African disputes should be heard in Africa by African arbitrators

By Des Williams

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Former high court Kenyan judge Edward Torgbor, now practicing as a specialist arbitrator, says that the parties in 99% of all African disputes are represented by lawyers and law firms based in the UK, USA and France.

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He warns that the time has come for Africa to wake up to the realisation that it remains a perennial outsider by choice.

Torgbor was speaking at a recent conference in Johannesburg, held under the auspices of the International Chamber of Commerce International Court of Arbitration (ICC) and the Fédération Internationale Des Ingénieurs-Conseils (FIDIC).

Torgbor spoke of prejudice and bias against Africa stemming from the negative image of Africa as a hopeless continent forever afflicted by ignorance, poverty and avarice. He suggested that the negative branding is so potent that the mere mention of Africa calls up images of subservience, incompetence and failure, and any positive development is credited to the controlling involvement of international donors, expatriates and expert advisers.

He concludes that foreign arbitrators and practitioners monopolise, or dominate, arbitrations in their own countries to the virtual exclusion of Africans, and that Africans themselves transfer their disputes abroad and appoint foreigners to resolve them at enormous cost and expense.

Torgbor's views are very important in the broader African context, but does this necessarily apply to South Africa?

Judicial transformation

Judge president of the Cape Provincial Division of the High Court, judge John Hlophe, said in a report nine years ago that arbitration was obstructing judicial transformation in South Africa. This followed a 2001 Law Commission report warning of a perception 'particularly among black lawyers, that some white members of the legal profession see arbitration as a form of 'privatised litigation', enabling them and their clients to avoid the courts'.

Notwithstanding Hlophe's report, there has been strong support for arbitration from the Supreme Court of Appeal and the Constitutional Court. These courts have confirmed that South Africa will continue to show a high degree of deference to arbitration awards and that there will be minimal judicial intervention when reviewing international commercial awards.

South Africa is well placed to play a leading role as an important regional arbitration centre. The country has a number of experienced arbitrators, including retired judges, eminent senior counsel, senior attorneys, strong local and regional arbitration organisations which include the Arbitration Foundation of Southern Africa (AFSA) and the Association of Arbitrators. South Africa also has strong connections with international arbitration organisations, including the ICC, and it has experience of arbitration conducted under the auspices of those organisations.

The issues raised by Hlophe nearly a decade ago, and the perceptions referred to by the Law Commission, have faded over the years, particularly in the context of international arbitration. The country can now look forward to a new International Arbitration Act, which, by adopting the internationally recognised United Nations Commission on International Trade Law Model Law, will signal a new dawn for arbitration in South Africa.

Major advantage

It must be recognised that the parties to international commercial disputes are from different countries and that in most cases they will not agree to submit their disputes for arbitration in each other's countries.

One of the major advantages of arbitration is the neutrality of both the arbitrator and the venue. It is therefore not surprising that many disputes emanating from Africa are submitted to arbitration in non-African venues by non-African arbitrators.

However, there are 54 countries in Africa and there are growing opportunities for disputes emanating from African countries to be dealt with in neutral African regional arbitration centres.

The major international arbitration organisations do not impose European arbitrators or European venues on parties to disputes emanating from Africa, or anywhere else. Parties are free to agree on the identity of the arbitrator and on the arbitration venue.

Where the parties are African and the dispute emanates from Africa, they can agree on the appointment of an African arbitrator and an African venue in accordance with the rules of a recognised international organisation such as the ICC, or, where appropriate, a regional arbitration organisation such as AFSA, the Association of Arbitrators or Africa ADR.

New African spirit

Africa is no longer the hopeless continent. There is evidence of new self-confidence, growth and assertiveness, and this new African spirit is increasingly visible in any discussion about arbitration in Africa. Once South Africa has a new International Arbitration Act, there is no reason why the country should not become the leading Southern African regional arbitration centre.

Torgbor sees the pervasive apathy in the African legal profession to international arbitration as a major impediment to African participation in international arbitration. His message is powerful and must be heeded. Now is the time for energetic confidence building in African arbitration, instead of the defeatist recycling of old prejudices. This opportunity must not be lost.

If South Africa meets the challenge, disputes emanating from Africa will continue to be submitted for arbitration under the

auspices of international arbitration organisations, but should increasingly be heard in Africa by African arbitrators.

ABOUT THE AUTHOR

Des Williams is chairman of Werksmans Attorneys and the South African member of the Court of Arbitration of the International Chamber of Commerce.