

The Last Frontier

Arbitrating in Africa – where shall we go?

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The World Bank Group

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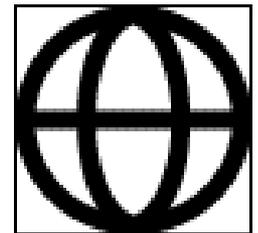
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Investment Disputes



Arbitration regimes can affect foreign direct investment

- ◆ Risks include:
 - Unforeseen change in government policies;
 - Delay in the execution of contracts; and
 - Variation of terms of commercial agreements caused by inflation and other exogenous factors.

- ◆ Barriers to arbitration include:
 - Lack of domestic court capacity to enforce arbitral agreements;
 - Lack of public awareness of ADR in commercial matters;
 - No provision for legal training; and
 - Poor legal/regulatory frameworks.

Key Considerations

- ◆ Arbitration laws
- ◆ Arbitration centers/suitable forum
- ◆ Appointment of arbitrators
- ◆ Jurisdiction of arbitral tribunals
- ◆ Role of the courts
- ◆ Application of the New York Convention

World Bank Group – Investing Across Borders 2010 Report (Arbitrating Commercial Disputes indicators)

Arbitrating Commercial Disputes indicators benchmark the following aspects of **domestic and international arbitration** regimes applicable to local and foreign companies:

- ◆ **Strength of laws index (0-100):** How do arbitration laws compare across economies?
 - Enactment of alternative dispute resolution (ADR) legislation
 - Adherence to certain international treaties
 - Subject matter arbitrability
 - Form of arbitration agreement

- ◆ **Ease of process index (0-100):** How easy is it for parties to conduct arbitration proceedings in the country?
 - Party autonomy (flexibility in choice of arbitrator, language, counsel, institution, etc.)
 - Tribunal integrity (confidentiality, impartiality, etc.)
 - Choice of institution

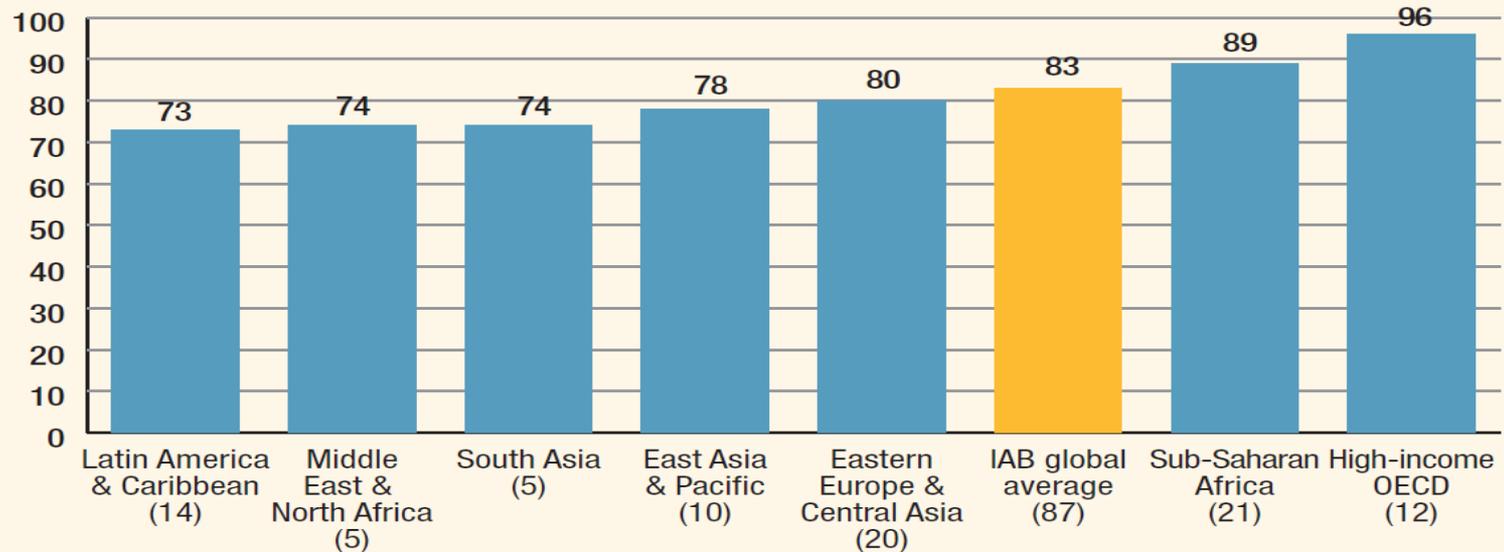
- ◆ **Extent of judicial assistance index (0-100):** How do courts support arbitration during proceedings and, later, at the enforcement stage?
 - Facilitation of proceedings and rules for recognition and enforcement of arbitration awards
 - Time for enforcement of domestic and foreign arbitration awards by local courts

