

# The Vision of Co-building China-Africa Joint Arbitration Centres in Different Legal Systems

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## 1.1 Introduction

Disputes are bound to arise in human interactions.<sup>1</sup> However, due to the fact that development is not feasible in a conflict situation<sup>2</sup> it is necessary to identify ways in which such disputes can be resolved in an efficient and effective manner for example through international commercial arbitration. It has become, therefore, necessary to come up with arbitral institutions that are context-specific, for example, the China-Africa Joint Arbitration Centre (hereinafter ‘CAJAC’). The CAJACs are aimed at providing efficient arbitral facilities that are tailored to the China-Africa relationship in view of the fact that China is currently Africa’s largest trading partner.<sup>3</sup>

The paper discusses this subject in four parts. Part 1 is this brief introduction and outline of the paper. Part 2 gives a background to the building of CAJACs while Part 3 discusses the challenges that must be overcome in establishing CAJACs. Part 4 concludes the paper and makes suggestions on issues to bear in mind in building CAJACs.

## 1.2 Background to the Co-Building CAJACs

The China-Africa Arbitration Centres (CAJACs) are arbitral centres created out of the need to find the most appropriate arbitral forum for disputes between nationals, legal entities and authorities from China and Africa.<sup>4</sup> It is a product of the Beijing Consensus, signed in June 2015, which called for the development of a joint dispute resolution framework between China and Africa. The aim of the Beijing Consensus was to:

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<sup>1</sup> Sudeshna Sarkar, ‘China-Africa Arbitration bodies sidestep international courts’ *African Business Magazine*, 9 May 2017 <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> accessed, on 13 May 2017.

<sup>2</sup> Kariuki Muigua and Francis Kariuki, ‘Alternative dispute resolution, access to justice and development in Kenya’ *Strathmore Law Journal* Vol. 1 (1), (2015), 1.

<sup>3</sup> *African Business Magazine*, 9 May 2017 <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> on 13 May 2017.

<sup>4</sup> CAJAC-Johannesburg, ‘Founding Statement and Rules for the Conduct of Arbitration,’ available at <http://www.cajacjhb.com/rules>, accessed on 11 May 2017. See also Dentons, ‘The China Africa Joint Arbitration Centre’ 26 January 2017 <https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/the-china-africa-joint-arbitration-centre>, accessed on 13 May 2017.

‘...review the traditional friendship existing between China and Africa; to observe the latest development trends of international arbitration: and to envision the cooperative prospects of establishing the China-Africa Joint Dispute Resolution Mechanism.’<sup>5</sup>

This was followed by the Johannesburg Consensus, and consequently the creation of the China-Africa Joint Arbitration Centre Johannesburg. The Johannesburg CAJAC was a result of the agreement between the Arbitration Foundation of Southern Africa (AFSA), Africa ADR, the Association of Arbitrators and the Shanghai International Trade Arbitration Centre.<sup>6</sup> The Nairobi CAJAC has also been established pursuant to an agreement between the Beijing Arbitration Commission and the Nairobi Centre for International Arbitration (NCIA), under the guidance of the China Law Society.<sup>7</sup>

The membership of the arbitral committees of the Shanghai, Johannesburg and Nairobi CAJACs will consist of individuals nominated by China, South Africa and Kenya, and disputants can pick arbitrators from these committees. Initially, the CAJACs are working using their local rules of arbitration as steps are underway to develop the standard CAJAC arbitration rules by all the centres, conjunctively.<sup>8</sup> The dispute resolution services provided by the CAJACs include arbitration, mediation and conciliation.<sup>9</sup>

The vision of creating and opening of dedicated arbitration centres for resolving trade disputes between Chinese and African companies in their own territories has been accentuated by a number of factors. First, China is now Africa’s largest trading and investment partner.<sup>10</sup> For instance, in 2016, China’s investment in Africa was more than 14 billion US dollars, while the capital investment had gone up by 515 per cent by July 2016 in comparison with that of the

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<sup>5</sup> Saadia Bhatti, ‘The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade’ Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>6</sup> The Arbitration Foundation of Southern Africa, ‘17 August 2015 Announcement of the China-Africa Joint Arbitration Centre Johannesburg (CAJAC)’ <http://www.arbitration.co.za/pages/CAJAC.aspx> on 13 May 2017.

