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INTERNATIONAL DISPUTE RESOLUTION IN AFRICA

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DISPUTE RESOLUTION

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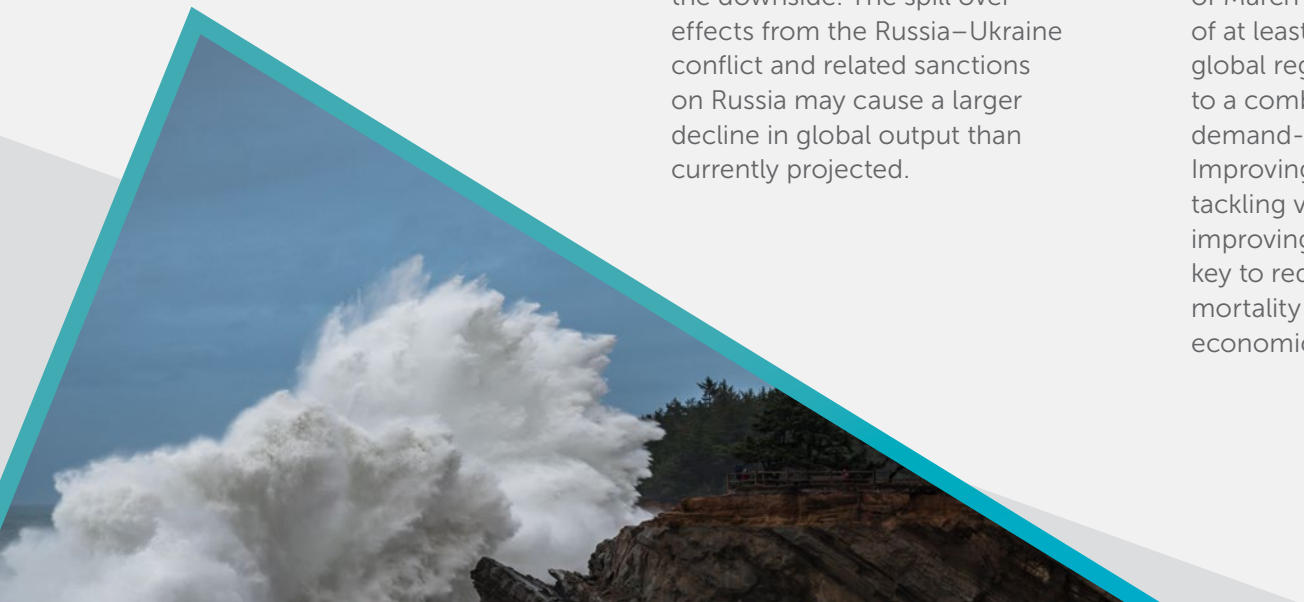
INDEX

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Foreword

Disputes are inevitable, especially in commercial and investor relations. Although it is important to employ dispute prevention methods, when these methods fail it becomes important to resolve and manage the resolution of disputes in an effective and efficient manner at the least cost to the parties.



Intra-Africa investment and trade over the past two years has had a severe beating. The COVID-19 pandemic and related lockdowns, trade restrictions and supply chain disruptions have caused a dramatic fall in global foreign direct investment (FDI), bringing FDI flows back to the level seen in 2005. The African Development Bank's (AfDB) recent report on the outlook for 2022 and 2023 African growth and development highlights several concerns:

- Africa's growth outlook is highly uncertain, with risks tilting to the downside. The spill over effects from the Russia–Ukraine conflict and related sanctions on Russia may cause a larger decline in global output than currently projected.
- Sovereign debt remains a threat to economic recovery despite recent debt relief initiatives. Although Africa's debt-to-GDP ratio is estimated to stabilize around 70% in 2021 and 2022, from 71.4% in 2020, thanks to growth recovery and debt relief measures, it will remain above pre-pandemic levels.
- Africa's low vaccination rates are constraining faster economic recovery and increasing the health impact of COVID-19. These rates – 15.3% of people were fully vaccinated by the end of March 2022 against a target of at least 60% in most other global regions – are attributed to a combination of supply- and demand-side impediments. Improving vaccination rates by tackling vaccine hesitancy and improving vaccine supply is key to reducing infections and mortality and to quickening economic recovery.
- Despite a rebound in growth, the impacts of the COVID-19 pandemic on lives and livelihoods in Africa continued in 2021. The AfDB estimates that about 30 million Africans were pushed into extreme poverty in 2021 and that about 22 million jobs were lost in African countries the same year due to the pandemic. These outcomes are likely to continue in 2022 and 2023. When the prolonged effect of economic disruptions stemming from the Russia–Ukraine conflict is accounted for, the number of additional Africans who could be pushed into extreme poverty is estimated to be 1.8 million in 2022 and 2.1 million in 2023.

Foreword CONTINUED

- Africa is the region most affected by climate shocks: five of the 10 most affected countries in 2019 are on the continent. In just 2020 and 2021, 131 extreme-weather, climate change related disasters were recorded on the continent: 99 floods, 16 storms, 14 droughts, and two wildfires. Climate change, therefore, poses substantial risks to African economies, threatens the lives and livelihoods of millions of people, and could undo hard-won progress in achieving some of the key targets of the Sustainable Development Goals, the African Union Agenda 2063, and the AfDB's High-5s. Policies to support post-pandemic economic recovery for Africa must include initiatives to enhance the resilience of the continent by mitigating climate-related shocks that contribute to output fluctuations and poverty.

The World Investment Report 2021 also highlights that foreign direct investment flows to Africa declined by 16% in 2020, to $40 billion – a level last seen 15 years ago – as the pandemic continued to have a persistent and multifaceted negative impact on cross-border investment globally and regionally. Greenfield project announcements, key to industrialization prospects in the region, dropped by 62% to $29 billion, while international project finance plummeted by 74% to $32 billion. Cross-border M&As fell by 45% to $3.2 billion. The FDI downturn was most severe in resource dependent economies because of both low prices of and dampened demand for energy commodities. FDI to East Africa dropped to $6.5 billion, a 16% decline from 2019. Ethiopia, which accounts for more than one-third of foreign investment to East Africa, registered a 6% reduction in inflows to $2.4 billion. FDI to Southern Africa decreased by 16% to $4.3 billion even as the repatriation of capital by multinational enterprises in Angola slowed down. Mozambique and South Africa accounted for most inflows in Southern Africa.

