AFRICA’S NEW MARKET IN DISPUTE RESOLUTION IS INVENTING ITSELF FROM SCRATCH AS PEOPLE RECOGNISE THAT DISPUTE RESOLUTION SERVICES ARE SET TO PLAY AN INCREASINGLY IMPORTANT ECONOMIC ROLE ACROSS THE CONTINENT.
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I am delighted to present the fourth issue of Clyde & Co's International Arbitration 1/3LY. This issue focuses on arbitration and dispute resolution across Africa and marks the first time that we have included an in-depth special report, exploring the growth of arbitration as a discipline and an industry in its own right in African jurisdictions.

As foreign direct investment to Africa continues to grow, the continent is experiencing an upswing in the volume of disputes involving African parties. In the extended report, I investigate African responses to this trend and compare and contrast different regional and jurisdictional approaches to disputes resolution through interviews with key stakeholders from Rwanda, Mauritius, Kenya and Nigeria. Michael Kuper SC provides the South African perspective in a conversation with Clyde & Co’s Daniel Le Roux and Nicola Vinovrški. In a separate article we assess the viability of South Africa as a seat for arbitration, focussing on its arbitration laws and judicial attitudes.

Other contributions to this issue cover dispute resolution trends in African construction disputes and an overview of the role of Investor-to-State Dispute Settlement provisions in Africa. Patrick Zheng covers the rise of Chinese investment, particularly in African infrastructure projects in a Q&A with Jun Cui, Former VP Of China Overseas Construction Corporation.

Elsewhere, we feature an in-depth conversation between Alec Emmerson and Louise Barrington, Independent Arbitrator, Director of Vis East International Commercial Arbitration Moot and Founding President of ArbitralWomen. Louise tells us about the birth and development of the Vis East Moot and the founding of ArbitralWomen.

On behalf of Clyde & Co, I would like to thank Louise Barrington, Michael Kuper SC, Jun Cui, Bernadette Uwicyeza, Duncan Bagshaw, Lawrence Ngugi, and Funke Adekoya for contributing their expert opinions and fascinating insights. I also wish to thank my colleagues from the firm’s global arbitration group for their interviews and articles.

MAURICE KENTON,
PARTNER, CLYDE & CO
DANIEL LE ROUX, NICOLA VINOVRSKI, AND MICHAEL KUPER SC DISCUSS THE GROWTH OF INTERNATIONAL ARBITRATION IN SOUTH AFRICA AND THE PROJECT OF THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA.
IN CONVERSATION WITH MICHAEL KUPER SC

THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA


THE DEVELOPMENT OF ARBITRATION IN SOUTH AFRICA

NICOLA You have had a long and eventful career stretching back to the 1970s. Can I kick off by asking you how and where your journey in arbitration began?

MICHAEL I had a commercial practice as an advocate of the Johannesburg Bar and I was introduced to arbitration during the 1970s and the 1980s. Back then, arbitrations were all ad hoc and closely resembled the courts but without robes. These proceedings were an effective introduction to the arbitration process but the need for administered arbitration soon became apparent and that gave rise ultimately to the initiative which created the Arbitration Foundation of Southern Africa (AFSA).

MICHAEL So we started from scratch. We had to learn our own way and as you know these things take time. AFSA is now the leading commercial arbitration body in the country and it has a stable and large stream of commercial and mercantile disputes. We administer fully, providing rules and facilities and overseeing panels. At any one time there are about 300 disputes under administration by the Foundation. The Centre in Johannesburg is by far the biggest venue for arbitral disputes, compared to Pretoria, Durban and Cape Town.

NICOLA In terms of the types of disputes that are managed by AFSA, could you tell us a bit about that and whether you have noticed any recent trends?

MICHAEL The Centre has a stable and large stream of commercial and mercantile disputes often involving mining ventures or banking relationships, among other things. The disputes cover every aspect of commercial life including various large construction disputes. For example, we have seen a run of well publicised disputes involving Government and foreign contractors relating to a speed train that has been designed and built here linking Pretoria, Johannesburg and the airport, a project which has given rise to a range of construction disputes.

MICHAEL I don't think we've seen any particular trends in recent years except that the amounts in dispute have probably increased. Is that a sign of changed economic circumstances or does it indicate that all levels of large disputes are going to arbitration? I'm not entirely sure.
However, there's certainly been an expansion in the range of attorneys who recommend and participate in the process. It includes all sorts of firms, large and small, whether with white membership or black membership. It seems to be all inclusive and that is an encouraging trend.

**Daniel** Michael may I come in here and just say that our firm has as one of its goals to increase its footprint into Africa. We have an office now in Dar Es Salaam, an office in Cape Town and one in Johannesburg. We find that our international client base of insurers, mining companies and the like are increasingly looking to us to find solutions which enable them to resolve commercial disputes not only in South Africa but in countries outside of South Africa.

**Michael** The Centre has always held itself available to administer cross-border arbitrations. One of the first objectives it had was to spread throughout the region because whilst there were some arbitral institutions in North African countries, there was very little south of the Sahara.

The AFSA has administered matters with some success in Namibia, Zambia and in various other African countries to the north of South Africa, and is trying to expand its footprint. Many of the disputes are very large — sometimes very complicated, sometimes routine — and we have a panel which is largely made up of retired judges and advocates. Additionally, we have a small but useful component of foreign arbitrators, including two Australian retired appeal judges, English practitioners and European practitioners, whom we use as needed because at the present time the number of international arbitrations compared to domestic cases is small. Perhaps 5% of our cases are cross-border. When such cases arise, they are dealt with as efficiently as possible in a country which has a poor international arbitral legislative infrastructure. This problem has dogged us for a long time when it comes to the international arbitration world but there are good initiatives underway.

Owing to its chequered history, prior to transformation in 1994, South Africa was completely isolated and therefore had no international arbitration of any consequence, nor was it likely to be an international arbitration venue. Since that time, South Africa has developed a business community which dominates investment into Africa and one would have expected South Africa to become the engine room of international arbitration in the region.

We recognised this opportunity and entered into a partnership with another arbitral body in South Africa, the Association of Arbitrators, which has a very prominent construction arbitration mandate. Together we have established Africa ADR which specialises in cross-border arbitration.

## A Practitioner’s Perspective on Arbitration in South Africa: A New Adventure

**Nicola** I want to ask you a little bit about the practice of arbitration in South Africa. My practice is commercial litigation and international arbitration. I am London based but get instructed by clients from all over the world because London arbitration is a very popular dispute resolution clause, particularly institutional arbitration, administered by the LCIA or the ICC. We see that quite a lot in disagreements between parties based all over the place. Now the practice of international arbitration in the UK and Europe is very elitist. It is a big money industry and I think it’s right to call it an industry: most law firms have specialist international arbitration teams; there are, particularly in Europe, boutique arbitration practices; and there are lots of institutions. There are also lots of articles being published and lots of conferences about arbitration. We’re witnessing ever more technical and academic consideration of arbitration as a transnational legal system. Can I ask you what the position is in South Africa by contrast?

**Michael** By contrast, in South Africa we’ve not had any well-established involvement in international arbitration, either in the attorneys’ profession or amongst Counsel. Naturally, we have various attorneys and members of the Bar who participate in arbitrations, but there is no stable established platform or industry, as you describe. To be exposed to international arbitration in South Africa in the present situation one would have to wait to be nominated by a South African party in an international arbitration, and such opportunities arise infrequently at best. So whether you’re talking about the attorneys’ profession or the advocates’ profession you’ve got to understand that there is a very sharp gap between what you call the vibrant international circuit of Europe and the situation in Africa. That’s been one of the prices of isolation paid over the decades which we’re now trying to bridge. In a sense though, it both invites and challenges us to look at the situation in 2015 and to plan anew with the benefit of all of the experience of international arbitration developments throughout the rest of the world. We must also take regional developments into account, such as the recent incursion of China into Africa and the establishment of the BRICS, all of which have added new dimensions and opportunities. So if we’re a bit of a blank page, it’s quite exciting to write a new adventure in international arbitration.

**Nicola** Daniel, as a practitioner in the region is this consistent with your experience?

**Daniel** Yes certainly. I think that there is varying demand for matters to be referred to arbitration. The benefits of doing so are not limited to the short timeframe within which the process can be completed but extend to confidentiality. This makes it a very attractive proposition for our clients.

**Nicola** Michael, you’ve mentioned contact between Africa and China.

**Michael** Well it’s a very important development. China is by far the most active and supportive of the international investors and its influence has grown dramatically in the course of the last five years. It would make a lot of sense for China and Africa to join together in sharing an arbitral institution and AFSA has recently entered into a partnership arrangement with the Shanghai International Arbitration Centre to establish a joint administrating authority for China-Africa disputes. This initiative, under the aegis of the China Law Society, is a significant further development in South Africa’s involvement in international arbitration.

**Nicola** That’s very interesting and I think that ties into a concern that some people in the UK and Europe are alive to, which is that the UK and Europe can’t rest upon their laurels, so to speak, as venues for international arbitration. Institutions in Singapore, Hong Kong and the Middle East are creating stiff competition for the so-called old guard of international arbitration, London and Paris. I think issues such as cost, geographical proximity, and even technology in these new arbitrations centres must be making commercial parties think twice about where to arbitrate their disputes, rather than simply defaulting to London or Paris.
THE DISTINCTIONS WITH LITIGATION AND THE RELATIVE ADVANTAGES OF ARBITRATION

NICOLA What is the preferred method for resolving disputes in South Africa? Can you talk a bit about the split between arbitration and litigation?

MICHAEL Yes. For many years arbitration was very much the little brother and it was used rarely in comparison to litigation. The growth in arbitration throughout the world had a knock-on effect and the launch of AFSA in 1995 reflected a feeling that there was a real need and that something was missing from South African legal infrastructure. Now, the majority of large commercial disputes are referred to arbitration and it has become the mainstay of dispute resolution settlement. It takes two forms. One form is the administered arbitration system which is dominated by AFSA; and the other form is ad hoc arbitration. In both instances, we have always had to deal with the reluctance of lawyers to readapt their techniques and to fight the automatic assumption that a good arbitration is really a good piece of litigation conducted informally. Over the years we’ve managed, I think, to make real advances in arbitration technique and you will now find arbitration here is indistinguishable from arbitration anywhere else in the world.

Oddly though, in South Africa there is a tendency for lawyers to schedule their preparation much closer to trial and the result is a spate of settlements at the ‘doors of the arbitration’. By contrast, in Europe much of the preparation tends to be done at an earlier stage and as a result you get earlier settlements, often saving parties a great deal in legal fees and other costs.

NICOLA Daniel, how does the divide between litigation and arbitration play out in your practice?

DANIEL I would agree that the vast majority of complex commercial disputes are now referred to arbitration. That is certainly the case in my own practice and also the experience of other practitioners in our offices in Johannesburg and in Cape Town, I believe. The downside, which Michael may wish to comment on, is that we have lost a lot of jurisprudence in South Africa because the awards are of course kept confidential.

MICHAEL Yes I think it’s absolutely true. A great wealth of legal learning is contained in the awards and it’s a great pity that they remain confidential. Remember, there is no connection between arbitration in this country and the courts, other than in the very limited case of review. So there’s not much opportunity for awards to be published in the course of reporting on appeal cases and the like. Hence most of the time parties are able to achieve total confidentiality, making arbitration very attractive to corporates in South Africa.

I think it’s desirable that AFSA should look at including a formula in its rules which would allow at least an abbreviated award to be published but at the moment there is resistance from the participants pretty much across the board. We’ve never had a case where both parties have been willing and eager to allow publication on any basis.

NICOLA It’s a great loss that awards of such high quality are not published. It sounds quite different from international arbitrations where one hears anecdotally that awards can be a bit more of a mixed bag. For example, I know from speaking to past and present Counsel for the ICC that the institution is very keen to defend its scrutiny of awards process on the basis that they see such varying quality of awards in the first draft.

It seems to me that varying quality of awards could be a function of the less homogenous nature of three arbitrator panels which are common in international arbitrations. Often panels are made up of arbitrators for the parties from two different jurisdictions and then a chairman from a third jurisdiction. Necessarily the arbitrators come from a large and diverse pool. It may be that that this is reflected in a myriad of approaches at the award drafting stage.