<sup>7</sup> Beijing Arbitration Commission, ‘Inaugural Conference of China-Africa Joint Arbitration Centre - Beijing and Nairobi & Symposium on Dispute Resolution of Sino-African Infrastructure Construction Project Successfully Hosted’ 31 March 2017 <http://www.bjac.org.cn/english/news/view?id=2934> on 13 May 2017.

<sup>8</sup> Dentons, ‘The China Africa Joint Arbitration Centre’ 26 January 2017 <https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/the-china-africa-joint-arbitration-centre>, accessed on 13 May 2017.

<sup>9</sup> Ibid.

<sup>10</sup> Sudeshna Sarkar, ‘China-Africa Arbitration bodies sidestep international courts’ *African Business Magazine*, 9 May 2017 <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> accessed, on 13 May 2017.

whole of 2015.<sup>11</sup> In the first quarter of the year 2017, the China-Africa trade has equally experienced a 16.8 percent boost.<sup>12</sup> Consequently, the vision of co-building joint arbitration centres is a ‘natural step to sustain the exponential growth of Sino African business and trade’<sup>13</sup> while ensuring that those relationships are maintained, optimum benefits are derived and that arising disputes are resolved efficiently.<sup>14</sup>

Second, the Sino-Africa legal relations, particularly the vision of developing CAJACs, was motivated by a great dissatisfaction with the established international tribunals outside of Africa, occasioning huge delays and expenses, and where in most cases African parties are always unsuccessful in spite hiring high-profile lawyers.<sup>15</sup> For example, it is reported that after the Gabonese government took back an oilfield it had licensed to Addax in 2013, alleging breach of contract, the Chinese company went to the International Court of Arbitration in Paris, seeking damages. The court’s first ruling went against Addax, which reportedly paid the Gabonese government over \$400m to settle the dispute.<sup>16</sup> This sad state of affairs arises because of a number of reasons. Already, there are old prejudices and bias against Africa explaining why most arbitrations are conducted out of Africa.<sup>17</sup> In addition, ‘90% of all international contracts negotiated in Africa or concerning African investment are drafted as being subjected to English Law.’<sup>18</sup> This is expected because the drafters of these international

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<sup>11</sup> Saadia Bhatti, ‘The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade’ Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>12</sup> China Daily, ‘China-Africa trade enjoys 16.8 percent boost in Q1’ 12 May 2017 [http://english.gov.cn/state\\_council/ministries/2017/05/12/content\\_281475652908925.htm](http://english.gov.cn/state_council/ministries/2017/05/12/content_281475652908925.htm) on 13 May 2017.

<sup>13</sup> Saadia Bhatti, ‘The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade’ Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>14</sup> Stuart Dutson, ‘Africa’s Century’ – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, 104.

<sup>15</sup> Saadia Bhatti, ‘The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade’ Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>16</sup> Africa Business Magazine, ‘China-Africa Arbitration bodies sidestep international courts’ available at <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/#sthash.oMlrKxAF.dpuf>

<sup>17</sup> Wiles J, ‘The Challenges of Arbitrating in Africa’ London Seminar, 19 September 2012.

<sup>18</sup> Edward Torgbor, ‘Opening up International Arbitration in Africa’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa,’ *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 21-22.

contracts are either English or American and thus prefer applicable laws, seats, venues and venues they are familiar, accustomed to and comfortable with but with unrewarding outcomes for their African clients.<sup>19</sup> Moreover, in most of the disputes, ‘African entities are usually the respondent in international arbitrations’ and in terms of legal representation the parties in 99.9% of all African disputes are represented by lawyers and law firms based in the UK, USA or France.<sup>20</sup> In addition, arbitral experience naturally remains as the overriding concern, argument being that Africans lack enough training and experience in international commercial arbitration.<sup>21</sup>

