

Civil-common law Divergence and Convergence in Handling Disputes from Specific Industries

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Introduction

Prior to the adoption of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958¹ and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration on 21 June, 1985², there were disparities between the arbitral enactments and practices in common law and civil law jurisdictions in terms of conduct of arbitral proceedings and recognition and enforcement of foreign arbitral awards.. In an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment is widely acknowledged. The UNCITRAL, established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.³

+Prof Paul Obo Idornigie, SAN, PhD, C.Arb, Nigerian Institute of Advanced Legal Studies, Abuja, Nigeria: Email: prof@paulidornigie.org. I chaired Panel 5 at the CIArb Conference in Johannesburg: 19-20 July, 2017. In this article, I have summarized my perspectives on the issues ably articulated by the Panel Members - Mr Philip van Rensburg, a Partner at Hogan Lovells, Johannesburg, Mr Mouhmed Kebe, Managing Partner of Geni & Kebe, Senegal, Anand Juddoo, a Chartered Arbitrator and Quantity Surveyor, Mauritius, Chris Seppala, former Vice-President Emeritus of the ICC International Court of Arbitration, was a member of UNIDROIT Working Party, former Legal Adviser (and Member) of FIDIC's Update Task Group, a Partner at White and Case, Paris and Prof David Butler, Emeritus Professor in Mercantile Law, Stellenbosh University, South Africa where he teaches International Commercial Arbitration

¹ See the 1958 NY Convention available at <<http://www.newyorkconvention.org/english>> accessed 15 June, 2020.

² See United Nations General Assembly (UNGA) Resolution No. 40/72 of 11 December, 1985 available at <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf> accessed 15 June, 2020. This Model Law was revised and amended in 2006. See UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments in 2006 available at <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 15 June, 2020. Earlier the UNCITRAL Arbitration Rules were adopted by the UNGA on 15 December, 1976 and the Conciliation Rules in 1980

³ See United Nations Commission on International Trade Law (UNCITRAL) available at <<https://uncitral.un.org/>> accessed 15 June, 2020.

In the African continent, as a result of colonialization, we generally have mixed families of law - civil, common, Islamic and customary law. Though the focus of this article is on Civil Law and Common Law, we should not lose sight of other families of law when discussing convergence and divergence in the African continent. Other than system differences between Civil Law and Common Law, there are individual differences often imbibed from court procedures. In consequence, the United Nations and in particular, UNCITRAL have tried to harmonise, unify and codify the laws relating to arbitration either through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ or the different Model Laws.⁵ In the Preamble to the Model Law on International Commercial Arbitration, UNCITRAL had hoped that the two instruments would significantly contribute to the establishment of a unified legal framework for the fair and efficient settlement of disputes.

The International Bar Association Rules on the Taking of Evidence in International Arbitration⁶ reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

In the area of construction, there is the **International Federation of Consulting Engineers** (commonly known as **FIDIC**, acronym for its French name *Fédération Internationale Des Ingénieurs-Conseils*). FIDIC is an international standards organization for Consulting Engineering and Construction best known for FIDIC family of contract templates. The templates are ideal for both common law and civil law jurisdictions.⁷

To what extent have we achieved all these objectives of harmonization, uniformity and unification - is the divide between Common Law and Civil Law real or imaginary? In Article 5(e) of the 1958 New York Convention, there is still no agreement as to

⁴ See the 1958 NY Convention available at <<http://www.newyorkconvention.org/english>> accessed 15 June, 2020

⁵ See also UNCITRAL Model Law on International Commercial Mediation, 2018 available at <<https://uncitral.un.org/en/texts/mediation>> accessed 15 June, 2020

⁶ See the IBA Rules on Taking of Evidence in International Commercial Arbitration, 2010 available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC> accessed 15 June, 2020 and the IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 available at <https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx> accessed 16 June, 2020. See also the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 1970 available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%20847/volume-847-I-12140-English.pdf>> accessed 15 June, 2020 and UNIDROIT Principles of International Commercial Contracts (UPICC), 2016 available at <<https://www.unidroit.org/contracts#UPICC>> accessed 16 June, 2020.

