Dispute Resolution

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SOUTH AFRICA

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Capacity building and fostering expertise in international arbitration in Africa

The central theme of the Johannesburg Arbitration Week 2024 (JAW) was showcasing arbitration in Africa. This prompted engaging discussion and renewed calls for the Africanisation of international arbitration. This encompasses African disputes being arbitrated in Africa, presided over by African arbitrators, administered by African arbitral institutions, and argued by African lawyers. With expanding foreign direct investment in Africa and the expansion of BRICS to Egypt and Ethiopia, the calls to ensure that Africa has a voice in and imprint on the international arbitration proceedings it participates in are gathering momentum. This ensures that Africa's unique priorities and experiences are sufficiently taken into consideration.

The under-representation of African individuals in proceedings is partially attributable to a precepted or real lack of expertise and experience. Consequently, the Africanisation of international arbitration requires efforts to continue to build capacity and foster talent and expertise. This applies to arbitrators, lawyers, experts, judges, governments, and users of arbitration across the continent through the initiatives and ideas considered below.

Diversity of tribunals

Practical case experience is essential in building capacity and confidence in the abilities of African practitioners. This necessitates the expansion of opportunities to a more diverse pool of arbitrators, legal counsel, and experts in terms of ethnicity, age, and gender. Greater diversity will also improve the quality of the decision-making process, allowing the tribunal to make decisions in the context of the relevant cultural, social, religious, and legal perspectives.

Understandably clients and their lawyers want to appoint good quality arbitrators who are best placed to determine the dispute. This could dissuade the appointment of more diverse arbitrators if they are perceived to lack sufficient expertise or experience. To address this and to achieve greater diversity, focus should be on:

- the preparation and promotion of accessible and detailed lists of appropriately qualified arbitrators and experts; and
- the proactive and open-minded consideration of such lists when appointing arbitrators.

In respect of the former, valuable strides have already been made, such as the Arbitration Foundation of Southern Africa-South Africa Development Community (AFSA-SADC) Panel of International Commercial Arbitrators. These lists should contain details of the experience, expertise, training and education of arbitrators. This could include a formal standardised accreditation to demonstrate candidates' abilities and capacities to the client. As capacity and experience continue to build, such lists will become longer.

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In respect of the latter, it will take time and patience to achieve the necessary shift in perceptions by lawyers and their clients, especially those who demonstrate a preference for non-African arbitrators. It is hoped that this shift can be expedited by:

- Drafting arbitration clauses that African arbitrators are more likely to be well-qualified for, such as those subject to an African applicable law or seated in Africa. For contracts governed by English law but concerning projects in Africa, dual-qualified arbitrators will be especially well-placed.
- Publication of transparent information about arbitrator demographics and the number of repeat appointments. This will promote awareness encourage reflection and accountability in selecting arbitrators and provide a way to quantify progress towards achieving greater diversity.
- Recognising the personal and relationship-driven nature of international arbitration appointments. This involves a continued focus on maintaining such and building relationships (for example 'Meet the Arbitrator' networking sessions).

Sharing expertise

African jurisdictions have already entered into a number of innovative and mutually beneficial initiatives to pool and share expertise and best practice. This includes sharing expertise from not only non-African established arbitral jurisdictions, but also from well-established pro-arbitration African jurisdictions such as Kenya. Kenya's Chartered Institute of Arbitrators branch was first established 40 years ago in 1984 and the Kenyan Arbitration Act has been based on the UNCITRAL Model Law since 1995. These initiatives can be replicated and developed. For example:

- At JAW a landmark moment was reached with the signature of the AFSA-SADC Alliance Charter. This will transform arbitration in SADC by establishing a standardised framework for arbitration practice across the region and providing for the sharing of expertise.
- Collaboration between dispute resolution centres. For example, in March 2024 the Nairobi Centre for International Arbitration, the Cairo Regional Centre for International Commercial Arbitration, the Kigali International Arbitration Centre (KIAC) and the Hamburg Chamber of Commerce signed a memorandum of understanding to enhance visibility and the growth of arbitration in Africa.
- Initiatives led by international centres such as the conferences and training delivered by the International Chamber of Commerce's (ICC) Africa Commission, with the stated objective of building capacity of African practitioners. The commission includes members from 16 African countries.