Another reason is that the African continent has not been a key player in steering global arbitral discourse in spite of the fact that Africa generates most arbitral references.<sup>22</sup> As such, the vision of ‘greater inflow of arbitral hearings with seats in the continent’<sup>23</sup> remains a mirage in spite of the huge benefits that accrue to jurisdictions that are chosen as seats of arbitration.<sup>24</sup>

Lastly, municipal laws and judicial systems have also proved inefficient, uncertain and highly regulated in dealing with matters involving foreign parties. It is as a result of some of these factors that there has been a push for arbitral centres specifically tailored to the China-Africa trade relations.<sup>25</sup> However, the co-building of these arbitral centres in Africa must confront a number of challenges.

### **1.3 Challenges with African Arbitral Institutions**

#### **(a) Plurality of legal systems**

The difference in the legal systems of the African countries is likely to pose a challenge to the CAJAC project. The legal systems in Africa vary from civil law, common law, Roman-Dutch, religious laws, customary law and hybrid jurisdictions coupled with cultural differences ranging from Anglophone, Francophone and Lusophone backgrounds, meaning that

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Emilia Onyema, ‘Discussion paper’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 21.

<sup>23</sup> Emilia Onyema, ‘Regional Arbitration Institution for ECOWAS: lessons from OHADA Common Court of Justice and Arbitration’ (2014) IALR, pp. 99 – 111.

<sup>24</sup> Emilia Onyema, ‘Discussion paper’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 22.

<sup>25</sup> Sudeshna Sarkar, ‘China-Africa Arbitration bodies sidestep international courts’ *African Business Magazine*, 9 May 2017 <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> accessed, on 13 May 2017.

international arbitration takes different forms in different countries.<sup>26</sup> This plurality of legal systems may also pose a challenge in adopting uniform arbitration rules.

### **(b) Low confidence in African Arbitrators, competence and their capacity**

It is worth noting that whereas there are quite a number of ADR practitioners in Africa, the practice of ADR largely remains a side job that professionals in other fields undertake from time to time.<sup>27</sup> There is also the related problem of parties having low confidence in African arbitrators thus favouring those from other regions. CAJAC and its collaborating arbitration centres in Africa such as NCIA, must therefore confront the question of whether there are sufficient and qualified arbitrators who will enable it to offer efficient and expeditious arbitral services.

### **(c) Proliferation of regional arbitration centres**

Recently, Africa has witnessed the proliferation of arbitration centres with each country seeking to become a regional arbitration hub.<sup>28</sup> The challenge is that each centre serves parties from that specific country. Moreover, the efforts to create these centres seem to be uncoordinated, fragmented, staff shortage, inadequate professional performance and poor service delivery.<sup>29</sup> There is need for joint efforts toward creation of fewer centres with more efficient working structure and capacity.<sup>30</sup> In addition, because the centres have not gained public confidence, most commercial disputes still end up in courts, explaining why they have low case loads.<sup>31</sup>

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<sup>26</sup> Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), pp.146-147. See also Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' *Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa*, Addis Abba, July 2015, p. 104.

<sup>27</sup> Kamau Karori, 'Promoting Professionalism in ADR Practice,' *Alternative Dispute Resolution*, Vol.3 No.1 pp. 122-129, at p. 123.

<sup>28</sup> These centres include: Congo Arbitration Centre, Cairo Regional Centre for International Commercial Arbitration (CIRICA), Court of Arbitration of Ivory Coast, Common Court of Justice & Arbitration of OHADA, Nairobi Centre for International Arbitration, Arbitration Centre of Madagascar, Permanent Court for Arbitration at the Mauritius Chamber of Commerce & Industry, Kigali International Arbitration Centre, Lagos Regional Centre for International Commercial Arbitration, and Arbitration Foundation of Southern Africa.

<sup>29</sup> Edward Torgbor, 'Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), pp. 116-117.

<sup>30</sup> Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p.145.

<sup>31</sup> Steven Finizio & Thomas Fuhrich, 'Africa's Advance'-Expert View: Surveying Africa,' *Commercial Dispute Resolution*, June 2014, pp. 27-29.

