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Reserve judgment

Arbitrating natural resources disputes in Africa

As African states seek to use national laws to protect their natural resources and increase revenue from their development, *Fieldfisher dispute resolution partner, Simon Sloane,* considers the difficulties facing energy companies seeking to protect their investments while respecting the transformational needs of host states.

Africa's capacity to benefit equitably from its own natural resources continues to be one of the main challenges facing many of its most energy-abundant jurisdictions.

While blaming this state of affairs on the old "resource curse" myth is simplistic and unhelpful, it remains the case that nations rich in resources tend to be poorer and less developed than those which are not, with many of the benefits of their exploitation going offshore.

Despite the clear moral case for African countries to profit more from their energy and mineral reserves, legally the picture is complicated.

Much of the cost and risk of extracting these resources tends to be shouldered by foreign investors, who expect to be compensated for their outlays and assume that the terms on which they invested will be protected by local and international laws.

Consequently, any new domestic legislation guaranteeing host countries a "fair" share of the revenues from internationally funded projects is often treated as breaching protections given to foreign investors in bilateral investment treaties (BITs).

There have been numerous incidents of foreign companies successfully bringing arbitrations against African states that have tried to amend investment terms retrospectively, with investors relying on safeguards such as fair and equitable treatment (FET) and non-expropriation rights provided in BITs.

This has led to growing scepticism among African governments of (particularly first and second generation) BITs, as these treaties are often perceived as looking after the interests of foreign investors, to the detriment of states' needs to transform their economies.

Affirmative action

A handful of African countries, including South Africa and Tanzania, have recently cancelled a number of their BITs – a situation that has created tension between the desire to preserve domestic assets for the national benefit and the need to attract foreign investment to fuel economic growth.

Domestic legislation designed to promote equitable ownership include South Africa's black economic empowerment initiatives, which compel 26% of shares in mining assets to be distributed to disadvantaged local people.

In Tanzania, new laws including the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017 and the Natural Wealth and Resources (Permanent

Sovereignty) Act, give the government power to renegotiate contracts with investors on terms more favourable to the state.

Although international arbitration is generally a last resort for resources companies when disputes arise, lately there has been a noticeable increase in requests for arbitration in circumstances where African states have sought to implement alternative local laws.

BIT terms and Western-centric legal principles rarely align with traditional African customary laws and there is a growing unwillingness in many African states to accept foreign rulings over key national assets, which can make the enforcement of an international arbitration award against a state politically challenging.

Since relatively few African court decisions are published, it is hard to tell statistically where many countries are in terms of compliance with international arbitration awards, and how many are resisting enforcement.

There have been some very public rejections of international arbitrators' decisions.

Zimbabwe, for example, has resisted recent efforts to enforce awards made against it in US courts.

Nigerian courts have also refused the local enforcement of a multi-billion dollar London Court of International Arbitration (LCIA) commercial arbitration award against a state-owned entity in favour of foreign investors, notwithstanding that the English courts have upheld the validity of the award (see P&ID Ltd v Federal State of Nigeria).

Yet even in cases where the authority of international arbitrators is accepted, the variety and nature of local laws can cause problems when it comes to implementing awards in African states.

Parallel proceedings

Growing distrust of the international arbitration system among African governments is a considerable problem for foreign investors, especially in the highly litigious energy sector, as there is currently no trusted alternative for resolving disputes.

Historically, arbitration has not been high on the agenda for most African states and relatively few African judges have significant experience of international arbitration.

Efforts are being made to redress this through legal education and there have been moves to establish regional arbitration centres throughout Africa that have the confidence of both states and investors, although these are yet to gain significant traction.

In the meantime, there continue to be serious problems in resolving natural resources project disputes caused by parallel proceedings, where one party will ignore an arbitration clause in a contract and ask for the matter to be addressed in a local court.

