Arbitration in Africa

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LCIA
WORLDWIDE
ARBITRATION

Kluwer Law International

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Foreword

The Rt. Hon. Lord Mustill

This work fills a conspicuous gap in the literature of world trade. It is not simply an exercise in comparative law, enabling those with an interest in such matters to contrast the evolution and existing rules of law in nations widely dispersed in geography and culture, and in juristic traditions and structures. This would be a useful end in itself, but *Arbitration in Africa* has a broader canvas. The conference, of which the essays collected here form a record, had an immediate practical purpose, namely to facilitate the growth of international commerce, both within the continent of Africa and across its boundaries. Such trade cannot flourish without a reliable fund of information about the systems of law liable to be encountered by those engaging in trade with African nations. This is of particular importance in relation to the law and practice of arbitration, for more than one reason. The provider of goods or services will need to consider whether he can prudently leave any disputes that may arise to the dispute-resolution processes of the place where the other party carries on business, and, if so, whether arbitration or some other method is to be preferred to litigation in the national courts. The current inaccessibility of data promotes over-caution in the use of local methods in distant centres. Similar reservations about the enforceability of judgments and awards obtained elsewhere may raise unjustified apprehensions about the wisdom of entering into transactions at all. These damaging effects can be ameliorated by the promotion of knowledge, a function in which the present work breaks new ground.

The collation of materials drawn from widely different systems brings another benefit, equally valuable though less concrete. Namely, to open the eyes of those accustomed through training and experience to the methods prevailing in countries whose laws and practices have historically dominated international trade to the existence, often the long existence, of other methods for the resolution of disputes which in their own ways and in the right contexts can be effective and acceptable. A reminder that arbitration and its kindred are not exclusively the fruits of the northern hemisphere is salutary, and will help towards a broadening of perspective which can only be of benefit not only to the trade of African countries but also to world trade as a whole.

I am glad to commend this work to a wide readership.

M.J. Mustill

Preface

Austin Amissah & Eugene Cotran

The Pan African Council joined the group of LCIA specialised regional Councils, the North American Council, the European Council and the Asia-Pacific Council being the others, with its first meeting in 1993. At that meeting the officers of the new Council were appointed. They are:

President:
His Excellency Judge Bola Ajibola, SAN, KBE (Nigeria)

Vice Presidents:
Mr. Justice Austin N.E. Amissah (Ghana)
Professor R.W. Christie Q.C. (South Africa)
Mrs. Tinuade Oyekunle (Nigeria)
Hon. S. Amos Wako EBS, EGH, MP (Kenya)
Mr. Ian Donovan FCIArb. (Zimbabwe)

Secretary:
His Hon. Judge Eugene Cotran (United Kingdom)

The inaugural Conference was held in Nairobi, Kenya, on 7 and 8 December 1994, immediately after an African Regional Conference of the International Bar Association, which was held there on 4 to 6 December. The theme of the Conference, 'Arbitration in Africa', was specially selected as a starting point for the study of the subject of arbitration and international dispute settlement throughout Africa. It

was considered by the Conference organisers that no serious discussions could take place about the needs and advantages, the improvement of arbitration and other dispute settlement mechanisms in the international commercial sphere without knowledge of the laws and what procedure and practices are in operation in the individual African countries. It was envisaged that the coverage of the Conference contributions should be comprehensive, embracing the whole continent. The papers read or prepared for the Conference form the subject matter of this publication.

A reading of the book yields two basic thoughts. The first is that arbitration and alternative dispute-settlement processes were not introduced to Africa by the colonial administrations that largely governed the continent in the 19th and early 20th Centuries. African societies knew and made use of them in their customary machinery of government and judicial processes. Formal adjudication of disputes was done before the courts of the Kings and Chiefs in centralised societies and before village headmen and elders in societies which lacked centralised authority. Arbitrations and negotiations for a settlement, which in the modern world are described as mediation or conciliation, were held by a respected person, who, depending upon the importance of the parties, might be a King, a Chief, or an elder or elders.[1] As would be expected, the feature which distinguished adjudication from arbitrations and negotiations for settlement was the compulsory nature of the jurisdiction exercised by the court. Non-African readers would be interested to find from the decisions of the regular courts established by the colonial regimes that the identifying features of a customary arbitration are not so unusual. Customary arbitration is distinguished from an adjudication and negotiations for a settlement. The requirement in an arbitration of a voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute decided informally, but on the merits, can be contrasted with adjudication, which is distinguished by the element of compulsion in the exercise of the jurisdiction. In addition, the prior