⁷ Koko Udom, *A Brief Introduction to FIDIC Contracts* available at <<https://www.thenbs.com/knowledge/a-brief-introduction-to-fidic-contracts>> accessed 16 June, 2020.

whether an award set aside at its seat is still enforceable in other jurisdictions; secondly there is no agreement on disputes capable of being settled by arbitration (principle of arbitrability); thirdly, there is also no agreement on when the enforcement of an award will be against public policy of a particular country. Thus there are several contending issues. It would seem, therefore, that the elephant is still in this room.

In this article, we will examine areas of divergence and convergence by considering the mining and construction law in the African continent. Another practice worthy of interrogation is that of 'sealed offers' known to common law but unknown to civil law jurisdictions.

Historical Perspectives

Africa is a continent of fifty four (54) countries. The laws and legal systems of Africa have developed from three distinct legal traditions: Customary African law, Islamic Law and the legal systems of Western Europe. Thus in addition to Customary African Law and the Islamic Law, the legal systems of most of the African countries are vestiges of colonialization. Africa was colonized by France, Portugal, Belgium, England and Netherlands. In consequence, most of the French and Portuguese former colonies have legal systems based on the Napoleonic Code which is a civil law system (Francophone and Lusophone) while the former English colonies have a common law legal system (Anglophone). That of South Africa is very interesting based on its chequered historical development. South Africa was first colonized by the Dutch and then the English. This spread to Namibia, Botswana, Zimbabwe, Lesotho and Swaziland. In these countries, we have a mixed Roman Dutch/Common Law system. In West Africa, we have the OHADA Napoleonic jurisdictions. In Egypt, Algeria, Tunisia, Morocco, Libya and Sudan, we have a mixed Civil/Islamic law.

Be that as it may, the three main legal families in Africa are the common law, Islamic law and civil law families. In Africa, to what extent is there a synergy or convergence between common law and civil law? More specifically, in the case of arbitration especially in international arbitration, what should the parties, their counsel and arbitral tribunal do? What system of law should they apply - civil or common law? It would appear, therefore, that a distinction must be made between domestic and international arbitration. For domestic arbitration, African countries adopt the prevailing family of law (*lex arbitri*) while in the case of international arbitration,

there is synergy in procedural matters but still divergence in terms of advocacy and proof of evidence.

In settling disputes in Africa, the two main forums are litigation and arbitration. For the purpose of this article, we will focus on arbitration and examine the arbitration regime in Africa. This will help in determining the level of convergence or divergence generally and in specific industries. African countries have arbitration regimes at various level of modernization.⁸ For this purpose, African countries can be divided into several regions - Southern Africa, West Africa, East Africa, North Africa, OHADA Region and The Islands of Africa.⁹ In the Southern Africa Region, Lisa Bosman further sub-divided the Region into three broad categories thus:

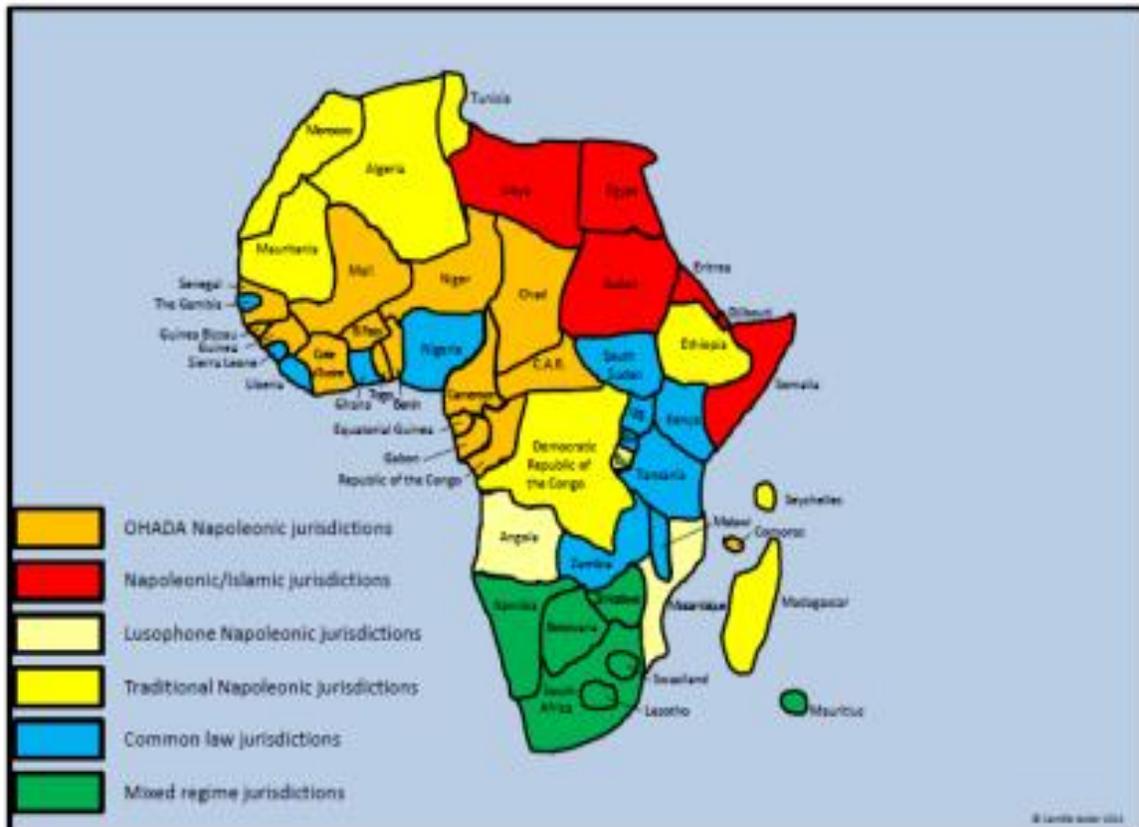
The first category comprises those countries that have adopted the Model Law (i.e. Madagascar, Mauritius, Zambia and Zimbabwe). The second category comprises three civil law countries, two of which (Angola and Mozambique), while not adopting the UNCITRAL Model Law, have fairly recently promulgated modern arbitration legislation. The third country in this category is The Seychelles, which has yet to modernise its 1977 arbitration legislation. Finally, the third category surveyed includes six common law countries that have neither adopted the Model Law nor modernised their outdated arbitration legislation - they are Botswana, Lesotho, Malawi, Namibia, South Africa and Swaziland.¹⁰

What is interesting in the third category is that Botswana, Malawi and Namibia have retained arbitration statutes based largely on the (now repealed) 1950 English Arbitration Act while Swaziland retains an arbitration statute dating from 1904 (Act 24 of 1904) which closely follows the English Arbitration Act, 1889.

⁸ See generally Lise Bosman (General Editor), *Arbitration in Africa: A Practitioner's Guide* (Wolters Kluwer, 2013) 3, 97, 175, 249 and 315. See also John Miles, Tunde Fagbohunlu SAN and Kamal Rasiklat Shah, *Arbitration in Africa: A Review of Key Jurisdictions* (Sweet & Maxwell, 2016) 1, 95, 185, 265, 307 and 353

⁹ Lise Bosman *Ibid* and Miles, Fagbohunlu and Sah, *Ibid*

¹⁰ Bosman (n 8) 4. It should be noted that in 2017, South Africa modernized its arbitration enactment by adopting the Model Law.



Map of Africa showing the Legal Families¹¹

In contrast, in West Africa, the region is made up of sixteen independent countries all of which (apart from Mauritania) are Member States of the Economic Community of West African States (ECOWAS) and nine of which are also members of the Organisation for the Harmonization of Business Law in Africa (OHADA).¹² Fifteen of the sixteen states have adopted and implemented the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States in their jurisdictions.¹³ Eleven of the sixteen states have implemented the 1958 New

¹¹ See the paper presented by Mohammed Kebe at the Johannesburg Conference: 19-20 July, 2017.

¹² The sixteen states are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. The Member States of OHADA are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Cote d'Ivoire, Mali, Niger, Senegal, and Togo available at <<https://www.ohada.org/index.php/en/aua-droit-de-l-arbitrage-en/aua-presentation-et-innovations-en>> accessed 18 June, 2020.