In these situations, parties end up straddling one or more proceedings on the same issues, with different tribunals and courts regularly reaching different decisions and with the added hurdle of a party facing competing anti-suit or anti-arbitration injunctions.

Such circumstances are common where at least one partner is foreign and relies on an arbitration clause in a contract or its public international law rights under a BIT, while local parties are more naturally inclined to seek decisions from local judges.

Often, the impasse is caused by local judges who are suspicious of the international arbitration process and are not willing to abdicate their powers to a foreign tribunal.

Pre-empting problems

In many cases, the need for arbitration can be avoided by careful and far-sighted approaches to contract negotiation.

Simply including an arbitration clause in a contract will not automatically prevent the parties ending up in messy disputes being contested simultaneously in domestic and international courts.

Natural resources projects especially will usually involve a complicated series of contracts between international energy companies and one or more domestic counterparts, including government bodies, local investors and contractors.

If a domestic party decides to ignore an arbitration clause and asks a local court to intervene, the foreign party then has to choose whether to seek an injunction and refer the dispute to arbitration, or submit to the local court's jurisdiction.

In these situations, the international partner is likely to have difficulty locally enforcing any award they obtain, if they proceed with the arbitration.

Alternatively, the international party can opt to engage in the local court process which can expose them to the vagaries of an unfamiliar legal system.

Where there is a suite of contracts containing different arbitration clauses, this leaves the parties open to arguments about which arbitration clause governs which dispute and the possibility of multiple proceedings.

Habitually, there is a lack of attention given by lawyers drafting contracts to what are sometimes mandatory laws to protect natural resources.

Rules obliging infrastructure developers to use local contractors on large projects are also frequently ignored.

This failure to respect local laws can lead to litigation in local courts, especially as communities become more empowered to challenge this practice, over issues which should have been addressed at the drafting stage.

While not wholly avoidable, the risk of becoming embroiled in paralysing disagreements can be minimised by careful drafting and fully thinking through how proceedings will work in particular African jurisdictions.

Intra-African arbitration centres

One of the solutions being implemented to improve the perception of international arbitration in African disputes is the establishment of local arbitration centres.

In 2016 alone, there were more than 70 international arbitration centres operating across Africa, with varying degrees of credibility, and more have sprung up since.

The Cairo Regional Centre for International Commercial Arbitration, established in 1979, has been notably successful in attracting Arab and north-Saharan arbitrations.

In Nigeria, the Lagos Court of Arbitration is growing in stature, as are the Kigali International Arbitration Centre (KIAC) in Rwanda and the Ghana Arbitration Centre.

The Casablanca International Mediation and Arbitration Centre (CIMAC) in Morocco and the Mauritius International Arbitration Centre (MIAC), which was previously an offshoot of the LCIA, are also actively seeking to play active roles in resolving African disputes.

China's approach to arbitrating in Africa is also worth paying attention to. The China-Africa Joint Arbitration Centre (CJAC) in Shanghai was specifically set up to deal with infrastructure project disputes, and China is now looking to set up centres with broader mandates in East and West Africa.

The goal of all of these African centres is to regionalise arbitration, so that cases involving precious national assets are dealt with in Africa by African lawyers and arbitrators, with the buy-in of African governments and international investors.

However, until local courts are equipped to play a supportive role in arbitration, it may be hard for these centres to command confidence, especially when there are so many centres competing to hear arbitrations.

Transparency within the local court system also needs to improve, as where there is little or no access to court judgments, the worst assumptions are going to prevail.

International investors need to feel they can trust the integrity of local courts before they can be comfortable with their handling of cases.

The Paris-headquartered International Court of Arbitration (ICA) is pushing to improve the transparency of enforcement, on the grounds that it is important for tribunals and courts to know what other courts are doing, and for the rest of the world to see that key treaties are not being overturned and set aside.

The Organization for the Harmonization of Business Law in Africa (OHADA) is similarly seeking to facilitate a pro-arbitration stance in West Africa.

