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Arbitration of Energy Disputes in Africa
by M.J. Beeley and A.L. Goins

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Arbitration of Energy Disputes in Africa

Mark Beeley and Adrianne Goins[1]

Executive Summary

International arbitration has been often misunderstood and poorly supported in much of Africa. This is especially the case with disputes in the oil and gas sector, where high financial stakes combine with national interest and a mix of nationalities. Distrust has resulted from the lack of insight into arbitration proceedings conducted by non-African, private tribunals outside of the continent. This distrust has manifested itself in domestic court interference in arbitration, which can significantly prolong or even derail the resolution of disputes. In recent years, however, there have been a number of efforts to advance the use of arbitration, through both international and regional institutions. These efforts have been effective on balance, including with regard to energy disputes. The number of African signatories to the New York Convention has increased, and multilateral and regional arbitration centers have begun to effectively counter-balance the distrust of arbitration through training and other programs. Though there have been setbacks, the developments are, on the whole, promising.

The incidence of commercial disputes in the oil and gas industry is generally high. Across the production chain, from upstream hydrocarbon extraction, through refining and downstream sales, significant numbers of interlocking contracts with multiple parties render disagreements virtually inevitable. The amounts of money at stake in the large construction, production and commercial projects also make disputes more likely. Typically, these disagreements are worth millions of US dollars.

As Africa has emerged as a potential global leader in energy exploration and production, these sorts of disputes have arisen across the continent.[2] Other characteristics of the continent – including a multiplicity of jurisdictions, evolving legal traditions, and high levels of both political risk and foreign direct investment in the energy sector – present unique practical challenges for resolving the disputes that arise in an efficient, timely, and satisfactory fashion. While a decline in oil prices has stemmed investment in new projects, corresponding financial pressures will likely lead to an increase of commercial disputes, at least in the short term.

The continent of Africa comprises over 50 countries, and it is impossible to make anything more than the most general points about commercial arbitration across the continent –

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[2] The emergence of Africa's hydrocarbon industry is reviewed in a number of industry reports. KPMG reports that as of 2014, "there [were] about 500 oil companies that participate in African hydrocarbon exploration." KPMG, *Oil and Gas in Africa: Reserves, Potential and Prospects of Africa* 1 (2014). Since 1980, proven oil reserves in Africa have grown by almost 150% and proven reserves of natural gas have grown by over 140%. *Id*. at 1-2.

particularly given the diverse mix of legal systems, reflecting the historic impact both of common law legal systems and multiple civil law legal systems (including, in some jurisdictions, the impact of religious laws). There are, however, certain trends that can be anecdotally observed, and a certain degree of empirical evidence to support them.

Generally speaking, the African continent is no stranger to arbitration. This process was well understood and used in Ptolemaic Egypt, and has since appeared across the continent in the form of customary arbitration, as well as from the legacy of the various colonial legal systems.[3] Despite this early start, however, and with some exceptions, modern international arbitration has been misunderstood and poorly supported in much of Africa (particularly in sub-Saharan Africa).

This is especially the case with disputes in the oil and gas sector, where high financial stakes combine with national interest and a mix of nationalities. A certain distrust has resulted from the lack of insight into arbitration proceedings conducted by private tribunals, especially arbitrations conducted outside of the continent by non-African decision-makers. Commenting on recent arbitration proceedings involving a Nigerian company, one journalist pointed out that the arbitration hearings were held "outside the country" with "a white umpire," making "the outcome of the arbitration predictable."[4] This distrust manifests itself in domestic court interference in arbitration, which can significantly prolong or even derail resolution of disputes. In recent years, however, there have been a number of efforts to advance the use of arbitration, and though there have been setbacks, the developments are, on the whole, promising.

Domestic Court Interference in Arbitration

As with the majority of international energy disputes, the first choice of many participants in the African oil and gas sector is arbitration. This is particularly true for commercial partners, contractors, other service providers, and investors from outside the continent. In choosing arbitration, parties expect to minimize the level of local court interference, allow for cross-border enforcement of any resulting award, and exercise control over selection of the decision-maker.

Still, a number of factors result in many African oil and gas disputes being resolved through domestic courts: restrictive hydrocarbon laws and other rules reserving certain matters to the courts; fear that arbitration gives an advantage to the "foreign" party; courts' willingness to interfere with the arbitration process; and a penchant for associated disputes brought by local agents. When interference in arbitration is not accomplished directly, it is often done indirectly through local court interference in the arbitration proceedings or through domestic challenges to enforcement of a resulting arbitral award.

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[3] Somali Judge Abdulqawi Ahmed Yusuf, Vice President of the International Court of Justice, reviewed the history of arbitration in Africa in his opening address to the ICCA Congress held in Mauritius in May 2016. *See* Sebastian Perry, *Time to "Relocalise" Arbitration in Africa, ICCA Told*, GLOBAL ARB. REV. (May 10, 2016). Judge Yusuf's remarks are available on ICCA's website. *Opening Address by Judge Abdulqawi Yusuf*, INT'L COUNCIL FOR COM. ARB., www.arbitration-icca.org/AV_Library/Judge_Abdulqawi_Yusuf-ICCA_2016-Mauritius.html.html.