#### **(d) Judicial attitude towards arbitration**

More often than not, the arbitral tribunal or the parties, may seek the assistance of courts in the arbitral process. It is for this reason that arbitral law allows for limited court intervention in arbitration, for instance in the appointment, removal of an arbitrator, seeking interim relief, setting aside an award or in the enforcement of an award. This means that the attitude, whether real or perceived, of the local court system towards arbitration is quintessential in boosting international arbitration.<sup>32</sup> Therefore, concerns that the local courts are not independent, impartial, and efficient and that they are likely to favour local parties or state-owned entities over foreigners,<sup>33</sup> is a major threat to international arbitration. For example, huge backlogs in local courts, occasion delays and expenses in pursuing court assistance in the arbitral process.<sup>34</sup>

Moreover, foreign parties are also afraid where national courts uses certain legal doctrines to favour national interests to the detriment of foreign parties. For example, if a court interprets the doctrine of public policy broadly, it may in effect upset cardinal principles of arbitration such as party autonomy and finality of arbitral awards, thus putting international arbitration into disarray.<sup>35</sup>

#### **(e) Political Instability**

Insecurity and political instability in the African region poses a great challenge to international investments and trade and consequently to the proper implementation of CAJAC. This is because increased incidences of ethnic violence, change of government and electoral violence are bound to interfere with conduct of arbitral and court proceedings.<sup>36</sup> For example, the eruption of the post-election violence in Kenya in the period 2007-2008 led to a lot of activities being brought to a standstill.<sup>37</sup>

#### **(f) Enforcement of arbitral awards**

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<sup>32</sup> Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 105.

<sup>33</sup> Ibid, p. 104.

<sup>34</sup> Ibid.

<sup>35</sup> Francis Kariuki, 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community' *Alternative Dispute Resolution*, Vol. 4, No. 1, (2016), pp. 64-99, at p. 93.

<sup>36</sup> Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p.104.

<sup>37</sup> See, Republic of Kenya, *Report of the Commission of Inquiry into the Post-Election Violence*, 2008, 90.

Recognition and enforcement of arbitral awards is also a concern at the core of the arbitral process. Investors are keen to ensure that there is reciprocity. However, this is not like to be a major challenge to the CAJAC project since agreements are entered into between China and the African country in each case.

**(g) Poor physical infrastructure**

Apart from good legal infrastructure that is supportive of arbitration, there is need for convenient physical infrastructure to make African countries preferred arbitration hubs. Some cities in Africa are not easily accessible because of poor road (with massive traffic jams at certain hours), air and rail transport system. In addition, not all cities have secure and safe environment, excellent broadband connectivity and world-class dedication arbitration facilities, such as hearing rooms, breakout and preparation rooms, audio-visual and videoconferencing facilities and special lounges for arbitrators and legal representatives. Moreover, services such as transcription, recording of hearings and interpretation may be lacking in some jurisdictions yet critical in arbitration.

**1.4 Conclusion and Recommendations**

The co-building of the CAJACs in the different legal systems in a viable project which would bring benefits to the concerned countries, as highlighted above. It is also important that the challenges discussed above are looked into keenly so that the process of implementation is beneficial for China and Africa. The following are some suggestions on how to confront the highlighted challenges.

**(a) Role of African and Chinese lawyers and arbitrators in drafting international commercial contracts.**

Greater involvement of African and Chinese lawyers and arbitrators in the negotiation and drafting of international contracts is needed to ensure the arbitration clauses are favourable to the choice of applicable laws, seats and venues in Africa and China. This is important because, as one commentator has opined, the arbitration clause is ‘the originating source and the crucial instrumental device, by and from which, Africans and their advisers wittingly or unwittingly transfer their problems and disputes for solutions abroad.’<sup>38</sup>

Moreover, to ensure adequate utilisation of CAJACs as arbitration centres, those negotiating and drafting arbitration clauses (clients and their legal representatives) must ensure