It is worth noting that suggestions around using institutionally appointed arbitrators, who have the advantage of proven expertise in the area they are arbitrating on, have generally received a cool reception by courts, states and investors.

Stabilisation clauses

The use of stabilisation clauses in contracts as a means for foreign investors to mitigate or manage political risks associated with their project is coming under scrutiny in Africa.

The World Bank and other multi-lateral development organisations favour the deployment of clauses that allow an investor to sue a state if the terms on which they invested change, as a way of increasing investment in Africa and developing economies in general.

But it is becoming increasingly evident that such clauses bind African governments and prevent them from amending local labour and environmental laws or their fiscal regimes, even if such reforms are deemed necessary to transform their societies and enhance domestic economies.

Although many African countries recognise that including stabilisation clauses in a BIT is likely to lead to expensive disputes that state balance sheets can ill afford, the need to attract foreign investment means that most governments are still willing to take the risk.

This is an area that multi-lateral organisations need to review, as it is clear that the current situation does not adequately serve the transformational needs of many African states.

New model treaties

Simultaneously with the growth of local arbitration centres, a raft of regional investment and co-operation agreements have sprung up to foster intra-African state and private investment from home -grown and international sources.

The majority of these agreements contain carve-outs expressly to enable African states to address their transformational needs, including exemptions for disenfranchised communities and the need to protect natural resources, without the fear of incurring liability to foreign investors.

The African Continental Free Trade Agreement (AfCFTA), signed in Kigali in March 2018, is intended to provide a platform for intra-African investment between 27 African Union member states, both at state level and for private investors.

It is also hoped that the AfCFTA will go some way towards dealing with the perception that foreign investors have advantages over local partners under traditional BITs, and with some of the problems of enforcing courts' decisions on disputes.

The New York Convention

One major benefit of international arbitration is the ease of enforcement in foreign jurisdictions which are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

In sub-Saharan Africa, a region which comprises 46 of Africa's 54 countries, many but not all jurisdictions have ratified the New York Convention.

The challenge now will be to ensure that the convention is properly implemented and respected by all signatories.

African governments are also closely following developments in Europe around the Investment Court System as an alternative to international arbitration, for resolving investor disputes in EU member states.

Tackling corruption

Non-governmental organisation Transparency International singles out the global oil and gas industry as one of the business sectors at the greatest risk of corruption, with Africa being a particular hot spot.

While there has been ample evidence of corrupt practices in some jurisdictions, observers should be cautious generalising about Africa, as many African countries are highly ranked as places to do business cleanly and legally.

Corruption is one of the issues at the heart of many governments' dissatisfaction with the international arbitration system, as it smacks of injustice that an investor may be involved in illegal activity, by coercion or by choice, yet still win significant arbitration awards.

There have been a few advances in BITs and model laws that indicate international law is starting to get to grips with the issue.

The Dutch Model BIT published earlier this year allows tribunals to take into account whether there has been corruption when making an award – a development that has been largely welcomed and is likely to be replicated in other BITs around the world.

The Nigeria-Morocco BIT (the Reciprocal Investment Promotion and Investment Agreement) signed in late 2016, which contains a comprehensive anti-corruption provision, is also seen as one of the most progressive new formats of BIT.

The future of African natural resources disputes

Anyone considering making investments in Africa needs to be aware that there are a number of regional treaties to be complied with in order to benefit from investment protections.

There continue to be unresolved questions around enforcement mechanisms and what protections are enforceable through arbitration, especially as countries pull out of BITs.

For users or would-be users of the arbitration system, there are some difficult choices to be made for those who find themselves in the midst of several parallel proceedings.

While disputants may be convinced that they are legally right that arbitration is the way to resolve an issue, parties need to be very certain that there is some kind of enforcement option available to justify the time and expense involved.

Otherwise, disputes can turn into difficult procedural battles between arbitrators and local court proceedings, leading to spiralling costs and project delays, ultimately forcing parties to abandon the case.

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