MACFARLANES

AFRICAN INSIGHTS

DISPUTE RESOLUTION: KNOWING YOUR OPTIONS

A fundamental consideration when entering into a contract is the ease and speed with which a party can enforce its rights. Dispute resolution and governing law clauses provide the essential mechanisms which will enable a party to protect its investment and other contractual rights. For this reason, it is important not to treat these provisions as generic "boilerplate" terms but to tailor them to the specific circumstances of a deal and the parties' commercial objectives.

This, the first of a two part publication, looks at the reasons why arbitration may often be a better choice than litigation in resolving a dispute and at some key international agreements which should be taken into account. A second publication will look in more detail at issues to consider when drafting arbitration agreements.

ARBITRATION OR LITIGATION?

There are a number of considerations which may mean that arbitration is a more attractive option than litigation for parties investing in Sub-Saharan Africa:

- **Enforcement** – In states where the New York Convention applies, or where an award is made in a member state of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) and is to be enforced in another member state (see below), arbitral awards are likely to be much easier to enforce than foreign court judgments, which may require fresh proceedings to be brought in the local courts or may not be recognised at all.
- **Neutrality** – Where the parties are from different countries arbitration avoids the need to select a court system with which one party is more familiar than the other. Furthermore, the parties can either select the arbitrators themselves or specify the process by which they will be selected. This alleviates concerns (whether real or perceived) that judges may prefer the interests of the "local" side or that court proceedings will be the subject of government interference.
- **Expertise** – The ability to control the appointment process also means that it is easier to ensure that arbitrators are selected who have the requisite experience and expertise to determine particular technical or sector-specific issues in dispute, or questions of the laws of "foreign" jurisdictions.
- **Procedural flexibility and party autonomy** – The parties are free to choose the procedural format and rules which apply and so are not bound by any fixed rules of court procedure. Arbitration hearings can ordinarily take place in any jurisdiction.
- **Confidentiality** – Arbitration is a confidential process.
- **Speed** – Although it is an over-generalisation to say that arbitration is always quicker than litigation, this is likely to be the case in many jurisdictions where court processes are subject to delays and inefficiencies.
- **Finality** – Arbitral awards are generally less susceptible to challenge than court decisions, and this greater degree of finality may be attractive to parties. However, it should be remembered that the restrictions on the ability to appeal against the decision of the arbitral tribunal may be a considerable disadvantage if you are on the receiving end of an unfavourable decision.

Arbitration will not be appropriate in every case. In particular, effective arbitration can be difficult in multi-party situations or where there are a number of separate but related agreements, such as a network or chain of contracts. As arbitration is consensual in nature, all the parties need to have contractually agreed to join the same arbitration, which can be difficult to achieve in multiple contracts between different parties. Where it is not achieved it can result in the fragmentation of proceedings with disputes between some parties being arbitrated and others being litigated, or disputes involving the same issues being heard before different arbitral tribunals. In some cases the benefits of being able to resolve disputes between all the parties in one forum will outweigh the advantages of arbitration identified above.

Cost is best regarded as a neutral consideration. In an arbitration, the parties may be able to tailor procedures to the needs of a particular dispute, which can result in significant savings in both time and cost. This, however, will require the co-operation of the parties which will not always be forthcoming once a dispute has arisen. Furthermore, arbitration contains a number of extra costs such as arbitrators' fees and disbursements, charges payable to any relevant arbitral institution and the cost of hiring a room for the hearings and other associated facilities.

THE NEW YORK CONVENTION

The New York Convention provides for a simplified and effective enforcement regime for arbitration awards. There are only limited grounds on which the courts of a New York Convention state can refuse to enforce an arbitral award.

More than half the countries in Sub-Saharan Africa are signatories to the New York Convention, including Kenya, Nigeria, Tanzania, Zambia and Ghana, although Angola, for example, is not a signatory. Some Convention states (e.g. Kenya, Nigeria and Tanzania) will apply the Convention only to recognition and enforcement of awards made in the territory of another Convention state – for awards from other states, enforcement will be dealt with under their general laws and so there is likely to be greater scope for challenge or review.

OHADA

OHADA was established in 1993, with the aim of modernising, standardising and harmonising business law in Africa. It has 17 (mainly, but not exclusively, francophone) members. Under the Uniform Arbitration Act, awards made in OHADA member states will be final and binding in other member states.

BILATERAL INVESTMENT TREATIES

Bilateral investment treaties (BITs) are agreements made between two countries containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territories. For example, they usually guarantee fair and equitable treatment for foreign investors and provide protection from expropriation of assets. The majority of BITs provide for disputes to be referred to arbitration, for example, pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) (which most countries in Sub-Saharan Africa have acceded to).

The advantages of ICSID arbitration include that it operates as a stand-alone self-contained system; the arbitration law of the place of arbitration has no impact on the proceedings and awards are final and binding on the parties and not subject to review by national courts.

ICSID arbitration, therefore, provides an attractive option for arbitration of disputes with state entities where a BIT is in place between the home state of the investor and the host state and the investment in question qualifies under the applicable BIT. In certain circumstances, claims under BITs for breach of treaty obligations may be available in addition and separate to any contractual protections or dispute resolution procedures.

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Please see overleaf for examples of our work.

Macfarlanes has extensive experience in Africa, having advised on transactions in more than 30 countries across a range of sectors and a number of disciplines including:

- public and private M&A;
- joint ventures;
- project finance;
- private equity;
- litigation and dispute resolution;
- commercial contracts; and
- fund formation.

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Recent examples of our work include advising:

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