With several factors having an impact on intra-Africa trade and investment its important businesses and/or governments alike to stay alert to the risks associated with investments.

This is the first edition of our quarterly International dispute resolution in Africa bulletin. It covers commentary on cross-border and intra-Africa trade and investment dispute resolution on the continent. This cuts across legislative changes and issues around recognition and enforcement of judgments and arbitral awards in Africa with a particular focus in both Southern and Eastern Africa.

In this bulletin:

- **Vincent Manko and Jonathan Sive** present a critical analysis of multi-jurisdictional dispute resolution forums in the context of the ensuing dispute relating to the Lesotho Highlands Water Project in Lesotho. This dispute has intrigued regional and international investment communities for more than 30 years and has received the attention of the courts in Lesotho, South Africa and Singapore, and has also made its way through arbitral proceedings in Lesotho, Singapore and Mauritius.
- **Belinda Scriba and Desmond Odhiambo** provide a timely assessment of settlements reached during mediation and the perceived lack of enforcement with reference to the Singapore Convention on Mediation. Interestingly, they note that mediation is still the least explored method of alternative dispute resolution in Southern Africa even though it is now gaining traction.

Foreword CONTINUED

- **Jackwell Feris** looks at the highlights of the flagship rules of the International Centre for the Settlement of Investment Disputes (ICSID) coming into effect on 1 July 2022. The key attributes of the amended rules touch on issues such as third-party funding, transparency, expedited procedures and mediation, which bodes well for ICSID, arguably the most important system of investor-state dispute settlement.
- **Jackwell Feris and Mukelwe Mthembu** give a useful summary of Nigeria's incoming Arbitration and Mediation Bill, 2022 which provides for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation and expressly codifies the recognition of foreign arbitral awards in Nigeria.
- **Vincent Manko** considers the inevitable cessation of investor-state dispute settlement in the Southern African Development Community (SADC) region with a detailed consideration of the SADC Protocol on Finance and Investment and the SADC Model BIT. He comments on the fundamental differences between these instructions insofar as resolution of investor disputes is concerned – which does not bode well for harmonisation and in some ways may defeat the objective of having a single, wide investment regime under SADC. He also looks at the upcoming African Continental Free Trade Area (AfCFTA) Investment Protocol.
- **Jackwell Feris and Desmond Odhiambo** consider the substantive and procedural issues pertaining to dispute settlements under the AfCFTA and note that the AfCFTA will hopefully change the attitude of member states towards the resolution of international and regional trade disputes and make a real contribution to better trade governance in Africa.

We hope you find the bulletin informative. Please do not hesitate to reach out to our International Dispute Resolution specialists who are available to assist and guide you.

JACKWELL FERIS, VINCENT MANKO, DESMOND ODHIAMBO AND BELINDA SCRIBA

A 30-year-old brawl in the kingdom in the sky

A land of mountains aptly referred to as a "*kingdom in the sky*", Lesotho is the only country in the world which has all its land lying at altitudes in excess of 1,500m above sea-level; it is a land of heights and extremes,. These extremes formed the basis of the Supreme Court of Appeal of South Africa's recent judgment in Trustees for the time being of the *Burmilla Trust and Another v President of the RSA and Another* (64/2021) [2022] ZASCA 22; [2022] 2 All SA 412 (SCA) (1 March 2022). This is the latest chapter in a saga that has intrigued the regional and international investment community for over 30 years, capturing the imagination and attention of courts in Lesotho, South Africa and Singapore and making its way through arbitral proceedings in Lesotho, Singapore and Mauritius. While the facts of this matter provide for interesting reading, it is the interaction between the different dispute resolution forums that deems this case worthy of assessment. This case and its convoluted history, the facts of which are outlined in part below, demonstrate the increasing need for cohesive and efficient international and regional dispute resolution forums.

BACKGROUND

Lesotho has abundant water resources that exceed its internal requirements. In 1986, it embarked on the Lesotho Highlands Water Project, a large-scale commercial joint venture with South Africa, which entailed the diversion of water from the Orange Senqu River in Lesotho to South Africa. In exchange, Lesotho would receive royalties for the water and would also be able to generate hydroelectricity. During 1988, construction operations by the Lesotho Highlands Development Authority (Authority), a Lesotho statutory body established pursuant to the treaty with South Africa, began in the Rampai area of Lesotho.

In 1987, following the project's initiation, Swissborourgh Diamond Mines (Pty) Limited submitted applications for prospecting and mining leases in five regions in Lesotho: Matsoku, Motete, Orange, Patiseng/Khubelu and Rampai. While these applications were approved in 1988, the water project continued, and it soon became clear that the area approved for mining would largely be submerged as a result of the project. Swissborough thus held mining leases in regions where mining would soon become impossible. To avoid compensating Swissborough for effectively expropriating the leased land, the Government of Lesotho attempted to revoke the leases.