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- Collaboration between law firms both in and out of Africa in formal and informal partnerships and secondments. This includes proper and open co-counsel relationships where lawyers work as genuine and respected partners to advance client interests, sharing and pooling experience and ideas from their respective jurisdictions.

Availability of materials

Capacity building can also be greatly facilitated by ease of access to relevant materials. This includes:

- **Legislation and arbitration related court decisions:** In some jurisdictions there is limited access to free, high-quality and up-to-date sources of legislation, regulation or court judgments. This can inhibit capacity building as practitioners may not be aware of all relevant requirements or recent decisions. Databases like Laws.Africa should be funded and promoted to make essential foundational legal information available.
- **Arbitration awards:** While giving appropriate deference to the confidentiality of arbitration, greater transparency and the publication of anonymised awards is also a valuable tool in capacity building. This could help demonstrate effective conduct of proceedings and confirm how tribunals make decisions. Arbitral institutions may consider exercising some of their discretion or powers to publish anonymised awards to facilitate that objective. For example, AFSA has discretion to publish awards unless a party objects. The inclusion of such awards in the International Council for Commercial Arbitration's Awards Series would help promote and expand African arbitration capacity as well as promote such capabilities outside Africa.
- Arbitral centre statistics. Similar to the London Court of International Arbitration's Annual Report, arbitral centres could assist capacity building by publishing comprehensive statistics about the cases they oversee, including details of case numbers, challenges to arbitrators and requests for interim relief. This data enables practitioners to assess important aspects of the arbitration process such as time and cost. This could both expand knowledge and improve confidence in the process as well as showcase the excellence and experience of the centres.

Training and education

Advances in technology and virtual learning have significantly improved the accessibility of online learning, often at a cheaper cost. Institutions like the African Arbitrational Academy, AFSA and Chartered Institute of Arbitrators (CIArb) branches across Africa (of which there are three in Nigeria alone) already offer regular virtual and in-person training sessions to young lawyers, the judiciary and other practitioners, including routes to CIArb membership and the ICC's Advanced Arbitration Academy taking place in a number of African cities throughout 2024 and 2025.

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Many educational institutions already offer formal training such as LLMs in International Arbitration, but this is not available in every country.

Such initiatives and training should be funded and expanded, including by means of international collaborative programmes, and practitioners should be encouraged to make full use of such opportunities.

Conclusions

Continuing to foster talent and expertise in African arbitration requires a long-term vision but there are strong existing foundations to build on. Academic dedication and training are valuable but there is no substitute for real-life practical experience.

Governments can also play a role in securing opportunities for that experience. For example, following Rwanda's lead in requiring that the KIAC is selected for arbitration agreements involving a public entity. Similarly, the African Arbitration Academy's Model BIT provides for the appointment of arbitrators of African descent in its dispute resolution clauses, and for the selection of a seat in Africa.

Improving capacity and fostering talent and expertise in international arbitration is not a one-way street. To be truly international, the international arbitration community must incorporate rather than impose, and integrate Africa's unique perspectives and ways of working as part of a global and collaborative capacity building exercise.

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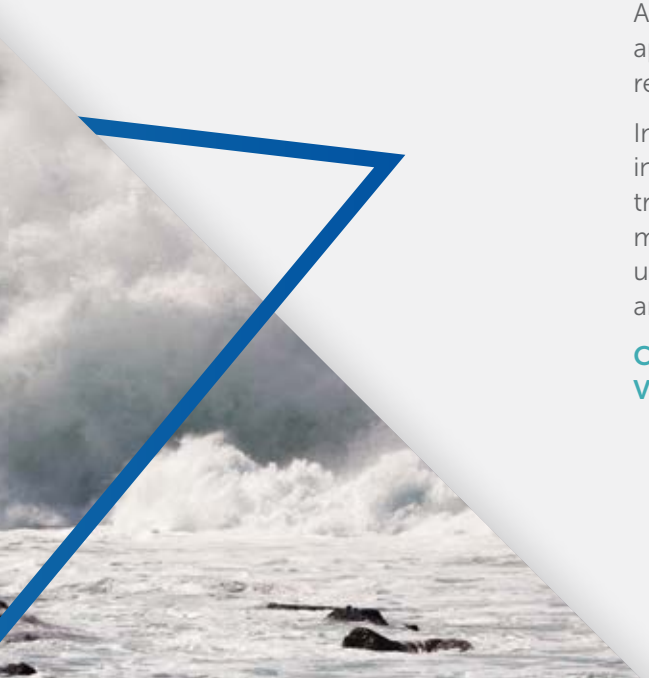

