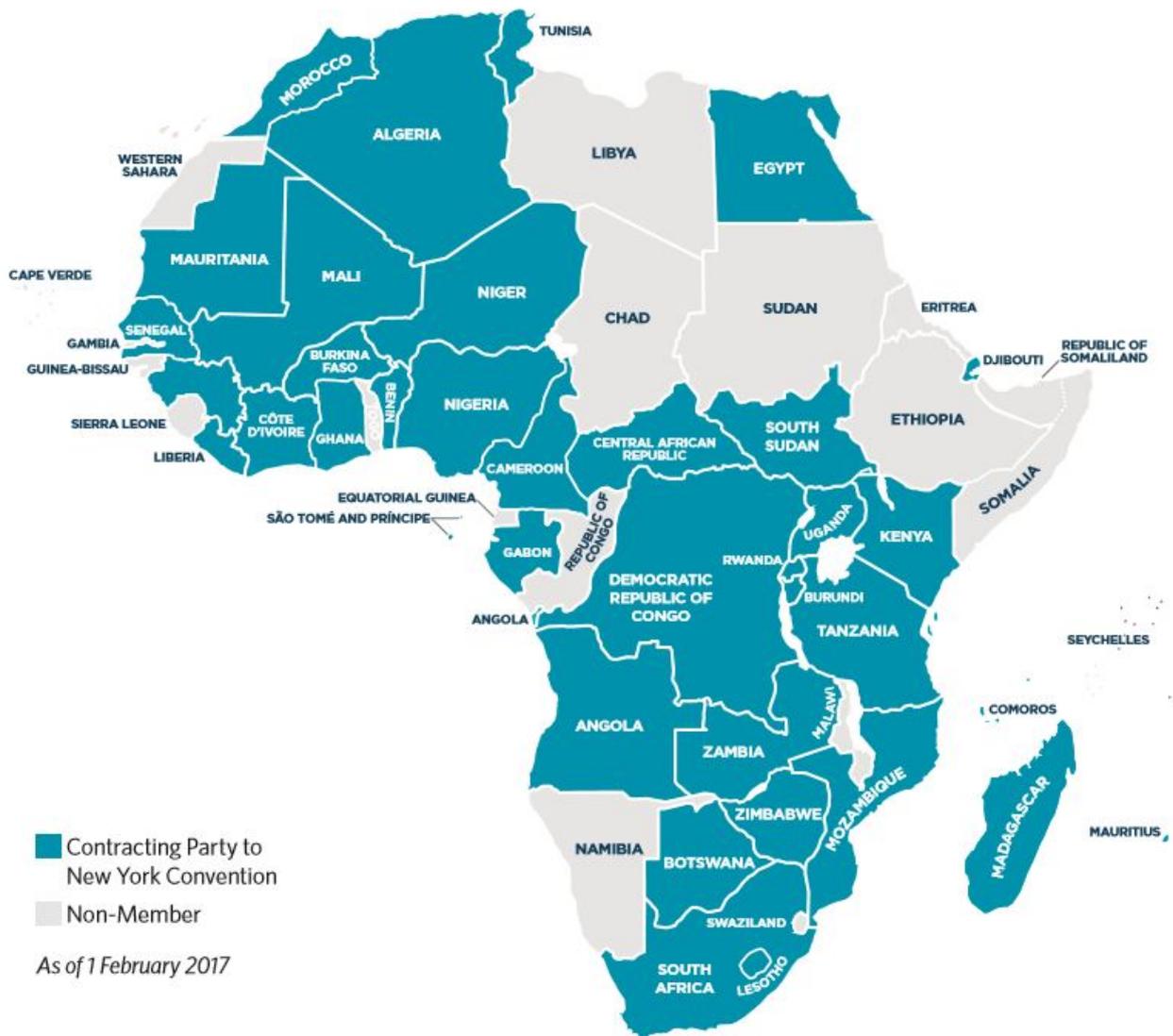
The Organisation pour l'harmonisation en Afrique du Droit des Affaires or **OHADA** was set up in 1993 to harmonise commercial law in the African Franc zone. As explained in our Guide to Dispute Resolution in Africa, seventeen African countries have signed the OHADA Treaty, which sits at the heart of a project to increase the attractiveness of the region to potential investors. OHADA is an example of the quick growth and development of the legal situation on the continent: it demonstrates willingness to engage externally, while developing internal systems and laws to foster a consistent and stable structure that investors can rely on.