Could it be that the more homogenous nature of the panels in South African arbitration explains why the awards are such high quality?

MICHAEL Yes, I’m sure that is an important difference. We don’t have to worry about coordinating different legal backgrounds or establishing an average acceptable quality of award as our arbitrators here are invariably retired Judges and senior silks. The general quality of the award is therefore good and it is of course coming from a homogenous and limited pool.

SOUTH AFRICA AS A FORUM FOR INTERNATIONAL ARBITRATION: THE CURRENT LANDSCAPE

NICOLA Picking up on some of the comments that you’ve made already, would you say that South Africa is an attractive forum for international arbitration?

MICHAEL I think the answer to that up to the present moment has been negative but that is changing. First, let me deal with the legislative structure, which is essential as no one would voluntarily choose a venue in which that structure is questionable. In South Africa we still have one Arbitration Act which dates back to 1965. It makes no distinction between domestic and international arbitration and the reason it doesn’t is that it was completely unnecessary, as far as a draftsman was concerned, to deal with the international elements at that time. That leaves us with a rudimentary international arbitral structure from the legislative point of view. Then there was a long and unfortunate history in which the courts were intrusive in dealing with awards and did not display the caution and the reserve that one would expect of courts operating in an efficient arbitration environment. In addition, some judgments were particularly offensive to the arbitration world, so for a long time South Africa stagnated with a poor legislative structure and with a questionable judicial approach to arbitration.

That has altered in two fundamental respects recently: First, the Constitutional Court and the Supreme Court of Appeal have come out in a number of judgments making it absolutely clear that the courts in this country are to acknowledge, respect and support the arbitral process in all the ways that international arbitration practitioners have come to expect. The latest Supreme Court of Appeal judgments are instructive in that regard and I think one can say that without any doubt the attitude of the Courts is now positive and supportive.

Second, so far as the legislation is concerned, in 1998 a South African Law Commission report on international commercial arbitration suggested reforms including a draft arbitration bill based on the UNCITRAL model law. Unfortunately, it just sat in a drawer somewhere in the Department of Justice offices and nothing came of it.
However, recently it’s been raised again at a high level and in the last month I’ve received a note saying that the Ministry of Justice has already notified the Parliamentary Secretary that it intends to submit the International Arbitration Bill to Parliament towards the end of this year. We know the content of the Bill because AFSA and other bodies were consulted and it is a good piece of work. It’s been largely researched and led by Professor Butler from Stellenbosch University who has a long track record in international arbitration. So at some point during 2016 the legislative infrastructure should be in place and there will be plenty of happy announcements from South Africa about international arbitration conferences and other international arbitration initiatives.

On one level we need it because of the costs involved in going elsewhere. On another more philosophical level, it will help to reduce the number of African disputes being resolved outside of Africa by persons who are not necessarily African arbitrators. It makes sense for the legal communities of Africa to have a shared community of interest and shared arbitral institutions and systems. In saying that, I’m not for a moment suggesting an arbitral institution which would not welcome onto its panels international practitioners from around the world — of course it would — but it would be a secretariat and a centre of knowledge and institutional experience which would be nurtured in Africa. That has been a blank page up to now and I believe we should start writing on that blank page on the basis of Africa sharing a combined initiative, rather than merely opening the continent to the European or American arbitral institutions.

I would also hope that in five years’ time Africa will be beginning to come together; its legal communities will be beginning to share a heritage which allows them the scope to interact in a way which gives them the strength and unity that they have lacked in the past.

DANIEL I think that there is a clear trend to refer commercial disputes to arbitration and based upon our practice there is no reason to think it will change in future. On the contrary, I think the referrals to arbitration will expand and grow rapidly, as I see our client base expanding into Africa and investing in various countries throughout the continent. South Africa is now well placed to develop an arbitral institution for dispute resolution across Africa. I agree with Michael’s view that hopefully in the next five years that will come about and we will see a growth also in the international arbitrations being hosted by the likes of AFSA.

MICHAEL I think the domestic picture of arbitration at the moment is a good and healthy one. There’s plenty of room for improvement and expansion but I think it’s going to evolve without difficulty and improve considerably. There’s everything to play for where international or regional continental arbitration is concerned. We are starting from a very low base with a combination of exciting prospects and serious challenges. In five years’ time I would hope to be able to say that there is a vibrant, regional arbitral institution operating in Africa and that Johannesburg or Cape Town has the same arbitral initiatives as Singapore or Kuala Lumpur or Brazil.

NICOLA That’s excellent news. You mentioned before Africa ADR. Can you tell us a bit about that and your involvement in it?

MICHAEL Yes. We have a strong belief that Africa must develop its own arbitral institutions with their own secretariats and panels of arbitrators. The idea of Africa ADR was to establish a secretariat which could administer matters primarily in Africa but with an international dimension. This could give to Africa a kind of shared arbitral system that we desperately need to facilitate the continents’ markets, trade and shared economic initiatives.

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IN CONVERSATION WITH MICHAEL KUPER SC

WITH THANKS TO THE CONTRIBUTORS OF THIS EXCHANGE...

MICHAEL DAVID KUPER SC BA (HONS.) LL.B (RAND)

Michael is a senior South African commercial advocate (barrister) and arbitrator in practice at the Johannesburg Bar (Society of Advocates Witwatersrand). He has served as chairman of the Johannesburg Bar; Vice-Chairman of the General Council of the Bar, and as an acting judge of the High Court of South Africa on various occasions.

His work covers mercantile, corporate, banking, mining and construction disputes and he maintains an active arbitration practice.

Michael served as convenor of the joint venture between the legal and accounting professions and the South African Chamber of Business to establish the Arbitration Foundation of Southern Africa (AFSA), for the purpose of providing administered arbitration and mediation in the southern African region and for the establishment of an arbitral regime consistent with the UNCITRAL model law (1996).

He is the chairman of AFSA and executive member of Africa ADR, a newly established African regional arbitration administering authority. He is a member of the AFSA Panel of Arbitrators for commercial, construction, mining and banking matters and of the Hainan Arbitration Commission.

Michael has acted as counsel or as sole arbitrator, tribunal member or tribunal chairman in South African arbitrations; in various cross-border arbitrations in the southern African region and in London, Mauritius, Nigeria, Paris and the USA. He served as country rapporteur for the ICC Commission on Arbitration in 2008.

He was formerly Hon. Professor in the Department of Procedural Law, Faculty of Law University of Pretoria, and Disciplinary Commissioner for Cricket South Africa.

DANIEL LE ROUX, CLYDE & CO

Daniel is a Partner based in Clyde & Co’s Johannesburg office. He specialises in all aspects of insurance law with particular emphasis on aviation, product liability, professional indemnity, financial lines, D&O and construction and engineering claims.

Daniel attended the University of Pretoria where he obtained his B Proc and was admitted as an attorney in 1983.

He advises on liability and coverage disputes and is recognised as a leading expert in Dispute Resolution and Insurance.

Chambers Global 2015 notes that Daniel is "one of the best insurance litigators in town", and clients appreciate that he is "always available and willing to assist." Daniel has also recently been included in The Best Lawyers in South Africa 2015.

NICOLA VINOVRŠKI, CLYDE & CO

Nicola is a Legal Director based in Clyde & Co’s London office. She represents diverse clients on a wide range of complex, multi-jurisdictional litigation and arbitration. Nicola works on commercial disputes with a particular focus on financial services litigation and international arbitration.

She advises on a wide range of complex, multi-jurisdictional litigation and arbitration. Her practice covers contentious matters for financial institutions, investment managers, private equity houses, high net worth individuals and corporate clients based in the UK, Europe, India, the US and elsewhere.

Nicola commenced work at Clyde & Co in 2007, after having practised in Australia.
CONSTRUCTION DISPUTE RESOLUTION ACROSS AFRICA

BY ELSA JORDAAN AND WARREN HIEPNER, PARTNER AND CONSULTANT AT CLYDE & CO

THE STATE OF PLAY

Inbound foreign direct investment (FDI) into Africa has increased significantly over the past few years, giving rise to a surge in commercial activity including numerous infrastructure and other construction projects across the continent. The surge has brought with it an increase in international disputes in Africa, with companies looking towards arbitration as the main method of resolving disputes involving international parties. However, the market is also witnessing an increasing level of pre-arbitration mechanisms (such as the appointment of designated persons or bodies) in contracts to prevent the escalation of disputes and to aid early settlement. Despite arbitration being the dominant method for the settlement of international disputes, regional preferences are beginning to emerge for construction disputes:

• Anglophone Africa: dispute boards also tend to be used (or at least considered)
• South Africa: the trend is for adjudication or a combination of adjudication and arbitration
• East Africa: the primary method of funding for construction projects is by FDI and as a consequence, companies generally seek to use established arbitral centres/rules to resolve disputes, such as LCIA or ICSID
• Maghreb and other parts of Francophone Africa: ICC arbitration continues to be a very popular choice

Regional centres are also beginning to emerge across Africa in places such as Egypt, Mauritius, Morocco and South Africa. However, due to the lack of developed arbitral systems, international jurisdictions (mainly across Europe or the Middle East) remain popular, particularly on international projects.
WHAT IS CAUSING DISPUTES IN CONSTRUCTION ACROSS AFRICA?

Disputes across Africa tend to be generated by issues such as:

- Poor design documents and drafting, as well as poorly adapted versions and non-standardised contracts
- Delayed access to the site
- Delayed progress with the works
- Failure to comply with contractual obligations (at all or in a timely manner)
- Lack of understanding of project requirements and professional negligence
- The difference in construction contract negotiations and in contract management between public parties and private parties

Construction projects in Africa are also prone to difficulties caused by the challenging environments in which they are negotiated and the asymmetrical knowledge and experience of the various parties to the contract.

CHOOSING THE RELEVANT SEAT OF ARBITRATION

Selecting the appropriate arbitral seat always requires careful consideration. In most cases, the competent court of the jurisdiction where the arbitral tribunal has its seat will be competent for any annulment procedure. South Africa is often chosen because its developed system of precedent provides parties with legal certainty. It is also a signatory to the New York Convention (which many African countries are not) and is more cost effective than many other African jurisdictions. Owing to marked differences between African jurisdictions, in contractual discussions it remains important that stakeholders carefully consider the consequences before agreeing to amendments to any dispute resolution clauses.

Across Africa, stakeholders find the court system challenging, as in most cases it is a long, expensive and arduous process. Local dispute resolution is also affected by a skill shortage at the administrative level and difficulties in securing appropriate experts, as well as allegations of corruption. As a result of these issues, international contractors are generally keen to negotiate international arbitration clauses and not to rely on the local courts.

On large scale projects, most parties prefer to agree that any arbitration will take place in arbitral centres with longstanding experience and expertise. For this reason, arbitrations are still generally taking place in Europe, the Middle East or the United States.

MITIGATING RISK AND THE FUTURE

What does the future of construction dispute resolution in Africa look like? Across Africa, particularly South and East Africa, there has been increased activity in the construction industry insofar as infrastructure and resources are concerned. This is likely to translate into an increase in construction disputes and alternative ways in which to resolve them. At present, arbitration remains the most widely accepted form of dispute resolution, though we expect to see an increase in other forms of dispute resolution, such as disputes boards, in the future. It is also hoped that this increased activity will lead to a transfer of know-how and skills, resulting in both more expeditious local methods for resolving disputes and more efficient projects.

Those looking to undertake a project in Africa should be aware of the range of legal issues that they may encounter, fully understand the implications of any contractual clauses relating to dispute resolution and ensure clear communication between parties at all times.

"Owing to marked differences between African jurisdictions, in contractual discussions it remains important that stakeholders carefully consider the consequences before agreeing to amendments to any dispute resolution clauses."
Africa is witnessing unprecedented levels of investment and growth. Its construction, mobile technology, energy and natural resources industries (among others) are booming and investors from diverse locations, both inside and outside the continent, are competing for a stake in its burgeoning enterprises. Higher incidence of commercial (and investor-state) disputes is an inevitable corollary of this increased economic activity, particularly in circumstances where the local court systems have not yet enjoyed the confidence of foreign users. In response, and facilitated by the growth of inter-regional economic communities, trade bodies and governments are developing mechanisms to enable the resolution of business disputes without recourse to local courts or to slower and more expensive international forums. This new market in dispute resolution is inventing itself from scratch as people recognise that dispute resolution services are set to play an increasingly important economic role across the continent.