¹³ The ICSID Convention available at

<<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>> accessed

York Convention while it is only Nigeria that has passed the Arbitration and Conciliation Act, 1988 based on the text of the UNCITRAL Model Law. Ghana enacted the Alternative Dispute Resolution Act of 2010 that regulates the use of arbitration, mediation and customary arbitration.¹⁴ In the OHADA sub-region, they have Uniform Acts on Arbitration Law, adopted on 23 November 2017 to replace the initial text of 11 March 1999¹⁵

Areas of Divergence and Convergence: Common Law and Civil Law Legal Systems

Generally, the common law and civil law legal families have more areas of divergence than convergence. Understanding the differences between these systems first requires an understanding of their historical underpinnings. Piyali Syam traced the historical underpinnings thus:

The original source of the common law system can be traced back to the English monarchy, which used to issue formal orders called "writs" when justice needed to be done. Because writs were not sufficient to cover all situations, courts of equity were ultimately established to hear complaints and devise appropriate remedies based on equitable principles taken from many sources of authority (such as Roman law and "natural" law). As these decisions were collected and published, it became possible for courts to look up precedential opinions and apply them to current cases. And thus the common law developed.

Civil law in other European nations, on the other hand, is generally traced back to the code of laws compiled by the Roman Emperor Justinian around 600 C.E. Authoritative legal codes with roots in these laws (or others) then developed over many centuries in various

18 June, 2020. Guinea Bissau signed the treaty on 4 September, 1991 but has not deposited the instrument of ratification.

¹⁴ See generally Emilia Onyema in Bosman (n 8) 99-102

¹⁵ OHADA Uniform Act on Arbitration Law available at <<https://www.ohada.org/index.php/en/aua-droit-de-l-arbitrage-en/aua-presentation-et-innovations-en>> accessed 18 June, 2020.

countries, leading to similar legal systems, each with their own sets of laws.¹⁶

Areas of divergence between Common Law and Civil Law can also be categorized as follows:

- **Basic Features**

- Civil Law Legal System

- ✓ The Laws are codified and contained in civil codes (statutes)
- ✓ The Courts apply law as contained in the codes to facts
- ✓ Codes prevail and case law constitutes secondary source of law, although generally of no binding force.

- Common Law Legal System

- ✓ The Laws are not codified and rely largely on precedents or judicial decisions (case law).
- ✓ Courts are entitled to create and develop the law.

- **Pleadings** - in civil law jurisdictions, the courts are concerned with case pleaded as expressed in the pleadings with detailed facts and supporting documents whereas in common law jurisdictions, facts, not law nor evidence are pleaded to sustain the cause of action.

- **Discovery/Evidence at pre-trial Stage**

- Civil Law Legal System

- ✓ The civil law system does not allow for discovery at pre-trial stage and there is no obligation to produce documents to the adverse party. However, documents are disclosed for legal and factual submissions.
- ✓ Ascertainment of evidence is a function of the judge
- ✓ Courts are in control of the process.

- Common Law Legal System

- ✓ Discovery is conducted prior to hearing

¹⁶ See Piyali Syam, 'What is the differences between Common Law and Civil Law' available at <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/#:~:text=The%20main%20difference%20between%20the,cut%20as%20they%20might%20seem>. Accessed 18 June, 2020

- ✓ Parties are responsible to collect and introduce evidence
 - ✓ All documents relevant to the matter must be disclosed
 - ✓ The process enables parties to gain access to information in possession of the adverse party.
- **Hearing/Trial**
 - Civil Law Legal System
 - ✓ The system is inquisitorial - focuses on the active role of the judge or arbitrator. The judge is in charge of the conduct of the proceedings - establish all the facts and the law while the parties and their counsel assist in this process.
 - ✓ The judge examines witnesses to establish facts and clarifies issues
 - ✓ The judge may order disclosure of evidence
 - ✓ The Counsel has right to question witness after the judge's initial interrogation
 - ✓ In resolving legal issues, the court is presumed to know the law
 - ✓ Less emphasis is placed on oral argument and witness testimony as more emphasis is on written communications
 - ✓ The judge builds facts, acts as investigator, apply the legal principles and rules and make a just decision.
 - Common Law Legal System
 - ✓ The system is adversarial - the judges do not play an active role in the dispute before them. System obligates the parties to present all the relevant evidence in their possession.
 - ✓ Parties lead proceedings by presenting evidence by way of witness testimony and legal submissions.
 - ✓ In resolving legal issues, submissions are made based on precedents
 - ✓ At the hearing, facts are elaborated upon and emphasis on witness testimony and legal submissions
 - ✓ The judge acts as neutral arbiter - no active role and decides matters on balance of probabilities in civil matters - more convincing submissions of law and evidence.