Round 1: The Courts of Lesotho

In 1991, aggrieved by the purported cancellation of the mining leases, Swissborough and its related entities commenced court proceedings in Lesotho to interdict the cancellation. They were successful in obtaining an interim interdict from the High Court of Lesotho requiring the cessation of the water project in the Rampai area. Faced with the consequences of having granted competing rights to Swissborough and the Authority as well as a potential breach of certain treaty obligations, Lesotho took

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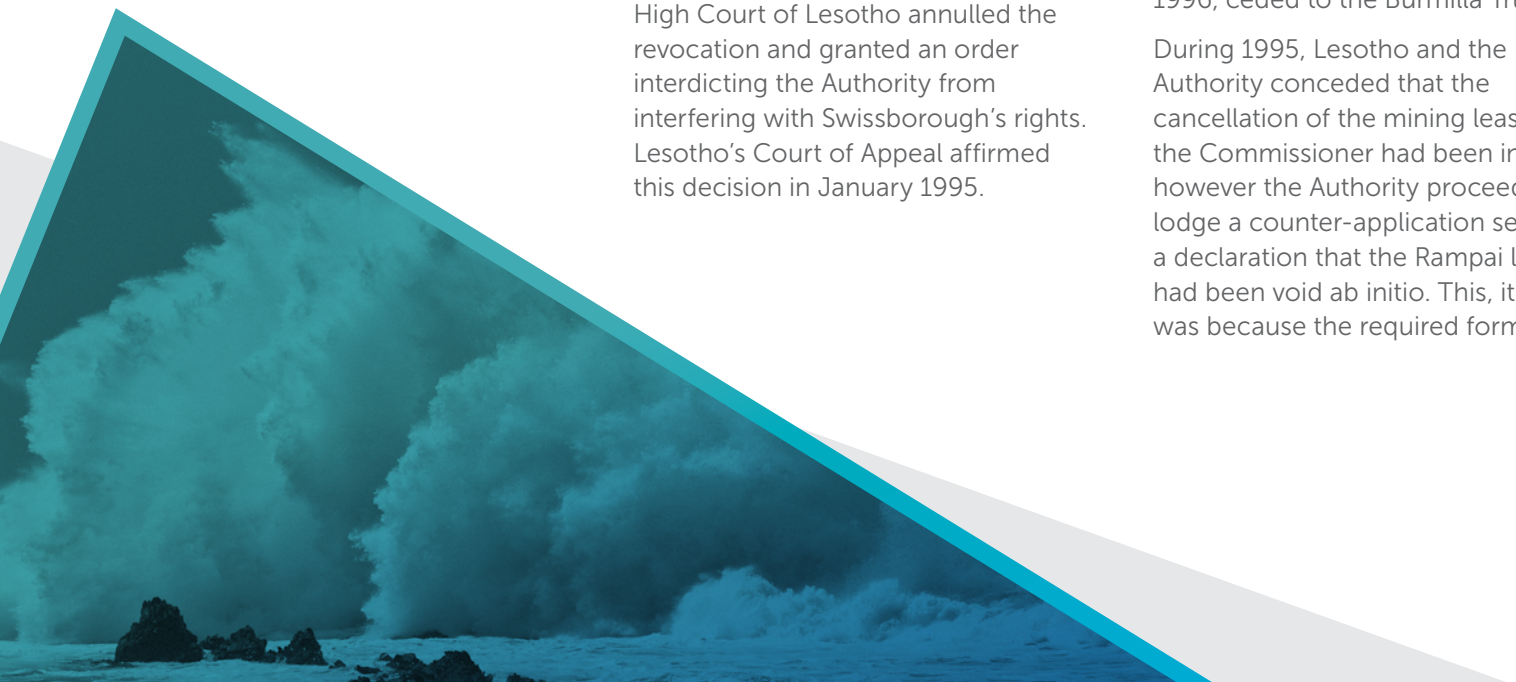

several steps which its courts found to be unlawful. Two of these steps are relevant when assessing this case's progression through the various legal systems.

Firstly, the Commissioner of Mines (Commissioner) cancelled Swissborough's mining leases. The High Court of Lesotho, however, set aside (on an interim basis) this cancellation and issued an interim interdict preventing the continuation of the dam's construction.

Secondly, the Commissioner issued an order purporting to revoke Swissborough's mining leases. The High Court of Lesotho annulled the revocation and granted an order interdicting the Authority from interfering with Swissborough's rights. Lesotho's Court of Appeal affirmed this decision in January 1995.

The Rampai lease

Faced with the revocation order, Swissborough regarded Lesotho's denial of the validity of the leases as a repudiation of contract, which repudiation they subsequently accepted, thereby ending any contractual relationship between the parties. The claimants did not, however, cancel the Rampai lease and in 1993 they instituted action for damages amounting to R930 million as well as an additional claim of R15 million in respect of physical damage to plant and equipment. These claims were, in the period between 1994 and 1996, ceded to the Burmilla Trust.

During 1995, Lesotho and the Authority conceded that the cancellation of the mining leases by the Commissioner had been invalid, however the Authority proceeded to lodge a counter-application seeking a declaration that the Rampai lease had been void ab initio. This, it argued, was because the required formalities had not been followed. The court consequently set the cancellation aside and referred the validity issue to oral evidence. This led to a 58-day trial in which the Rampai lease was determined to be void ab initio. The claimant's appeal to Lesotho's Court of Appeal was dismissed in 2000 for the following reasons:

- according to Lesotho's customary law, all land belongs to the Basotho Nation and this principle is entrenched in the Lesotho Constitution; and
- following the promulgation of the Lesotho Mining Rights Act of 1967 (under which the mineral leases were granted) any granting of rights in relation to land requires the consent of the relevant chiefs. The evidence presented had established that no consent had been sought or granted and the Rampai lease was accordingly determined to be void.

A 30-year-old brawl in the kingdom in the sky

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Round 2: Diplomatic Protection and the Courts of South Africa

Between 2000 and 2007, the claimants requested the Government of South Africa to exercise diplomatic protection for their investments in Lesotho. The South African Government, however, declined to do so, resulting in an unsuccessful challenge in the South African courts, concluding in the Supreme Court of Appeal in 2007.

Round 3: Before the SADC Tribunal

Undeterred, and pursuant to Article 15 of the South African Development Community's (SADC) Tribunal Protocol, the claimants commenced proceedings in 2009 against Lesotho before the SADC Tribunal where they sought damages arising from the alleged expropriation of the mining leases. The claimants also claimed damages arising from Lesotho's alleged violations of Articles 4(c) and 6 of the SADC Treaty.