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[1] For a detailed account of the importance of arbitration, mediation and conciliation the African Customary Judicial Process, *see* Cotran and Rubin, *Readings in African Law*, Frank Cass, 1970, Vol. 1 Part I pp. 1-100; Elias, *The Nature of African Customary Law*, Manchester University Press, 1956, Chapter XII, pp. 212-272; Allot, *Essays in African Law*, Butterworths, 1960, Chapter 6, pp. 117-149.

agreement by both parties to accept the award of the arbitrators distinguishes it from negotiations for a settlement. The parties to a negotiation for a settlement do not have to agree before hand to be bound by the award. A decision in such a negotiation is, therefore, not binding on them until they accept it after it has been given.[2] An interesting problem arises when the arbitrator or conductor of a negotiation is a Chief or elder whom the defendant to a claim is bound to obey upon being summoned. Does his appearance on the summons, which may be no more than the issuing of an informal invitation, amount to an agreement to be bound by the procedures adopted by the elder in settling a dispute between the defendant and a claimant? Modernists might also wonder whether this distinguishing feature between an arbitration and a negotiation for a settlement is not the same or similar to the distinction between modern arbitration and a mediation or conciliation. It is also interesting that one of the features of customary arbitration is the publication of the award, although this is not a requirement of modern commercial arbitration. In the context of the debate started by the recent Australian High Court case of *ESSO/BHP* v. *Plowman* (see Arbitration International 1995 Vol. II No. 3) on the notion of confidentiality as a hallmark and advantage of modern arbitrations, customary arbitrations would fall within the category of advocating publicity in the arbitration process.

It is important to emphasise the place of customary arbitration in the culture of African societies,[3] because it gives encouragement to any attempt by the LCIA or other international commercial arbitration bodies interested in promoting these dispute-resolution mechanisms in the international commercial ethos of the continent.

The second obvious thought which strikes the reader is that until recently, the national arbitral systems that were adopted from the colonial administrators divided Africa into two main streams: the English tradition, which was adopted by the former British colonies,[4] and the continental tradition adopted by the Francophone[5] countries. The countries of North Africa fall broadly under the latter, though

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[2] *See*, e.g., the contribution of Austin Amissah on Ghana at p. 113. It seems, as stated on p. 117, that the Nigerian courts have decided that even in an arbitration, the parties are not bound by the award unless they accept it.

[3] A number of contributions to this book deal with customary arbitration.

[4] *See* Part II, Commonwealth African Countries.

[5] *See* Part IV, Francophone Africa.

they have had their own Arab- and Islamic-based values influencing development.[6] Recently, Tunisia, Egypt, Nigeria, Kenya and Zimbabwe have adopted arbitration legislation[7] based on the UNCITRAL Model law. But otherwise, in the Anglophone countries, the arbitration statutes have been based on British statutes ranging from the Arbitration Act of 1889, which was adopted by, among others, Gambia, Sierra Leone, Swaziland, Tanzania and Uganda, to the Arbitration Act of 1950, which has been reproduced in almost identical form in Ghana, and to some extent forms the basis of the South African statute, as well as that in operation in Lesotho and Namibia. Botswana followed neither of these British statues, but rather the statute applying in Zimbabwe before the latter adopted legislation based on the UNCITRAL Model Law. The age of the basic English legislation adopted in each country may be a commentary on the inactivity of various Attorneys-General, the Bar Associations, the business communities and the level of commercial arbitration activities in the respective countries. Though the story told about most of the Anglophone countries, regarding the age of the basic British legislation they still rely on and the level of commercial arbitration, may at first blush appear discouraging, in fact it really demonstrates the challenge thrown to institutions and other persons involved in the development of an active arbitration environment in Africa. In that respect, it should serve as encouragement to the pan African Council of the LCIA in its efforts to promote the cause of a modern arbitration ethic and its value in the settlement of international commercial disputes arising in or related to the continent. It should also be a challenge to those involved in reforming the laws, both domestic and international, in Africa.