Transforming public procurement: A comprehensive analysis of the Draft Public Procurement Bill

The National Council of Provinces' select committee on finance has made amendments to the Public Procurement Bill (Bill) and aims to have it approved by the National Assembly during the course of this week.

The Bill outlines the establishment of a comprehensive procurement system, emphasising the use of technology to provide access to officials, bidders, suppliers and the public for all procurement-related services.

The Bill aims to recognise the need for promoting economic transformation within the ownership and management control of Black people and advancing preferential procurement from enterprises that are owned and managed by Black people in terms of the codes of good practice on Black economic empowerment issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003, in order to enable meaningful participation of Black people in the economy.

At a glance, the Bill outlines provisions for access to procurement processes and information, as well as measures for preferential procurement.

It specifies that the Minister of Finance (Minister) is required to prescribe measures for the public, civil society, and the media to access, scrutinise and monitor procurement processes. This indicates a commitment to transparency and public oversight of procurement activities.

Regarding preferential procurement, Chapter 4 of the Bill focuses on the preferential framework for procurement policies. It includes provisions for set-asides for preferential procurement, pre-qualification criteria for preferential procurement, sub-contracting as a condition of a bid, and the designation of sectors for local production and content. These measures aim to promote the advancement of sustainable development, job creation, and the development of small enterprises within specific geographical areas.

In summary, there is an emphasis on the importance of transparency and public access to procurement processes and information, while also outlining measures for preferential procurement to promote economic development and job creation.

Consequences for financial misconduct

The Bill includes new provisions related to financial misconduct. It outlines various offenses and penalties related to financial misconduct in the context of procurement processes. It specifies that individuals who knowingly give false or misleading information, interfere with or exert undue influence on procurement processes, or cause loss of public assets or funds due to wilful acts or gross negligence, may be liable to fines, imprisonment, or both, upon conviction. Moreover, the document mandates the investigation of allegations against officials or role players of corruption, improper conduct, or failure to comply with the procurement system, with requirements to report to relevant authorities and take necessary steps against the individuals involved.

The Bill further includes provisions for debarment of bidders or suppliers who engage in misconduct, such as providing false information, engaging in corrupt activities,

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or failing to perform contractual obligations. It also outlines the process for issuing debarment orders and the considerations involved in such decisions. An affected person will now have 10 days to provide reasons why a debarment order should not be issued.

The document incorporates measures to address financial misconduct within the procurement framework, aiming to ensure integrity, transparency and accountability in public procurement processes. It establishes clear guidelines for investigating and addressing financial misconduct, as well as imposing penalties for offenses related to procurement integrity and financial probity.

The Public Procurement Act, in contrast to the Public Finance Management Act 1 of 1999 (PFMA), which merely mentions that a procurement system must meet particular criteria in a single line, offers detailed instructions on what the Minister must specify. Under section 31(2)(a), it covers details such as cancelled bids, reasons for the cancellation communicated to unsuccessful bidders, and the disclosure of bids awarded to a politician's family member.

The Bill does not replace the PFMA or any other act in their entirety. Instead, it amends and repeals specific sections of various acts to align them with the new procurement regulations introduced in the Public Procurement Act. The amendments are intended to ensure that the procurement processes across different sectors and entities are consistent with the principles and requirements of the Public Procurement Act. This includes updates to the definitions, objects, application, and administration of the Procurement Act, as well as changes to the way procurement is managed and reported within the framework of the PFMA and other relevant legislation.

In conclusion, the Bill represents a significant step towards enhancing transparency, efficiency and integrity in the country's procurement processes. With provisions for access to information, measures for preferential procurement, and the use of technology to combat corruption, the Bill aims to promote economic development, job creation and sustainable practices.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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