Increasing confidence in international arbitration as a means of resolution of commercial disputes across signatory states is among the core purposes of OHADA. OHADA has established a dual track for arbitration: institutional arbitration administered by the Cour Commune de Justice et d'Arbitrage (**CCJA**) and ad hoc arbitration where the CCJA acts as the Supreme Court.

The CCJA provides an administered arbitration mechanism. It has made considerable efforts towards modernisation and greater transparency, including the publication of decisions and a number of documents relating to arbitration.

In recent developments, the CCJA set aside an arbitral award in the case of *GETMA v Republic of Guinea* on the grounds that the international tribunal was paid greater fees than those that the CCJA had set. The decision is double-edged. It may discourage international parties from OHADA arbitration because international arbitrators will not be happy to be paid the sums the CCJA would set. But there are also some positive aspects. First, the CCJA has emphasised the need to maintain transparency throughout the arbitration process. Second, the CCJA has shown that it will uphold its decisions on the fees it sets for arbitrators. Given that the costs of many European-based arbitration institutions are deemed prohibitive in the region, the CCJA's decision will give parties comfort that the costs set by the CCJA will not be exceeded as a result of separate negotiations by the arbitrators.

The Uniform Act on Arbitration (**UAA**) provides a basic foundation for all arbitrations seated in the 17 OHADA countries and guarantees that all OHADA-governed arbitral awards – including ad hoc arbitration awards – will be enforceable in all member states. This is particularly useful as some OHADA states are not party to the New York Convention. There are some shortcomings in the UAA and we understand that OHADA has begun a tender process for the revision of the UAA. In June 2016 OHADA also signed a partnership agreement with the ICC with the aim of enhancing cooperation between the two organisations and to promote, professionalise and standardise the practice of arbitration in the 17 member countries of OHADA.



SIGNATURE AND RATIFICATION OF OR ACCESSION TO THE NEW YORK CONVENTION

Many African states have taken or are taking steps to align themselves with the international approach provided for by the ratification of the New York Convention. The New York Convention is now ratified in 35 of Africa's 54 jurisdictions. While many have signed the New York Convention without making any reservations, a limited number have exercised their right to apply reservations. For example, recent African state to ratify the New York Convention, the Democratic Republic of Congo, issued a record number of four reservations when ratifying the treaty. These include limiting applicability to awards issued in the territory of another contracting state, non-retroactivity of the treaty, applicability only to disputes arising out of legal relationships considered commercial under national law, and inapplicability of the Convention in cases concerning immovable property.

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In June 2016, Somalia announced its intention to accede to the Convention and to adopt the UNCITRAL Model Law.

It is very important to remember though that ratification of, or accession to, the Convention is only one step. Compliance with Convention obligations by the judiciary is crucial. There may be a widely accepted international approach to the limited grounds in the Convention for refusing to recognise and enforce an arbitral award, but unless the judiciary in question are aware of, and willing to follow, that same approach, ratification or accession to the Convention may not make a practical difference.

THE ENFORCEMENT OF ARBITRAL AWARDS IN AFRICA UNDER THE NEW YORK CONVENTION

One prevailing and pervasive view of Africa is that enforcing arbitral awards in these countries is difficult. But that sense derives as much from the absence of information as it does from evidence. It is often hard to find published case law at all and therefore difficult to establish a proven track record.

