

The coming of age of arbitration in Africa

Rémy Gerbay looks at whether Africa could prove a suitable arbitration seat for US corporations

Private investments by US corporations in Africa are expected to increase in the coming years. In turn, cross-border disputes are also expected to surge. This comes at a time when arbitrating disputes on the African continent is slowly becoming an increasingly viable option for US corporations.

Investments in Africa are expected to increase

The African continent as a whole has seen renewed economic growth in recent years, making it, once again, an attractive place for private foreign direct investment. In 2019, the World Bank expects an average GDP growth of 3.4%, increasing to 3.7% in 2020. This compares favourably to the (declining) growth rates of other regions, including North America. For example, the growth of US GDP is projected to reach a modest 2.5% in 2019 and is expected to drop down to 1.7% in 2020.

At the same time, geostrategic considerations have led the US government – first under the Obama administration and now under the Trump administration – to take measures to counterbalance Chinese influence in resource-rich Africa.

In recent years, China has advanced its influence across the developing world under the umbrella of what it calls its ‘One Belt, One Road’ strategy. In Africa alone, China invests an estimated \$40bn a year in infrastructure projects. To respond to China’s global ambitions, the US recently moved to establish a new agency named the International Development Finance Corporation (IDFC). The IDFC, which consolidates the Development Credit Authority of the US Agency for International Development and the Overseas Private Investment Corporation,

will be responsible for providing foreign aid through the financing of private investments. More specifically, the IDFC will provide loans, loan guarantees and insurance to US corporations that invest in developing nations, particularly in Africa. With its \$60bn annual budget – more than twice that of its predecessors – the IDFC is expected to foster renewed growth in investment from the US into Africa.

More investment means more disputes

Naturally, increased flows of investment mean increased disputes between foreign investors and local companies and state entities.

Recent statistics of leading arbitral institutions like the International Chamber of Commerce (ICC) and the London Court of International Arbitration suggest that the number of Africa-related commercial arbitrations is already growing. So much so that, in 2018, the ICC took the notable step of creating a dedicated Africa Commission to co-ordinate its expanding range of activities and growth on the continent. Meanwhile,

at the International Centre for Settlement of Investment Disputes (ICSID), investments in Africa have long been a significant source of disputes. About one fifth of all ICSID cases filed to date have arisen out of investments made on the African continent.

Traditionally, Africa-related disputes have centred on the construction, energy and mining sectors. But as foreign investors are investing more and more in new sectors, such as telecoms, real estate, and banking and finance, cross-border disputes in Africa are poised to become more diversified. In this context, the coming of age of African arbitration is a timely development.

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Recent developments in African arbitration

The past two years have seen significant developments in African arbitration. These developments show that arbitration seated in Africa or administered by a local institution is becoming a viable option for foreign corporations.

In 2018 the new Uniform Law on Arbitration of the Organisation for the Harmonization of Business Law in Africa (OHADA) came into force, which aims to increase the transparency, speed and efficiency of arbitral proceedings within the territory of OHADA's members. This was accompanied by revised arbitration rules for OHADA's Common Court of Justice. These are significant developments, as OHADA membership covers no less than 17 West African countries, including the large economies of the Democratic Republic of Congo, Ivory Coast and Cameroon.

In the past two years, two countries often considered among the most stable and reliable arbitration seats in Africa have also taken steps to update their respective arbitration legislation. In October 2017, South Africa passed its long-awaited International Arbitration Bill, which largely incorporates the UNCITRAL Model Law on arbitration. In 2018, Rwanda also commenced work on updating its own arbitration law, bringing that legislation closer to the text of the Model Law. The current draft bill is decidedly pro-arbitration and forward looking. If adopted, it will give the small East African nation one of the world's most modern arbitration statutes.

Last year, Angola officially became a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Most large African countries are now parties to the New York Convention, making New York Convention membership the norm rather than the exception in Africa. This should provide some reassurance to foreign investors as to the enforceability of arbitral awards on the continent. Notable exceptions to this norm include Libya, Ethiopia, Chad and Namibia, which remain outside the New York Convention regime.

In parallel to the above developments, Africa has seen the creation of a number of arbitral institutions (there are over 40 at present). These institutions' caseloads vary greatly, but some of them now routinely administer cross-border disputes, sometimes of significant value. Among the institutions that administer a sizeable load of cross-border disputes are The Cairo Regional Centre for International Commercial Arbitration in Egypt and the more recently established but fast-growing Kigali International Arbitration Centre in Rwanda.

Conclusion

Admittedly, US corporations will continue to prefer non-African seats and arbitral institutions when contracting with Africa-based parties. But in those circumstances where the use of a non-African seat or arbitral institution is a deal-breaker for the African counterparty, African arbitration might prove a viable solution. When a US corporation is faced with the prospect of having to arbitrate a dispute in Africa, it should not dismiss it as futile. A combination of careful strategic planning and local know-how can make arbitrating in Africa a feasible option.

Rémy Gerbay, MoloLamken



Rémy Gerbay is a counsel at MoloLamken, a US law firm focused exclusively on complex litigation and arbitration. The firm handles civil, criminal and regulatory matters across the US for clients around the world. Gerbay focuses on cross-border commercial arbitration, international investment arbitration, as well as related litigation. He represents both claimants and respondents in arbitral proceedings globally. A fluent French and English speaker with a dual civil law/common law background, he has sat as an arbitrator and represented parties in arbitrations in various African jurisdictions.