

A NEW INTERNATIONAL ARBITRATION CENTRE

With the first international meeting of Chinese African Joint Arbitration Centre being held in Cape Town in late November 2017, Dawid Welgemoed documents how and why it was established, and comments on the impact it will have on arbitration in South Africa.

Introduction

The Belt and Road initiative is the short form for the "Silk Road Economic Belt and the 21st Century Maritime Silk Road." It is a development strategy for the next fifty years set in train by China's current head of state, President Xi Jinping, who took office in 2013. Its focus is cooperation between Eurasian countries, primarily those countries comprising the land based Silk Road Economic Belt and those along the ocean bound Maritime Silk Road. Under the Belt and Road initiative, in 2016, Chinese state-owned entities had spent US\$1,3 Billion in Africa.

Inevitably, as history dictates, there will be conflicts in commercial transactions.

The FOCAC legal forum is an important part of FOCAC (Forum of Chinese African Cooperation). Established in 2009, the legal forum has been successfully held in Egypt, China, Mauritius, Zimbabwe, Angola and South Africa, which totals six successful forums with gradually improved mechanisms, more and more diversified content, increasingly pragmatic cooperation and continually growing impact. Of particular significance is article 2.4.4 of the Beijing Action Plan (2013-2015) which was adopted

at the fifth ministerial conference of FOCAC, and mentioned that China and Africa "agree to ...an increased cooperation in the fields of... and the mechanism of non-judicial settlement of disputes."

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In 2015, Ministers and Heads of State of 50 African countries and China issued the "Johannesburg Action Plan" in which they committed themselves to establishing CAJAC, the Chinese Africa Joint Arbitration Centre. The initial impetus for CAJAC, and specifically setting out CAJAC Johannesburg, came from the Chinese Law Society which in 2012 contacted the Arbitration Foundation of South Africa to assess whether it might be possible to establish CAJAC's first African centre. In June 2015 this initiative was endorsed by Beijing by way of the Beijing Consensus.

In December 2015, the heads of state of China and 50 African states adopted the "Johannesburg Action Plan". This is a comprehensive document. The forum for Chinese African cooperation adopted the "non judicial resolution of disputes" as a fundamental principle in the investment of China in Africa. At the sixth forum of Chinese African cooperation meeting, the Johannesburg Action Plan had been adopted.

The Forum of Chinese African Cooperation Johannesburg Action Plan (2016-2018) is a far-reaching document. It envisages economic cooperation in the areas of agriculture and food industry, industry partnering, infrastructure development, energy and natural resources, the ocean economy, tourism, trade and finance. In addition, it anticipates social development cooperation in the form of medical care, education and human resources development, exchanges of experience on poverty eradication strategies, science and technology cooperation and knowledge sharing. Further, it foresees cultural cooperation and people to people exchanges. In fact the principles envisaged in the Chinese Africa Cooperation extends to virtually all spheres of social and economic wellbeing.



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The Development of the CAJAC

In the section of the Action Plan devoted to law and justice the signatories thereto agreed to set up the Chinese African Joint Arbitration Centre. The factors which impelled the establishment of CAJAC are obvious:

- China invests heavily in Africa.
- The inevitable conflicts following the vast span of activities envisaged by the Johannesburg action plan created the need for mutual cost-effective and speedy mechanisms for the resolution of commercial and construction disputes.
- In the absence of a forum like CAJAC, parties will have to resort to local courts or arbitrations such as the ICC, the International Court of Arbitration or the London Court of International Arbitration.

Typically parties to the Chinese African Cooperation Initiatives would prefer to enter the CAJAC arbitral process as the parties are entitled to select at least one member of the arbitral panel, and that panel has a neutral independent chair. The parties can then expect to receive a fair hearing; proceedings in a national court where one of the litigants is a national of the state in question might not enjoy the same credibility. In addition, under CAJAC the aim is for matters to be disposed of quickly which is not possible in the national courts. In China, judges and arbitrators are expected to distil the key

issues in a matter and to ask the parties to focus on those. While there may be some cross-examination, it is limited to key issues as identified by the judge or arbitral panel. Proceedings rarely last for more than a day, only evidence strictly necessary to the key issues is presented orally and the emphasis is on the relevant documents. There is however no process of discovery and parties have to put up documents supporting their cases as part of their statement of claim in the reference. Whilst the risk of disputes is inevitable in doing business abroad, the consensus between the Chinese and African parties was that arbitration was the way to go. CAJAC is devised to fill this space. Currently the CAJAC panel includes retired judges of the Constitutional Court including a retired Chief Justice, retired judges from the Supreme Court of Appeal and leading senior advocates.

Arbitration Rules

Cases accepted by CAJAC Shanghai will apply the Shanghai International Economic and Trade Arbitration Commission Arbitration Rules. The Rules incorporate the advanced ideas and practices of other principal international arbitration institutions and stipulate joint appointment of arbitrators by multiple parties, joinder of third party and consolidation of arbitrations which will match the parties’ needs for convenience and efficiency.

Arbitration awards rendered by CAJAC Shanghai and CAJAC Johannesburg will be globally recognised and enforced in accordance with the New York Convention. The Arbitration Foundation of Southern Africa is one of Southern Africa’s leading arbitral institutions specialising in the

resolution of mercantile and commercial disputes. It provides fully administered services including specialised case managers. At any one point it has an active case portfolio of some 350 matters involving disputes with combined quantum run into millions of rands. AFSA deals with disputes throughout Southern Africa.

Model Arbitration Clause

The Model arbitration clause as envisaged by CAJAC Johannesburg and CAJAC Shanghai reads as follows:

“Any dispute arising from or in connection with this Contract shall be submitted to

- *China Africa Joint Arbitration Centre Johannesburg (“CAJAC Johannesburg”)*
- *China Africa Joint Arbitration Centre Shanghai (“CAJAC Shanghai”)*

for final and binding resolution in accordance with its arbitration rules.

The Future

It is intended that CAJAC centres will open in Nairobi, Lagos, the OHADA countries and Egypt. Johannesburg CAJAC opened for business on 14 July 2016.

It is clear that the establishment of CAJAC in Africa will create a shared jurisprudence and provide vital legal service in support of China African trade and investment.