For some countries, that is simply because few, if any, applications to recognise and enforce an award have been made there. It is difficult to evidence that you will enforce awards without being given any opportunity to do so. In others, cases may be limited and spread over a number of years: they may therefore prove inconsistent or unclear. For example, in Kenya in 2002 in *Christ For All Nations v Apollo Insurance Co*, the High Court set a high bar for refusal to enforce final arbitral decisions when it rejected a public policy defence, and held that parties to arbitrations should, in general, accept awards “warts and all”. Yet in *Kenya Shell v Kobil Petroleum* (2006) the Court of Appeal upheld the right to appeal in the context of enforcement proceedings on the basis that the domestic legislation did not prohibit a right of appeal or limit the supervisory jurisdiction of the courts. One should not necessarily assume that awards will not be enforced in Africa. As our Guide to Dispute Resolution in Africa shows, in many jurisdictions, even those which are not signatories to the New York Convention, it may be possible to enforce an arbitral award. It is important to get accurate information about processes and procedures and, importantly, how long these may take.

AFRICAN INSTITUTIONS

North Africa

- In Morocco the Casablanca International Mediation and Arbitration Centre (**CIMAC**) is a possibility. In 2014, CIMAC organised an inaugural arbitration conference, Casablanca Arbitration Days, which attracted a number of high profile guest speakers from the global arbitration community. The event was supported by the ICC International Court of Arbitration (**ICC**), the International Centre for Dispute Resolution (**ICDR**) and the London Court of International Arbitration (**LCIA**). However, CIMAC is in its relative infancy and it is difficult to find information, including a copy of the CIMAC Rules of Arbitration.

“MANY CONSIDER CRCICA TO BE THE LEADING AFRICAN ARBITRAL INSTITUTION AND, AS IT NEARS ITS FORTIETH ANNIVERSARY, IT CAN POINT TO AN EXPERIENCED TEAM, HIGH-QUALITY FACILITIES AND A STRONG TRACK RECORD OF CASE ADMINISTRATION” CRAIG TEVENDALE, PARTNER

- The Egyptian capital is home to the oldest African arbitration institution, the Cairo Regional Centre for International Commercial Arbitration (**CRCICA**). Created in 1979 by the Asian-African Legal Consultative Organisation, CRCICA was ranked as one of the leading arbitration centres across the African continent by the African Development Bank in a survey published in April 2014. By 30 June 2016 the CRCICA had registered 1109 cases. In 2015, 13 non-Egyptian parties were participating in arbitration cases under the auspices of CRCICA and 10 arbitrators appointed in CRCICA-administered cases were also foreign nationals. Non-Arab arbitrators came from the USA, the UK, Germany, France and Spain, whilst Arab arbitrators came from Egypt, Lebanon, Saudi Arabia, Libya and Tunisia.

East Africa

- In Rwanda, Kigali has been making efforts to win a slice of the arbitration market, notably by opening the Kigali International Centre of Arbitration (**KIAC**). Administrating cases under its own KIAC Rules and under the UNCITRAL Rules, it provides both a domestic and an international panel of arbitrators. KIAC actively seeks to attract internationally renowned arbitrators. The centre has registered 52 cases since its creation.

Southern Africa

- The Arbitration Foundation of Southern Africa (**AFSA**) offers a domestic option for international investors. Based in South Africa and established in 1996, AFSA's caseload is mainly domestic, but it has facilitated at least twenty international arbitrations, involving parties from Europe, the United Kingdom, the United States, Australia, Asia and Africa. AFSA maintains a panel of more than 700 experts and has offices in Johannesburg, Cape Town, Durban and Pretoria. To increase its international reach, AFSA entered into an agreement in June 2015 with the Shanghai International Arbitration Centre in China to establish the China-Africa Joint Arbitration Centre (**CAJAC**). CAJAC aims to serve as one of the primary arbitration facilities for disputes involving Chinese and African parties.
- Although geography places Mauritius within Africa, it does not form part of continental Africa. Its island location means it is closer to many countries in Asia than to many other African jurisdictions. Mauritius can therefore be viewed as both an "on-shore" and an "off-shore" seat of arbitration. Mauritius has certainly made concerted efforts to take the crown of "African arbitration venue", including the passing of a new arbitration law in 2008 based on the UNCITRAL Model Law. In July 2011, the Government of the Republic of Mauritius, the LCIA and the Mauritius International Arbitration Centre Limited (**MIAC**) entered into an agreement for the establishment and operation of a new arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre. It administers arbitrations and other forms of ADR, whether according to LCIA-MIAC's own rules, the UNCITRAL Rules, or any other procedures agreed by the parties.

