Africa's advance

Steven Finizio and **Thomas Führich** of **WilmerHale**
survey Africa's arbitral laws and institutions

Africa has become a rising star in terms of foreign investment, fuelled at least in part by its oil and gas, mining and other natural resources. Sub-Saharan Africa is currently the second-fastest growing economic region in the world, and is the region with the highest returns on investment.[1] Increased investment also means an increase in disputes, and raises questions about how disputes will be resolved. While it is dangerous to generalise, foreign parties have been reluctant to litigate in local courts in many parts of Africa, and, while African parties have often been willing to include international arbitration provisions in contracts with foreign parties, foreign parties usually avoid agreeing to arbitrate in Africa. According to the World Bank, the ability to enforce arbitral awards is one of the important factors driving investment decisions, and one of the issues faced by parties entering into contracts with African parties is how likely it is that foreign arbitral awards will be recognised and enforced by African courts.

This article looks at international arbitration in Africa today by region, with a particular focus on issues of enforcement. Discussing arbitration trends in Africa is complicated by the fact that there are distinctions between different regions in Africa, and within them, and information about local court decisions can be difficult to obtain. Africa boasts a number of distinct legal traditions, including legal systems based on French, English and Portuguese law, with some jurisdictions also influenced by Sharia law. In addition to these differences, arbitration legislation and practice varies greatly: many of African countries have adopted modern arbitration laws based on the UNCITRAL Model Law, but a significant number do not have modern arbitration laws. While most have ratified the United Nations Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention), a significant number have not, and even those that have sometimes add requirements not found in the Convention.

There is a similarly mixed story with regard to investment treaties. African countries have entered into almost 800 bilateral investment treaties, most of which provide foreign investors with defined protections and the right to bring claims in arbitration. There are also regional treaties that provide arbitration options for investors (e.g. the Southern African Development Community (SADC) Treaty and Protocol); Morocco and other North African states are preparing to accede to the Energy Charter Treaty (ECT), and there have been recent discussions about the possibility of further integrating African states into the ECT framework.

However, while most African countries have signed and ratified the ICSID Convention, six have not (Angola, Djibouti, Equatorial Guinea, Eritrea, Libya and South Africa) and four have signed but not ratified it (Ethiopia, Guinea-Bissau, Namibia and São Tomé and Príncipe). Moreover, a substantial percentage of African BITs involve North African countries.

1 See McKinsey & Company, *What's Driving Africa's Growth?* (June 2010), noting that, in addition to natural resources, two-thirds of Africa's growth has come from other sectors, including wholesale and retail, transportation, telecommunications, and manufacturing.

One quarter of the cases registered at ICSID have involved African states, and South Africa recently announced it is reviewing its investment treaties and taking steps to cancel treaties with a number of European countries.[2]

International arbitration institutions in Africa are still developing, with many foreign parties preferring to arbitrate outside of Africa (often in London or Paris), under the rules of major international arbitral institutions. There is no established pan-African arbitration centre, although the Cairo Regional Centre for International Commercial Arbitration (CRCICA) is an important institute in North Africa. Mauritius is also seeking to establish itself – and a new institution there, LCIA-MIAC – as a regional arbitration centre, and there are a number of new and developing local institutions.

Southern Africa

Angola ◆ Botswana ◆ Lesotho ◆ Madagascar ◆ Malawi ◆ Mauritius ◆ Mozambique ◆ Namibia ◆ Seychelles ◆ South Africa ◆ Swaziland ◆ Zambia ◆ Zimbabwe

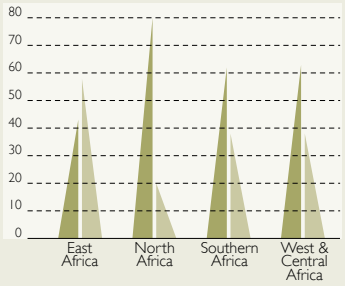
All the countries in the region are members of the South African Developed Community (SADC).[3] However, five Southern African states have not signed the New York Convention (Angola, Malawi, Namibia, Swaziland, and Seychelles), and some that have done so impose grounds for refusing to enforce foreign awards not found in the Convention. For example, South Africa requires permission of the Minister of Economic Affairs for the enforcement of foreign awards; for its part, Zimbabwe will not enforce an award that is in "breach of the rules of natural justice".

Many of the countries in Southern Africa do not have modern arbitration laws: only four have adopted arbitration laws based on the UNCITRAL Model Law (Madagascar, Mauritius, Zambia and Zimbabwe), with two more (Angola and Mozambique) recently enacting legislation that borrows elements from the Model Law. The six common law countries in the region (Botswana, Lesotho, Malawi, Namibia, South Africa and Swaziland) have arbitration legislation based primarily on the 1950 English Arbitration Act. This legislation allows for greater court interference in arbitration proceedings, and does not expressly provide for the separability and competence-competence doctrines. However, courts in these jurisdictions sometimes take steps to mitigate the shortcomings of the legislation – for example, South African courts have a reputation for interpreting its law narrowly to avoid interfering with arbitration.