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<sup>38</sup> Edward Torgbor, ‘Opening up International Arbitration in Africa’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa,’ *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 22.

that the clauses provide for referral of disputes to CAJAC and the seat of arbitration as the relevant African country depending, for example, where the CAJAC is based. The seat of arbitration is particularly important as it is the law of the seat that governs the conduct of arbitral proceedings, the choice of the seat can determine whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease with which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions.<sup>39</sup>

On being chosen as the seat of arbitration, a country derives benefits in numerous ways.<sup>40</sup> The country benefits by modernising its legal framework and earning tax from the services connected with arbitration, for example, hospitality, tourism, transportation and communication, and open up its legal services market particularly to international law firms; reputational advantage, among others.<sup>41</sup> Courts and judges are afforded the occasion to make judicial decisions on arbitration hence adding ‘African voices’ to global arbitral jurisprudence.<sup>42</sup> Arbitration institutions also increase their presence in the globe due to caseload while the arbitration users will get the benefit of the best practices in the arbitral process.<sup>43</sup>

#### **(b) Capacity gaps and infrastructural challenges**

Training of arbitrators is vital in dealing with capacity gaps, ensure there are sufficient arbitrators who are suitably qualified, and avoid repeat appointments (which may create a perception of partiality, bias and put the credibility of the centre at risk). In this regard, CAJAC must need to confront issues such as: who will undertake the training in different countries? Are there sufficient trainers in the different states? Who will determine the curricula? Will the curricula be uniform across the different countries or will it reflect local dynamics such as culture? Who will set, mark and accredit arbitrators after the training?<sup>44</sup> This is an area where CAJAC may also need to partner with already existing regional and international ADR training centres such as the CIArb, NCIA, KIAC et cetera, to put up cohesive training and continuous professional development programmes. After building sufficient capacity, CAJAC may need

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<sup>39</sup> International arbitration briefing, ‘Anatomy of an arbitration Part II: Key elements of an arbitration clause,’ *Ashurst*, (2013), p. 2.

<sup>40</sup> Emilia Onyema, ‘Discussion paper’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 22.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Kamau Karori, ‘Promoting Professionalism in ADR Practice,’ *Alternative Dispute Resolution*, Vol.3 No.1 pp. 122-129, at p. 124.



to create a database of arbitrators across the different partner states based on their areas of practice and/or experience, a brief description of the matters they have dealt with (of course without compromising on confidentiality).<sup>45</sup>

For states to be chosen as seats of arbitration, they must ensure that they have excellent road, air and rail transport system with secure and safe cities, excellent broadband connectivity and world-class dedicated arbitration facilities, such as hearing rooms, breakout and preparation rooms, audio-visual and videoconferencing facilities and special lounges for arbitrators and legal representatives. This explains why arbitration centres should seek more collaboration to pool resources together.

### **(c) Collaboration with other arbitration centres in Africa**

To address the problem of proliferation of arbitration centres and fragmentation of efforts, staff shortage, inadequate professional performance and poor service delivery, there is need for realigning these efforts. Moreover, there is need for the various arbitration centres to collaborate and share experiences so as to win public confidence in the continent. CAJACs could collaborate with the various arbitration centres in Africa and benefit from joint marketing initiatives. Such initiatives could extend to holding of arbitration conferences and events in the respective countries, publication of joint websites listing the centres and maintaining the profiles of all qualified arbitrators.<sup>46</sup> This could increase caseloads to the centres and boost public confidence in arbitration.

In co-building CAJAC, there is need to ensure that the arbitration centres it collaborates with in Africa are independent from public institutions and that they operate with a promise that national governmental and judicial institutions will not interfere unduly with their independent operation and decisions.<sup>47</sup> For example, financial and technical support from the State to the Nairobi Centre for International Arbitration should not affect its neutrality, predictability, professionalism and competitiveness by being seen as promoting national as opposed to international interests<sup>48</sup> thus affecting negatively on the confidence of the business

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<sup>45</sup> Ibid.

<sup>46</sup> Edward Torgbor, 'Opening up International Arbitration in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 38.