[4] *Court Voids Two Arbitration Awards Worth N840bn against NNPC*, VANGUARD NEWS, Apr. 23, 2012, www.vanguardngr.com/2012/04/court-voids-two-arbitration-awards-worth-n840bn-against-nnpc/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+vanguardngr%2FdIeb+%28Vanguard+News+Feed%29.

Domestic court interference is the key obstacle to the success of international commercial arbitration of disputes involving African parties and projects. There is nothing particularly surprising about most arbitration practices or procedures in Africa *per se*, but there is a pronounced need for the local courts to support arbitration (including by showing restraint). While some jurisdictions have enthusiastically embraced arbitration, others remain skeptical, with judiciaries seeing arbitration as a poor cousin to the courts – or as a threat to the courts. Some courts allow recalcitrant parties to violate arbitration agreements and bring disputes before the courts instead. In some cases, courts have even gone so far as to enjoin parties from participating in an arbitration, particularly where a domestic party is being made a respondent in a foreign-seated arbitration. It is not an irregular experience for parties, arbitral tribunals, and legal representatives involved in an offshore-seated arbitration against a sub-Saharan African respondent to be ordered not to participate in an arbitration by the home court of that respondent. Such orders are often ignored by international tribunals, and arbitrations proceed, but at significant risk to enforcement of awards. It is not difficult to argue that it would be against the public policy of a country to enforce an arbitral award obtained in breach of a court injunction in that country.[5]

In a recent example of such court interference, as well as reservation of certain issues for the courts, the Federal High Court of Nigeria enjoined an arbitration brought by a Shell subsidiary (and other interest holders) against the Nigerian National Petroleum Corporation (NNPC). A dispute had arisen under their Production Sharing Contract about allocation of oil and certain tax reporting issues. The parties engaged in arbitration proceedings in accordance with the contractual arbitration clause for two years beginning in September 2009. Nigeria's tax authority, the Federal Inland Revenue Service (FIRS), then filed suit in the Federal High Court seeking to enjoin the arbitration. FIRS argued that the tax issues raised in the arbitration were not arbitrable. In May 2012, the Federal High Court issued a judgment restraining the parties from continuing with, or taking any benefit from, the arbitral proceedings. Shell appealed this judgment to the Court of Appeals in Abuja. In September 2016, the Court of Appeals affirmed the injunction against the arbitration, holding that arbitral tribunals do not have jurisdiction to decide issues under several tax statutes, including the Petroleum Profit Tax Act and the Deep Offshore Act.[6]

Looking back to the arbitration proceedings, the hearing had occurred before the Federal High Court issued its judgment enjoining the arbitration in May 2012. After the hearing, the panel continued to deliberate and in May 2013 reached a partial final award ordering NNPC to pay Shell $1.4 billion. NNPC then filed an action to set aside the partial final award in the Federal High Court of Nigeria. That action was stayed pending the outcome of Shell's appeal of the Court's injunction. In May 2016, before the US Federal Arbitration Act's three-year deadline for confirming an award, Shell filed a motion to confirm the partial final award in

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[5] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") art. V(2)(b), June 10, 1958, 330 U.N.T.S. 38 (providing that enforcement of arbitral award may be refused if enforcement would be contrary to public policy of state where enforcement is sought).

[6] *See* Kelvin Ebiri, *Appeal Court Dismisses Oil Firms' Suit against FIRS*, THE GUARDIAN, Sept. 6, 2016, http://guardian.ng/news/appeal-court-dismisses-oil-firms-suit-against-firs/; *Court Voids Two Arbitration Awards Worth N840bn against NNPC*, VANGUARD NEWS, Apr. 23, 2012, www.vanguardngr.com/2012/04/court-voids-two-arbitration-awards-worth-n840bn-against-nnpc/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+vanguardngr%2FdIeb+%28Vanguard+News+Feed%29.

US court (specifically, the US District Court for the Southern District of New York).[7] That motion remained pending in mid-September 2016.[8]

Even where a court's involvement is entirely proper, relatively onerous local court procedures can render the process slow and inefficient. Users often find that local courts impose frequent adjournments and hear cases piecemeal over the course of months rather than in one block until the proceedings are concluded. In matters involving agency agreements (including royalty interests) and land, it is all too common for large multinational oil companies to find themselves locked in years of court proceedings with private individuals who have no objectively meritorious positions, but who do have improper influence over court processes. Unpredictability is also a common feature, with many of the relevant legal systems still only starting to develop a reliable corpus of legal precedents applicable to complicated commercial matters. This is particularly problematic in the area of conflicts of laws, an area in which arbitrations so often require analyses. Furthermore, given the national interests often extant in energy cases, along with the high financial stakes, domestic judges often make decisions based on policy concerns not actually presented in the disputes before them.