In this article Maurice Kenton, partner at Clyde & Co, surveys the African dispute resolution scene and takes a more in-depth look at developments in Rwanda, Mauritius, Kenya and Nigeria. In the course of his investigations Maurice spoke to Bernadette Uwicyeza, Secretary General of the Kigali International Arbitration Centre (KIAC), Rwanda; Duncan Bagshaw, Registrar of the Mauritius International Arbitration Centre (LCIA-MIAC); Lawrence Ngugi, Acting Registrar of the Nairobi Centre for International Arbitration (NCIA); and Funke Adekoya of ÆLEX, a commercial and litigation law firm in Nigeria.
AFRICA’S INVESTMENT CLIMATE

Foreign direct investment (FDI) in Africa is driving growth and increased commercial activity. In 2014, Africa was the second most attractive investment destination¹ and the world’s fastest-growing region for FDI², reaching its highest level for over a decade (5.7%) resulting in job creation figures reaching an all-time high. Concurrently, the growth of inter-regional investment and the continued development of supporting infrastructures are funding the growth of existing regional economic communities and fuelling new hotspots of interest and activity. African investors accounted for 23% of FDI in 2013, while China, the UK, Japan, UAE and India continue to be major investors in the continent. According to China’s Ministry of Commerce (MOFCOM) statistics, direct investments from China to Africa increased by 33.9% in 2013³.

This investment has fuelled a transportation, power and communication infrastructure boom that, combined with associated financial services, has had a profound impact on the aspirations of middle class Africans, producing significant growth in the consumer economy. Improved infrastructure has facilitated access to goods and resulted in the growth of both large and small manufacturers.

ARBITRAL FORA ACROSS THE CONTINENT

Arbitration is growing in popularity across Africa and most arbitral centres around the globe are reporting an increase in the number of cases with African claimants⁴. However, countries across Africa are at very different stages of development in relation to arbitration and other methods of alternative dispute resolution (ADR). For example, only ten out of 54 African countries (Uganda, Tunisia, Rwanda, Zambia, Zimbabwe, Nigeria, Mauritius, Kenya, Egypt and Madagascar) have chosen to base their arbitration laws on the UNCITRAL Model Law and just under half of all African countries have signed and ratified the New York Convention, prompting concerns about the enforceability of arbitral awards in African jurisdictions. Albeit in relation to investment disputes, the majority are party to the ICSID Convention. Seventeen African countries are members of the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA), a system of business laws and implementing institutions, and the majority of OHADA members are French-speaking civil law jurisdictions. In 1999, the OHADA states adopted the Uniform Act, which, based on the UNCITRAL Model Law, sets out the basic principles for any arbitration seated in an OHADA member state.

Owing to concerns regarding the reliability of local courts, foreign parties tend to opt for arbitration under the auspices of one of the established institutions or sets of rules in a seat outside the continent. However, a number of African jurisdictions appear to perceive the commercial opportunity represented by arbitration in its own right, in addition to the knock-on benefits in terms of attracting foreign investment. As a result, new arbitral centres are springing up across Africa, providing foreign and domestic parties with home-grown fora for settling disputes.

In North Africa, all countries, with the exception of Libya, have ratified the New York Convention. In Morocco, political stability combined with a buoyant economy is making the country an attractive base for foreign investors. The opening of the Casablanca International Mediation and Arbitration Centre (OMIC) in late 2014 highlights Morocco’s intention to promote arbitration for resolving disputes. Progress is also discernible in Egypt: following a period of political stability, FDI has resumed and in 2014 the Arbitration Act, based on the UNCITRAL Model Law, was passed.

In West Africa, the Lagos State government in Nigeria recently established the Lagos Court of Arbitration (LEA) under the Lagos Court of Arbitration Act [2009]. The ICC has also announced its intention to set up an arbitral centre in Ghana.

The trend continues across Eastern and Central Africa, where new regional centres have been created. In the past three years, the Kigali International Arbitration Centre (KIAC) has opened in Rwanda whilst the Nairobi Centre for International Arbitration (NCIA) has been established in Kenya. A Tanzanian International Arbitration Centre is expected to be launched later this year.

In Southern Africa, only four countries base their arbitration laws on the UNCITRAL Model Law and all of the six common law countries have arbitration legislation based primarily on the 1950 English Arbitration Act. However, Africa ADR was recently established by arbitral institutions from across Southern Africa, along with the Institute of Directors of Southern Africa, aiming to become an arbitral authority in the region and beyond. Additional progress is being made in South Africa, where at the end of this year, the Cape Chamber of Commerce and Industry will launch the Cape Town International Arbitration Institute.

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³ See http://english.mofcom.gov.cn/article/newsrelease/significantnews/201409/2014090072958.shtml, Ministry Of Commerce People’s Republic Of China Website
RWANDA

Located in Eastern and Central Africa, Rwanda shares borders with Uganda, Tanzania, Burundi and the Democratic Republic of the Congo. With a population of approximately 11 million people, it is among the top three African countries for internet connectivity.

According to the World Investment Report 2014, Rwanda received USD 1.11 million through FDI during 2013, with the financial services, mining and telecom sectors attracting the highest number of FDIs. Since 2008, Rwanda has made a push to establish itself as a regional hub for arbitration by passing a new law governing arbitration in commercial matters and signing the New York Convention. The new law is an adaptation of the UNCITRAL Model Law and aims to improve arbitration in commercial matters. The enactment of the new law was immediately followed by the project of Kigali International Arbitration Centre (KIAC) to provide the much needed supportive institution for effective use of arbitration and ADR in general.

Many of the conditions necessary for arbitration to flourish appear to be in place but asked about the preferred method and/or forum for resolving disputes in Rwanda and East Africa, Bernadette Uwicyeza, Secretary General of KIAC, had a different response:

"I am not sure we can say there is a preferred method. Litigation is commonly used as it is familiar to every lawyer. Arbitration as a concept and practice is not well known to many users."

While there is still some distance to travel, Bernadette believes that the new centres in the region are having an impact:

"Things are changing since EAC countries started to promote arbitration. The KIAC launched in 2012, the Nairobi Centre opened two years later and Tanzania Private Sector Organization is looking to start an arbitration centre. All those arbitral bodies in the region will play an important role in creating a culture of ADR in their respective countries."

And in Rwanda, we have already noticed changes in the attitudes of users as we are receiving requests for advice on dispute resolution clauses before contracts are signed and from the last survey made, users are more aware about arbitration and its advantages over litigation."

Bernadette has been involved in the KIAC since its conception:

"KIAC was established by an Act Parliament in 2011 and in January 2012, the first team comprising of myself as the Secretary General, the Registrar in charge of Case management and two support staff was put in place. The centre was formed to provide an appropriate forum for economic operators in the region to resolve their disputes in a friendly, confidential and efficient manner without the need to go to courts. We are committed to promoting global standards in international arbitration and building local capacity in the region. 300 professionals from various disciplines [lawyers, engineers, architects, accountants, judges] enrolled in KIAC's capacity building program in arbitration, mediation and adjudication in association with the Chartered Institute of Arbitrators (CIARB), the Centre for Effective Dispute Resolution (CEDR) and the Kuala Lumpur Regional Centre for Arbitration, which was open to participants from the region."

KIAC has recently acquired new state-of-the-art facilities. It has administered 28 cases since 2013, including four international cases and one emergency arbitrator procedure. Just under half of these cases have related to the construction and infrastructure sector. Case values range between USD 20,000 to USD 5.8 million.

Looking ahead, Bernadette sees the importance of promoting the benefits of arbitration in cross-border transactions. She added:

"In the Context of EAC Integration, ADR should be promoted and strengthened in each EAC country to secure cross border trade."

Bernadette is the Secretary General of Kigali International Arbitration Centre (KIAC). She has held this role since the starting of the Centre in 2012. She holds a French Law degree and a Postgraduate Diploma in European Union Law (with Honors) from the University of Rennes I in France. The special field for Bernadette is business law, regional integration, management and policy formulation. She is also an Accredited Mediator CEDR.

Prior to joining KIAC, Mrs. Uwicyeza was a Legal Advisor to the Ministry of East African Affairs under Trade Mark East Africa Project (2011) assisting the Ministry in legal and judicial matters of the EAC integration.

She serves as Legal consultant to the Ministry of Justice under the Competitiveness and Enterprise Development Project/World Bank (2006-2011), coordinating the business law reform program engaged by the government for easy doing business in Rwanda.

She worked earlier to that as Managing Director in different companies in Rwanda and served as lecturer in different schools of law in Rwanda.

She speaks English, French and Kinyarwanda.
DUNCAN BAGSHAW

REGISTRAR, LCIA-MIAC ARBITRATION CENTRE

Duncan practised in the fields of commercial and property litigation and arbitration for eight years until 2012 when he was appointed as the first Registrar of the LCIA-MIAC Arbitration Centre. LCIA-MIAC is an independent arbitral institution based in Mauritius. It receives support from the London Court of International Arbitration (LCIA), including administrative support and knowledge of arbitrators. LCIA-MIAC offers all the same services as the LCIA, with the same commitment to efficiency and quality of service, at competitive rates of administrative fees. The LCIA Court, which is the supervisory body for arbitrations under the LCIA Rules, performs the same functions for LCIA-MIAC under its own rules.

In his role as Registrar of LCIA-MIAC, Duncan is responsible for the administration of cases and for developing and promoting LCIA-MIAC. As an arbitral institution based in Africa (Mauritius is a member of the AU and of the Common Market of Eastern and Southern Africa) LCIA-MIAC is particularly suitable for disputes involving African parties and projects. Duncan has travelled extensively in Africa to meet governments, lawyers and companies, and has spoken and written extensively on arbitration in Mauritius, Africa, Europe and Asia. He has also assisted with the continued development of arbitration law in Mauritius, including work on the drafting of amendments to the International Arbitration Act 2008 and Court Rules for international arbitration-related proceedings.
MAURITIUS

STRATEGICALLY POSITIONED IN THE INDIAN OCEAN BETWEEN AFRICA AND INDIA, MAURITIUS IS RAPIDLY DEVELOPING INTO A NEW FINANCIAL HUB. IT HAS A MIXED LEGAL SYSTEM, WITH INFLUENCE FROM ENGLISH AND FRENCH LAW, MAKING IT FAMILIAR TO PARTIES FROM BOTH COMMON LAW AND CIVIL LAW JURISDICTIONS. OVER THE PAST 15 YEARS, MAURITIUS HAS ADOPTED A RANGE OF MEASURES TO POSITION ITSELF AS AN ATTRACTIVE VENUE FOR RESOLVING INTERNATIONAL DISPUTES, ESPECIALLY THOSE EMANATING FROM THE AFRICAN MAINLAND.

This began with the adoption of the New York Convention in 2001, followed by ratification of the International Arbitration Act (the IAA 2008) in 2008. The Act is based on the UNCITRAL Model Law, with refinements to support the arbitration process, including court proceedings heard by the Mauritius Supreme Court.

Duncan Bagshaw, Registrar of the London Centre of International Arbitration – Mauritius International Arbitration Centre (LCIA-MIAC) explained the thinking behind the state of the art Act:

“The decision to make a real push to make Mauritius an attractive venue was taken in around 2006. Mauritius already had an arbitration law which followed the old French law on arbitration but without any of the recent modifications. A complete legislative overhaul was required. To make the new Act as attractive as possible, they made some key decisions including applying the law to international matters only and limiting court involvement in arbitrations by giving powers in relation to certain matters to the Secretary General of the Permanent Court of Arbitration (PCA) in the Hague.”

Earlier this year, the LCIA-MIAC won the Global Arbitration Review 2015 award for up-and-coming regional arbitral institution. Duncan viewed the award as well-deserved recognition for hard work.

“The Centre is breaking down negative perceptions overseas by building capacity and expertise in the region. I am really pleased that this work has been recognised because it shows that an African country can be at least regarded as an upcoming centre. Hopefully sooner or later we will be regarded as fully established. We are taking steps towards this goal all the time, such as our new hearing centre, to be built before the end of 2015, based on the standard of the Hong Kong hearing centre or the Singapore hearing centre”.