Indicators do not measure...

- Arbitration clauses in **bilateral investment treaties**, investment chapters of free trade agreements, investment treaty arbitrations, and enforcement of ICSID arbitration awards (Expanded in 2012 Survey)
- **Level of awareness and acceptance** of arbitration practices by the community, or extent to which arbitration is preferred over other dispute resolution tools in each country
- **Level of training** of local arbitration practitioners and judges
- **Effectiveness of local arbitral institutions**
- **Commercial litigation** (it is measured by the World Bank Group's Doing Business)

Arbitrating Commercial Disputes indicators 2010: comparison of party autonomy in regional arbitration regimes

Regional comparison of party autonomy index (100=full autonomy)



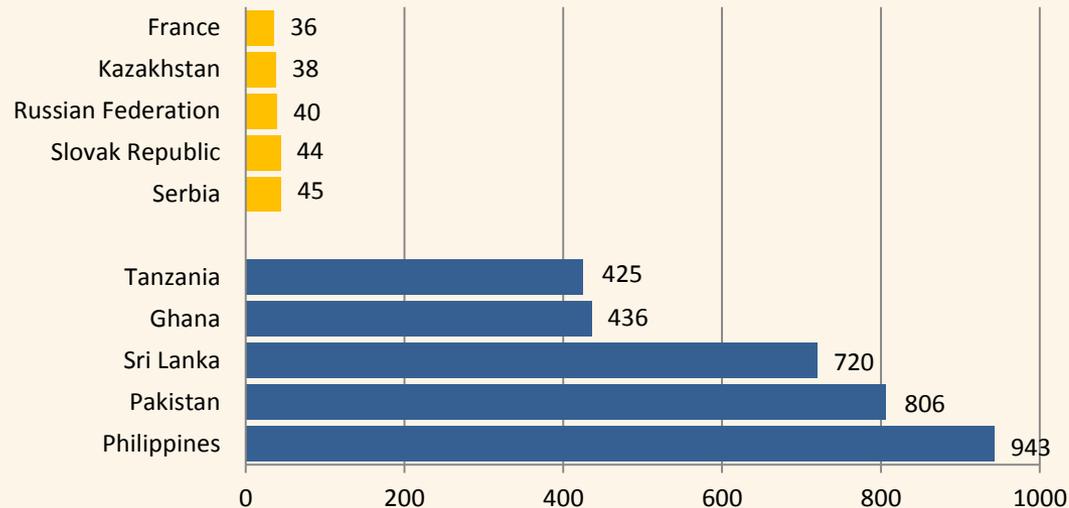
Source: Investing Across Borders database.

- Countries with well developed or modern arbitration laws give parties in dispute greater freedom to choose a flexible and effective arbitration process.
- Sub-Saharan Africa generally has strong laws. The disconnect is seen in practice.