Regrettably, in the authors' experience, parties also still face corruption, or at least significant bias, with many international parties being rightly concerned about "home town advantage." While there is a tendency to generalize about the extent of corruption in African nations, experience suggests that it can often constitute a significant obstacle to the just and effective disposal of disputes by both courts and arbitral tribunals. This is particularly an issue for oil and gas companies, a sector that has global corruption issues and is under fierce regulatory scrutiny.[9]

Concerns as to speed and reliability of African litigation are being combatted in part by the incremental spread of specialized and better funded commercial courts, with specialist training for judges, tailored procedural rules, and much needed professional support staff. Such courts can now be found, for example, in Ghana, Kenya, Nigeria, Tanzania, Uganda, and several other countries. As early as 2008, the World Bank noted that these courts were already helping to reduce delays in enforcing commercial contracts in jurisdictions across the continent.[10] These specialized commercial courts are particularly welcome in African states that have reserved particular hydrocarbons-related matters (e.g., environmental matters, taxation, and rights of ownership) exclusively to the courts. Such reserved matters can create complications where foreign-seated arbitrators have jurisdiction to decide a matter, only for

[7] Tom Jones & Sebastian Perry, *Shell Takes Nigerian Oil Award to New York*, GLOBAL ARB. REV., May 27, 2016, http://globalarbitrationreview.com/article/1036367/shell-takes-nigerian-oil-award-to-new-york. The Shell case is one of several arbitrations against Nigeria under production sharing contracts. As reported by Global Arbitration Review, most have seen "interference from the Nigerian courts." *Id*.

[8] The procedural history of this case is described in the Petition to Confirm Arbitral Award, *Shell Nigeria Exploration & Production Co. Ltd., et al. v. Nigerian National Petroleum Corp.*, No. 1:16-cv-03939-LAK (S.D.N.Y. May 26, 2016), ECF No. 1.

[9] The industry recognizes the challenges it faces with corruption in Africa. In a 2013 survey of industry players in Africa, PricewaterhouseCoopers found that while "95% of respondents indicated that their companies have anti-fraud and anti-corruption programmes in place . . . only 55% believe that the programme is very effective at preventing or detecting fraud and corruption." PricewaterhouseCoopers, *From Promise to Performance: Africa Oil & Gas Review* 19 (June 2013).

[10] World Bank & Int'l Finance Corp., *Doing Business 2009* 51-52 (2008).

the award ultimately to prove unenforceable domestically as being contrary to the country's public policy.

All of these factors lead to a situation in which, irrespective of whether a party is dealing with a domestic or foreign-seated arbitration, court intervention can be expected to subvert both the arbitral process itself and enforcement of any resulting award.

Growth in Support for International Arbitration in Africa

Model Agreements and Laws

All that being said, there is evidence that the use of arbitration to resolve energy disputes in Africa is growing and, along with it, a greater confidence in the reliability of the process. Indeed, the idea of commercial arbitration in the African oil and gas sector has increasingly become the norm, irrespective of the parties involved in the dispute. African parties, particularly those connected to states, originally resisted arbitration clauses. More recently, however, arbitration has become more widely accepted.

It is now the starting point in most African model form production sharing contracts to agree to resolve disputes with operating companies by arbitration, typically under either the United Nations Commission on International Trade Law (UNCITRAL) or the International Centre for Settlement of Investment Disputes (ICSID) regimes. For example, the Ugandan model production sharing agreement provides for ICSID arbitration or, if ICSID does not take jurisdiction, for *ad hoc* arbitration under UNCITRAL Rules. In either case, the arbitration is to take place in London.[11] The model production sharing agreement for Equatorial Guinea provides for arbitration under ICSID or UNCITRAL rules and allows the parties to agree on the place of arbitration.[12] The Ethiopian model production sharing agreement provides for arbitration under the UNCITRAL Rules and permits the parties to choose the seat for the arbitration proceedings.[13]

Foreign investors have also introduced the Association of International Petroleum Negotiators (AIPN) Model International Joint Operating Agreement (JOA) and other similar instruments with arbitration clauses into their African projects. The AIPN's Model International JOA contains a "broad form arbitration agreement designed to encompass all possible Disputes, including Disputes about the arbitrability of a Dispute."[14] The AIPN model JOA allows parties to choose the arbitration rules, the place of arbitration, and whether one or three arbitrators will hear a dispute. The AIPN Model Form International Unitization and Unit Operating Agreement (UUOA) allows the parties to choose the place of arbitration

[11] Model Production Sharing Agreement of August 1999 for Petroleum Exploration, Development & Production in Uganda, art. 23, www.eisourcebook.org/cms/Feb%202014/Uganda%20Model%20PSA%20,%201999.pdf. The Ugandan model PSA also provides for expert determination of certain discrete issues.

[12] Republic of Equatorial Guinea, Model Production Sharing Agreement of 2006 art. 26, www.eisourcebook.org/cms/April%202014/Equatorial%20Guinea%20Model%20Production%20Sharing%20Contract%20(in%20Spanish).pdf (in Spanish).