How does the LCIA-MIAC stand up against more traditional seats?

“The combined effect of the legislative framework and the MIAC system (based on the LCIA) is probably a more robust system than a lot of other potential venues. The whole system is designed to minimise court intervention and so to drastically reduce potential delays. You can often avoid going to court in Mauritius, where you wouldn’t be able to in other jurisdictions.”

A recent snapshot of cases where the parties have agreed to refer disputes to the Centre suggests that the majority of cases tend to arise out of the main areas of activity in Africa:

“Contracts relating to infrastructure development; power generation and supply; and oil and gas at both ends of the process – so exploration and extraction, and supply and purchasing.”

Trends are also emerging in relation to clauses in contracts:

“African parties, especially governments and state owned corporations, seem to be trying to Africanise, as far as possible, the dispute resolution process. So they are more likely to insist on domestic law as the substantive governing law of the contract. They are also more likely to try to insist on arbitrations or other dispute resolution processes taking place in the jurisdiction that the project relates to.”

Looking towards the future, Duncan can still see challenges ahead for the continent as a whole:

“Although we are catching up with the rest of the world, there is still a massive need for development and investment. My worry is that continued fear of disputes and fear of things not being sorted out efficiently and fairly is preventing foreign parties from investing. Dispute resolution has got to keep up so that people are not put off.”
KENYA

Located on the Equator with the Indian Ocean to the South-East, Kenya is the founding member of the East African Community (EAC), an economic bloc and regional intergovernmental organisation of the Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, and the Republic of Uganda, established by treaty in 1999. According to the World Investment Report 2014, Kenya received USD 514 million through FDI during 2013, with key investments in the industrial production, oil and gas and transport sectors.

Based on the 1985 UNCITRAL Model Law, the Kenyan Arbitration Act was adopted in 1995 and amended in 2009 to reflect the 2006 amendments to the UNCITRAL Model Law. Kenya signed the New York Convention in 1989 and has also ratified bilateral investment treaties with a number of western countries to provide for investor-state arbitration. Recent amendments to the Civil Procedure Act 2010 to enhance court appended mediation and assisted arbitration, further demonstrates the growth in acceptance of alternative dispute resolution.

The Kenyan court experience is similar to that of other jurisdictions across Africa, characterised by prolonged and expensive procedures. Consequently, major international companies tend to opt for arbitration clauses providing for offshore settlement of disputes in foreign centres such as London and Paris. The passing of the Nairobi Centre for International Arbitration Act of 2013 sought to address this problem and establish Nairobi as a hub for international companies to settle disputes. As a result, the independent and not-for-profit Nairobi Centre for International Arbitration (NCIA) was set up to promote and encourage international commercial arbitration. The Centre administers domestic and international arbitrations and provides assistance with the enforcement and translation of arbitral awards. Lawrence Ngugi, Acting Registrar of the NCIA has been involved with the Centre from its inception and has a long history in Kenya’s legal sphere. He explained:

“The Centre is in the formative stage, so our focus has been on setting up a structure and rules which we expect will be operational by the end of June 2015. Commercial dispute resolution in the country has relied heavily on litigation. However the popularity of arbitration and other forms of dispute resolution has increased. The judiciary is involved in a project to introduce pre-action mediation as a pre-requisite to litigation. The Centre is part of this initiative working with the Mediation Accreditation Committee.”

Steps are also being taken to limit the role of the local courts. Furthermore, just like many other jurisdictions, Kenya is exerting considerable effort on training in its legal profession:

“We are also developing the capacity to conduct arbitration under our rules through training. We have strong links with CIArb and we are involved in the series of events which they are running in Nairobi covering arbitration practices. We are heavily involved in training and quality assurance, having recently put on a mediation course with the CEDR.”

As such, Nairobi is slowly developing into an attractive and cost-effective dispute resolution venue.

“The Centre is in the formative stage, so our focus has been on setting up a structure and rules which we expect will be operational by the end of June 2015.”
Lawrence Muiruri Ngugi is the Acting Registrar, Nairobi Centre for International Arbitration. He leads a Secretariat that is overseeing the set-up of the Centre. Lawrence heads the Commercial & Arbitration Division, Civil Litigation Department, Office of the Attorney General & Department of Justice where he serves as a Senior Principal Litigation Counsel. With 14 years’ post admission practice; he has experience in diverse fields of commercial, civil, constitutional and judicial review law practice.

He has had the privilege to represent the Government of Kenya in high profile and complex litigation and arbitrations locally and internationally with significant successes. In the course of service he has had the privilege to participate and contribute to precedent setting jurisprudence from courts in Kenya and at the East Africa Court of Justice in cases involving the Republic.

A passion for ADR has seen him represent the Chambers in UNCITRAL Working Group II Arbitration & Conciliation discussions which culminated in the Convention on Transparency in Investor-State Arbitrations. He serves as a representative of the Attorney General at the Board of the Association of Credit Providers of Kenya. He is a member of the Institute of Certified Public Secretaries of Kenya (ICPSK) and has served at the Public Procurement Advisory Board as Board Member.
Mrs Funke Adekoya SAN is a partner at ALEX, a commercial law firm operating in Lagos. She is one of the few female partners in any law firm in Nigeria and was the pioneer Managing Partner and is now the Finance Partner. She now heads the Dispute Resolution practice group which manages litigation and arbitration matters for the firm’s clients.

She obtained her LL.B (2nd Upper) from the University of Ife in 1974 and her LL.M, Harvard Law School, Boston, Mass, USA 1977. She was appointed as Notary Public in 1986 and qualified as a Solicitor in England and Wales in 2004.

She has nearly 40 years’ experience in commercial litigation and corporate dispute resolution; advises clients on commercial and corporate legal issues regarding business insolvency, receivership, corporate liquidations and business turnaround issues; and regularly lectures on arbitration law and procedure.

She was elevated to the rank of Senior Advocate of Nigeria in September 2001 [at that time the 5th woman to be so elevated].

In addition to heading the dispute resolution practice group at ALEX, she has maintained an active interest in her profession, both academically and professionally. She is acknowledged within the arbitration sector where she is listed on the Energy Arbitrators List by the International Centre for Dispute Resolution, and is a Board member of both the Lagos Court of Arbitration and the African Users Council of the London Court of International Arbitration.

She is an active member of the Nigerian Bar Association, having been a past Secretary of Lagos branch, and a National Officer on three occasions [past Assistant General Secretary, past Treasurer and past 1st Vice President]. She recently contested [albeit unsuccessfully] for the presidential slot. She was a member of the Committee set up to draft Bye-Laws for the new Sections established in 2004 in the NBA and thereafter held office as Chairman of the Association’s Section on Legal Practice.

At the international level, she is an active member of the International Bar Association, where she has held the posts of Deputy Secretary General for Africa [West] and later Officer of its Bar Issues Commission. She was recently elected a member of the Governing Council of ICCA [International Council for Commercial Arbitration] as well as being appointed a member of the World Bank Group Sanctions Board.

She has been a Life Member of the International Federation Of Women Lawyers (FIDA) since 1982.
NIGERIA

NIGERIA RECENTLY OVERTOOK SOUTH AFRICA TO BECOME THE LARGEST ECONOMY IN AFRICA IN 2014. SIMILARLY TO OTHER JURISDICTIONS, AS COMMERCIAL ACTIVITY IN NIGERIA HAS INCREASED, INTERNATIONAL ARBITRATION HAS GROWN TO SERVICE THE NEEDS OF PARTIES INVOLVED IN DISPUTES. AWARENESS OF THE BENEFITS OF ARBITRATION IS GROWING AND MANY COMMERCIAL ENTITIES NOW FAVOUR ARBITRATION OVER LITIGATION. FRUSTRATION WITH THE COURTS APPEARS TO BE A MAJOR CONTRIBUTOR TO THIS TREND.

Funke Adekoya San, Partner of ÆLEX, a commercial and litigation law firm in Nigeria comments: “For me it was the frustration of spending days and weeks in court without much happening.”

Nigeria became a signatory to the New York Convention with both reciprocal and commercial reservations in 1979. Nigeria is also a signatory to the ICSID Convention and awards are enforced in Nigeria by the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, CAP 120, Laws of the Federation of Nigeria, 2004.

Arbitration in Nigeria is governed by the Arbitration and Conciliation Act, 1988, CAP A18, Laws of the Federation of Nigeria, 2004. The Act was based on the UNCITRAL Model Law and applies to all arbitrations seated in Nigeria, bar ICSID arbitrations. However, an additional piece of legislation was introduced recently which is specific to Lagos, Nigeria’s hub for commercial activity:

“The State Government took the view that arbitration was an economic investment and wanted to develop Lagos into a hub for arbitration activities in Africa. The Lagos Arbitration Law, May 2009 is flexible in that the nationality of the arbitrator is unimportant, irrespective of whether the case is domestic or international. It’s much more attractive to investment than the federal law which is still at the outdated 1988 law stage.”

The Lagos Court of Arbitration (LCA) was launched in 2012 in response to the increase in commercial activity in Nigeria to provide a modern legal framework for the settlement of disputes in Nigeria and across West Africa. The country boasts the largest branch of CIArb. Nigeria is also home to the Regional Centre for International Commercial Arbitration and the Arbitration Commission of the International Chamber of Commerce (Nigerian National Committee).

The question surrounding the Nigerian courts’ attitude to arbitration, and particularly in relation to the enforcement of awards, is slowly being answered by case law from the Nigerian Court of Appeal. According to a recent judgement in the Nigerian National Petroleum Corporation v. Statoil (Nigeria) Limited case, the Nigerian courts do not have jurisdiction to intervene in arbitration proceedings (except as provided in the Arbitration and Conciliation Act [ACA]). Funke’s experience is consistent with this:

“Two or three years ago I used to hear stories about Nigerian judges treating enforcement proceedings like appeals and going through awards with fine tooth combs. In the last two years, there’s been a fair amount of training for judges in arbitration processes and on the role of courts in the process. Now the judges are faster if there’s an application to enforce an award. Cases move faster through the courts than previously and judges are more aware of the extent of their powers.”

Training appears to be a focus for the region:

“As a member of CIArb, I see hundreds of lawyers now turning up to take entry, membership and training courses in arbitration. This is a positive development for foreign parties, as the quality of Nigerian and West African arbitrators and counsel will increase. So I think the only way to go is up.”
ROOM FOR IMPROVEMENT

Considerable progress is being made but new African centres are developing amidst a difficult and often hostile climate. Hence, there is still a long journey ahead for jurisdictions which would invent themselves as hubs for international dispute resolution. Unwelcome intervention by local courts and wider acceptance by users are just two of the hurdles which need to be overcome before foreign investors are prepared to subscribe to dispute resolution clauses providing for African seated arbitrations in greater numbers. Although the legal community in Africa is working hard to bridge the gap, there are still cases which act as reminders of the challenges faced. Notorious examples include the admission of a challenge by a non-party to an arbitration agreement in one West African jurisdiction, while in East Africa a national court, apparently in clear breach of the ICSID Convention, issued an injunction to prevent the continuation of ICSID proceedings. While such examples persist, there is still a role for established offshore centres such as the LCIA and the ICC.

Another problem is lack of knowledge and understanding of the arbitral process by some users, which in some instances leaves them open to exploitation by foreign investors under the system of arbitration. This problem was highlighted following a case involving Chinese investors and a Kenyan party. The dispute relating to a Kenyan infrastructure project was resolved via arbitration proceedings in China, in the Chinese language and subject to Chinese law. The Kenyan party involved had unwittingly signed a contract to that effect, leaving it effectively unable to contest its rights. Cases such as these have a deleterious effect on the reputation of arbitration among local businesses. However, both Duncan Bagshaw and Bernadette Uwicjeza were of the view that the case has helped to raise the issue of dispute resolution clauses in contracts and local parties are now paying more attention to the content of these clauses.

CONCLUSION

The battle to establish effective alternative dispute resolution mechanisms in Africa is being fought on two fronts. First, jurisdictions must put in place the requisite legislation, rules and infrastructure. Second, an education programme, encompassing judiciary, lawyers and users, is clearly needed to ensure that arbitration and other forms are utilised and to limit the potential for abuse and corruption. Our experience suggests that many centres and jurisdictions are approaching these challenges with a high degree of dynamism which is yielding incremental progress. In the short to medium terms there are still challenges to be surmounted. However, in the long term, the future of African arbitration seems bright and this fledgling African industry is likely to increase the attractiveness of the continent as a destination for foreign trade and investment.