- **Witness Testimony**

- Civil Law Legal System

- ✓ Written evidence prevails over oral evidence
- ✓ It is uncommon to call witness to testify in commercial cases
- ✓ Cross examination of witnesses is uncommon and preparation of witness statements by counsel is not allowed. It is forbidden.

- Common Law Legal System

- ✓ Under this system, witnesses are examined, cross-examined and re-examined
- ✓ Oral evidence carries considerable weight
- ✓ It is common practice for counsel to prepare witness statements before hearing.
- ✓ Testimony of witnesses are usually recorded verbatim.

- **Expert Witnesses**

- Civil Law Legal System

- ✓ Expert witnesses are appointed by the court and are impartial
- ✓ Courts rely on expert opinion and many cases are decided on court's expert's opinion
- ✓ Court Experts prepare written opinion which is circulated to counsel, who may question the Expert at the hearing.
- ✓ Court Experts may be replaced by Court if the expert opinion is unsatisfactory or a valid objection is raised by a party.

- Common Law Legal System

- ✓ Experts are appointed by the parties and are expected to provide impartial opinion.
- ✓ Experts are paid by the parties and tasked with motivating the position of the party who appointed them
- ✓ Experts are cross-examined by the adverse party.

- **Admissibility of Evidence**

- Civil Law Legal System

- ✓ Civil Procedure Rules contain rules on evidence - what may be introduced, conditions and weight of evidence.
- ✓ Generally no rules dealing with admissibility of 'hearsay evidence' and 'best evidence' although there are some restrictions.
- ✓ Generally, all evidence is admissible, unless precluded but Court will evaluate weight of evidence.

➤ Common Law Legal System

- ✓ There are various rules on admission of evidence.
- ✓ A witness may not testify about a fact of which he has no direct knowledge - hearsay
- ✓ Evidence must contain the best evidence available to the parties.

Lastly, under civil law, force majeure means unforeseen and unexpected event outside the control of the parties which makes impossible performance of the contract. Under this system, there is no need to include a force majeure clause in a contract as it operates independently of the parties' agreement. In contrast, under common law, force majeure operates only when it is included in a contract and precisely defined by the parties.

Areas of convergence are in jurisdictions where instruments similar to the following have been adopted:

a) UNCITRAL Model Laws.

In the UNGA Resolution of 5 December, 1985, it was recommended that

all states give due consideration to the UNCITRAL Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

Thus the convergence started with the adoption of the UNCITRAL Model Law and Arbitration Rules. Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted in 83 States in a total of 116 jurisdictions in the world. The following eleven African countries have adopted the Model Law: Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, South Africa, Tunisia, Uganda, Zambia and Zimbabwe. Out of this

number only three countries adopted the 2006 version of the Model Law. They are Mauritius, Rwanda and South Africa.¹⁷ It must be stressed that this is a Model Law and not a Convention.

b) 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention", is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. The Convention applies to Contracting States from the common law and civil law jurisdictions.

c) 1965 Washington Convention on the Settlement of Disputes Between States and Nationals of Other States (ICSID Convention)

ICSID provides for **settlement of disputes** by conciliation, arbitration or fact-finding. The **ICSID** process is designed to take account of the special characteristics of international investment **disputes** and the parties involved, maintaining a careful balance between the interests of investors and host States. It also applies to contracting states only.

d) FIDIC Contracts

FIDIC contracts adopt a multi-tier dispute resolution process in common law and civil law jurisdictions. The first sets of FIDIC contracts were based on English law principles. Since 1957, future FIDIC contracts have successfully incorporated the principles of other legal systems especially the civil law system. However, the basic framework of English law principles has survived. For instance, provisions relating to liquidated damages have been maintained.¹⁸

¹⁷ See Status: UNCITRAL Model Law on International Commercial Arbitration (1985) with Amendments as adopted in 2006 available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 18 June, 2020.

¹⁸ Koko Udom (n 6)

e) United Nations Convention on Contracts for the International Sales of Goods (CISG)¹⁹

The **CISG** is also known as the Vienna Convention. It started its development in 1964. The **purpose** of the **CISG** is to provide a uniform, modern, and fair regime for the international sale of goods contract. The CISG applies only to contracting states.

Other instruments include the IBA Rules on Taking Evidence in International Arbitration, IBA Guidelines on Conflict of Interest and UNIDROIT Principles of International Commercial Contracts. Indeed, in the Preamble to the IBA Rules, paragraph 1 provides that

These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions.