“THE ATTRACTIVENESS OF THESE INSTITUTIONS WILL BE ENHANCED ONCE SOUTH AFRICA ADOPTS LEGISLATION INCORPORATING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, IN RELATION TO WHICH A DRAFT BILL WAS PUBLISHED IN APRIL 2016” PETER LEON, PARTNER

Kenya: A number of significant reforms have been achieved in Kenya in recent years through the concerted efforts of both the government and the private sector. This includes amendment of the Arbitration Act in 2009 and the drafting of the 2010 Constitution which actively promotes arbitration and other ADR mechanisms. As part of these reforms, Kenya established the Nairobi Centre for International Arbitration (**NCIA**) in 2013 by an Act of Parliament. Beyond its broad mandate to administer domestic and international arbitration in Kenya, the NCIA also seeks to promote arbitration by organising international conferences, seminars and training programmes for arbitrators and scholars, providing advice and assistance for the enforcement and translation of arbitral awards, and by entering into strategic agreements with other regional and international bodies. In December 2015, the NCIA published its own set of arbitration and mediation rules. These detailed rules include modern mechanisms such as provisions for the appointment of an emergency arbitrator.

Rwanda is a jurisdiction seeking to take the crown as a leading arbitration centre in Africa. The Kigali International Arbitration Centre currently has the largest caseload of all African arbitral institutions. Turn to page 11 of this edition of Inside Arbitration to read an interview with the Secretary General of the International Arbitration Centre, Dr Masengo.

South Africa offers considerable attractions as a seat of arbitration but does not have modern arbitration legislation to match. Earlier this year South Africa proposed new legislation to update its arbitration laws. For further details, please see Partner Peter Leon's article in Issue 2 of Inside Arbitration.

West Africa

- The region has been relatively slow to adopt the dispute resolution machinery typically sought by foreign investors. Nigeria is the only country in the region to have a modern arbitration law, the Arbitration and Conciliation Act (**ACA**), based on the UNCITRAL Model Law. Nigeria is home to various arbitral institutions, including the Lagos Regional Centre for International Commercial Arbitration (**LCRICA**) and the Lagos Court of Arbitration (**LCA**). Established in 1989, the LCA amended its Rules in 2013 to introduce its own form of emergency arbitrator procedure. Whilst Nigeria has been proactive in its attempt to foster an arbitration-friendly environment, the approach of the courts to arbitration matters remains inconsistent and court involvement can slow the resolution of a dispute considerably.

If considering any of these institutions (or indeed, any other institution with which you are not familiar), it is important to check that the rules and/or the arbitration agreement preserves the right to appoint experienced international arbitration practitioners to the tribunal and the fee levels are sufficient to ensure a high calibre tribunal would be willing to determine the dispute. Serious consideration would also need to be given to the combination of institution and seat.

IS AN AFRICAN-SEATED ARBITRATION AN OPTION?

Choosing an arbitral institution is different to the seat of arbitration. The institution will administer the arbitration and provided the institution is robust and is working off a modern set of rules, this should be effective. However, when you choose the seat of arbitration you are also choosing that country's court to supervise your arbitration, potentially decide issues like interim relief and, ultimately, consider any challenge to your award. There needs to be a modern, fit for purpose arbitration law and local judges who are impartial and with the requisite expertise in arbitration related matters, gained through training and/or experience. You need to be able to choose international counsel to represent you in the arbitration if you so wish and many laws are silent on that issue. You need arbitrator immunity in order to attract quality arbitrators. You need the parties and lawyers to be able to enter and travel into the country.