[13] Federal Democratic Republic of Ethiopia, Model Petroleum Production Sharing Agreement art. 16.2 (Aug. 26, 2011), www.eisourcebook.org/cms/December%202015/Ethiopia%20Model%20Petroleum%20Production%20Sharing%20Agrement%202011.pdf

[14] AIPN Model Int'l JOA art. 18.2.D (2012).

and includes six options for arbitration rules: International Chamber of Commerce, London Court of International Arbitration, American Arbitration Association, Singapore International Arbitration Centre, Institute of the Stockholm Chamber of Commerce, or UNCITRAL.[15]

These developments signal an important shift towards arbitration of disputes more generally. Rather than rejecting arbitration, negotiators focus on agreeing to a neutral (typically offshore) seat or juridical place of arbitration and on obtaining a valid sovereign immunity waiver. The sovereign immunity waiver in the AIPN model JOA, for instance, is comprehensive. It provides for waiver of immunity from expert determinations, mediation and arbitration proceedings, judicial proceedings in aid of such determinations and proceedings, enforcement proceedings, service of process, execution and attachment.[16] The AIPN model UUOA contains a similarly broad waiver of sovereign immunity.[17]

As of August 2016, only 10 African countries had adopted the UNCITRAL Model Law on International Commercial Arbitration,[18] which might be considered surprising given that this model law was developed for emerging markets in particular. In addition, Somalia has created a task force to support the country's adoption of the Model Law.

Those countries not adopting the Model Law appear to have two preferences. The first preference is to retain arbitration laws from former colonial regimes. These laws, however, are now often grossly behind modern practice; for example, in some countries, the English Arbitration Act of 1889 remains the model form. The second preference is to have combinations of arbitration laws that are surprising to outsiders, creating traps for the unwary with seemingly contradictory results. Bodies of case law and precedent are developing in each jurisdiction, but remain a long way short of forming a reliable corpus with sufficient depth to promote certainty of outcome.

Adherence to International Arbitration Treaties

Developments in the area of investor-state disputes have also contributed to a strengthening of arbitration culture across the African continent. With strong levels of foreign direct investment, about 80% of African countries are signatories to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[19] Over 90% of African countries are signatories to bilateral investment treaties that provide individuals and companies with both investment protection rights and access to international arbitration directly against the state if those rights are violated.[20] Given the levels of political risk often perceived across the continent, such protection mechanisms are increasingly important to oil and gas investors in Africa.

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[15] AIPN Model Form Int'l UUOA art. 20.2(D) (2006).
[16] AIPN Model Int'l JOA art. 18.4.
[17] AIPN Model Form Int'l UUOA art. 20.4.
[18] UNCITRAL maintains a list of jurisdictions that have adopted the model law that is available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
[19] See the list of signatories maintained by ICSID that is available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.
[20] A database of bilateral investment treaties is maintained by ICSID and available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx?tab=AtoE&rdo=TCN.

Other multilateral investment treaties have been less widely accepted by African states, but progress is being made. The Energy Charter Treaty of 1994 is of particular interest to participants in the oil and gas industry. This multilateral investment protection treaty initiated in Europe in the early 1990s is aimed at the energy sector. Though the African continent has abundant energy resources, there are no African parties to the Treaty. To foster participation, over the past few years, the Energy Charter Secretariat has worked with several African governments with a view towards their accession to the treaty. Morocco and Mauritania prepared their accession reports in 2015, and Burundi and Niger are currently preparing their accession reports.[21]

A less well known multilateral investment treaty, the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference 1981 (the OIC Investment Agreement) may provide protection to investors.[22] In an arbitration seated in Singapore, in 2012 a tribunal held, for the first time, that the OIC Investment Agreement provided a mechanism for investors to sue ratifying member states.[23] The award on jurisdiction was subsequently heralded as "a fabulous discovery that will open a new perspective to arbitration and to investment in the Islamic world"[24] and may have substantial ramifications in the field of investor-state arbitration for the 27 African nations of the Organisation of Islamic Cooperation (OIC).[25] Member states of the OIC account for almost two-thirds of the world's proven crude oil and natural gas reserves, at 62% and 63% respectively, and include some of the largest producers in Africa, such as Nigeria, Algeria,

[21] Energy Charter Secretariat, *Energy Charter 2015 Annual Report* 12, www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2015_en.pdf.

[22] Where a dispute arises, the OIC Investment Agreement permits reference to international arbitration directly against the state, until the time a standing judicial body is set up to hear such claims. One of the judicial bodies contemplated by the OIC framework is the International Islamic Court of Justice (IICJ), which is referenced in the OIC Charter as having been established in Kuwait in 1987, though there is no tangible evidence to demonstrate that the court even exists. Accordingly, the OIC Investment Agreement currently offers a mechanism for bringing disputes against states only by way of arbitration. If the OIC were to begin to address the various outstanding issues relating to the application of the OIC Investment Agreement, it would provide an invaluable arbitral tool for many investors in the African continent.