<sup>47</sup> P.J. McConaughay, 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles,' *PKU Transnational Law Review*, Vol. 1. No.1, p.11.

<sup>48</sup> F. Kariuki, 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community,' *Alternative Dispute Resolution*, Vol. 4 No.1, pp. 64-99, at p. 96.

community. Where there is state support in establishing the centres, the arbitral court may be seen as lacking neutrality thus affecting confidence in the process.

#### **(d) Overcoming the issue of a plural legal system in co-building CAJAC**

To overcome legal barriers arising from the different legal systems in Africa and bring certainty as to what rules and procedures would be applicable to arbitration, there is need for CAJAC to consider a regional approach in developing arbitration rules. Instead of adopting the local rules of an arbitration centre, CAJAC could consider adopting harmonised rules for specific regions. A few lessons can be drawn from the Organization for the Harmonization of Corporate Law in Africa (OHADA) treaty and its system of arbitration where it has a set of simple and uniform laws prescribing the basic rules applicable to any arbitration with a seat in an OHADA member state which supersede the arbitration law of any member state.<sup>49</sup> It is instructive to note also that in cases concerning OHADA law, the Common Court of Justice and Arbitration (CCJA), which is both a judicial court and an arbitration institution supervising the administration of arbitral proceedings, has exclusive jurisdiction to rule upon disputes relating to the application and interpretation of the uniform acts<sup>50</sup> thus taking precedence over national courts.<sup>51</sup> This could help alleviate the problem of different legal systems amongst the countries trading with China and minimise incidences of excessive intervention by municipal institutions in the arbitral process.

#### **(e) Independence of arbitral courts**

Moreover, to ameliorate the difficulty that arises particularly where lawyers seek to delay and frustrate the arbitral process, for example through applications for stay and injunctions, there is need to safeguard the independence of arbitral courts and statutorily limit instances when national courts can intervene in arbitration.

One approach, is to allow the arbitral tribunal to conduct the proceedings from beginning to the end and allow courts intervention to ‘issues of confirming appointment of

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<sup>49</sup> OHADA, Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, available at <http://www.pict-pcti.org/courts/OHADA.html>

<sup>50</sup> ‘The Harmonisation of business law in Africa & its impact on investors’<http://www.trinityllp.com/the-harmonisation-of-business-law-in-africa-its-impact-on-investors/>

<sup>51</sup> See for instance Rule 2.3 of the CAJAC-Johannesburg Rules which provides that ‘In the event of any provision of the Rules conflicting with the mandatory law applicable to the arbitration, such law shall prevail.’ If the mandatory law of arbitration happens to be a national law allowing excessive leeway for courts, this may create trouble.

arbitrators, interim measures, setting aside, and enforcement of the final award.<sup>52</sup> The CAJAC-Johannesburg seems to limit court intervention in enforcement of the arbitral awards by providing that, ‘By submitting the dispute to arbitration under these Rules, the parties (subject only to Article 36) undertake to carry out any award immediately and without delay; and also waive irrevocably their rights to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may validly be made.’<sup>53</sup> Similarly, the NCIA Act establishes an Arbitral Court<sup>54</sup> with exclusive original and appellate jurisdiction to hear and determine all disputes referred to it under the Act<sup>55</sup> and whose decision is final<sup>56</sup> but its relationship with Kenyan courts in so far as jurisdiction in arbitration matters is concerned is unclear especially in view of Kenya’s Arbitration Act, 1995<sup>57</sup> which allows for court intervention in limited instances. However, while the establishment of an independent Arbitral Court or Commission is a positive step in encouraging international arbitration in Africa, there is the potential of dissatisfied parties, challenging the same on grounds of ousted jurisdiction of national courts.<sup>58</sup>

Another approach, is to detach the arbitral process from the national courts, by establishing arbitral courts. For example, the Mauritius International Arbitration Act provides for appointments and specified administrative functions to be done by the Permanent Court of Arbitration.<sup>59</sup> Under the NCIA rules, the Arbitral Court plays a role in the removal of the arbitrator,<sup>60</sup> while under the CAJAC-Johannesburg Rules, the Arbitral Commission has the power to hear challenges relating to the jurisdiction of the tribunal<sup>61</sup> and arbitrability of a matter referred to arbitration.<sup>62</sup>

#### **(f) National courts that are independent, efficient, transparent and pro-arbitration**

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<sup>52</sup> Edward Torgbor, ‘Opening up International Arbitration in Africa’ Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa,’ *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 40.

