The Enforcement of Arbitral Awards in Sub-Saharan Africa

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Introduction

The attractiveness of sub-Saharan Africa to investors has made it one of the fastest growing regions in the world. Whilst economic growth in the region has slowed in recent years, it is projected to grow at a rate of 3% in 2016, 4% in 2017 and 5% in 2021. This growth, combined with an economic slowdown in other regions, will further attract the attention of investors globally with an increase in foreign investment likely to lead to an increase in commercial disputes.

The ability to enforce an arbitral award is an important factor for investors when considering potential investment opportunities. Sub-Saharan Africa is a very diverse region, with a wide variety of different legal systems (including French, English and Portuguese based legal systems) and legal traditions (including common, civil and sharia law). These differences will concern many investors and international arbitration offers comfort and security by allowing investors to enforce their rights in a neutral forum. Across sub-Saharan Africa a number of arbitration conventions, laws and treaties exist.

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The main enforcement regime for arbitral awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**"the New York Convention"**). Of the 48 sub-Saharan countries, 30 are signatories to the New York Convention which leaves member states to decide the best way to implement it into national law. A majority of sub-Saharan African countries have opted to implement international arbitration model laws into national law, including the UNCITRAL Model Law on International and Commercial Arbitration (**"the Model Law"**) and the OHADA Uniform Arbitration Act (**"the Uniform Act"**).

These model laws merely provide a framework for modern arbitration laws and are separate from the New York Convention, with many non-signatories having also adopted them. Whilst some signatory states to the New York Convention have opted to implement their own domestic arbitration laws, for many, the Model Law and Uniform Act offer modern arbitration laws which are internationally recognised and can readily be implemented into their own domestic arbitration regime.

Also in sub-Saharan Africa there are a considerable number of bilateral (**"BITs"**), multilateral (**"MITs"**) and regional investment treaties which should also be considered. These are explained in more detail below.

The New York Convention

Enforcement in signatory countries

The convention requires the courts of signatory states to give effect to arbitration agreements and mutually recognise and enforce arbitral awards made in other contracting states. Whilst the number of signatories is growing, with Comoros ratifying the convention in 2015 and Angola currently going through the ratification process, almost a third of sub-Saharan African countries have not yet signed up.

Each signatory must implement the convention through national legislation. In sub-Saharan Africa this implementation has typically been achieved via one of the three following methods:

- Model Law
- Uniform Act
- Domestic legislation

a) The Model Law

Of the nine countries in sub-Saharan Africa which have adopted modern arbitration legislation based on or substantially similar to the Model Law, all have ratified the New York Convention (namely Kenya, Madagascar, Mauritius, Mozambique, Nigeria, Rwanda, Uganda, Zambia and Zimbabwe). One difficulty with implementation via this method is that some countries have different interpretations of the New York Convention public policy exception, whereby enforcement of an arbitral award is refused if it is deemed to conflict with the public policy of the jurisdiction where enforcement is sought. For example, Rwanda and Mozambique have given the exception much wider application than Zimbabwe which has defined and applied its use more narrowly.

b) The Uniform Act

The OHADA Treaty introduced the Uniform Act in an attempt to harmonise business law in Africa. Like the Model Law, the Uniform Act is separate from the New York Convention and only 11 of the 17 member states are signatories to the New York Convention (namely Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, the Democratic Republic of Congo (DRC), Ivory Coast, Gabon, Guinea, Niger and Senegal). The other 6 member states have adopted the Uniform Act but not ratified the New York Convention.

c) Domestic legislation

There are a number of countries in sub-Saharan Africa that are contracting states to the New York Convention but have not adopted modern arbitration laws. The arbitration laws in Botswana, Lesotho, South Africa, Swaziland, Namibia and Malawi are wholly or substantially based on repealed UK arbitration laws dating back to the 1950's. It is suggested that retention of these old laws means that they are in some aspects not fit for purpose and often their provisions are inconsistent with the provisions of the New York Convention.

Enforcement in non-signatory countries

Approaching half of the countries in sub-Sahara Africa (18 out of 48) are not signatories to the New York Convention. As mentioned above some of these countries have adopted modern arbitration laws such as the Uniform Act. However because the New York Convention has not been ratified by these countries there is no guarantee of reciprocal recognition and enforcement of foreign arbitral awards.

BITs/ MITs and regional investment treaties

In sub-Saharan Africa there are currently over 200 BITs and MITs which offer binding arbitration and the guarantee of fair and equitable treatment and compensation. This combined with a large number of regional economic treaties, offer some comfort to investors looking to invest in these countries, particularly in the absence of the New York Convention.

a) Bilateral/ Multilateral Treaties

An important example of these would be the multilateral treaty between 41 out of the 48 countries of sub-Saharan Africa who are members of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**"ICSID"**). ICSID provides a means of resolving investment disputes outside of the national court system. It compels other member states to enforce an ICSID judgment as if it were a judgment of their own national courts. Whilst there are instances of non-compliance, in circumstances involving sovereign/ diplomatic immunity and where assets or individuals are located in multiple jurisdictions, compliance amongst member states is usually high.

b) Regional Treaties

There are a number of regional treaties that may provide an adjudicative forum for investors within which disputes are decided and awards are enforced. Depending on which regional treaty is used, arbitral rights issued pursuant to these treaties are usually enforced under ICSID or pursuant to the national legislation. The main regional treaties are as follows:

- The Common Market for Eastern and Southern Africa Treaty (**"COMESA"**) has 18 member states in sub-Saharan Africa (including Burundi, Comoros, Djibouti, DRC, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Zambia, Seychelles, Sudan, South Sudan, Swaziland, Uganda and Zimbabwe). Under COMESA an investor that is resident in one member state can bring an action against an entity in another member state.

- The South African Development Community Protocol on Finance and Investment (**"SADC"**) consists of 15 members (namely Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe). SADC allows investors to bring claims directly against entities in other member states.

- The Economic Community of West African States Treaty (**"ECOWAS"**) has 15 member states (namely Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo). It is worth noting that the treaty does not include a prescribed enforcement procedure and therefore depends on the legal system in the jurisdiction where enforcement is sought.

Summary

The enforcement of arbitral awards in sub-Saharan Africa poses a number of issues and risks to investors, including the following:

- Non-signatories to international conventions – not many more than half of sub-Saharan African countries have ratified the New York Convention and many have not adopted modern arbitration laws. This makes enforcement of arbitral awards difficult in many countries in the region.

- Length of time – the amount of time required to enforce an arbitral award varies significantly between countries. In some cases enforcement proceedings can last for many years before a final resolution is reached.

- Cost – the cost of enforcing an arbitral award can vary widely between jurisdictions.

- Political factors – in some countries there is risk that courts will be reluctant to enforce arbitral awards which are against the interests of the government.

Ultimately the level of risk posed by each of the above depends on the type of award being enforced, the individual country and the legal systems in place where enforcement is sought and whether the country is a signatory to any international conventions or treaties