[23] The Award on Jurisdiction was issued in June 2012 in a dispute between Hesham Al-Warraq, a Saudi businessman, and the Republic of Indonesia concerning the nationalisation of a bank in the wake of the 2008 Global Financial Crisis. See Award, www.italaw.com/sites/default/files/case-documents/italaw3174. The Tribunal subsequently held that Indonesia breached its obligation of fair and equitable treatment and found that the process that led to the conviction of the claimant had been illegal under both Indonesian and international law such that the conviction was illegal, but that the claimant's unrelated misconduct rendered his claims for compensation inadmissible. Luke Eric Peterson, *In Al Warraq v. Indonesia Award, Arbitrators Devote Bulk of Their Analysis to Assessing Investor's Treatment in Light of UN Human Rights Treaty Norms*, INV. ARB. REP. (Dec. 19, 2014), www.iareporter.com/articles/in-al-warraq-v-indonesia-award-arbitrators-devote-bulk-of-their-analysis-to-assessing-investors-treatment-in-light-of-un-human-rights-treaty-norms/.

[24] Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of Islamic Cooperation Agreement Related to Investment*, 30(6) J. OF INT'L ARB. 636 (2013).

[25] The Organisation of the Islamic Conference changed its name to the Organisation of Islamic Cooperation in 2011.

and Libya.[26] Despite this, the OIC Investment Agreement has received remarkably little attention since it was initially ratified in 1981.[27]

Despite the high level of ratification of the Washington Convention, ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) is somewhat lower. Still, important progress has been made in recent years as additional African countries have become parties to this critical treaty allowing for cross-border enforcement of commercial arbitration awards. Burundi, Comoros, and the Democratic Republic of the Congo all acceded to the New York Convention in the past two years. Angola, Africa's second-largest oil producer, is the latest member of the regime, having acceded to the treaty in August 2016. Since 2013, then, the percentage of African parties to the New York Convention has increased markedly from 59% to 67%.[28]

Even with this recent progress, for one third of African countries, the standard international enforcement mechanism is not available, leaving parties at the mercy of relatively unpredictable local court processes and domestic arbitration laws. In addition, many parties have found the process of trying to enforce foreign arbitral awards in Africa uneven, irrespective of whether or not the New York Convention has applied, with varying degrees of political and other influences often creating significant risks to enforcement. Despite the application of the New York Convention in many jurisdictions, little or no effort has been made to make domestic laws conform so as to give it effect.

Use of International Arbitration Institutions

In recent years, African participants have fairly steadily used international institutions to manage commercial arbitration proceedings. Annually, an average of about 150 African parties have been involved in new arbitrations managed by the Paris-based International Chamber of Commerce (ICC) since 2012. These numbers represent between five and eight percent of parties on the ICC's docket.[29] Over the same period, the number of African arbitrators appointed to hear these disputes has averaged over 35 per year. Despite this steady level of usage, parties agreed to seat under seven of these arbitrations in Africa annually over the period, demonstrating the degree of uncertainty, even among African parties, as to the domestic legal frameworks that support arbitration.

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[26] Organisation of Islamic Cooperation Statistical, Economic and Social Research and Training Centre for Islamic Countries, *Current Stance of Energy Resources and Potential in OIC Member Countries* 1 (Dec. 2012), www.sesrtcic.org/files/article/459.pdf.

[27] For an overview of the investment arbitration provisions in the OIC Investment Agreement, see Solomon Ebere, *The Phoenix of Multilateral Investment Treaties: The Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference – What Impact on Sub-Saharan Africa?* in this special issue.

[28] See the list of signatories maintained by UNCITRAL, available at www.uncitral.org.

[29] In 2012, the ICC received 759 new filings for arbitration, which included 127 parties from Africa (6.2%). 2012 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin No. 1 (2013). In 2013, the ICC received 767 new filings for arbitration, which included 174 parties from Africa (8.2%). 2013 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin No. 1 (2014). In 2014, the ICC received 791 new filings, which included 163 African parties (7.3%). 2014 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin No. 1 (2015). In 2015, the ICC received 801 new filings, which included 125 African parties (5.5%). 2015 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin No. 1 (2016).

African parties have also participated in arbitrations conducted through the London Court of International Arbitration (LCIA) at about the same rate, though African parties have traditionally been less willing to embrace this institution than the ICC. On average, from 2012 to 2015, under seven percent of parties to new LCIA arbitration filings each year were African.[30]

Though commercial arbitration proceedings are normally confidential, news reports occasionally shed light on proceedings. In October 2014, for example, it was reported that Vanoil Energy of Canada had filed an arbitration claim against Kenya after the state refused to renew Vanoil's rights under production sharing contracts for two onshore oil blocks. Vanoil's licenses expired in December 2013, after delays were caused by civil unrest, and the government rejected Vanoil's requests for extensions. The arbitration is reportedly governed by UNCITRAL rules and seated in Nairobi.[31]

In January 2016, it was reported that Ethiopia had won an award against PetroTrans in an ICC arbitration. PetroTrans, a Chinese oil and gas company, initiated arbitration against Ethiopia after the Ministry of Mines, Petroleum and Natural Gas terminated a petroleum development agreement signed in 2011. The agreement reportedly included an arbitration clause calling for ICC arbitration.[32] Ethiopian Minister Tolosa Shagi hailed the award as a remarkable achievement and a success for African countries generally.[33] This sort of "good press" will help to stem the distrust of arbitration felt by some in Africa.