Even while conducting arbitral proceedings especially at Preliminary Meetings, we try to merge both Civil and Common Law procedures in our procedural orders. The IBA Guidelines represent the most comprehensive work to date defining the framework by which the impartiality of arbitration in the international arena can be most effectively assured. The publication sets out a series of seven general standards of independence and disclosure to govern the selection, appointment, and continuing role of an arbitrator. Lastly, the **UNIDROIT Principles** of International Commercial Contracts constitute a non-binding codification or "restatement" of the general part of international contract law. We must stress that the IBA Rules, Guidelines and UNIDROIT Principles are neither Model Laws nor Conventions. Therefore, the parties must adopt them before they become applicable.

The aim of these instruments is to harmonise, unify and codify international trade law and hence the convergence.

¹⁹ The United Nations Convention on Contracts for the International Sale of Goods, 1980 available at <<https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>> accessed 18 June, 2020

Specific Industries

We will now examine two specific industries, namely, mining and construction.

Mining Sector²⁰

In order to attract investment in this sector States established national companies dedicated to the exploration and exploitation of natural resources and the acquisition of shares in private mining companies. In Nigeria, we had the Nigerian Mining Corporation. Similarly in order to bring legal certainty to foreign investors and to stabilise the legal framework established, many African states concluded Bilateral Investment Treaties (BITs) starting from the 2000's. While foreign investors generated exponential profits, this did not translate into an increase in their tax contributions to host states. As a consequence, tax and legal reforms were introduced and were followed by the re-negotiation of many mining contracts concluded with investors in a number of African states. Some of these reforms were not accepted by the foreign investors, leading host states to terminate the mining contracts, giving rise to a number of disputes. In a number of cases, the reasons invoked by African states to revoke mining titles or to terminate the contracts remain unknown: These are some of the ICSID cases involving African countries in the mining sector.

- a) *IQR Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. République Démocratique du Congo*, ICSID Case No. ARB/10/21;
- b) *Russel Resources International Limited v. République Démocratique du Congo*, ICSID Case No. ARB/04/11;
- c) *Tamagot Bumi S.A. and Bumi Mauritania S.A. v. République Islamique de Mauritanie*, ICSID Case No. ARB/14/23, initiated on 20 October 2014.

In other cases, the initiation of arbitral proceedings was based on:

(i) the general issue of legal uncertainty in Africa, i.e. the forbiddance to trade the extracted minerals:

Southern Africa Resources Ltd. v. Swaziland, initiated on 22 January 2015;

²⁰ Paper presented by Mohamed Kebe at the Conference.

This case has the particularity of being the first ICSID case involving Swaziland on the basis of the Finance and Investment Protocol of the Southern African Development Community (SADC), a multilateral tool still rarely used by investors.

(ii) the breach by the state of a contractual clause of tax stabilization as in *Société des mines de Loulo v. Mali*, ICSID Case No. ARB/13/16

(iii) lack of protection from the State:

The South African gold mining company AngloGold Ashanti Ltd. took Ghana into ICSID arbitration after illegal miners stormed the company's Obuasi mine. AngloGold accused Ghana of improperly withdrawing military protection from the Obuasi mine and allowing illegal miners to take control of areas that hold its richest deposits.²¹

(iv) Human rights issues in commercial and international arbitration

African states are more and more taking steps to comply with their human rights obligations including, the right to a safe and healthy environment, the right to health. Adopting new statutory rules aiming at achieving this goal has a consequence: the breach of stabilisation clauses included in some investment contracts, and BITs.²²

Construction Sector²³

In this sector, FIDIC plays a major role and applies to both common law and civil law jurisdictions. Construction contracts are regulated by FIDIC Contracts. International arbitration deals mostly with commercial disputes where matters of interpretation of contracts are of primary importance. In both common law and civil law jurisdictions, there are very clear rules on interpretation of contracts. However, in construction law, the difference is more pronounced.

FIDIC has long been renowned for its standard forms of contract for use between employers and contractors on international construction projects, in particular:

- **Conditions of Contract for Works of Civil Engineering Construction: The Red Book (1987)**

²¹ See *AngloGold Ashanti (Ghana) Ltd. v. Republic of Ghana*, ICSID case number ARB/16/15

²² See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, (ICSID ARB/05/22).