Unfortunately for the claimants, the SADC Summit dissolved the existing SADC Tribunal in 2012 and negotiated a new protocol limiting the tribunal's authority in the adjudication of inter-state disputes. This resulted in the suspension of all claims pending before the SADC Tribunal. The claimants were thus left without a forum to pursue their claim and in 2015, the SADC Summit approved a proposal that *"each member state of the SADC may decide on an alternative forum for the resolution of a SADC Tribunal pending case of which that member state has been named a respondent"*. Lesotho, however, failed to take steps to establish any such alterative forum.

Round 4: Permanent Court of Arbitration in Singapore

Undiscouraged, in 2012 the claimants took their fight to the Permanent Court of Arbitration (PCA) seated in Singapore under Arbitration Rules of the

A 30-year-old brawl in the kingdom in the sky

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United Nations Commission on International Trade Law (UNCITRAL) pursuant to Article 28 of Annex 1 to SADC's Protocol on Finance and Investment (Investment Protocol). In 2016, by a majority of three to one, the PCA found that it had authority to hear and determine the claims. On the merits, the majority found that:

- Lesotho breached Articles 14 and 15 of the Investment Protocol by unilaterally withdrawing its consent to the SADC Tribunal;
- Lesotho breached Article 6(1) of Annex 1 by failing to accord fair and equitable treatment to the claimants and their investment;
- Lesotho breached Article 27 of Annex 1 by failing to protect the claimants' right of access to the SADC Tribunal, which was a judicial tribunal competent under Lesotho's laws, to redress the grievances in relation to matters concerning the admitted investment; and
- Lesotho breached Articles 4(c) and 6(1) of the SADC Treaty by failing to uphold the rule of law.

The PCA ordered that a new tribunal be established to determine the claims that were before the SADC Tribunal. The new tribunal was to be seated in Mauritius (unless the parties agreed on another seat) and would comprise of three independent arbitrators who were nationals of SADC member states. The new tribunal would have the same authority that the SADC Tribunal had in 2009 when the dispute was lodged. The arbitration would be administered by the PCA (unless the parties agreed otherwise) under the UNCITRAL Arbitration Rules, save that the tribunal was also to take into account the SADC Tribunal Protocol and the applicable rules.

Importantly, the dissenting party reasoned that the PCA Tribunal lacked jurisdiction to entertain the dispute. This was because the dispute, it was argued, should have been characterised as an expropriation dispute, which pre-dated the entry into force of the Investment Protocol, rather than a dispute involving the shuttering of the SADC Tribunal. It further reasoned that the claimants had not exhausted all local remedies as required by Article 28(1) of Annex 1 prior to commencing the arbitration. In particular, they had not pursued an aquilian action to seek compensation for economic loss caused by Lesotho's participation in the shuttering of the SADC Tribunal.

Round 5: The Courts of Singapore

In 2016, Lesotho succeeded in an application to review and set aside the PCA's award in Singapore's High Court. The claimants' appeal to Singapore's Court of Appeal was unsuccessful. In essence, the Court of Appeal held that:

- the dispute fell outside the scope of an arbitration clause and as such Article 34(2)(a)(iii) of the UNCITRAL Model Law allows the award to be set aside;
- Lesotho was not bound to accept the jurisdiction of the PCA Tribunal and therefore the PCA Tribunal did not have jurisdiction over the claim; and
- the claimants had not exhausted local remedies before bringing the arbitral claim as required.

A 30-year-old brawl in the kingdom in the sky

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The claimants had once again been stumped by the unclear and overlapping jurisdictions of the various international and regional dispute resolution forums. The results of this round appear to have deprived the claimants of their ability to be compensated for an unlawfully expropriated investment. The situation which unfolded at this stage is concerning as Lesotho participated in the process to shut down the SADC Tribunal, a process which resulted in the need to find a new dispute resolution forum. This arguably left the claimants without recourse. It does, however, seem that adherence to fundamental principles of international jurisdiction would not allow this.

Round 6: Back to the South African Courts

In what turned out to be a complication for the South African Government, the Law Society of South Africa and six other applicants, who were landowners in Zimbabwe, launched an application in the High Court, challenging the decision to suspend the operations of the SADC Tribunal insofar as that decision relates to the role of the South African President. The High Court readily declared the conduct of the President unconstitutional, and the matter went to the Constitutional Court on confirmation proceedings.

In a refreshingly disruptive judgment handed down in 2018, and one that can be described a revival of the SADC Tribunal by South African courts (at least in theory), the Constitutional Court held that in disbanding the SADC Tribunal and purporting to replace it with a weaker forum (an act which was in effect contrary to the provisions of the SADC Treaty) the SADC Summit had acted unlawfully and irrationally. Consequentially, the South African President's participation in the decision-making processes as well as his decision to suspend the operations of the SADC Tribunal, together with his signature on the 2014 Protocol on the SADC Tribunal, were declared unconstitutional, unlawful and irrational. The court ordered the President to withdraw his signature from the 2014 Tribunal Protocol.

In 2019, the claimants issued summons against the President and the Government of South Africa in the High Court for payment of damages in the total sum of approximately R800 million plus interest and costs

A 30-year-old brawl in the kingdom in the sky

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for its role in the drastic curtailment of jurisdiction and capacity of the SADC Tribunal, a curtailment which had deprived the claimants of a dispute resolution forum for decades. Taking a tactical point, however, the President and the Government of South Africa excepted to the claims, alleging that a cause of action had not been disclosed. The High Court upheld most of the grounds of exception, effectively extinguishing each of the claims.

Again unsatisfied with the outcome, the claimants approached South Africa's Supreme Court of Appeal. By a majority of three to two, the court upheld the appeal in part and held that the exception should have been dismissed in respect of claim A, which was the value of the Rampai lease, and claim C, which was the costs of the SADC claim. The appeal was dismissed in respect of clam B being for moral damages and claims D and E for wasted subsequent legal costs.