Growth in Regional and Multilateral Arbitration Institutions

Though the use of the major international arbitration institutions has been slow to take off in Africa, as discussed above, African parties have steadily used these institutions. In recent years, Africa has also seen pronounced growth in regional and multilateral arbitration institutions. These include the LCIA-Mauritius International Arbitration Centre (LCIA-MIAC) and the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA). These relatively new entrants to African dispute resolution should be on the radar of those involved in African oil and gas. They are explored in more detail below, not least because their efforts span the continent and may lead incrementally to a more informed and perhaps more unified approach.

The LCIA-MIAC Arbitration Centre

In July 2011, the Mauritian Government and the LCIA entered into a joint venture to launch the LCIA-MIAC Arbitration Centre in Mauritius. The intent is to provide an institutional

[30] In 2012, with 265 arbitrations referred to the LCIA, 5.5% of the parties were African. In 2013, 10% of parties to the 290 new cases were African. In 2014, 296 arbitrations were referred to the LCIA, and 5.6% of the parties were African. In 2015, 326 arbitrations were referred to the LCIA, and 6.4% of the parties were African. Data on LCIA arbitrations is available at www.lcia.org/LCIA/reports.aspx.

[31] Sebastian Perry, *Kenya Faces Claim over Oil Blocks*, GLOBAL ARB. REV., Oct. 3, 2014, http://globalarbitrationreview.com/article/1033760/kenya-faces-claim-over-oil-blocks.

[32] *See, e.g.*, Kaleyesus Bekele, *PetroTrans Presents Its Case to ICC*, LAW ETHIOPIA, Feb. 23, 2013, http://lawethiopia.com/index.php/cassation-decisions-by-number/124-demo/slides/500-petrotrans-presents-its-case-to-icc.

[33] Ethiopian News Agency, *Ethiopia's Victory over PetroTrans Success for Africa: Ministry*, Jan. 23, 2016, www.ena.gov.et/en/index.php/politics/item/688-ethiopia-s-victory-over-petro-trans-success-for-africa-ministry.

arbitration center within Africa, with its own set of bespoke rules and a Secretariat that is making active efforts to identify the best African arbitrators and increase the use and sophistication of arbitration across the continent.[34]

While LCIA-MIAC is, of course, not the first arbitration center in Africa, it does represent a stepping stone between the benefits of local centers possessing knowledge of the unique features of their domestic markets and the experience and expertise of the LCIA as a very long-standing international arbitration center. This balance between local African expertise and global arbitration credentials should be attractive to parties seeking a neutral institution within Africa. Furthermore, the user has the benefit of a locally savvy English/French dual-language Secretariat, the staff of which can tap into the LCIA's long experience and, in particular, have access to the LCIA's extensive diligence and knowledge of arbitrators. Equally, the addition of the LCIA brand may well serve to attract arbitrators who may not otherwise be willing to sit in a case under the auspices of a center with which they are unfamiliar.

To be truly successful, the LCIA-MIAC will have to overcome the traditional reluctance of many domestic African parties to using the LCIA. Despite being a truly international body, with an outstanding reputation, some African parties have focused heavily on the fact that the "L" in the acronym stands for "London" and have (wrongly) concluded that this represents an institutional bias towards parties from western Europe. (This prejudice has not affected the ICC International Court of Arbitration in the same way, despite the fact that it is based in Paris.) The center will also need to overcome the general preference towards *ad hoc* or non-administered arbitration, with African states in particular generally preferring to employ the UNCITRAL Arbitration Rules for significant oil and gas contracts rather than agreeing to institutional arbitration. Where this is the case, it may be worthwhile for a negotiator to accept the demand for UNCITRAL arbitration, but seek agreement to the use of an administrative body to assist in the arbitral process – in particular, to appoint arbitrators if the parties are unable to complete the appointment process and to manage the funds for paying the arbitrators. Both the LCIA-MIAC and the International Bureau of the Permanent Court of Arbitration at The Hague are (among others) willing to provide such services. This approach may represent a compromise, in that the state will not feel as though it has submitted to an arbitral institution, but the arbitral process will still benefit from any support that an experienced institution can render to it.

OHADA

The evolution and expansion of OHADA is being keenly watched by those with an interest in dispute resolution in Africa. Originally signed by the 14 African Franc zone states at Port Louis in Mauritius on October 17, 1993, OHADA's constitutional treaty came into effect on September 18, 1995 and was later substantially revised, with the revised treaty entering into force on March 21, 2010. OHADA now includes 17 member states in central and west Africa, along with Comoros.[35]

[34] The rules and other information about LCIA-MIAC are available on the centre's website at www.lcia-miac.org.
[35] See the organization's website at www.ohada.org.