²³ See paper presented by Anand Juddoo at the Conference

- Conditions of Contract for Electrical and Mechanical Works including Erection on Site: The Yellow Book (1987)
- Conditions of Contract for Design-Build and Turnkey: The Orange Book (1995)

During its past work in updating the Red and Yellow Books, FIDIC has noted that certain projects have fallen outside the scope of the existing Books. Accordingly FIDIC has not only updated the standard forms but has expanded the range, and has - in September 1999 - published a suite of four new Standard Forms of Contract which are suitable for the great majority of construction and plant installation projects around the world.²⁴

The general principle is that all contracts are to be interpreted against the substantive law identified therein; the principle of freedom of contract may only be limited by a formal provision or 'order public' and statutes relating to public policy and morals may not be derogated from by private agreement. Consequently, conditions of contracts are to be interpreted under the law of the jurisdiction under which it is identified. The two traditions have different notions about contract liability. In common law systems, the payment of damages constitutes true fulfilment of the contractual promise whereas in civil law systems, contract liability is an effect arising from the breach or a sanction. Thus the amount stipulated is always intended to be higher than the loss. Similarly whereas the common law enforces the privity of contract rule, under the civil law, a contract includes a sub-contract though there is an obligation to inform the employer of the sub-contract.

Contracts and obligations are covered under the provisions of the Napoleonic Civil Code (the old French Code Civil, CCF), Article 1101-11.²⁵ FIDIC 1999 Red Book has elaborate provisions on the following:

- a) Termination of contract affecting property rights - SCL 15.2 and 16.2
- b) Time-Bar - SCL 20.1
- c) Liability can be capped - SCL 17.6

Generally, interpretation must be carried out on a case by case basis.

²⁴ See 'Which FIDIC Contract Should I Use' available at <<https://fidic.org/bookshop/about-bookshop/which-fidic-contract-should-i-use>> accessed 19 June, 2020.

²⁵ There is also the Civil Code of Mauritius (CCM) and the Egyptian Civil Code (ECC) – all inspired by the CCF.

Sealed Offer²⁶

In addition to the specific industries, we also examined 'sealed offers' in common law and civil law jurisdictions. We found that a concept of a sealed offer is a common law procedure unknown to civil law jurisdictions and regrettably little used in international commercial arbitration. How does it work? This is provided in the International Chamber of Commerce Arbitration Rules, 2017. Thus

- a) when making its final award, the tribunal is required by the ICC Rules to "fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties." (Article 38(4)),
and
- b) when making decisions as to costs, the arbitral tribunal may take account of whether "each party has conducted the arbitration in an expeditious and cost-effective manner." (Art. 38(5)).

Consequently, any Sealed Offer should be capable of immediate acceptance and should make clear:

- the scope of the offer (i.e. does it include all claims and counterclaims?);
- the monetary amount (or other remedy) being offered;
- the time when payment (or the other remedy) will be made;
- the treatment of interest, if appropriate;
- the allocation of the costs of the arbitration until the offer is accepted;
- how the offer can be accepted; and
- whether the offer is open for acceptance within a limited time or not.

Sealed offers should be kept confidential. It is ideal for international arbitration as it helps to prevent inflated claims.

Concluding Remarks

At the beginning, there were two distinct legal families of law, namely, civil law and common law. Subsequently, other families emerged. However, with the adoption of

²⁶ See paper presented by Christopher R Seppala at the Conference.

1958 NY Convention, work of the UNCITRAL since 1966 in terms unification, codification, harmonization of trade law, the work of FIDIC and that of IBA, UNIDROIT and United Nations, arbitral tribunals now apply a mixture of the traditions of the common and civil laws. Thus in terms of international commercial arbitration especially evidential procedures, the divergence is less pronounced. However, it would seem unlikely that the common law and civil approaches to advocacy and proof will fuse nor it is desirable that they do. This is so because one of the attributes of arbitration is its procedural flexibility which allows the process to be tailored to the particular needs of each case. What is emerging is rather a consensus as to a range of procedural options available to the arbitrators and the advocates in each proceeding.

In practice we found that parties and their counsel as well as the tribunal agree to apply a mixture of the evidence procedures of the Common Law and of the Civil Law traditions. We would thus submit that the differences between the arbitral procedures in the Common Law and the Civil Law traditions are less relevant in today's international arbitration practice.