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INTERNATIONAL DISPUTE RESOLUTION IN AFRICA

QUARTERLEY BULLETIN

INDEX

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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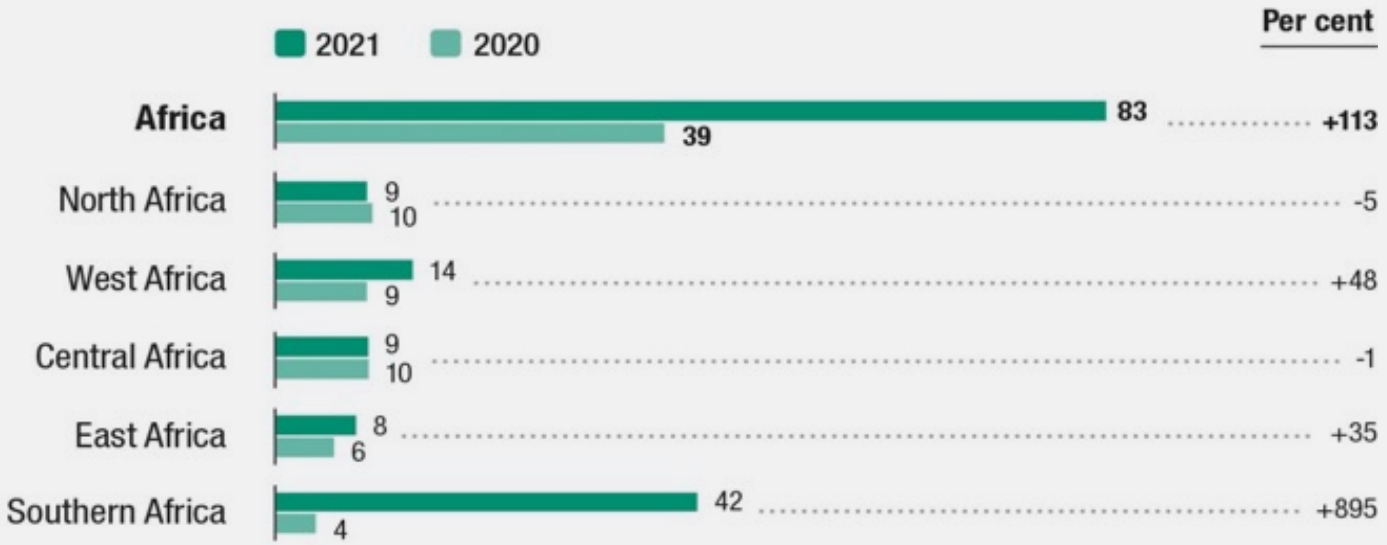
Since the publication of our first bulletin, the United Nations has released the World Investment Report for 2021. The report reveals that foreign direct investment flows to Africa reached $83 billion in 2021 – a record level – from $39 billion in 2020, accounting for 5,2% of global foreign direct investment, up from 4,1% in 2020. The continent thus saw foreign direct investment rebound strongly after the fall in 2020 caused in the main by the COVID-19 pandemic. This was more than double the amount reported in 2020, when the pandemic weighed heavily on investment flows to the continent. In terms of subregions, Southern Africa, East Africa and West Africa saw their investment flows rise while those to Central Africa remained flat and North Africa registered a decline, as reflected below.

Foreign direct investment inflows to the African continent and subregions, 2020-2021



Source: World Investment Report 2022

There is no doubt that the global environment for international investment changed dramatically with the onset of the war in Ukraine, which occurred while the world was still reeling from the impact of the COVID-19 pandemic. The effects on investment flows to developing countries in 2022 and beyond are difficult to anticipate. With this in mind, the importance of effective and efficient investor-state dispute settlement mechanisms in foreign direct investment cannot be overstated. With some of these factors having an impact on foreign direct investment, international trade and intra-Africa trade and investment, it is therefore critical for businesses and states alike to stay alert to the risks associated with these investments.