Operating under a framework of commercial laws deriving largely from modern French law, the original goal of the signatory states was to harmonize outdated business codes, which often dated back to the colonial era. OHADA also sought to facilitate trade and investment in order to promote economic development, including by encouraging resolution of business disputes.[36]

While OHADA clearly has a far broader mission than dispute resolution, its impact in this area could be profound. Among nine uniform acts that OHADA members have ratified, the Uniform Act on Arbitration (UAA) is applicable to both individuals and corporate entities alike. Based on the UNCITRAL Model Law, the UAA was adopted by the OHADA member states on March 11, 1999, and entered into force 90 days later. Upon entry into force in a new OHADA member state, the UAA immediately becomes applicable to all arbitrations. The UAA states that it supersedes conflicting domestic arbitration legislation, and any existing national legislation covering arbitration that does not conflict will remain in force.

OHADA's UAA favors arbitration as a method for resolving commercial disputes and applies to all types of arbitration where the registered office of an entity is in a member state. OHADA law also contemplates institutional arbitration organized under the auspices of the Common Court of Justice and Arbitration (CCJA), although that body does not itself act as an arbitral tribunal. Arbitration under the procedural rules of the CCJA strongly resembles ICC procedure and the rules themselves are broadly similar to those of the Dubai International Arbitration Centre and the Singapore International Arbitration Centre. Any arbitral award rendered in an OHADA member state may be enforced within any other member state by obtaining an *exequatur*. Under the UAA, the granting of an *exequatur* may only be refused in very limited circumstances.

The UAA covers both domestic and international arbitration and its rules apply to "any arbitration when the seat of the Arbitral Tribunal is in one of the Member States" (article 1). Thus, if an arbitration clause merely specifies that the seat of the arbitration will be in an OHADA member state, the UAA will apply, though the clause may also state that the arbitration will take place under the specific framework of the CCJA. Under article 14 of the UAA, parties "may directly or by reference to arbitration rules, determine the arbitration procedure; they may also subject this procedure to a procedural law of their choice."

Perhaps noting the LCIA's engagement with the LCIA-MIAC Arbitration Centre, described above, the ICC recently signed a partnership agreement with the CCJA. In June 2016, these organizations agreed to work together to promote arbitration and other forms of alternative dispute resolution in OHADA member states. They plan to hold annual conferences and provide training opportunities for CCJA staff.

With its model law, arbitration rules, and connection to the ICC, OHADA provides an important contemporary framework for dispute resolution in Africa. The environment in which this institution operates, however, inherently breeds a number of significant practical challenges to their effectiveness. As a 2011 World Bank paper on OHADA points out, any

[36] Although there is no official English translation, a rough translation of the Preamble to the revised treaty includes the wording, "Determination to make the harmonisation of business law a tool continuously strengthening the rule of law and legal and economic integration." *See* Treaty Related to the Revisions to the Treaty on the Harmonisation of Business Law in Africa, Oct. 17, 2008, www.ohada.com/traite-revise.html.

assessment of the organization must take account of the milieu in which it operates: "OHADA member states are all low-tier countries crippled by structural problems and most of them have experienced numerous calamities since the creation of OHADA, including humanitarian crisis, military coups and the collapse of democratic governments."[37]

Lack of resources is far from the only deficiency affecting OHADA. The organization spans a vast geographical area, encompassing west and central Africa and stretching out to the Comoros Islands, off the coast of Madagascar. Although the CCJA is intended to act as a court of final appeal across Africa, it has been noted that, by 2010, a majority of the appeals heard came from within hydrocarbons-rich Ivory Coast (where the CCJA is located).[38] By contrast, a party in the Comoros Islands would perhaps be more reluctant to resort to an appeal to the CCJA, for reasons of practicality and cost.

Moreover, although membership of OHADA is open to any member state of the African Union, the application of OHADA law has already raised numerous difficulties, due to the differing nature of the judicial systems and the fact that French remains the working language of the organization, by virtue of article 42 of the OHADA treaty. OHADA has faced particular hostility in the common law regions of Cameroon, where the Southern Cameroons National Council and other legal associations have complained of marginalization and an attempt to wipe out the English cultural, legal and linguistic heritage.[39] Asking an English-speaking common law judiciary to apply a constitutional treaty with no official translation from the French text inherently presents major difficulties; in the Cameroonian case of *Akiangan Fombin Sebastien v. Fotso Joseph & others*, Justice Ayah Paul refused to apply the OHADA treaty on the ground that, by being available only in French, its application to the Anglophone region was thereby excluded.[40] Essentially, OHADA faces a "Catch 22" situation: any tweaks to the framework of the organization to incorporate differing judicial systems may result in a further drain on resources. Unlike a comparable European body, however, there is little money available to fund a large bureaucracy and an army of translators.