COMMENT

The 30-year brawl ensuing in the kingdom in the sky provides a vivid illustration of the application of international investment law in practice and the consideration investors should make at each stage of a transaction. The jurisdictional abyss that the claimants had to navigate in order to, at the very least, enforce their right to access an efficient dispute resolution forum, is clear. As international trade increases, regional collaboration and the clear demarcation of jurisdictions for the efficient and just resolution of disputes are becoming all the more important. As Burmilla Trust was decided at an exception stage, we can rest assured that we have not seen the end of this saga. At the very least, the claimants' tenacity and endurance up to now is to be admired.

VINCENT MANKO AND
JONATHAN SIVE

Accountability when settlement is reached during mediation

Mediation is the least explored method of alternative dispute resolution (ADR) in Southern Africa. For various reasons it is considered (wrongly, in our view) a mostly futile exercise. One of the reasons parties tend to shy away from mediation is because it is viewed as toothless – in that any settlement agreement is not immediately executable should one or the other breach the terms of the agreement. Whereas with arbitration and litigation there is an award or an order obliging the parties to comply, failing which there are court sanctioned consequences.

However, for various reasons African mediation is gaining traction, while the concerns surrounding mediation are also being addressed at international levels. The most poignant reasons for the increase in mediation are that (i) many African jurisdictions are adopting court sanctioned mediation; and/or (ii) for commercial reasons it is not viable for the parties to resolve their disputes through either the acrimonious process of litigation or arbitration.

In many countries lawmakers are recognising that mediation is a useful ADR tool. It is, amongst other things, the least harmful for party relationships. If successful, it is much more efficient than litigation and arbitration – saving not only money, but also time, and the dispute is settled by the parties themselves and not a third-party arbitrator or judicial officer. It also eases the burden placed on courts by reducing the number of disputes they need to adjudicate.

These are just some of the reasons for an increasing number of jurisdictions writing court-annexed mediation into law. For example, South Africa, Lesotho, Namibia, Zambia, Kenya, Uganda, Tanzania and Rwanda have implemented court-annexed mediation. Parties are either encouraged or compelled to appear before a mediator. It is, however, not mandatory that a settlement is reached at the end of the process.

Accountability when settlement is reached during mediation

CONTINUED

MAKING AGREEMENTS AN ORDER OF COURT

Court-annexed mediation has, to a large extent, alleviated the concern regarding the lack of execution in terms of mediated settlements. Most countries with court-annexed mediation allow for settlement agreements reached through mediation to be made an order of court, in turn allowing for immediate execution in the case of parties breaching the terms of settlement.

In certain jurisdictions it is also possible, even if settlement is reached through private mediation (not court-annexed), to make the settlement agreement an order of court. In such jurisdictions the terms of the settlement agreement should contain a provision allowing the parties to make application to court to specifically obtain this order.

When it comes to international commercial disputes, the most revolutionary aid to encouraging parties to consider mediation is the United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation (otherwise known as the Singapore Convention on Mediation) (Convention), introduced by the UN Commission on International Trade Law.

DISPUTES COVERED BY THE CONVENTION

The Convention provides for the recognition and enforcement of settlement agreements reached through mediation. However, there is a clear restriction as to which mediated disputes are covered by the Convention if ratified by signatory states. The dispute must be both international and commercial in nature.

A mediated settlement agreement is recognised by the Convention as being international in nature if:

- at least two parties to the settlement agreement are in places of business in different countries; or
- the country in which the parties to the settlement agreement have their places of business is different from:
  - either the country in which a substantial part of the obligations under the settlement agreement are to be performed; or
  - the country with which the subject matter of the settlement agreement is mostly connected.

A settlement agreement is recognised as being commercial in nature for so long as it does not resolve disputes:

- arising from transactions between one party for a personal, family or household reasons; and/or
- relating to family, inheritance or employment law.

Enforcement shall be in accordance with the rules and procedures governing the settlement agreement and under such conditions as prescribed by the Convention.

Accountability when settlement is reached during mediation

CONTINUED

RATIFICATION

In most instances, like the 1958 New York Convention for Arbitration, countries ratifying the Convention shall most likely prescribe that the settlement agreement can be made an order of court, and thereby become executable.

This Convention therefore resolves one of the major concerns parties would have had in referring their international commercial disputes to mediation – lack of enforcement.

Setting aside all the "*softer*" reasons for considering mediation (e.g. rescuing relationships), parties now, in most instances, should have a mechanism to ensure that mediated settlements can be enforced if breached – whether in a domestic, private, commercial and/or international dispute.

Unfortunately, only 13 African countries, and only Eswatini in Southern Africa, have signed the Convention to date, all of which have yet to ratify and adopt it into law. Hopefully this will increase once the shock-waves of the COVID-19 pandemic and the Russia–Ukraine war settle.

Considering the ramifications both of these events have had and will continue to have on commercial contractual relationships across Africa, there is an increased need for mechanisms to be put in place for parties to settle disputes outside the realms of litigation and arbitration. Now, more than ever, procedures and systems are required to allow parties to settle their disputes (created by circumstances often beyond their control) in a less litigious environment. The Convention is precisely the tool to allow this, and governments are encouraged to consider, sign and ratify the Convention as soon as possible.

BELINDA SCRIBA AND
DESMOND ODHIAMBO

Investor-state dispute settlement in the SADC region

There is no doubt that trade and investment are the two fundamental pillars of international economic relations. The Southern African Development Community (SADC) has put a number of policies and structures in place that aim to deepen integration in the region. One such measure is the Protocol on Finance and Investment (Protocol) which was signed on 18 August 2006 and came into effect on 16 April 2010. The Protocol aims to foster investment in the region and outlines SADC's policy on investment, requiring member states to enact strategies to attract investors and facilitate entrepreneurship among their populations. SADC member states are encouraged to implement legislation that creates a favourable environment for investment, such as tax incentives that ease financial burdens for private firms seeking to invest in the region. Annex 1 to the Protocol was amended in 2016 following criticism in the SADC region due to the perception that it failed to adequately balance investor protection and regulatory autonomy of host states and contained investment protection standards which contradict the recommendations in the SADC Model Bilateral Investment Treaty Template (Model BIT) of 2012.