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### Status of International Arbitration Conventions and Legislation in Africa

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Africa’s rise as an attractive international investment destination will invariably bring international disputes in its wake, creating exciting opportunities for countries within the continent to develop as seats for arbitration. However, many countries in Africa are not signatories to the New York Convention, throwing up problems in terms of enforceability of awards. South Africa on the other hand, signed the Convention in 1977 and boasts world class infrastructure and services in its major centres. Does South Africa have the potential to become an attractive seat for international arbitration?

THE STORY SO FAR

In some senses, one might argue that Johannesburg and Cape Town are where London was a short three decades ago. Although failure by the South African legislature to implement the UNCITRAL Model Law has unfortunately fuelled the perception of South Africa as an unattractive venue for arbitration. A cursory review of the South African case law suggests this perception is unfounded. On the contrary, the South African Courts seem to bend over backwards to accommodate the principle of party autonomy in private arbitrations.

WHAT LAW GOVERNS ARBITRATION IN SOUTH AFRICA?

Arbitration in South Africa is governed by the Arbitration Act 42 of 1965 (the “Act”) which contains empowering provisions which enable:

- Production of documents
- Leading of oral evidence
- Recording of evidence

It does not however prescribe any particular rules of procedure – this is left entirely to the discretion of the parties. Although cutting edge at the time of enactment, it is widely accepted, 50 years on, that the Act is out-dated and in need of reform. It predates the UNCITRAL Model Law and does not distinguish between domestic and international arbitration.

However, the Act does allow parties the freedom to choose the law and legal rules that will apply to their arbitration agreement. Should there be no express choice of law clause contained in such an agreement, the arbitration tribunal will determine the appropriate laws by considering the implied choice of the parties and, if appropriate, by following the principles in the Rome Convention.
AFRICA ADR MAINTAINS ITS OWN SECRETARIAT AND SET OF RULES AND IS INTENDED TO FACILITATE REGIONAL AFRICAN ARBITRATION.

WHAT IS THE ATTITUDE OF THE COURTS?

The failure of South Africa’s legislature to bring the Act in line with the UNCITRAL Model Law has fuelled a perception that South Africa is an unreliable arbitration venue. It is true that the Act does allow for judicial interference in certain instances. For example, a party to an arbitration agreement may apply to court for the setting aside of an arbitration agreement on “good cause”.

However, in reality, the South African judiciary, led by the apex Constitutional Court and the Supreme Court of Appeal, has adopted a much more guarded approach.

In 1994, in the case of Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun, the Supreme Court of Appeal opined that there were many reasons for commending those who elect arbitration as opposed to litigation via the courts. Writing for the full court Goldstone JA noted that courts should not discourage parties from resorting to arbitration and “should depurate conduct by a party to an arbitration who does not do all in its power to implement the decision of the arbitrator promptly and in good faith”.

In Telcordia Technologies Inc v Telkom SA Ltd the same court highlighted that since the early part of the nineteenth century, South African courts have consistently given due deference to arbitration awards out of “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes”.

Writing for the majority of the Constitutional Court in Lufuno Mphaphuli v Andrew and Another O’Reagan ADJ stated that “the decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal body and other similar matters... Given the approach not only in the United Kingdom, ... but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems that the values of our Constitution will not necessarily be served by interpreting [it] in a manner that enhances the power of the courts to set aside private arbitration awards. Indeed, the contrary seems to be the case”.

In a more recent decision, the Supreme Court of Appeal confirmed that it could not interfere with the decision of an arbitrator to determine his jurisdiction.

In a separate judgment in which all but one Judge of Appeal concurred, Nigel Willis JA opined that the South African courts not only have a legal, but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. Sensitive to the context within which international arbitrations take place, he argued that international arbitration in South Africa will not only foster comity among the nations of the world, as well as international trade, but also bring about the influx of foreign spending to the country. The result further evidences a welcome trend emerging out of the South African courts to show due deference to the institution of private arbitrations.

WHAT TYPES OF CLAIMS ARE ARBITRABLE?

The Act imposes only two restrictions. It prohibits the referral to arbitration of any matrimonial or personal status disputes. Apart from this, any civil dispute may be resolved via the means of arbitration.

RULES OF PROCEDURE AND FORA

As indicated above, the Act prescribes no specific rules of procedure and parties are free to elect the process of their own choice. In domestic arbitrations, parties frequently choose to apply the rules of the High Court of South Africa. Influenced heavily by English rules of process, such procedure would, in the main, be familiar to those in common law jurisdictions.

Where foreign parties are involved, popular choices are the rules of the LCIA and the rules of the International Chamber of Commerce (ICC).

There are two main arbitration bodies in South Africa namely the Arbitration Foundation of Southern Africa (AFSA) and the Association of Arbitrators (AOA). Each has its own set of rules and its own secretariat which parties may elect to govern the arbitration process.

More recently in 2009, the Africa ADR, endorsed by The New Partnership for Africa’s Development (NEPAD) and supported by AFSA and AOA, has been established as an alternative to the traditional European based international arbitral authorities. Africa ADR maintains its own secretariat and set of rules and is intended to facilitate regional African arbitration. Arbitrating parties are, however, not obliged to commence proceedings using these authorities.

WHAT SUPERVISION IS THERE OF ARBITRATORS AND THEIR AWARDS?

Where a party contests the validity of the contract containing the arbitration agreement, alleges the arbitrator has no jurisdiction or the arbitrator declines to proceed with the arbitration, the other party may apply to court for a declaratory order as to the validity of the contract and the jurisdiction of the arbitrator. Alternatively, where the arbitrator decides to proceed with the arbitration in the same circumstances, the objecting party may seek to enforce the objection by applying to court for an interdict if it can prove the defect in the underlying agreement. Should an arbitrator or tribunal exceed its powers, a court may, on the application of any party, make an order setting aside the decision. In addition, if the parties agree, or the court directs after an application by one of the parties, a court may determine any question of law arising in the course of the arbitration proceedings. This may take place at any time prior to the final award being issued.
The Act contemplates a fairly streamlined process regarding the enforcement of an arbitration award. An award may, on application to a court of competent jurisdiction by any party, be made an order of court. Once an award has been made an order of court it may be enforced in the same manner as any judgment or order to the same effect.

IS THERE ANY REcourse FOR INTERIM MEASURES?

Unless the arbitration agreement provides otherwise, an arbitrator may make an interim award at any time within the period allowed for making an award. In addition, the Act conveys residual powers to the High Court to award, on application by one of the parties:

- Security for costs
- Disclosure of documents and the provision of interrogatories
- Examination of witnesses, whether within South Africa or abroad
- Production of evidence by affidavit
- Inspection, preservation or sale of any property involved in arbitration proceedings
- Certain injunctive relief where necessary

CAN ONE APPEAL THE DECISION OF AN ARBITRATOR?

Unless the agreement provides otherwise, the decision of an arbitrator [or tribunal] is final and is not subject to appeal. That being said, it is quite common for parties to agree to a right of appeal to a tribunal, subject to specific time limits and procedures.

HOW DOES ONE ENFORCE FOREIGN AWARDS?

South Africa acceded to the New York Convention in 1976 and to give effect to it, enacted the Recognition and Enforcement of Foreign Arbitral Awards Act the following year. Enforcement of foreign awards is one area in which South African law appears not only consistent with, but also in full harmony with prevailing international best practice in the field. A party seeking to enforce a foreign arbitral award must apply to the relevant division of the South Africa High Court having jurisdiction over the respondent party. The respondent is afforded an opportunity to oppose the enforcement [and must be given notice of the application] but will only succeed in very limited circumstances.

WHAT ARE THE LIKELY COSTS OF ARBITRATION IN SOUTH AFRICA?

By far the most significant component of the cost is in respect of the arbitrator and legal representation, which by international standards is competitive. Administration and ancillary charges are negligible. The indicative daily cost (excluding party representation) of an arbitration is probably in the region of USD 5,000, which is typically shared between the parties until an award is made.

CAN ONE FIND MANY SKILLED ARBITRATORS AND EXPERTS?

The South African legal system is, perhaps, one of the best developed on the African continent and therefore highly skilled and experienced barristers and solicitors are in abundance. South Africa also benefits from the fact that its Universities and Law Schools lead international rankings in Africa and enjoys a very rich academic legal tradition. The result is that there are many legal academics equally capable of sitting as arbitrators. Although the second largest African economy in gross terms, South Africa still leads the services sector in Africa with the largest pool of engineers, accountants, and other professionals able to act as experts, or to sit as arbitrators themselves.

TRAVEL, HOTELS, VENUES AND VISAS

As a very popular destination for international tourism as well as for business, and having hosted major international events in its recent history, South Africa boasts world class infrastructure. Johannesburg and Cape Town, in particular, offer first-rate facilities. Travel to and from South Africa is possible from every major centre in the world and travel between cities is inexpensive and convenient. South Africa also possesses an abundant and very competitive hospitality industry – almost every international hotel brand maintains a local presence. Private arbitration of domestic disputes [i.e. between South African litigants] has become a very popular alternative to court proceedings and the market has responded with venues specifically designed for arbitration.

As nationals of most OECD; BRICs and SADC nations are visa exempt when visiting South Africa, parties to arbitration are unlikely to have to apply for a visa unless the arbitration is expected to run for over 90 consecutive days. Those nationals who are not visa exempt will have to apply for a Visitor’s Visa in the same way as they would be required to do for a business trip.

CONCLUSION

Despite a failure to adopt the UNCITRAL Model Law, South Africa has the potential to serve as a reliable, economical and convenient place to conduct arbitration proceedings – particularly in relation to disputes arising on the African continent. On 21 May 2015, South Africa’s deputy Minister of Justice and Correctional Services revealed during the department’s budget vote in parliament that an overhaul was imminent and that a bill to that effect would be put to parliament. According to the Minister, the proposed legislation will allow for the adoption of the UNCITRAL Model Law. It is safe to say that the South African government accepts that arbitration is a speedier, less formal and more tailored approach to resolving disputes than court proceedings and that there is a recognition that the change is necessary. Given that similar announcements were made as long ago as December 2013, it is probably fair to suggest that developments will take place shortly.

In the meantime, whilst the old Act has many deficiencies, having been in use for so long, practitioners are well versed in its application. Moreover, whilst the UNCITRAL Model Law undoubtedly permits less scope for judicial interference than the Act does, the restrictive interpretation that the South African courts have given to these provisions significantly militates against fears that the South African arbitration experience would be characterised by the undue interference of the local courts.
INVESTOR-TO-STATE DISPUTE SETTLEMENT IN AFRICA
– A MIXED PICTURE

BY SIMON SCHOOLING, LEGAL DIRECTOR AT CLYDE & CO

Just as the proposed Transatlantic Trade and Investment Partnership (TTIP) is currently causing intense arguments in Europe and North America about the role of Investor-to-State Dispute Settlement (ISDS), so too in recent times has the role of ISDS been under scrutiny in Africa. In southern Africa at least, the landscape has been dominated by the aftermath of the 2008 case of Mike Campbell (PUT) Ltd and others v Republic of Zimbabwe, a case brought in the South African Development Community Tribunal, sitting in Namibia. In that case, the claims against Zimbabwe of dozens of co-claimant farmers alleging expropriation were upheld. However, as a result of the ruling, political pressure was successfully brought to bear to disempower the SADC Tribunal. Due to the wide nature of its remit, the demise of the SADC Tribunal sparked concern far beyond investment circles but it is from within the business community that legal challenges are now being pursued. A diamond mining company whose leases were cancelled by the Lesotho government in 1991 and which failed to secure compensation through the Lesotho courts, took its case to the SADC Tribunal but found that its case there became barred upon the disbandment of the SADC Tribunal. Now, relying on the SADC Protocol on Finance and Investment, the company is reported to be alleging in an arbitral claim that Lesotho’s participation in the disbandment of the SADC Tribunal constitutes an actionable wrong. The decision in that case is expected after the hearing later this year, and may well have interesting implications for potential claimants relating to investment anywhere in the 15 member countries of SADC.