This is the second edition of our 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 on Southern and Eastern Africa. In this edition:

- Clive Rumsey and Sethu Khumalo outline the confidentiality of adjudication proceedings in standard construction contracts.
- Vincent Manko and Nomlayo Mabhena-Mlilo provide a useful commentary on the draft Code of Conduct for Adjudicators in International Investment Disputes being prepared by the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law.
- Jackwell Feris provides an update on the ongoing negotiations pertaining to the African Continental Free Trade Area Investment Protocol.
- Belinda Scriba highlights the approach adopted by the high courts in Lesotho in connection with mediation.
- Vincent Manko considers whether there is a disjointed approach to the enforcement of international arbitral awards with reference to a recent judgment from the High Court of South 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.

VINCENT MANKO

Standard construction contracts and confidentiality of adjudication proceedings

Adjudication is a form of alternative dispute resolution that is commonly provided for in standard construction agreements.

Adjudication is a precursor to a dispute being referred to arbitration and requires the appointment of a neutral third party to determine a dispute that has arisen between the parties and is generally accepted as an accelerated form of dispute resolution.

The decision or determination by the adjudicator is binding upon the parties unless and until overturned by an arbitrator in their award.

It is generally assumed that the adjudication proceedings are confidential, but to provide certainty, we have considered the various forms of construction agreements used in South Africa, and whether such forms of agreement specifically provide that the adjudication procedure is confidential.

The JBCC form of agreement (through its various editions), provides that in terms of the adjudication rules, the adjudicator shall treat all matters which have been referred to them for adjudication as confidential, and shall not disclose such without the prior written consent of the parties.

The 1999 edition of the FIDIC form of agreement (Red and Yellow Books) provide for a Dispute Adjudication Board (DAB) to be convened either as an ad hoc or standing DAB, to adjudicate disputes that have arisen between the parties.

In terms of the general conditions applicable to the Dispute Adjudication Agreement (1999 FIDIC). The DAB is to treat the details of the contract and all the DAB's activities and hearings as private and confidential and shall not publish or disclose them without the prior written consent of the employer, the contractor and any other member of the DAB (if the DAB consists of more than one member).

A Dispute Avoidance/Adjudication Board (DAAB) is provided for in terms of the 2017 FIDIC edition. The general conditions of Dispute Avoidance/Adjudication Agreement specifically provide for confidentiality. The DAAB activities and documents provided to them, shall be private and confidential and may not be published or disclosed without written consent.

Standard construction contracts and confidentiality of adjudication proceedings

CONTINUED

The General Conditions of Contract for Construction Works (GCC, 3rd edition 2015) also provides for an adjudication board, and in terms of its rules, provides for confidentiality, and the proceedings before the adjudication board are private and confidential, except where disclosure is necessary for the purpose of implementation or enforcement.

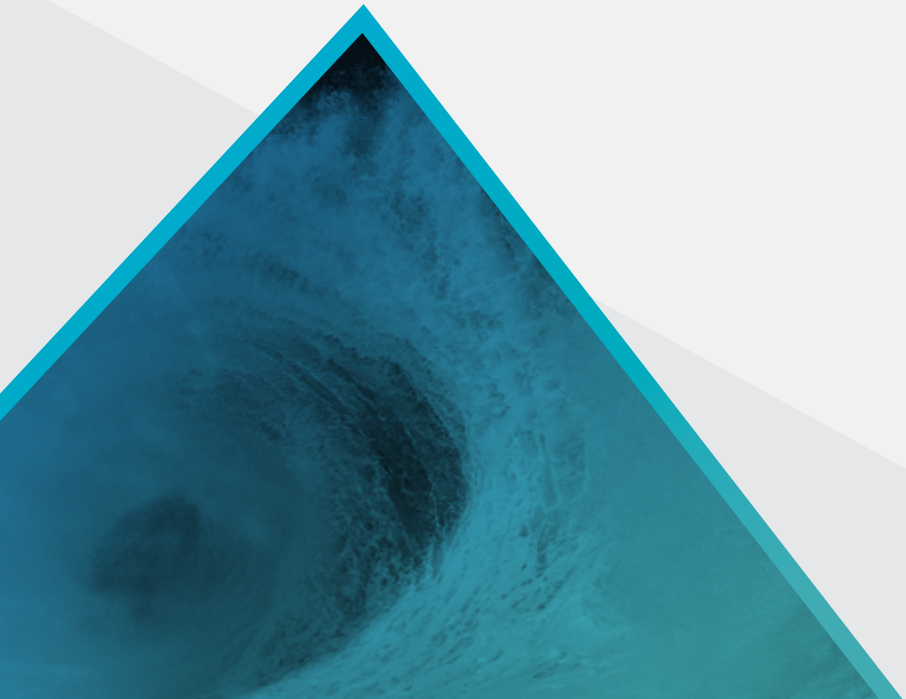
In terms of the NEC3 contract, and insofar as the parties conclude the NEC3 adjudicator's contract, confidentiality of the proceedings is provided for in the contract.