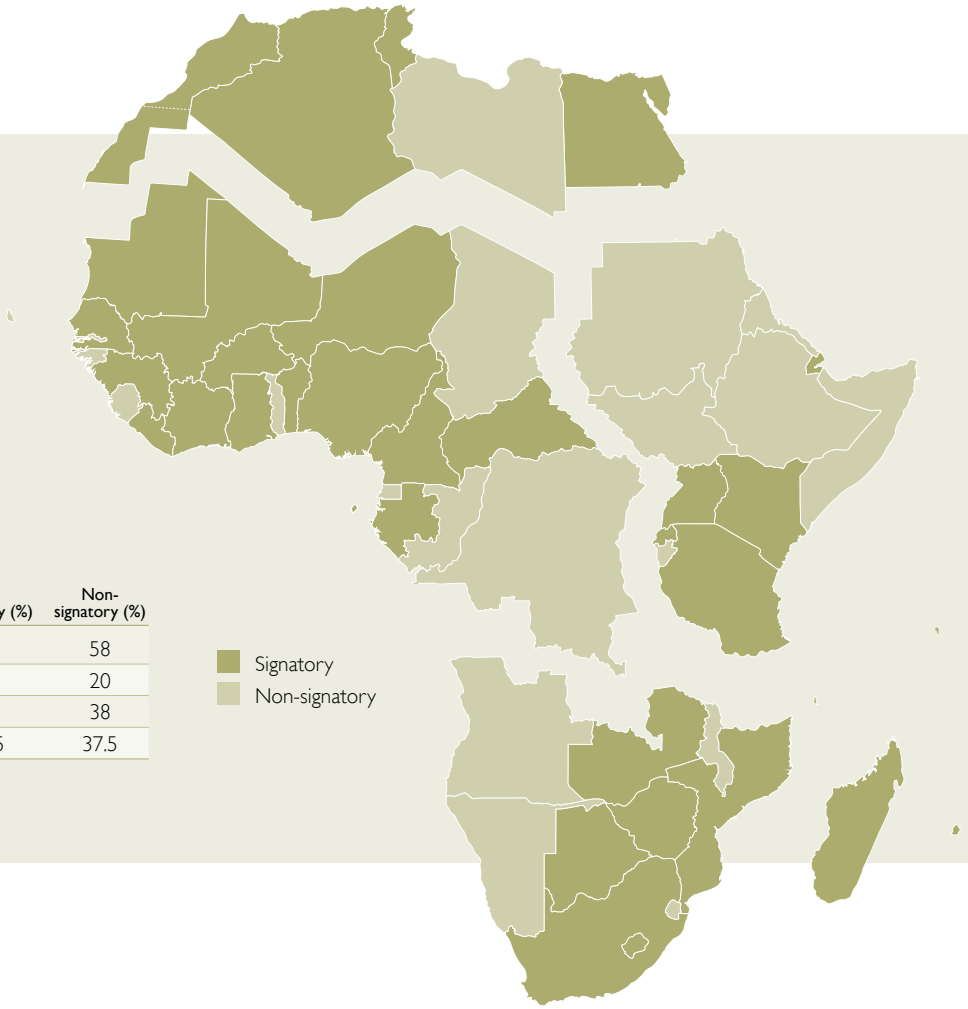
While there are local arbitral institutions in the region, none yet have significant experience with international arbitration. There has nonetheless been a notable development with the 2011 launch of LCIA-MIAC, a joint venture of the London Court of International Arbitration and the Mauritius International Arbitration Centre. LCIA-MIAC's rules are based on the LCIA Rules, and it also will administer arbitrations under other rules. Mauritius has adopted arbitration legislation based on the 2006 UNCITRAL Model Law, and is trying to use its offshore location and international business links to establish itself as the leading arbitration centre in Africa. The recent announcement that the International Council for Commercial Arbitration (ICCA) will hold its 2016 Congress in Mauritius is a boost to those ambitions and reflects international interest in developing an arbitration centre in Africa. ▸

2 South Africa has taken steps to terminate BITs with Belgium, Luxembourg, Spain, Germany, Switzerland and The Netherlands.
3 Members include Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

African signatories to the New York Convention



	Countries	Signatory (%)	Non-signatory (%)
East Africa	12	42	58
North Africa	5	80	20
Southern Africa	13	62	38
West & Central Africa	24	62.5	37.5