The settlement of investor-state disputes is the gateway for the investment arbitration case between an investor and a state. This mechanism has, however, been decreasing in popularity in Africa due to concerns over the impartiality of arbitrators and the subjection of a sovereign state on equal footing with an individual person. This article therefore considers the settlement of investment disputes under both the Protocol and the SADC Model BIT.

THE PROTOCOL AND CONCERNS FROM SOUTH AFRICA

It is important to note that Article 28 of the original Annex 1 of the Protocol, which dealt with settlement of investment disputes, provided for the right of either an investor or state to refer a dispute to the SADC Tribunal, the International Centre for the Settlement of Investment Disputes or an international arbitrator or ad hoc arbitral tribunal for arbitration in the event that a dispute is not amicably resolved and after exhausting domestic remedies. Article 28 was, however, removed in its entirety from the amended Annex 1. This change was proposed by South Africa on the basis of concerns relating to the settlement of investor-state disputes by international tribunals. Such concerns include, *inter alia*, a perceived lack of transparency, the legitimacy of the international arbitration process, conflicting arbitral jurisprudence, independence of arbitrators, the prohibitive legal costs associated with international commercial arbitration, and excessive damages. The member states were of the view that Article 28 presented significant risks and removing it would help to obviate the risks associated with international arbitration of investor-state disputes. Investor-state disputes may be competently resolved or settled through domestic courts or tribunals. The amended Annex 1 effectively brought an end to international investment arbitrations in SADC under the Protocol.

Investor-state dispute settlement in the SADC region

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MODEL BIT

In 2012, SADC introduced its Model BIT under the overall goal of the Protocol to promote harmonisation of the member states' investment policies and laws. Even though the Model BIT is not legally binding, it a guiding document to governments that they may consider in any future negotiations they enter into relating to an investment treaty. It also provides an educational tool for officials and serves as the basis of training sessions for SADC government officials. It is important to note that even though the Model BIT was published more than 10 years ago, no state has used or adopted it yet. The settlement of investor-state disputes is regulated in Article 29 of the Model BIT. It rejects the incorporation of investor-state dispute settlement provisions in bilateral investment treaties and rather recommends domestic and regional forum frameworks in the settlement of investment disputes. According to the Model BIT, investors should rather vindicate their rights in domestic courts or arbitration within the host country's institutions. Notably, the drafting committee of the Model BIT was of the view that the preferred option is not to include investor-state dispute settlements at all.

The Model BIT is, however, flexible and recognises that some states may nonetheless choose to include investor-state arbitration for different considerations. It therefore builds a carefully constructed process that circumscribes investor-state arbitration rights to alleged breaches of the treaty. It also expressly recommends against the inclusion of an umbrella clause and the transfer through this provision of domestic law issues into international law issues. As a standard procedure, the template recommends the inclusion of a provision that requires treaty arbitration tribunals to recognise and give primacy to dispute settlement mechanisms identified in any investment contracts for any matters related to the alleged breach of such contracts, even if restated as a breach of the treaty. This is supported by a provision that seeks an exhaustion of local remedies rule to be put in place, subject to a tribunal being able to assess whether the claims relating to the underlying measure can be addressed in a domestic court.

TENSION BETWEEN THE PROTOCOL AND MODEL BIT

Although both the amended Annex 1 of the Protocol and the Model BIT deal with the resolution of investor-state disputes, they still differ in some fundamental respects. For example:

- The Model BIT introduces the requirement than an investor must first exhaust administrative remedies, followed by local remedies in the host state, unlike the Protocol, which has effectively discontinued international investment arbitrations in the SADC region.
- The Model BIT provides that a state may, upon receipt of a notice from an investor that it wishes to commence arbitration proceedings, propose mediation.

Investor-state dispute settlement in the SADC region

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- Under the Model BIT, a state can bring arbitration proceedings against another state on behalf of an investor who is its national, while the Protocol does not provide for this.
- The Model BIT provides that arbitration hearings are to be open to the public and that this may be achieved though live broadcast of the hearings online.
- The Model BIT makes investor-state international arbitration an optional provision unlike the Protocol, which has effectively terminated them.

These fundamental differences do not bode well for harmonisation, because they defeat the objective of having a single wide investment regime under SADC. Save for the old generation BITs still in force (or which have been terminated but are still subject to sunset clauses), investment arbitrations have basically become extinct in the SADC region.

While the shift away from investor-state arbitration has no doubt eased the concerns of SADC members with regard to the risk of international investment arbitrations, it raises new concerns about the adequacy of the recourse mechanism available to investors in the region including investors from the SADC region itself. In the South African context, this is illustrated by recent judgments from the Supreme Court of Appeal in Trustees for the time being of the *Burmilla Trust and Another v President of the RSA and Another* (64/2021) [2022] ZASCA 22; [2022] 2 All SA 412 (SCA) (1 March 2022) and *Luke M Tembani and Others v President of the Republic of South Africa and Another* (167/2021) [2022] ZASCA 70 (20 May 2022) relating to investment disputes in Zimbabwe and Lesotho.

Investor-state dispute settlement in the SADC region

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INFLUENCE ON THE REST OF THE CONTINENT

If SADC members accept that an investor-state dispute settlement mechanism (with its imbalances) is critical for the promotion and protection of foreign direct investment, they need to perhaps consider either re-establishing the SADC Tribunal and clothing it with jurisdiction to determine investor-state dispute settlements; and/or re-introducing the investor-state dispute settlement in Annex 1 of the Protocol. These options, however, seem unlikely in light of the past experiences of countries such as South Africa, Zimbabwe and Lesotho. These experiences have led to a growing movement for the discontinuation of investor-state dispute settlement mechanisms as reflected in the Model BIT and more forcefully the Annex 1 of the Protocol. With the African Continental Free Trade Area's Investment Protocol up for negotiation, it will be interesting to see whether the SADC bloc can and will dissuade the continent to also jettison investor-state dispute settlement in favour of its stance, which comprises of the use of dispute prevention policies; state-state co-operation akin to diplomatic protection; alternative dispute resolution mechanisms such as conciliation and mediation; and the use of domestic courts, the ombud's office or administrative review procedures, and exhaustion of local remedies as suitable substitution.