While it is well known that bilateral investment treaties (BITs) provide for ISDS through the International Centre for Settlement of Investment Disputes (ICSID), another approach adopted by some African countries has been to incorporate into their domestic investment protection legislation a right for investors to bring claims at ICSID. The ICSID case of Interoc Oil Development Company and Interoc Oil Exploration Company v Federal Republic of Nigeria was registered by claimants who argued that the Nigerian Investment Promotion Commission Act of 1995 conferred ICSID jurisdiction on certain disputes between non-Nigerian investors and the State of Nigeria. Nigeria however disputed jurisdiction, arguing that the reference to ICSID in the Act did not confer ICSID jurisdiction or ICSID administration, but was merely the identification of the rules to be applied. In rejecting this in a decision of October 2014, the Tribunal found that “there is nothing novel about consent to ICSID being granted through national legislation” and viewed the wording of the Act as “a standing written offer to arbitration to anyone with a claim under the Act” which the claimants had accepted by filing their request with ICSID. The claimants’ USD 650 million claim is currently progressing through the further stages of arbitration.

Domestic legislation also seems to be the basis for jurisdiction in the ongoing ICSID case of BSG Resources v Republic of Guinea, and ICSID records suggest the claimants in that case rely for jurisdiction upon Guinea’s investment laws of 1987 and 1995. The case is in its early stages, and it remains to be seen whether any jurisdictional challenges of the type seen in Interocean will be attempted. The case has attracted significant media attention, not least because it will be a test of the appropriateness of ISDS in circumstances where the government alleges that the claimant’s licences were acquired fraudulently.

In the ongoing ICSID case of Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited (TANESCO), the respondent is a state-owned entity and ICSID jurisdiction was claimed by reference to contract. However, in April 2014 the High Court in Tanzania issued an injunction requiring the parties to refrain from pursuing ICSID proceedings. That decision has attracted mixed comments, and while it is seen by some as unwarranted interference in ICSID arbitral proceedings which by their nature are not subject to the supervision of any national court, others have seen the ruling as confined to its particular facts and have sought to defend it as being a useful endorsement of the general principle that the Tanzanian courts will agree to respect the parties’ decision to arbitrate.

Similar uncertainties prevail in the sphere of African BITs. It is something of a curiosity that although China has BITs with approximately 130 countries, it currently has relatively few with African countries despite its increasing investment in Africa. Looking ahead, time will run out for Africa’s BITs with individual EU countries, since EU-level agreements are due eventually to replace existing BITs. The nature of the ISDS provision in those future BITs will depend not only on the debate currently intensifying in Europe and the US, but also on evolving sentiment in Africa.
ALEC EMMERSON AND LOUISE BARRINGTON DISCUSS THE FUTURE OF ARBITRATION AS A DISCIPLINE, INCLUDING THE ARBITRATION COUNSEL AND ARBITRATORS OF TOMORROW. THEY DISCUSS THE VIS EAST MOOT IN DEPTH AND THE FOUNDING OF ARBITRALWOMEN.
IN CONVERSATION WITH LOUISE BARRINGTON

INTERNATIONAL ARBITRATOR, MEDIATOR AND CONSULTANT

Alec Emmerson, Consultant at Clyde & Co in conversation with Louise Barrington, Independent Arbitrator, Director of Vis East International Commercial Arbitration Moot and Founding President of ArbitralWomen

THE HISTORY OF THE VIS EAST MOOT AND THE ARBITRATORS OF THE FUTURE

ALEC The Vis East International Arbitration Moot has had a successful run over the past 12 years. Tell me about how it all came about.

LOUISE I was invited to go to the Willem C. Vis International Commercial Arbitration Moot in Vienna as an arbitrator and I found that it was a fabulous experience both for the students and the arbitrators. It was a real joy to be there on the first day and to see those shy, nervous, unsure students and then to see them again on day four, by which time they had become quite open professionally. That really impressed me and what's more, in my role as arbitrator I was sitting with people like Pierre Karrer and Professor Martin Hunter, whom I would never have had the chance to work with otherwise because I was just beginning my career at the time.

ALEC Yes, and were you based in Hong Kong at the time?

LOUISE Yes. I was teaching at City University in Hong Kong and having been in Asia for several years I was aware of the arbitration culture in various places and the lack of it in others. I loved the Vis Moot in Vienna but in talking to Eric Bergsten, the Director of the Vis Moot at the time, I became aware that they were very over-subscribed. Eric said “We’ve got well over 100 teams. It’s getting really big; it’s hard to manage. I don’t know what we are going to do with Vienna, possibly siphon off some of the teams that would normally come to Vienna, and also make it easier for Asian people to attend? Both financially and psychologically a trip to Hong Kong would probably be a lot easier for them than Vienna?”

So with some doubt Eric said “Well try it, we’ll see how it works out” and so that’s how the Vis East started in 1993.

ALEC And how many teams did you get initially?

LOUISE We started with 14 teams – Eric had started with 11 in Vienna – and in twelve years it has grown to over 100 teams.

ALEC Remarkable. How fast did it grow in Hong Kong?

LOUISE It grew very quickly, by about 10 teams per year. When it reached 64 teams, people started to say to me “This is getting really big, like Vienna”. Vienna was about 200 teams at this point. I felt very strongly that we should keep Hong Kong fairly small by comparison because part of what we noticed about Hong Kong was that the smaller community meant that it was very friendly. Everybody could meet each other and maintain friendships from year to year; whereas, I was finding that in Vienna it was hard to find my friends. I would say “Oh, I’ll see you in Vienna” and we would sort of wave at each other across a crowded room and then never cross paths again. Just as important was the logistical factor because Hong Kong just does not have access to the same number of professionals and space is at a great premium there, so unlimited growth would make running the Vis East very difficult to manage.
“While some of the universities award credit for the moot, plenty of teams do it completely without credit or any assistance from their institution.”
LOUISE So we decided to limit numbers at the Hong Kong moot. At first we liked 64 teams but the next year the numbers rose to 83 and they steadily increased to the point when we said that our absolute maximum would be 100. And now we’ve even exceeded that, with 107 for Vis East 12. But each year I say, absolutely no more! And the growth has slowed.

ALEC The growth seems to mirror the rise in the number of students who are interested in international arbitration. There has been an increase in the number of schools which offer arbitration as a module. Do you know how many of the teams participate in the moot as part of their course?

LOUISE It’s interesting that you ask that question because we do ask the students to tell us during the week by filling out feedback forms. They tell us what kind of support they receive from their schools with tackling the Vis East problems and whether it’s from teachers or just from people that they know who are willing to help. We also ask about what sort of financial and professional support they receive in attending the moot and whether they receive any formal course credit for participating. It’s interesting to compare the different approaches and levels of support by academic institutions. For instance, this year we have a team that entered without a coach and reached the quarter finals. On the other hand, there’s also a team that has 13 people coaching it. While some of the universities award credit for the moot, plenty of teams do it completely without credit or any assistance from their institution.

Another thing to note is that there is a whole culture, and indeed an economy, which has grown up around us in the form of pre-moots. Pre-moots are changing the nature of the Vis Moots, by making it far more professional. The enormous transition that we used to see over the four days of the general rounds has in many cases has disappeared. By the time the participants come to us, many teams have been to two, three, four, or even five pre-moots. Some of them have done 60 arguments against other schools before they come to Hong Kong. Conversely, there are also the teams that I mentioned who not only don’t have a coach but they certainly don’t have money to be running around the world participating in pre-moots and so they are always at a disadvantage. They have to be really fabulous and really motivated to be able to succeed. Obviously these people are.

ALEC This tallies with my experience of sitting as an arbitrator for Vis East. This year in Hong Kong, I saw a very, very slick and polished team from a US University on their first day and I asked them in the feedback how many pre-moots they had been involved in. They said they had done three.

LOUISE Three pre-moots means at least six to twelve arguments.

ALEC Exactly. So they have no notes and they’ve already reached the point that you would expect people to get to by the end of the week, if they’ve progressed that far at all. They are coming here to argue, rather than to really develop. There’s not much you can really do about that because it’s just the way that they are doing their prep. But there are lots of resources going into it.

LOUISE There are tremendous resources going into it. I’m finding some arbitrators who say “Well I’m not going to come to Hong Kong because I’ve been doing team work in my country” or “I’ve been to three or four pre-moots around the region already so I’m a little petered out now, sorry”. Or, you get some teams that say “Well I can’t debate against this team because I got them in a pre-moot so I saw that argument.” So they’re conscious even before they have arrived.

My own feeling is if they judged a team in a pre-moot, unless they have a problem with debating them again during the Vis East, then I just can’t do anything about it. I don’t have enough arbitrators to deal with that, especially when we don’t know about it until they arrive in Hong Kong!

ALEC I can completely understand. Speaking of resources and the explosion of pre-moots, I can imagine that law firms have got more involved. Do you know what percentage of teams get support of one sort or another, like coaching or perhaps financial assistance, from disputes teams in law firms?

LOUISE I think that’s happening more often now, at least in countries which have an arbitration culture. However, it really depends upon the culture and system because coming from somewhere like Cambodia, for example, you could probably count on one hand the number of lawyers there that have actually done an international arbitration.
ALEC That’s quite an interesting point. What do you think about the numbers of people who are studying arbitration at law school and mooting and so on?

LOUISE I think it’s a double edged sword. Arbitration has become a very sexy thing to study. When we were at school we didn’t have arbitration so I learned about it in France when I was doing my Masters work there. It certainly wasn’t on my undergraduate syllabus. Now of course it’s offered as an elective at a lot of schools at the undergraduate level which is all very well except that I think students are thinking that arbitration itself is a specialty, when really arbitration is nothing more than a procedural specialty. A student who goes into arbitration thinking, “I want to do arbitration and nothing else”, doesn’t seem to realise that that’s tantamount to saying “I don’t know anything at all but I’d like to be able to judge it!”

And so on one hand you’ve got these people who are really good at procedure and they understand the law of arbitration but whether they will ever be able to find jobs as arbitrators is very doubtful unless they also have some other specialty, whether it be international tax, or international finance or banking or insurance or construction. Where do arbitrations occur most often? Those are the areas where students should be specialising.

ALEC Yes, it’s quite interesting, especially when you think that in big law firms arbitration groups have been developed over probably not much more than 30 years.

Although Clyde & Co has a Global Arbitration Group, comprising a core of arbitration specialists, we are also sector-focussed in our approach owing to our strong heritage in the shipping, insurance and international trade sectors. We also have a global construction group which specialises in substantial construction arbitrations. This structure gives our trainees and associates the best of both worlds, as they have the opportunity to learn from both arbitration specialists and lawyers with in-depth knowledge of particular industries.

LOUISE You are absolutely right. I think that students and young lawyers who go into arbitration for the sake of arbitration are probably making a big mistake. They could be lucky and get great experience and exposure on one or more high-profile cases but that is not everyone’s experience.

Ideally, what arbitration needs is lawyers that understand their clients’ businesses because they have worked in the relevant area for several years and who can work together with arbitration specialists who possess inside-out knowledge of the procedure.

So my concern is that law schools are taking advantage of regional interest in arbitration because it is attractive to students. Travel in business or first class, luxury hotels and all those sophisticated cocktail parties. It sounds great but they need to have something in their heads to offer. I came from the ICC where I learned about process in the context of commercial international law but I still feel that most of my work has come about because I have a background in construction law and have worked in a construction firm and now, of course, have several construction-related cases behind me. The CISG expertise from long years with the Vis Moot doesn’t hurt either!

ALEC I agree with what you say about arbitration needing both industry and procedural specialists. For quite a number of years I refused to accept appointments as an arbitrator on construction disputes because I’d never been a construction lawyer. Then one evening, the co-head of our construction group in MENA and I were having a drink and he questioned why I wouldn’t accept construction appointments. His response to my answer was “Why do you think they want a construction lawyer to chair a tribunal, they want somebody who can run and manage the process, and anyway you’ve done shipbuilding and rig building disputes for years”. This changed my opinion and I do quite a few construction arbitrations now.

LOUISE I can completely understand that you were able to get construction appointments after establishing your career in other sectors. My point is that students who are fresh from study are not going to get into arbitration directly because who wants a 24 year old arbitrator with no practical industry experience? They will be lucky to find work in firms that do arbitration as a substantial part of their work.

