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DISPUTE RESOLUTION ALERT

IN THIS ISSUE

THE CONSENT OF A STATE TO INTERNATIONAL ARBITRATION MUST BE 'CLEAR AND UNAMBIGUOUS' AND MAY NOT BE ASSUMED

For a state to be bound by an arbitration agreement there must be 'clear and unambiguous' consent by the state to an arbitration. The recent annulment order by the Dutch District Court (DDC) of the world's largest arbitral award ($50 billion) in the arbitration *The Russian Federation v Veteran Petroleum Ltd, Yukos Universal Ltd and Hulley Enterprises Ltd (Yukos* matter) reinforced this principle (albeit subject to appeal).

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How does one determine 'clear and unambiguous' consent by the state to an arbitration clause in the context of international investment agreements (IIAs)?

How does one determine 'clear and unambiguous' consent by the state to an arbitration clause in the context of international investment agreements (IIAs)? Is it not sufficient for an investor to rely on the provisions of the relevant IIA to demonstrate, by reference to the arbitration clause, that a state has consented to an investor-state arbitration? A lesson from the *Yukos* matter (which may appear obvious) is that the mere signing of an IIA by a state does not mean that the specific IIA is binding and enforceable against a state. It is important to ascertain:

1. what the terms of the specific IIA provides for in relation to the enforcement thereof, and
2. have particular regard to the domestic law requirements of a state when such international agreements will be deemed binding on the state.

In the *Yukos* matter, save for a number of other grounds highlighted by the DDC for the annulment of the arbitration award against the Russian Federation (Russia), the court emphasised that due to non-compliance with the Russian domestic law (adoption of Energy Charter Treaty by the Russian duma or parliament) the Energy Charter Treaty was never enforceable against Russia. Any reliance on the Energy Charter Treaty by an investor aggrieved by the conduct of Russia, for purposes of an international investment arbitration, was misplaced given that no 'clear and unambiguous' arbitration agreement existed with Russia in terms of which it consented to international arbitration. Notably, a number of courts in jurisdictions such as the US and Switzerland have also refused to enforce the *Yukos* arbitration award on the basis that there was no agreement to arbitrate the dispute with Russia.

That aside, unless the state has agreed otherwise, the subject matter of arbitration must not conflict with the domestic law of a state. Any matter inconsistent with the domestic laws (ie non-arbitrability of public law issues such as administrative law matter, tax matters etc.) is not arbitrable in terms of the Russian law. The state would not be able to consent to such arbitration as the arbitration of public law disputes is prohibited in terms of Russian domestic law.

Bringing it home – So how is this relevant to South Africa and Africa in general?

From a South African perspective, any IIA can only bind the South African government should it comply with the requirements of s231 of the Constitution (ie adoption by parliament), failing which any reliance on such IIA (even though

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signed) for protection in respect of investment will be misplaced. A number of the Bilateral Investment Treaties (BITs) concluded between South Africa and other SADC member states are signed, but have never (as far as we can ascertain) been ratified (and will possibly never be based on the policy change). The *Yukos* matter illustrates the importance of understanding what the effect thereof is, in terms of international investment law, specifically whether investors could still rely for protection on a BIT which has been signed but not ratified. The same principle would apply to all other African jurisdictions where both signature by the executive and ratification by parliament is required to bind the state.

Where BITs or IIA have been signed but not ratified, the parties (ie the states) to such BIT/IIA are under an obligation of good faith, in terms of customary international law, to refrain from acts which would defeat or frustrate the object and purpose of the treaties they have signed. The basis of this principle is to be found in article 8 of the *Vienna Convention on the Law of Treaties*, 1969 and cases such as *German Interest in Polish Upper Silesia* 1926 PCIJ. This rule has also been regarded as part of the principle of pacta sunt servanda – ie nations are obliged to comply with their treaty obligations in good faith.

Any signed, but unratified treaty may still hold some level of protection for investors, albeit limited to a state-to-state intervention (ie diplomatic protection). The consent by South Africa to any investor-state arbitration in respect of any new investment not covered by current IIAs or multilateral investment agreements will be prohibited in terms of the Protection of Investment Act, No 22 of 2015 (Investment Act) once it comes into operation on a date determined by the President by proclamation in the Gazette. This also limits the recourse of foreign investors

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South Africa thus remains open to challenges to its policies through investor-state arbitrations from foreign investors (without reference any BITs) who have a qualifying investment in South Africa.

to the dispute resolution system in South Africa and only with the express consent of the South African government will state-to-state arbitration will be allowed.

However, having regard to multilateral agreements such as the Southern African Development Community Protocol on Finance and Investment (SADC Protocol) as adopted by South Africa, there are inconsistences with the Investment Act that must be remedied before it comes into effect. If not, the provision of the SADC Protocol will override the Investment Act and leave the door open to foreign investors arguing that 'clear and unambiguous' consent to investor-state arbitration against South Africa for any current or future breaches of the SADC Protocol still exists, despite the Investment Act. South Africa thus remains open to challenges to its policies through investor-state arbitrations from foreign investors (without reference any BITs) who have a qualifying investment in South Africa.

A further article dealing with the enforcement of arbitral awards (such as in the *Yukos* matter), despite an annulment at the seat of arbitration, will follow in a further edition.

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