In some jurisdictions which have active and modern arbitral institutions, there may still not be these necessary underlying legal structures. Some countries do not have modern arbitration laws which are consistent with those usually found in arbitration-friendly jurisdictions, for example, in respect of the grounds available for challenging an award. Some Arabic-speaking jurisdictions require that court submissions must be in Arabic, which might limit parties' willingness to use that seat for non-Arabic language arbitrations. In others, the legislative framework might have outpaced experience and expertise, including amongst the judiciary.

DID YOU KNOW?

In a Nigerian-seated arbitration in which the firm was involved, the Legal Practitioners Act was interpreted as precluding parties from being represented by international counsel and requiring that all oral advocacy be conducted by Nigerian counsel to avoid a potential challenge to the resulting arbitral award. This is not necessarily something that you would find out from looking at the legislation.

In all jurisdictions, there may be procedural hurdles or pitfalls that only experience can highlight. That is exactly what our Guide to Dispute Resolution in Africa is intended to do. Whilst it sets out the structure of dispute resolution in each jurisdiction, it also aims to identify the practical reality on the ground.

For many international clients and investors, assurance that all these facets are present in a particular jurisdiction is not enough. They also want evidence. And for that, you need past satisfactory experience and court decisions showing a pro-arbitration stance and sensible rulings on challenges to arbitral awards.

For many African jurisdictions this is unfortunately the sticking point. It is a vicious circle: in order to develop that jurisprudence, parties need to choose to seat their arbitrations within the jurisdiction but are reluctant to do so as they are unwilling to trust a jurisdiction without a track record. Established seats like London, Paris and New York have developed a long history of pro-arbitration decisions which is difficult to replicate in a short time unless there is a sufficient caseload, however supportive the government and judiciary are of arbitration. But whilst it may be challenging, it is not impossible. The key is to be consistently and proactively arbitration friendly, and to persevere.

At the moment, the front-runner for the most likely contender as a “safe” African seat is Mauritius. There has been substantial investment by the government in building its profile as an arbitration centre, and it is 32nd in the World Bank “ease of doing business” rankings. There is also promising (albeit still limited) case law from the Mauritian courts regarding arbitration. The Mauritian Supreme Court has held that enforcement applications must be made to the court’s arbitration branch (a specially constituted three-judge panel designed to create a single body with advanced expertise in international arbitration), even where the arbitration is not governed by Mauritius’ 2008 arbitration legislation. Our recent experience of the Mauritian courts has been positive – we have been involved in obtaining a stay of Mauritian proceedings in favour of arbitration proceedings in Singapore, and also obtained a freezing order from the Mauritian courts in support of arbitration proceedings seated in Dubai.

Herbert Smith Freehills is an acknowledged market leader in Africa-related work, both in a transactional and disputes context. In September 2016 the firm launched its updated [Guide to Dispute Resolution in Africa](#), providing insight into litigation and arbitration in all 54 countries in Africa.

Whether African-seated arbitration is appropriate will depend on bargaining power, the nature of the transaction, the likely amounts in dispute, where assets are and where enforcement is likely to take place, and the seat which is being proposed.

If the concern of the counterparty is that the dispute is not “exported” outside Africa, it may be possible to agree on:

- an “African” governing law, but off-shore arbitral seat and institution
- an “international” governing law and off-shore arbitral seat, but an “African” institution
- an “international” governing law, on-shore venue of the arbitration but off-shore legal seat, with an “African” institution
- in limited jurisdictions it may be possible to keep all aspects of the dispute on-shore and still ensure that an international party is confident the dispute will be resolved effectively

We can advise on all aspects of clause drafting in Africa-related transactions. Please do contact one of the partners named in this article for advice

ENDNOTES

1. www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf
2. <http://crcica.org.eg/newsletters/nl022016/index.html>
3. <http://crcica.org.eg/newsletters/nl042015/nl042015a001t.html>
4. www.kiac.org.rw
5. www.lcia-miac.org
6. www.doingbusiness.org/rankings

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