

The Place of International Arbitration in Investment in East Africa



By: Agnes Gitau and Wairimu Karanja, © all rights reserved

Introduction: Investment in the East African Community

Countries globally are positioning themselves and offering a wide range of incentives in order to attract more Foreign Direct Investment. East Africa has not been left behind in this pursuit of attracting international investment.

According to the FT's fDiIntelligence's fDiReport 2016, Uganda led the East Africa pack in 2015 with an FDI inflow of USD 4.6 Billion, which was mainly because of a coal joint venture with a Russian investor. Kenya recorded 84 new announced projects, the highest number of FDI projects in Sub-Saharan Africa, outside of South Africa. In its January 2016 Global Economic Prospects Report, the World Bank projects positive growth in real GDP in all East African countries from 2016 to 2018, above 5.5% (save for Burundi with 3.5% in 2016 and 4.8% in 2017 and 2018). The GDP growth estimates for Rwanda and Tanzania over the next 3 years stand at above 7%. East Africa has largely been spared the devastating effects of the commodities downturn, with major investments being in renewable power, manufacturing, natural gas and large scale infrastructure investment (roads, rail and airports).

A correlation: investment and disputes

Trade and investment lead a path to economic development and prosperity. There is also an inevitable path to disputes. There are pitfalls associated with the court system in most countries, including adjournments and delays. There is also an increasing sophistication of parties who seek neutrality and party autonomy in disputes.

International arbitration is thus gaining momentum as the preferred mode of dispute resolution in the region. In international commercial arbitration, an increasing number of international contractual disputes are resolved in arbitration under the auspices of the International Chamber of Commerce (ICC), the London court of International Arbitration (LCIA) and Ad hoc arbitration under the UNITRAL Rules. In investment arbitration, all the East African Community (EAC) countries are members of the International Centre for the Settlement of Investment Disputes (ICSID) and Kenya, Rwanda and Uganda are members to the Permanent Court of Arbitration (PCA). East Africa is already seeing an impact in investment arbitration, with Burundi having had 4 cases lodged against it at ICSID, Kenya with 3, Rwanda with 1, Tanzania with 5 and Uganda with 3.

Is East Africa ready for international arbitration?

With the growth of international arbitration in investment and contractual dispute resolution in East Africa, the question then is how ready are regional arbitrators, practitioners and arbitration centres to take on the challenge? East Africa has developed international arbitration centres in Mauritius (LCIA-MIAC), Rwanda (KIAC) and Kenya (NCIA). However, these are in their infancy, with LCIA-MIAC perhaps being the most developed. NCIA in Kenya is having an official launch in December 2016. There is a growing clamour for inclusion of African practitioners in international arbitration and in having administration and seats of arbitration in Africa. Is the region ready to competitively participate in international arbitration?

The East Africa International Arbitration Conference (EAIAC) 2016

The East Africa International Arbitration Conference (EAIAC) was launched 4 years ago to promote the development of Arbitration practice in East Africa and bring together private sector, investment community, regional and international arbitrators, legal practitioners to share best practice and network. The organising committee is constituted by arbitration and investment advisory practitioners from East Africa and beyond and has 4 members: Agnes Gitau, Partner at GBS Africa, a London-based Africa investment advisory; Wairimu Karanja, a legal practitioner and Energy Law LLM candidate (formerly a director at JMiles & Co., an international arbitration, investigation and investment consultancy boutique in Africa); Leyou Tameru, Director at I-Arb Africa, an Africa-focused international arbitration resource platform, and Elodie Dulac, Partner at King & Spalding, Singapore and Ethiopia university lecturer. The EAIAC Committee are members of Legal and Business Women for Africa (LABFA).

The EAIAC Committee aims to build this capacity, know-how and networks by hosting EAIAC in a different East African capital each year. In 2016, EAIAC took place on the 8th and 9th of September in Kampala Serena and attracted over 200 delegates from East Africa, Asia, Europe and Middle East. Past EAACs have been held in Addis Ababa (2013), Nairobi (2014) and Dar es Salaam (2015). EAIAC 2017 will be held in Kigali, Rwanda.

EAIAC Kampala was hosted in partnership with the Uganda Law Society as the host partner, and graced by its President Francis Gimara and Deputy President, Alice Namuli (who is also a member of Legal and Business Women for Africa (LABFA)). Speakers represented the Government of Uganda, the East Africa Court of Justice, the Uganda AGs Chambers and Judiciary, regional arbitration centres (including in East African and the Lagos Court of Arbitration) leading local and international law firms, and public and private sector corporates from across Africa.

Representing the Government of Uganda, the Minister of State for Urban Development Hon Isaac Musumba called for East Africa to sketch out a strategy for investment regulation, explore opportunities for harmonising investment laws to develop a regional approach to resolving investment disputes. "This strategy needs to restore the balance between investment protection and the legitimate right of state to act in accord with its development needs and objectives," he said.

The forum was also addressed by Uganda's Deputy AG Hon Mwesigwa Rukutana who stressed the importance of building arbitration capacity in East Africa and at the same time urged EAC member states to profile more Africa Arbitrators in Africa focused on international arbitration cases.

The East Africa Court of Justice (EACJ) President, Hon Justice Ugirashebuja gave the overview of EACJ echoing every other speaker on the importance of building legal capacity and regional approach to regional and international issues.

Excellent speakers drawn from across the globe held discussions on some of these topics: (a) Overview of large infrastructure projects and ENR in East Africa; (b) Cross-Border Investment and Trade Regimes (regional blocs and dispute mechanism); (c) Using Arbitration and selecting Representation; (d) Africans in African International Arbitration – Myth or reality; (e) Dispute resolution in Africa Infrastructure; (f) Drafting large Infrastructure Contracts; (g) Investment protection in large infrastructure projects; and (h) Making Africa an International Arbitration Hub.

The conference closed on a high note stressing the importance for EAC members to explore opportunities for harmonising investment laws to ensure a regional approach to resolving disputes.

Presentations and a photo gallery of the conference can be accessed from the EAIAC website:

<http://www.eaarbitration.com/?v=79cba1185463>

Conclusion

The conference provided food for thought to participants, and various issues were raised for attention in the next EAIAC. These included: bridging the gap to more inclusion of African arbitrators and practitioners in international arbitration; mutually beneficial partnerships between local and international practitioners in international arbitration; improvement of arbitration and investment law in certain countries; the harmonisation of efforts by regional arbitration centres; government commitment to improvement of infrastructure that supports international arbitration in Africa; and greater awareness and engagement of private sector corporate users of international arbitration. These, among other pertinent issues, will be addressed in Kigali 2017.