VINCENT MANKO

Flagship Rules of International Centre for the Settlement of Investment Disputes Rules to come into effect on 1 July 2022: What does it mean for states and investors?

On 21 March 2022 the member states of the International Centre for Settlement of Investment Disputes (ICSID) approved a comprehensive set of amendments to ICSID's flagship rules for resolving disputes between foreign investors and their host states.

The amendments are the most wide-ranging in ICSID's 55-year history, and are a culmination of extensive dialogue in a series of six working papers released over five years. The process leading up to the adoption of the amended ICSID rules is considered to be the most transparent and collaborative process in ICSID's history.

ICSID is currently the only multilateral institution with a specific mandate to facilitate the peaceful resolution of international investment disputes under treaties, contracts and investment laws. The ICSID Convention Rules and Regulations were adopted in 1967 and the Additional Facility Rules were adopted in 1978.

The ICSID rules establish procedures for arbitration, conciliation, fact-finding and mediation. These are the only rules of procedure that have been specifically designed for disputes between foreign investors and their host states.

The key attributes of the ICSID amended rules are outlined below.

BROADER ACCESS TO ICSID'S DISPUTE RESOLUTION RULES AND SERVICES

The jurisdictional requirements under ICSID's Additional Facility Rules have been modified, providing states and investors access to Additional Facility arbitration and conciliation where one or both disputing parties are not an ICSID contracting state. In addition, regional economic integration organisations may also be a party to proceedings under the amended Additional Facility Rules.

This is a material change, as it now extends access to ICSID arbitration and conciliation to non-ICSID state such as Namibia and South Africa and their national, regional or continental organisations such as the African Union. These parties may now choose ICSID arbitration as the primary dispute resolution mechanism in investment laws, investment agreements or treaties.

TRANSPARENCY ENHANCEMENT

The updated ICSID arbitration rules will further enhance public access to ICSID orders and awards, which benefits legal consistency in tribunal decision making. At the same time, the rules assist parties in identifying confidential information and specify that protected personal information cannot be publicly disclosed.

Flagship Rules of International Centre for the Settlement of Investment Disputes Rules to come into effect on 1 July 2022: What does it mean for states and investors?

CONTINUED

THIRD-PARTY FUNDING DISCLOSURE REQUIREMENT

Disputing parties now, for the first time, have an ongoing obligation to disclose third-party funding, including the name and address of the funder, to avoid conflicts of interest that may arise out of such financing arrangements.

TIME AND COST BENEFITS

The ICSID rules for arbitration and conciliation have been updated to further reduce the time and cost of cases, including mandatory timeframes for rendering orders and awards.

EXPEDITED ARBITRATION RULES

There are new, expedited arbitration rules, which aim to cut case times in half when adopted by parties.

NEW PROCEDURAL RULES FOR MEDIATION AND FACT-FINDING

New procedural rules were developed for mediation and fact-finding. The mediation rules offer a process to support a negotiated resolution of a dispute between parties, while fact-finding provides an impartial and targeted assessment of facts related to an investment.

Look out for the guidance notes that will be published by ICSID in the coming months to assist users in applying the amended ICSID rules.

JACKWELL FERIS

Dispute settlement under the AfCFTA

Member states of the African Continental Free Trade Area (AfCFTA) are cognisant of the fact that, as part of the growing pains of the AfCFTA, there will inevitably be disputes (triggered by private sector players) which will result in disagreement on the interpretation and application of, amongst others, the Protocol on Trade in Goods and the Protocol on Trade in Services and the terms set out in the respective annexes to these Protocols. As such, Article 20 of the AfCFTA agreement provides for the establishment of an AfCFTA dispute settlement mechanism and gives effect to it with the inclusion of the Protocol on Rules and Procedures on the Settlement of Disputes (DS Protocol).

The DS Protocol is considered an integral part of the AfCFTA agreement and specifically establishes the AfCFTA Dispute Settlement Body (DSB). The DSB held its inaugural meeting on 26 April 2021 on the implementation of the DS Protocol. The DSB is comprised of representatives from all member states who monitor and evaluate the functions of the dispute settlement mechanism. Dispute settlement is recognised as a central element in providing security and predictability to the regional trading system under the AfCFTA. A key feature of the dispute settlement process is that, similar to the World Trade Organization's (WTO) approach, recourse is only available to member states, as opposed to citizens or nationals of member states. It is thus only member states that will be able to initiate a dispute against another member state. However, it will be the private sector participants that will be the catalyst for such disputes, similar to the current WTO system where industry players need to approach their local trade administration office to lodge complaints of non-compliance with the AfCFTA instruments by member states.

COMPOSITION OF THE DISPUTE RESOLUTION BODY

The Dispute Resolution Body consists of a DSB and an Appellate Body. At the first instance disputes are adjudicated by trusted and competent panellists chosen from a list of candidates nominated by the member states, ensuring balance between party control and independent expertise. Any appeals against the panel reports are then heard by the permanent Appellate Body, which is comprised of seven members. The Appellate Body reviews panel decisions and ensures the soundness and fairness that comes from a two-tier system. In summary, the DSB establishes panels, adopts panel and Appellate Body reports, and maintains surveillance of the implementation of rulings and recommendations.

Dispute settlement under the AfCFTA

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WHAT IS THE PROCEDURE?

The following dispute settlement process is contemplated where a dispute arises between or among state parties. Firstly, recourse shall be had to consultations with a view of finding an amicable resolution to the dispute. Article 7 of the DS Protocol sets out the consultation rules for states to amicably resolve disputes. An important part of the consultation process is that the settlement discussions between member states in relation to a dispute that arose out of the interpretation or application of the AfCFTA agreement will be regarded as confidential and without prejudice to the rights of any party in any further proceedings. So, it provides insulation to the member states involved in the consultation process during the negotiation process as they attempt to find an amicable solution. The intention appears to be to ensure that parties are able to engage in an honest and frank discussion about the issues under complaint in order to find a workable solution.