West and Central Africa

Benin ◆ Burkina Faso ◆ Cameroon ◆ Cape Verde ◆ Central African Republic ◆ Chad ◆ Congo ◆ Democratic Republic of Congo ◆ Equatorial Guinea ◆ Gabon ◆ The Gambia ◆ Ghana ◆ Guinea ◆ Guinea-Bissau ◆ Ivory Coast ◆ Liberia ◆ Mali ◆ Mauritania ◆ Niger ◆ Nigeria ◆ São Tomé and Príncipe ◆ Senegal ◆ Sierra Leone ◆ Togo

Fifteen countries in West and Central Africa have ratified the New York Convention, and the Democratic Republic of Congo is set to do so in 2014 (it is also a member of SADC). Cape Verde, Chad, Congo, Equatorial Guinea, Guinea-Bissau, The Gambia, Sierra Leone and Togo have not done so.

Many of the countries in the region are members of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA),[4] which was created by treaty in 1993 to promote foreign investment through harmonisation of business laws. The OHADA countries have adopted a Uniform Arbitration Act, which is largely based on the UNCITRAL Model Law.

Outside of the OHADA countries, Nigeria is the only country in the region that has a modern arbitration law based on the UNCITRAL Model Law. Nigeria's economic strength and its energy resources mean that Nigerian parties are frequently involved in international arbitration, and the Nigerian courts are gaining a reputation for being

4 Members include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, and Togo.

less adversarial and more cooperative in enforcing arbitral awards.

There are a number of local arbitration institutions in the region. Nigeria, in particular, has several institutions, including the Regional Centre for International Commercial Arbitration (RCICA Lagos) and the Lagos Court of Arbitration (LCA), but these institutions are only beginning to develop international caseloads. In 1997, OHADA also established the Common Court of Justice and Arbitration in Ivory Coast, with rules based on the ICC Arbitration Rules, but it does not yet appear to have a significant caseload.

East Africa

Burundi ◆ Comoros ◆ Djibouti ◆ Eritrea ◆ Ethiopia ◆ Kenya ◆ Rwanda ◆ Somalia ◆ South Sudan ◆ Sudan ◆ Tanzania ◆ Uganda

Five countries in East Africa have signed the New York Convention (and Tanzania is also a member of SADC). However, seven have not (Burundi, Comoros, Eritrea, Ethiopia, Somalia, South Sudan, and Sudan), and some impose more onerous requirements for the recognition and enforcement of foreign awards – for example, Ethiopia requires that a foreign award comply with the country's morals and "general enforceability under national law", and Sudan has similar language concerning compliance with morals.

Kenya, Rwanda and Uganda are the only countries in the region to have adopted arbitration laws based on the UNCITRAL Model Law. While most of the other countries in the region have revised or adapted their arbitration laws in the last 15 years, these laws have gaps and other uncertainties, and courts in those countries have reputations for being at best indifferent to, and at worst interfering in, the arbitral process.

Local arbitral institutions in the region do not yet have significant international caseloads, although the Kigali International Arbitration Centre (KIAC) in Rwanda is making efforts to establish itself as a regional centre.

North Africa

Algeria ◆ Egypt ◆ Libya ◆ Morocco ◆ Tunisia

Other than Libya, all the countries in North Africa are signatories to the New York Convention, and courts in the region generally have positive reputations for supporting arbitration, and for enforcing foreign awards under the terms of the New York Convention.

All the countries in the region, with the exception of Libya, have arbitration laws based on the UNCITRAL Model Law. Libya's current arbitration law dates from the 1950s. Prior to the overthrow of the Gaddafi regime in 2011, Libya was in the process of enacting a new arbitration law, but whether and when new legislation will be enacted is unclear.

While there are a number of arbitral institutions in North Africa, the pre-eminent institution is CRCICA in Cairo, which was established in 1979. CRCICA has administered a significant number of international arbitrations and it has a strong reputation in the region, as well as in the Middle East and Asia (although it is not a significant institution for other regions of Africa). CRCICA's current rules came into force in 2011 and are based on the 2010 UNCITRAL Arbitration Rules.

Next steps for arbitration in Africa

Along with foreign investment, interest in arbitration in Africa is growing, and many African jurisdictions have taken the key steps of ratifying the New York Convention and adopting modern arbitration legislation. There is also growing interest in developing arbitral institutions, as reflected by CRCICA's reputation in North Africa and by newer institutions like LCIA-MIAC and the efforts being made by institutions in Nigeria and Rwanda. Serious issues nonetheless remain with arbitration in Africa, and critical next steps include the wider ratification and proper implementation of the New York Convention, more widespread adoption of modern arbitration legislation, and the continuing development of judicial support for these laws where they have been adopted. ■

ABOUT THE AUTHORS

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