<sup>53</sup> Rule 36.3 of the CAJAC-Johannesburg Rules.

<sup>54</sup> Section 21(1), Nairobi Centre for International Arbitration Act, Act No. 26 of 2013.

<sup>55</sup> Section 22(1), Nairobi Centre for International Arbitration Act, Act No. 26 of 2013.

<sup>56</sup> Section 22(2), Nairobi Centre for International Arbitration Act, Act No. 26 of 2013.

<sup>57</sup> Section 10, Act No. 4 of 1995, Laws of Kenya.

<sup>58</sup> Kariuki Muigua & Ngararu Maina, ‘Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration,’ *Alternative Dispute Resolution*, Vol.4 (1), (2016), p. 169.

<sup>59</sup> See for example, Section 8(3) and 8(6) of the Mauritius International Arbitration Act, Act No. 37 of 2008.

<sup>60</sup> Rule 11(6), Nairobi Centre for International Arbitration Rules.

<sup>61</sup> Rule 6.2 of the CAJAC-Johannesburg Rules.

<sup>62</sup> Rule 6.3 of the CAJAC-Johannesburg Rules.

National courts must have a reputation for efficiency, integrity, impartiality, transparency, soundness of their judgments and have a good track record of supporting and enforcing arbitral awards. They should be supportive of arbitration, with minimal judicial intervention except to uphold and support the arbitral process,<sup>63</sup> for instance by court decisions denying the setting aside of arbitral awards or preventing court proceedings from ignoring the existence of an arbitration clause. There is therefore a need for increased collaboration between courts and the arbitration fraternity and training of judges to enhance the levels of knowledge and experience in arbitral matters.

#### **(g) Enforcement of arbitral awards**

Although with most arbitral centres rules, the parties by consenting to arbitration undertake to carry out an award immediately and without any delay,<sup>64</sup> it is important to note that enforcement of an award is a very crucial phase in arbitration as it is the fruit of every arbitral process. As such, there is need for CAJACs to exude efficiency, neutrality, predictability, professionalism and competence in the arbitral processes, to ensure that their awards will be easily complied with by parties, otherwise it will be futile to engage in such proceedings.

Even so, it is advisable for parties and their legal advisers to ensure that the chosen seat has ratified the New York Convention<sup>65</sup> to maximise the chances of an award being enforced in other jurisdictions.<sup>66</sup> It is therefore worrying when Rule 8 of CAJAC-Johannesburg Rules under the heading ‘venue’ provides that ‘CAJAC Johannesburg will accept matters referred to it by agreement of the parties regardless of the seat of the arbitration.’<sup>67</sup> What happens if the chosen seat is not a part to the New York Convention or UNCITRAL Model Law?

#### **(h) Political stability**

It is also important that the countries ensure that there is security and political stability so that an environment conducive for trading activities and the functioning of dispute resolution

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<sup>63</sup> Richard Tan, ‘The Emergence of Singapore as a Global Arbitration Hub: Reasons for its Success,’ *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 79. No. 4 (2013), p. 438.

<sup>64</sup> See for example, Rule 21 (17) of the NCIA Rules and Rule 36.3 of the CAJAC-Johannesburg Rules.

<sup>65</sup> United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

<sup>66</sup> International arbitration briefing, ‘Anatomy of an arbitration Part II: Key elements of an arbitration clause,’ *Ashurst*, (2013), p.2.

<sup>67</sup> Rule 8 of the CAJAC-Johannesburg Rules.

structures is created. Insecurity and political instability negatively affect trading activities and, as already pointed out above, is one of the key reasons why some African countries have not been picked as seats of arbitration.