Should the dispute not be resolved during the consultation process, the member states to the dispute are barred from using any of the information, exchanges or concessions that have been made during the consultation process in the other disputed resolution processes contemplated under the DS Protocol. Where state parties to a dispute fail to settle a dispute through consultation within 60 days of the date of receipt of the request for consultations, the complaining party may refer the matter to the DSB for the establishment of a panel. Unless the parties to a dispute agreed to continue or suspend consultations, consultation shall be deemed to be concluded within 60 days.

Secondly, where amicable resolution is not achieved, any party to the dispute shall, after notifying the other party, refer the matter to the chairperson of the DSB, and request the establishment of a dispute settlement panel for purposes of settling the dispute. Once the panel is appointed, it must set in motion the process of a formal resolution of the dispute. Once the dispute settlement process by the panel is concluded, it must submit a report to the DSB for adoption and, in accordance with Article 6(5), the DSB shall make its determination of the matter and its decision shall be final and binding on the parties. In addition to the consultation process or the appointment of a panel, state parties, in accordance with Article 6(6), are entitled to have recourse to arbitration as the first avenue for dispute settlement, in accordance with the provisions of Article 27 of the DS Protocol.

Under Article 7(9) there is an emergency dispute settlement process in the form of a consultation with reduced timelines for the resolution of a dispute. The emergency dispute settlement consultation process is, however, only available in respect of perishable goods. The DS Protocol also makes provision for the appeal of a panel report. The Appellate Body's report becomes binding once adopted by the DSB and unconditionally accepted by the parties within

Dispute settlement under the AfCFTA

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30 days of its circulation to the parties. Save for the recourse to arbitration, the features of the DS Protocol mirror those of the WTO dispute settlement process with respect to the principle of "*negative*" or "*reverse*" consensus. This principle prevents member states from blocking the initiation of formal dispute settlement proceedings or the adoption of binding judgments. At each stage of the dispute settlement process, the DSB must automatically decide to take the action ahead unless there is a consensus not to do so. This provides certainty and security on the efficiency, speed and cost effectiveness of the dispute resolution mechanism under the AfCFTA.

WHAT REMEDIES ARE AVAILABLE?

Article 23 of the DS Protocol provides that where the panel or Appellate Body concludes that a measure is inconsistent with the AfCFTA agreement, it shall recommend that the party concerned bring the measure into conformity with the agreement. In addition to its recommendations, the panel or the Appellate Body may suggest ways in which the party concerned could implement the recommendations. Member states must fully implement the recommendations and rulings of the DSB. If a member state fails to implement the recommendations, the aggrieved party can apply for compensation and the suspension of concessions or other obligations as temporary measures pending the implementation of the recommendations and rulings of the DSB. The secretariat of the AfCFTA is tasked with assisting the panels and must keep the DSB informed of the status of the implementation of the decisions made under the DS Protocol.

WHO CAN BRING A DISPUTE?

As highlighted, the AfCFTA dispute mechanism deals with disputes between member states. Industry players do not have direct access to this dispute resolution mechanism. However, disputes between member states will be triggered by private sector participates as a consequence of the use of the AfCFTA trade system and such perceived or alleged violations of the AfCFTA instruments by a particular state. The trade dispute settlement system must, however, be distinguished from any future investment state dispute settlement systems that are contemplated under the proposed Investment Protocol. The fate of investor-state dispute settlements under the AfCFTA is somewhat still unclear as negotiations are yet to be concluded.

It is anticipated that the AfCFTA will change the attitude of member states towards the resolution of international and regional trade disputes and make a real contribution to better trade governance in Africa. The impact of a speedy, efficient, and cost-effective dispute resolution process is profound and of great importance, as also recognised by the agreement establishing the AfCFTA.

DESMOND ODHIAMBO
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Nigeria's incoming arbitration and mediation bill, 2022

The incoming Arbitration and Mediation Bill (Bill) in Nigeria, which is said to be more commercially aware and more in tune with international practices, is set to change the legal landscape of mediation and arbitration in Nigeria.

On Tuesday, 10 May 2022 the Nigerian Senate passed the Bill and it now awaits the assent of the President. The bill will replace a 34-year-old enactment, the Arbitration and Conciliation Act Chapter A.18, Laws of the Federation of Nigeria, 2004 which became law on 14 March 1988, and which was incapable of completely meeting the present intricate issues of arbitration.

A number of the important highlights of the Bill include:

- Electronic communication can now form an arbitration agreement between the parties provided that the information is accessible.
- Consolidation of arbitrations and joinder of parties are now permitted as well as emergency arbitration where a party seeks urgent relief. This is an effort to cut down on unnecessary delays and processes.
- In instances where the number of arbitrators is unspecified, by default it will be understood to be one single arbitrator.
- Institutions' fees and third-party funding are now included in the costs of arbitration and in cases where parties do not agree on interest, the Bill provides guidelines for the awarding of interest by the tribunal. On the topic of expenses, tribunals and arbitral institutions are expressly permitted to place a lien on final awards pending full payment of arbitrators' fees and institutions' expenses by the parties.
- In dealing with the controversial topic regarding the enforcement of arbitral awards running from the accrual of the cause of action, the limitation period for enforcement of awards now excludes the period when the arbitration was ongoing.
- Parties may agree to a review of the final arbitral award by an award review tribunal, which shall endeavour to render its decision as an award within 60 days from the date on which it is constituted.
- The default appointing authority is now the Regional Centre for International Commercial Arbitration in Lagos. Furthermore, the Bill expressly codifies the recognition of foreign arbitral awards in Nigeria.

The Bill provides a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation and expressly codifies the recognition of foreign arbitral awards in Nigeria.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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