ALEC ArbitralWomen has enjoyed considerable growth in numbers and profile and recently celebrated its 20th anniversary. Tell me about how the idea was conceived. I hear that you were very much involved in setting it up.

LOUISE Yes. I think people give me more credit than is due because I was there first. The idea was born as a result of my very first ICCA conference, in Bahrain, in 1993. There were around 225 people there and a total of 24 people speaking, with one (token) woman who was a professor there.

There were also very few women attending the conference – it was a sea of grey suits. On about the second or third day, I was standing by the coffee table with maybe seven or eight other women, almost all attending the conference. We started to talk about why there were so few women at the conference.

During the conversation people said that it would be interesting to find out where the women are and why they aren’t here. Before leaving Bahrain, we all exchanged addresses and I arranged a dinner for later in the year. The dinner was surprisingly successful with over 60 women in attendance. We actually had to change venue at the last minute due to demand, as the first place we had booked only had space for 40 people. The energy in the room was amazing.

Out of that original dinner came the idea to study women in arbitration so I devised a questionnaire. Vera Van Houtte, who was already very established at that time, helped me to design it. We made it very detailed, asking women who were active in arbitration how they got into it, how successful they felt, their background, their family situation and what languages they spoke. Each woman referred a few others, who in turn sent in other names, like a chain letter. I received over 80 responses, which was fantastic as I didn’t know there were 80 women doing arbitration at the time.

The group began informally as an ad hoc network and Yahoo! chat room and it grew from that into something a little bit more than we imagined.
“Arbitration has become a very sexy thing to study... it’s offered as an elective at a lot of schools at the undergraduate level... students are thinking that arbitration itself is a specialty, when really arbitration is nothing more than a procedural specialty.”
ALEC That is a very interesting story. So how many members do you have now?

LOUISE I think that the number of paid up members is probably around 300 women from across the globe. However, we have at least 1,000 women who say that they are part of ArbitralWomen.

We promote women in dispute resolution through events, social gatherings, mentoring, coaching and granting awards to assist women law students to participate at the Vis Moots in Vienna and Hong Kong. We also have one major event per year and we are present at the IBA meeting and organize roundtable discussions. Our website offers a 'find a practitioner service' which allows the user to search for an arbitrator, mediator, expert, lawyer or practitioner in any jurisdiction or field of business by selecting criteria.

ALEC It sounds like there are a lot of benefits to joining the group. Why do you think that some women in arbitration are reluctant to join ArbitralWomen?

LOUISE There are some voices which say that ArbitralWomen is just as bad as the old boys' club because we don't let men in. There are reasons for it and one of them is that once you have a man in the group the energy changes. Studies have proved this, and it is quite amazing. We want a forum where women can be stars.

That said, most of our events are open to men; only a few are dedicated to women, like our speed networking events which take place around the world. A lot of men like to come to our events as it shows that they are supportive of women in arbitration.

ALEC I have attended a few ArbitralWomen events myself. What do you think about the numbers of women involved in arbitration now compared with when you first started ArbitralWomen?

LOUISE There are definitely more women involved in arbitration today compared with 25 years ago. We have made a great deal of progress, with women leading many arbitration commissions, serving as arbitrators and mediators, and taking a more visible role in the leadership of the arbitration community. On the Counsel side, there are hundreds of women involved which is very encouraging but when you talk about women as arbitrators there is still a long, long, long way to go. Sadly, women are under-represented as lead counsel in arbitrations and as panel members in high-value, high-profile cases. It is going in the right direction but more work has to be done if women are to achieve equal status with men in this field. As we focus more attention on the gender gap, people are thinking of ways to diminish it. ArbitralWomen is publishing a joint special issue with OGEMID about diversity in arbitration. The key is persuading the clients and their lawyers that diversity on a tribunal is a positive thing, that can bring them better results. Women's progress in international arbitration is still very much a work in progress.

SADLY, WOMEN ARE UNDER-REPRESENTED AS LEAD COUNSEL IN ARBITRATIONS AND AS PANEL MEMBERS IN HIGH-VALUE, HIGH-PROFILE CASES.
LOUISE BARRINGTON

Louise Barrington is a chartered arbitrator and accredited mediator, legally qualified in Ontario, New York and England. A multicultural Canadian, she also holds a British passport. Ms Barrington is principal of Aculex Transnational Inc. She frequently acts as sole arbitrator in “smaller” arbitration cases (under USD 10 million). She also lends her expertise to the legal profession, both by teaching and by discreetly advising law firms on international arbitration practice. She has taught international, commercial and arbitration law at University of Ottawa, King’s College London, City University of Hong Kong, LaTrobe in Melbourne and Georgetown in Washington. She has arbitrated or advocated in cases under ICC, HKIAC and UNCITRAL Rules, including wrongful dismissal, international sales, banking, licensing, construction and shareholder disputes. Ms Barrington established ICC Asia in Hong Kong, the first-ever regional office of the International Chamber of Commerce. In that role she acted as an arbitration resource for businesses from Pakistan to New Zealand. She has taught and continues to direct the annual Vis East International Arbitration Moot (www.cisgmoot.org) and is the founder and honorary president of ArbitralWomen (www.arbitralwomen.org). She is active in the Chartered Institute of Arbitrators, having held elected office for years in Asia, and currently serves on the Education Committee in London. She is a member of ICC’s arbitration committees in Canada and Hong Kong, participates regularly in the Paris Commission meeting and chaired its Small Claims Guidelines Committee. Ms Barrington speaks English and French fluently, plus conversational Spanish and a little German and Mandarin.

VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

The Vis East Moot is an international moot court competition held annually in Hong Kong, China attracting more than 100 law schools from around the world. The goal of the Moot is to foster the study of international commercial law and arbitration and to encourage the resolution of international business disputes by arbitration.

ARBITRALWOMEN

ArbitralWomen began informally 20 years ago as an ad hoc network and Yahoo! chat room, and was formally constituted ten years ago as a non-profit company under French law. Its 400 members and 1000 associates from 43 countries organize events around the world to bring women together, and to help them grow their profiles in what was until recently an almost entirely male field. Although the organisation’s membership is all female, its events are usually open to men. In addition to providing a communication network via its website and newsletter, ArbitralWomen provides role models, and assists young women through its mentorship programme which pairs newer entrants with experienced practitioners. Each year the organization assists law school teams with at least 50% women members to attend and compete in the Vis Moot and the Vis East Moot.

ALEC EMMERSON, CLYDE & CO

Alec moved into the disputes sector on joining Clyde & Co in 1977, having previously spent five years handling corporate insolvencies. He managed the Hong Kong office from 1984 onwards, acting on headline cases such as the Carrian fraud and many ‘phantom’ ship frauds. Alec also handled numerous arbitrations, investment disputes, disaster and commercial contract litigation, and most areas of insurance dispute resolution. He returned to London in 1996, and then moved to the Dubai office in 1999 as Head of the Dispute Resolution Group.

In 2008, Alec retired from the partnership to work as an independent arbitrator, and remains with the firm as a consultant acting for clients in complex disputes [including ADECCAC, DIAC, DIFC-LCIA, ICC, LCIA, LMMA, SCMA & SIAC disputes]. He sits as an arbitrator in a wide range of disputes under most of these institutions’ rules as well as in UNCITRAL and other ad hoc arbitrations. He has recently been appointed as a member of the London Court of International Arbitration (LCIA).

Alec has been listed as a leading individual in the International Who’s Who of Commercial Arbitration since 2009.
The past decade has seen a rise in the number of Chinese companies investing in Africa. What has been your experience of doing business there and which countries do you have specific experience of?

Operating in Africa brings both opportunity and risk. Over the years, I’ve been involved in projects in countries including Kenya, Tanzania, Ethiopia, Chad, Cameroon, Angola and Tunisia. Even the most carefully planned ventures can encounter problems, not only arising from contracts but also caused by environmental factors in the host country. The thorny issues that Chinese companies operating in Africa face, on the one hand, involve security risks such as political instability, civil war, terrorism and internal disorder. On the other hand, Chinese companies encounter situations such as local government failure to pay employees or breach of contract by other parties to the contract.

What factors do you consider when entering contracts with African parties? Do you have a preference in relation to dispute resolution clauses in contracts?

Contracts should be carefully managed and compiled. The main priorities for contract terms are as follows:

1. Force majeure: its identification, procedure and remedy;
2. Breach of contract clause: its identification, events establishment;
3. Compensation arising from breach of contract: detailed procedure;
4. Dispute settlement: choice of arbitration venue, procedure and enforcement of arbitral award;
5. Applicable law;
6. Other contract terms and conditions should be as detailed as possible.

I prefer amicable negotiation as the first step to settle any contractual disputes. However, when drafting the contractual provisions it’s best to avoid amicable negotiation as the pre-arbitration procedure. Arbitration in London or Paris is much less risky than the local courts in African countries.

What is your preferred method and/or forum for resolving disputes in Africa? What makes this method reliable and effective?

I would choose arbitration in any third place, like London or Paris, rather than the local courts in African countries, with the exception of South Africa. The primary concern, when drafting dispute resolution clauses, is to avoid interference from the host government should a contractual dispute occur. Sometimes it’s best to draft the clause with OHADA [Organisation for the Harmonization of Business Law in Africa] acts uniformes in mind because some French-speaking countries like Chad aren’t members of the New York Convention but are signatories to OHADA’s Droit de l’arbitrage, for example.

It’s important to do everything in your power to ensure that the arbitration clause is valid. It should include essential provisions such as arbitration institution, applicable arbitration rules, venue of arbitration and the number of arbitrators. It’s also important to plan ahead in terms of enforcement of arbitral awards in the host country, ensuring that it will be possible to enforce the award if you win the case.

Have you noticed a difference in relation to the options available for resolving disputes in Africa now compared with in the past?

Alternative Dispute Resolution (ADR) has become a more popular option in African countries in recent years. For example, adjudication is becoming the most popular option for resolving construction contract disputes as FIDIC standard forms are used. However, arbitration at an offshore centre is still the first option for contracting parties in the investment sector.

What is your experience/view on the enforcement of arbitral awards following disputes with African states/state-owned entities?

Enforcing arbitral awards in African states can be very tough indeed. It is worthwhile trying to plan ahead for this scenario when agreeing contract terms or as soon as a dispute arises. Local courts are often unreliable and it is common for them to refuse to enforce arbitral awards. The situation is particularly uncertain in the case of states that are not signatories to the New York Convention. Often there is very little you can do.

Do China-Africa Bilateral Investment Treaties offer adequate protection for Chinese investors?

In practice, invoking a BIT to protect the interests of Chinese investors is often not an easy business. Unless the relevant government is overtly involved in the dispute, parties are often best advised to look for contractual remedies. There is a view held by many that BITs will provide protection to Chinese parties only to the extent that they are skilled at making use of BITs.
Mr Jun Cui

Former VP of China Overseas Construction Corporation

Jun Cui has over twenty years experience in construction management in Middle East Countries, Africa, Asia and Europe. He has rich experiences in the field of project management, contract management, construction claims, risk control as well as BOT/PPP projects development. Mr Jun Cui became a Consultant and Specialist in 2011. As a Specialist and Consultant he participates in several cases, construction claims and dispute settlements between Chinese international contractors and foreign employers in different countries.

Patrick Zheng

Partner, Clyde & Co

Patrick is the Managing Partner of the Beijing office. He specialises in international arbitration, China-related litigation (both onshore and offshore) and other China-related contentious matters.

As a Chinese national, Patrick has been a member of China’s international arbitration community for almost 20 years and is a well-known and highly regarded disputes lawyer in China.

