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HOW TO: SETTLE A COMMERCIAL DISPUTE IN AFRICA

By Kwadwo Sarkodie

For any investor, an overseas commercial dispute will bring challenges and Africa is no exception.

In many African jurisdictions, the local courts, sometimes grappling with case backlogs and limited judicial experience of complex commercial issues, can struggle to resolve disputes in a timely and cost-effective manner. This may help to explain why arbitration in Africa is growing both in popularity and sophistication.

Arbitration offers a number of benefits, including confidentiality, the possibility of selecting a third country as the seat of arbitration, the option to choose the substantive and procedural law and the prospect of widespread enforceability under the New York Convention. All of these factors make arbitration particularly suited to cross-border investments.

Legislative developments in Africa

Recognising the value of a legislative framework to support arbitration, and thereby encourage investment, over recent years countries such as Ghana and Gambia have enacted new arbitration legislation.

A number of countries (including Rwanda, Uganda and Zambia) have adopted legislation based on the UNCITRAL Model Law. In the OHADA grouping of 17 (mainly) French-speaking African countries, a Uniform Act on Arbitration Law provides a single commonly-applicable law governing the upholding of arbitration agreements and the enforcement of awards.

The number of African countries party to the New York Convention is also growing, with the Democratic Republic of Congo and Burundi acceding within the past 12 months.

In addition, local arbitration centres, such as those in Nigeria, Rwanda and Mauritius, are becoming increasingly active.

Practical steps

Despite the above developments, arbitration in Africa is rarely straightforward, and caution is advised.

Consideration of arbitration should begin at the very outset of contractual negotiations. This allows the best prospect of structuring the contractual framework so as to allow disputes, should they arise, to be dealt with effectively and efficiently.

With regard to enforcement, it is necessary to be clear as to where a counterparty's assets are held, and the availability of measures to enforce an award against such assets – i.e. are assets held in a jurisdiction which is party to the New York Convention?

Further, court support for arbitral proceedings may be necessary, and the approach of local courts to enforcement must therefore be considered.

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The level of support for arbitration varies, but an overall trend of pro-arbitration court decisions is apparent in a number of African jurisdictions. Nevertheless, significant uncertainty remains in terms of how local courts may respond to particular circumstances.

When a dispute becomes apparent, as well as identifying the applicable law and whether there is an arbitration clause, there is no substitute for obtaining advice from legal practitioners familiar with the relevant jurisdiction.

There is a cultural preference for negotiated settlement in many African jurisdictions, and so this should be explored, even if in parallel with procedural steps to protect and pursue an investor's rights and entitlement. Things may move slowly, so one must be prepared to be patient.

Bilateral investment treaties are a further consideration. These can offer a means of securing rights by way of (investor-state) arbitration in respect of contracts with state entities, provided that an appropriate treaty is in place between the home state of the investor and the host state, and the transaction in question constitutes a qualifying investment.

Conclusions

When resolving disputes in Africa, hurdles will undoubtedly be encountered and the identification and management of risk is key.

Arbitration is central among the range of measures by which risks, hurdles and challenges can be navigated. As such, the increasing familiarity with, and support for, arbitration in many countries across the African continent is good news for investors.