The UNCITRAL Model Law has for some time presented African countries interested in the modernisation of their law with a model. As was noted earlier, some countries have taken advantage of this fact and have modelled their recent legislation on it. At the Conference, members heard from the Hon. Amos Wako, the Attorney-General of the host country and one of the Council's Vice-Presidents, who

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[6] *See* in particular the contribution of Dr. Abdul Hamid El-Ahdab in Part II on Arab North Africa.

[7] Reproduced in Appendix I, to compare the different modes of drafting, form, content and differences from the Model Law.

announced in his welcome address that Kenya had chosen the Model Law as a basis for its new law. He, and Kenya as a whole, should be congratulated that they have since then seen the enactment of the new law through. Zimbabwe is the latest addition to the countries that have played a roll in what is expected to be a continuing modernisation process. It is a fact that as more countries adopt an internationally recognised model statute, the easier it would be for potential users, especially those from abroad, to recognise the system with which they have to deal, and that in turn creates confidence in the international community in the law they have to apply to the settlement of their disputes. Developing African countries now have a choice in models. The English, who, for reasons of uniformity in certain commercial transactions, declined to follow the UNCITRAL route when Scotland went that way, have, with the enactment of the English Arbitration Act of 1996,[8] come out with their own statute, which is open for consideration by countries that want an alternative to the UNCITRAL Model, especially the Anglophone countries, which might prefer not to break with the English tradition.

The publication also seeks to inform readers of the status of African countries with respect to international conventions. As Appendix II shows, of the 46 countries mentioned, 23 have ratified, acceded or accepted the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards. Thirty-five of the same countries have ratified, acceded to or accepted the 1965 International Convention for the Settlement of Investment Disputes (ICSID), while 3 more have signed but not ratified it. The Convention Establishing the Multilateral Investment Guarantee Agency of 1985 (MIGA) has the highest number of African signatories; 34 have ratified, acceded or accepted it, while 5 have signed but not ratified it.

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[8] The Act was passed on 17 June 1996, but is not expected to come into force until 1 January 1997 (pending the drafting of rules of procedure). For a history of the Bill, *see* Arthur Marriott, 'The New Arbitration Bill', in *Arbitration*, the Journal of the Chartered Institute of Arbitrators, Vol. 62, No. 2, pp. 97-109; for a commentary on the Act, *see* Sir Mark Saville, 'An Introduction to the 1996 Arbitration Act', in *Arbitration*, Vol. 62, No. 3, pp. 165-167; Harris, Panterose and Tecks, *The Arbitration Act 1996 - A Commentary*, Blackwell Science London, 1996; Rutherford and Sims *Arbitration Act 1996: A Practical Guide*, FT Law & Tax, London, 1996. *See also* Sir Michael Kerr's Postscript to his contribution 'International Commercial Arbitration - Worldwide', Chapter 3, p. 29.

The organisers of the Council's 1994 Nairobi Conference selected contributors with special knowledge of the individual countries about which they wrote. For the convenience of readers, all the contributions were in English. For some of the contributors, English is neither their first language or first foreign language. But all contributors have endeavoured to effectively portray the arbitration and related laws of the respective countries. The Council wishes to convey its thanks to all of them. The Council also wishes to convey its thanks for the energy of Mr. B.W. Vigrass, now retired, who as Executive Director of the LCIA, arranged the Conference, and to Ms. Madeleine May, who has taken over from him for her efforts to ensure the publication of this book. We also wish to convey our sincere thanks and appreciation to Lord Mustill for writing the Foreword and to Sir Michael Kerr for his 'tour de force' on International Commercial Arbitration Worldwide.

We sincerely hope that this publication will be a reference book of the arbitration laws and practices of each country in Africa and, as such, will provide the basic material necessary for improvement, unification and reform at both the domestic and international levels. We also hope that it will provide a rich source of material for fruitful discussion and debate at future Conferences of the Pan African Council of the LCIA and other international conferences.

Austin Amissah
Eugene Cotran

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B. WEST AFRICA