Aside from structural deficiencies, as has already been noted, corruption remains a key issue in obtaining effective legal process in Africa and apparently OHADA is not immune from this problem. In July 2015, two senior OHADA officials were disciplined for offenses involving mismanagement of funds following an audit of the organization by an international accounting firm. While some observers have decried corruption at the highest levels of OHADA, others have commended the organization for conducting the audit and taking action against financial improprieties. In reality, any hope that OHADA could eradicate corruption was implausible. In one study conducted in Cameroon, all of the lawyers interviewed complained about corruption in the judiciary and stated that the OHADA system has had very

[37] Renaud Beauchard & Mahutodji Jimmy Vital Kodo, *Can OHADA Increase Legal Certainty in Africa?* 5 (World Bank Justice & Development, Working Paper Series, 2011).
[38] *Id.* at 22.
[39] Justin Melong, *Implementation of OHADA laws in a bilingual and bijural context: Cameroon as a case in point*, REVUE DE L'ERSUMA (2013), http://revue.ersuma.org/no-2-mars-2013/etudes-21.
[40] Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* 669 (2d ed., Cambridge U. Press 2012).

little impact on this.[41] Another scholar noted in 2005 that, while the CCJA was well respected for its integrity, legal professionals in Cameroon were quick to acknowledge that the CCJA's transparency had not eradicated corruption in the national judicial systems, a problem compounded by the perception that political corruption is endemic.[42] Nevertheless, the development of arbitration in member states, a key pillar of OHADA law, has begun to offer a viable alternative to the state judiciaries.[43]

Additional Multilateral and Regional Arbitration Centers

In addition to these prominent multilateral arbitration centers, there are many additional arbitration centers throughout the African continent. One of oldest and most well-established of these is the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which celebrated its 35th anniversary in 2014. The Cairo Centre was formed as an initiative of the Asian African Legal Consultative Committee in 1978 with the goal of contributing to economic development in Asian and African countries by working to settle trade and investment disputes. The Centre offers a range of dispute-resolution services including arbitration, conciliation, mediation and technical expertise.[44]

Across the continent in South Africa, another regional arbitration center is emerging. Signatories from China and South Africa determined to establish the China-Africa Joint Arbitration Centre (CAJAC) in August 2015, and centers were inaugurated in Johannesburg and Shanghai in November 2015. The CAJAC is focused on the resolution of commercial disputes between African and Chinese parties. Another recent entrant is the international arbitration center established by the Intergovernmental Authority on Development (IGAD) in Djibouti.

Further arbitration centers may now be found in Rwanda (the Kigali International Arbitration Centre), Nigeria (the Lagos Regional Centre for International Commercial Arbitration and the Lagos Court of Arbitration) and Kenya (the Nairobi Centre for International Arbitration), as well as in Algeria, Benin, Burkina Faso, Cameroon, the Democratic Republic of the Congo, Ethiopia, Ghana, Ivory Coast, Lesotho, Libya, Madagascar, Mali, Morocco, Senegal, Swaziland, Tunisia and Zimbabwe. Generally, these centers provide hearing room facilities and promote arbitration locally, including by educating local practitioners, the judiciary and lawmakers in international arbitration practice with a view towards increasing the reliability and usability of arbitration in their countries. This is, of course, a good thing both for arbitration users and host governments.

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[41] Gustav Kalm, *Building Legal Certainty through International Law: OHADA Law in Cameroon* 19 (Buffett Centre for International and Comparative Studies, Working Paper No. 11-005, 2011), www.cics.northwestern.edu/documents/workingpapers/Buffett_11-005_Kalm.pdf.

[42] C.M. Dickerson, *Harmonising Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. OF TRANSNAT'L L., 17, 70 (2005).

[43] Somewhat ironically, given criticisms of local courts for setting aside arbitral awards, in 2015 the CCJA set aside an arbitral award on grounds that the three-member panel entered into a private fee agreement with the parties in violation of the CCJA's rules and orders. A US District Court subsequently refused to confirm the award. *Getma Int'l v. Republic of Guinea*, No. 14-1616 (RBW) (D.D.C. June 9, 2016).

[44] Detailed information about CRCICA is available on its website, http://crcica.org.eg/home.html.

Conclusion

Successful dispute resolution in Africa, particularly in the oil and gas sector, requires parties and their counsel to understand not only the law, but also the degree to which court interference can be anticipated and managed. Ultimately, participants in arbitration proceedings must adopt real-world pragmatism to determine whether an award or judgment realistically stands any prospect of enforcement.

At the outset, before project agreements are signed, attention should be paid to structuring deal documents to ensure the most reliable dispute resolution process, and thought must be given as to enforcement of an award. When dealing with states, sovereign immunity waivers are key. It is also important to utilize deal structures that will allow for offshore money flows that might be used for enforcement purposes, if at all possible. Consideration should also be given to enforcement treaties and whether, in reality, there is any track record of the law being applied as written.

All that being said, dispute resolution in Africa is making steady strides in the direction normally expected by international lawyers and their clients. Regional arbitration centers in particular are building relationships – and therefore trust – with local judiciaries. These centers have also been instrumental in training a strong set of arbitration and litigation specialists, as well as arbitrators, across the African continent. As the culture on the continent becomes more supportive of international commercial arbitration, with intelligent planning beginning at the contracting stage and carrying through to arbitration proceedings and enforcement, effective and efficient dispute resolution is becoming more achievable.