Arbitrating Commercial Disputes indicators: fastest and slowest economies in enforcement of arbitration awards

Fastest and slowest economies in enforcing arbitration awards

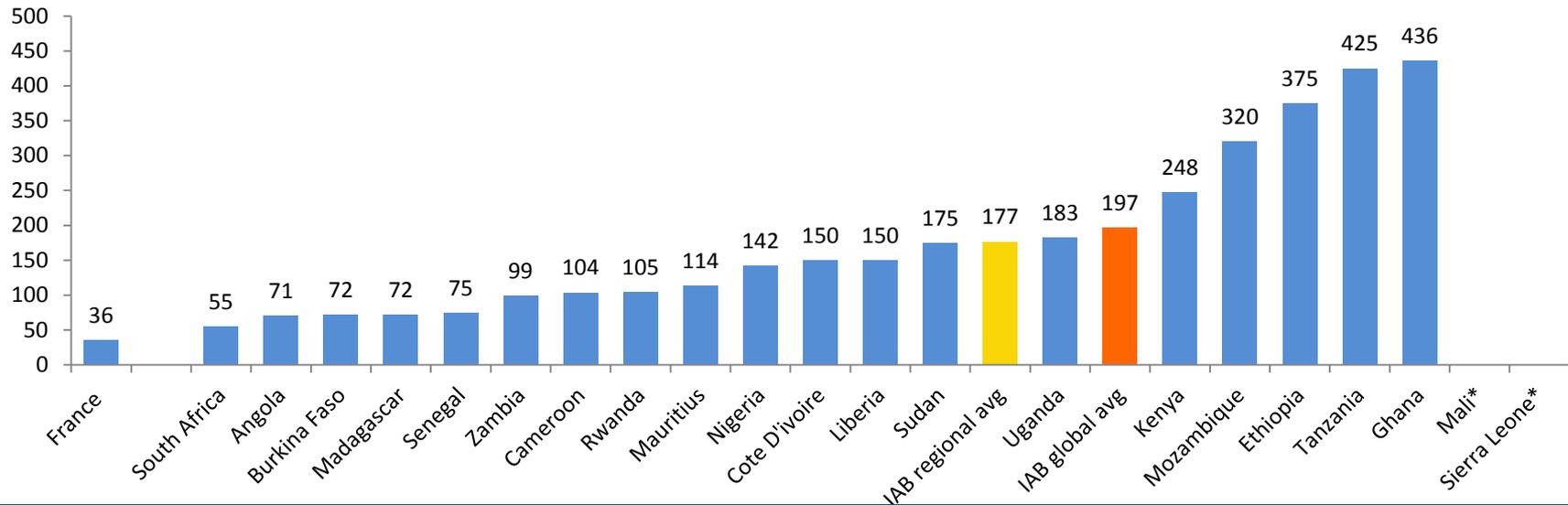
Number of days to enforce an arbitration award in the local courts
(selected fastest and slowest economies)



Source: Investing Across Borders database.

- Speed of enforcement varies across countries, from several weeks in some, to several years in others. Many African countries lack sufficient resources and specialized commercial courts for efficient enforcement.

Sample data for Arbitrating Commercial Disputes in Sub-Saharan Africa



- Arbitration and other ADR mechanisms are increasingly common dispute resolution tools in Sub-Saharan Africa. However, indicators reveal the difference between the standards in arbitration laws and arbitration practice.
- Many Sub-Saharan African economies have recently adopted modern laws but despite these reforms, arbitration practice is often rare or non-existent.
- Lengthy time periods for enforcement of arbitration awards in local courts is one of the biggest constraints for efficient arbitration regimes in the region. The time to enforce an arbitration award varies from 55 days in South Africa to over a year in Ethiopia, Tanzania, and Ghana.

L'Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA): Regional Initiative

- ◆ International Organization created by Treaty (signed 1993).
- ◆ Goal: secure, legal framework for the conduct of business in Africa.
- ◆ Currently 16 Member States, predominantly civil law West African jurisdictions.
- ◆ Areas governed by OHADA laws
 - General commercial law
 - Company law
 - Secured transactions
 - Debt recovery and enforcement law
 - Bankruptcy law
 - Arbitration law
 - Accounting law
 - Transportation of goods by road
- ◆ Not all Member States have arbitration laws. OHADA Treaty provides for two routes:
 - (1) Institutional arbitration under the auspices of the Common Court of Justice and Arbitration (CCJA); and
 - (2) Uniform Act on Arbitration (being reformed).

OHADA (2)

- ◆ In 1999, OHADA Member States adopted a Uniform Act of Arbitration binding where the seat of arbitration is an OHADA Member State.