Patrick’s primary focus is representing Chinese clients in front of international venues such as SIAC, ICC, HKIAC and courts of various jurisdictions. He also represents international companies before Chinese arbitration tribunals such as CIETAC (China International Economic and Trade Arbitration Commission) and the Chinese courts. In addition, Patrick has acted as an arbitrator (both party and CIETAC appointed) in approximately 30 CIETAC arbitrations and prior to entering private practice, he worked for CIETAC in Beijing. He is regularly ranked as a leading individual in the Chambers and Legal 500 legal directories, and is fluent in Mandarin, English and Korean, with proficiency in Japanese.
NEWS IN BRIEF

PEOPLE MOVES

USA
- Olivier André joins the International Institute of Conflict Prevention and Resolution as its new vice president of dispute resolution services

UK
- Keisha Williams appointed head of the Dispute Appointment Service at the Chartered Institute of Arbitrators in London
- Judith Gill QC will be the first female president of the LCIA from May 2016. She joins Jacomijn van Haersolte-van Hof, the first female director general of the LCIA.
- Alec Emmerson, Consultant, Clyde & Co has been appointed as a member of the London Court of International Arbitration (LCIA)

HONG KONG
- Neil Kaplan QC, Michael Pryles and Andrew Aglionby join Arbitration Chambers Hong Kong as international arbitrators in July 2015

BRITISH VIRGIN ISLANDS
- Barry Leon becomes Commercial Judge of the High Court of the Eastern Caribbean Supreme Court

TURKEY
- Ziya Akinci was elected the first chairman of the new Istanbul International Arbitration Centre for a four year term. The centre launched earlier this year, in response to the Istanbul Arbitration Centre Law of last year

SINGAPORE
- June (Junghye) Yeum joins Clyde & Co’s international arbitration group in Asia
- Sir Bernard Eder joins the Singapore International Commercial Court as an international Judge
- Gary Born takes over as the President of the Singapore International Arbitration Centre (SIAC)
- Camilla Godman, former deputy registrar of SIAC is set to become the Chartered Institute of Arbitrators’ first regional director of Asia
MARKET ACTIVITY

PROPOSAL FOR A DISPUTE RESOLUTION HUB IN HONG KONG

The Hong Kong government is getting serious about promoting Hong Kong as a centre for dispute resolution with plans to transform a heritage building and former government offices into an international dispute resolution hub within the city centre. The hub will bring many of the major international arbitral institutions that operate in Hong Kong under one roof.

CHANGES TO ARBITRATION ACT IN SWEDEN

A report has been released by a parliamentary committee in Sweden proposing changes to the Arbitration Act. The new legislation is expected to be in effect by 1 July 2016. The 1999 Act will be updated to include provisions for multi-party arbitration and allow English to be used in set-aside proceedings before the Svea Court of Appeal.

INTERNATIONAL ARBITRATION CENTRE IN THE PIPELINE FOR DJIBOUTI

The African state of Djibouti is set to open an international arbitration centre. The centre is expected to open in 2016. The focus of the centre will be to resolve international disputes across the region in order to attract investment.

REFORMS TO BRAZILIAN ARBITRATION ACT

Brazilian Congress along with the Office of the President approved reforms to the 1996 Arbitration Act. The revisions were enacted on 26 May. One major change is that Brazilian state entities are now permitted to participate in arbitration.

JOHN COATES TO REMAIN PRESIDENT OF THE COURT OF ARBITRATION FOR SPORT (CAS)

The International Council of Arbitration for Sport (CAS) has re-elected John Coates. The Australian will serve as president of both the Council and CAS until 2018.

THE NEW YORK CONVENTION IN AFRICA

On 3 February 2015, the New York Convention came into force in the Democratic Republic of the Congo. Elsewhere in Africa, the Comoros is in the process of acceding and it is set to become the 155th state to ratify the convention.

CLYDE & CO ASSOCIATE A FOUNDING MEMBER OF THE ARAB LEGAL FORUM

The Arab Legal Forum has been established by London-based arbitration practitioners as an international association for lawyers with an interest in the Arab world. Khaled Moyeed, Associate at Clyde & Co is one of the founding members.

NEW CENTRE IN AUSTRALIA FOR DISPUTES IN THE ENERGY AND RESOURCES SECTOR

The Perth Centre for Energy and Resources Arbitration (PCERA) has launched as the first dedicated arbitration institution in Western Australia. The not-for-profit arbitration centre will aim to manage disputes in the energy and resources sector.
NOTABLE CASES

> **ICSID, 9 JUNE:** AL SHARIF, A JORDANIAN FOUNDER AND CEO OF AMIRAL GROUP, HAS DROPPED THREE CLAIMS FILED UNDER THE JORDAN-EGYPT BILATERAL INVESTMENT TREATY FOLLOWING A HIGH-VALUE SETTLEMENT. THE DISPUTE RELATES TO INVESTMENT PROJECTS IN VARIOUS PORTS AND CUSTOMS OPERATIONS.

> **ICSID, 21 MAY 2015:** AN ICSID TRIBUNAL HAS RULED ON A CONTRACTUAL DISPUTE OVER EXPORT ROYALTIES. INVESTORS IN PERU’S LARGEST NATURAL GAS PROJECT HAVE BEEN ORDERED TO PAY APPROXIMATELY USD 65 MILLION TO PERUPETRO, A STATE OWNED AGENCY.

> **AD HOC, 20 MAY 2015:** USD 1.1 BILLION HAS BEEN AWARDED TO IRAN’S NATIONAL OIL COMPANY IN A 26 YEAR ARBITRATION DISPUTE AGAINST A COMPANY OWNED BY THE ISRAELI GOVERNMENT OVER PAYMENT FOR OIL SHIPMENTS PRE-DATING THE IRANIAN REVOLUTION OF 1979.

> **COURT OF JUSTICE OF THE EUROPEAN UNION, 13 MAY 2015:** THE ADVOCATE GENERAL OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) GAVE HIS OPINION ON WHETHER AN EU MEMBER STATE CAN REFUSE TO ENFORCE AN ARBITRAL AWARD CONTAINING AN ANTI-SUIT INJUNCTION BECAUSE IT IS INCONSISTENT WITH COUNCIL REGULATION (EC) 44/2001 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL MATTERS, ALSO KNOWN AS THE BRUSSELS REGULATION. HE RECOMMENDED THAT THE BRUSSELS REGULATION MUST BE INTERPRETED AS NOT REQUIRING AN EU MEMBER STATE COURT TO REFUSE TO RECOGNISE AND ENFORCE AN ANTI-SUIT INJUNCTION ISSUED BY AN ARBITRAL TRIBUNAL ON THE BASIS THAT RECOGNITION AND ENFORCEMENT FALLS EXCLUSIVELY WITHIN THE SCOPE OF THE NEW YORK CONVENTION. THE CJEU THEN GAVE ITS DECISION IN THE CASE ON 13 MAY 2015, MIRRORS THE ADVOCATE GENERAL’S OPINION THAT AN ANTI-SUIT AWARD MADE BY AN ARBITRAL TRIBUNAL SHOULD BE LEFT TO BE DETERMINED BY THE NATIONAL ARBITRATION LEGISLATION IN THE STATE OF ENFORCEMENT. IN OTHER WORDS, IT IS NOT AFFECTED BY THE BRUSSELS REGULATION. THIS DECISION REAFFIRMS THE PRIMACY OF THE NEW YORK CONVENTION BY TAKING THE BRUSSELS REGULATION OUT OF THE EQUATION WHEN IT COMES TO THE ENFORCEMENT AND RECOGNITION OF AN ANTI-SUIT AWARD.

> **ICSID, 5 MAY 2015:** AN ICSID TRIBUNAL HAS DISMISSED A CLAIM BY A COMPANY CHAired BY A FORMER PRIME MINISTER OF PAPUA NEW GUINEA AGAINST THE PACIFIC ISLAND STATE ON JURISDICTIONAL GROUNDS. ACCORDING TO THE TRIBUNAL, PAPUA NEW GUINEA’S 1992 INVESTMENT PROMOTION ACT DID NOT CONTAIN A FREE-STANDING CONSENT TO ARBITRATE AT ICSID.

> **ICSID, 5 MAY 2015:** A EUR 1 BILLION CLAIM BY A CHINESE SHAREHOLDER IN FORTIS FINANCIAL SERVICES AGAINST BELGIUM WAS DISMISSED ON THE GROUNDS OF TEMPORAL JURISDICTION. THE CLAIM RELATED TO A BAIL OUT OF FORTIS FINANCIAL SERVICES DURING THE FINANCIAL CRISIS IN 2008 WHICH THE CHINESE SHAREHOLDER OBJECTED TO Owing TO DEVALUATION OF THEIR INVESTMENT.

> **THE MOSCOW COMMERCIAL COURT, 29 APRIL 2015:** THE MOSCOW COMMERCIAL COURT HAS SET ASIDE A USD 118 MILLION AWARD ISSUED IN THE MOSCOW CHAMBER OF COMMERCE AND INDUSTRY (MCCI) LAST YEAR. CANADIAN MINING COMPANY STANS ENERGY OBTAINED THE AWARD AGAINST KYRGYZSTAN FOR THE EXPROPRIATION OF A RARE EARTH PROJECT.

> **ICC, 10 APRIL 2015:** CLAIMS THAT THE CZECH ELECTRICITY DISTRIBUTOR, CEZ, BREACHED A PRIVATISATION DEAL WITH ENERGY SHARES ADMINISTRATION COMPANY (SAPE), A ROMANIAN STATE ENTITY, HAVE BEEN PARTLY UPHELD BY AN ICC TRIBUNAL. ALTHOUGH THE CLAIM WAS FOR EUR 81 MILLION IN DAMAGES, SAPE DECLARED THAT IT HAD WON EUR 5.7 MILLION IN DAMAGES ON 10 APRIL.
FORTHCOMING EVENTS
2015

JULY
01
ICC Brazilian Arbitration Day
[SÃO PAULO]
01/03
1/3 CIARb Centenary Conference: The London Principles [LONDON]
09
SIARB commercial arbitration symposium 2015 [SINGAPORE]

AUGUST
27
ICC Dispute resolution on the international energy sector conference [MEXICO CITY]

SEPTEMBER
11
LCIA Young International Arbitration Group (YIAG) Symposium [HAMPSHIRE]
11
ICC Institute, ICC Italy, AIA Conference: Towards a transnational approach for choice-of-law clauses [ROME]
11/13
LCIA European Users’ Council Symposium [HAMPSHIRE]
25
4th Annual GAR Live New York [NEW YORK]
28
ICC YAF: What you need to know about quantum - the ultimate barometer of success or failure [LONDON]

OCTOBER
03/04
LCIA European Users’ Council Symposium [VIENNA]
04/09
Annual Conference of the International Bar Association [VIENNA]
22/23
LCIA and AIPN Symposium [LONDON]
27
HKIAC ADR in Asia Conference [HONG KONG]
27
Hong Kong Arbitration Charity Ball [HONG KONG]
28
UNCITRAL Asia-Pacific Judicial Summit [HONG KONG]
29
5th Annual GAR Live Hong Kong [HONG KONG]

NOVEMBER
01/03
13th annual ICC Miami conference on International Arbitration [MIAMI]
19
GAR Live Dubai [DUBAI]
20
GAR Live Paris [PARIS]
INTERNATIONAL ARBITRATION AT CLYDE & CO

Our dedicated arbitration practice has over 60 partners, with experience in all major international, regional and specialist industry forums. Recognised by GAR as possessing ‘one of the largest dockets of commercial disputes’, we have hundreds of arbitrations on our books with billions of dollars at stake at any given time.

We handle large-scale and multi-jurisdictional commercial arbitrations, and draw on our deep sector roots to provide focused arbitration services in the construction, energy, marine, trade, insurance, banking and finance sectors. With a global network covering six continents, our regional teams provide in-depth knowledge of local centres and rules. In combination, these elements uniquely position us to offer an unrivalled package to multi-national clients with diversified business interests. We respond rapidly in high pressure scenarios, delivering a bespoke and flexible service to meet the requirements of individual disputes.

Renowned for our work in emerging markets, we also routinely act for and against governments in investment disputes in many of the rapidly expanding and sometimes unpredictable markets of the world. We are recognised as foreign experts in South America, the Middle East, North Africa, Belarus, Kazakhstan, the Balkans, Russia and Ukraine.

Our arbitration practice is highly rated in the legal directories, with many team members renowned for their individual practices. Several of our practitioners sit as arbitrators on LCIA, DIAC, ADCCAC, UNCITRAL, SIAC and ICC arbitrations, among others.

“QUALITY INTERNATIONAL ARBITRATION TEAM OPERATING WITHIN AN ACCLAIMED DISPUTE RESOLUTION GROUP.”
CHAMBERS GUIDE TO THE LEGAL PROFESSION, 2014