- ◆ Benefits of Uniform Act - harmonized approach to arbitration
 - Especially if parties are from different countries, each of them may prefer disputes to be handled by a neutral body rather than by the national courts of the other party
 - Gives parties unfettered access to the benefits of arbitration, including:
 - Lower costs
 - Avoidance of unnecessary publicity
 - Neutral and impartial adjudication
 - Access to the expertise of arbitrators in specific fields
 - Certain level of control over the procedure



- ◆ International Arbitration Act (2008) regulates only international arbitrations taking place within Mauritius – domestic arbitrations are governed by *Code de Procédure Civile*
- ◆ Most commercial disputes are arbitrable (exception: bills of exchange)
- ◆ Parties may appoint arbitrators of any nationality, gender, or professional qualifications for both domestic and international arbitrations
- ◆ Arbitration awards are enforced in Supreme Court, and decisions regarding enforcement can be appealed to Judicial Committee of Privy Council
- ◆ On average, it takes approx. 16 weeks to enforce arbitration award rendered in Mauritius and 11 weeks for foreign award



- ◆ Arbitration Act (1965)
 - No distinction between domestic and international arbitration
 - Not based on the UNCITRAL Model Law, although many of the provisions are similar e.g. Act provides arbitrators with more powers to rule on issues of procedure
- ◆ All commercial matters may be resolved by way of arbitration
- ◆ Parties are free to elect arbitrators of any nationality, gender or professional qualifications and may also select foreign counsel to represent in arbitration proceedings
- ◆ There are at least 2 active arbitral institutions in South Africa, including the Arbitration Foundation of Southern Africa
- ◆ Arbitration awards are enforced in the High Court of South Africa
- ◆ On average, it takes approx. 8 weeks to enforce arbitration award rendered in South Africa or 6 weeks in foreign country.



- ◆ Arbitration Act (1996) closely based on UNCITRAL Model Law
 - Applies to domestic and international arbitration
- ◆ 2 principal arbitral institutions: the Chartered Institute of Arbitrators and the Dispute Resolution Centre (Nairobi)
- ◆ Despite strong legal framework, problems with length of arbitration proceedings and enforcement of arbitration awards
 - Domestic court process is slow, which can further impede efficacy of judicial assistance in arbitrations
- ◆ On average, it takes approx. 35 weeks to enforce an arbitration award rendered in Kenya and 43 weeks for a foreign award
- ◆ Practitioners state that arbitrations are not common in Kenya
- ◆ Mediation starting to be used as a dispute resolution technique, and on average, mediation cases are settled within 30 days



- ◆ OHADA Uniform Act on Arbitration (1999) governs both domestic and international arbitrations
- ◆ Principal arbitral institution is Common Court for Justice and Arbitration (CCJA) in Abidjan, Côte d'Ivoire
- ◆ *Groupement Interpatronal du Cameroon (GICAM)*, created in 2005, also administers arbitration and mediation proceedings although CCJA remains primary institution for settling arbitration disputes. Currently in the process of reforming rules.
- ◆ Cameroon has ratified the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention for the Settlement of Investment Disputes (ICSID)
- ◆ On average, it takes approx. 15 weeks to enforce an arbitration award rendered in Cameroon, and 24 weeks for a foreign award



- ◆ OHADA Uniform Act on Arbitration (adopted in 1999) governs both domestic and international arbitrations in Burkina Faso
- ◆ In domestic arbitration, parties are not free to choose the nationality of the arbitrator
- ◆ The Centre d'arbitrage, de médiation et de conciliation d'Ouagadougou (CAMCO) administers arbitrations
- ◆ It takes approx. 10 weeks from application for hearing to granting of writ of execution assuming there is no appeal and several weeks longer for international arbitration award
- ◆ The enforcement of a foreign award takes approx. 13 weeks if no appeal is filed
- ◆ Arbitration is not common in Burkina Faso

Next Steps

- ◆ Increasing understanding that strong arbitration regimes represent a key component of investor friendly climates.
- ◆ Promoting regional initiatives e.g. OHAHA Uniform Act to capture network effects. Being considered for East Africa Common Market.
- ◆ Capacity building among arbitrators and lawyers.
- ◆ Explaining the links between commercial arbitration and investment arbitration.

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