CONCLUSION

Insofar as the parties to the standard forms of construction contracts, as set out above, follow the rules and agreements provided for in terms of the standard contracts, the proceedings and documents placed before the adjudicator/DAB/DAAB are confidential as is the decision or determination that is handed down.

It is only when the parties to the construction contract do not follow the standard rules or agreements provided for that an issue of confidentiality may arise.

CLIVE RUMSEY AND
SETHU KHUMALO



All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

The art of guerrilla warfare is characterised by the use of military tactics, including ambushes, sabotage, raids, petty warfare, hit-and-run tactics, and mobility, to fight a larger and less-mobile traditional military. Litigation has, over time, become infiltrated by guerrilla-esque tactics in the court room. The move to alternative dispute resolution mechanisms seeks to restrict the no-holds-barred method of dispute resolution to reach effective solutions for all concerned. To this end, the Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) are joining forces on a draft Code of Conduct for Adjudicators in International Investment Disputes (Code).

This Code is an important step towards uniformity as arbitral tribunals and each of their members could generally be bound by diverse ethical standards depending on the nationality of the arbitrators, affiliation with bar associations, as well as the place of arbitration. Therefore, multiple, and possibly contradictory, norms may apply at the same time, without any clear indication on which shall prevail in case of conflict. In addition, increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to the conduct of arbitrators. This is notwithstanding the fact that while there is a general agreement about the fundamental standards on the conduct of arbitrators, in practice, the assessment of compliance with such standards may be carried out quite differently depending on the prescripts deemed applicable and depending on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts.

It is therefore unsurprising that arguably two of the most influential arbitration institutions, ICSID and UNCITRAL are collaborating on the Code. The Code is intended to provide applicable principles and provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency and civility. It is based on a comparative review of standards found in codes of conduct in investment treaties, arbitration rules applicable to investor-state dispute settlement, and international courts. Such a uniform code of conduct is especially essential in investor-state dispute settlement, being a hybrid legal construct

All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

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uniquely placed at the crossroads of domestic and international law and of private and public law. It has, over the years, become a reliable avenue to which aggrieved investors turn when host states fail to honour obligations owed to them.

The first version of the Code was published on 1 May 2020. ICSID and UNCITRAL received extensive input on the draft through consultation with state delegates and other interested stakeholders. Based on the feedback received, a second version of the Code was published on 19 April 2021, a third version was published on 22 September 2021, and a fourth version was published on 25 July 2022. A draft commentary to the Code was published on 25 August 2022.

The Code in particular seeks to clarify the content of the standards for Adjudicators in International Investment Disputes, thereby furthering harmonization and clarification of the different existing requirements. It aims to ensure that all stakeholders understand the thresholds for when independence, impartiality and integrity would be impaired; develop requirements for qualification; and determine the mechanisms for disclosure, and the sanctions in case of non-compliance. As far as arbitrators are concerned, the Code provides clarity on their roles, in particular regarding the question of double-hatting and repeat appointments, and as far as adjudicators (i.e. full-time adjudicators in a standing mechanism) are concerned, establishes requirements in a fashion that would be consistent with those of international courts, taking into account requirements found in the existing investor-state dispute settlement regime. Notable features of the fourth version are outlined below.

DEFINITION OF INTERNATIONAL INVESTMENT DISPUTE

An international Investment Dispute is defined as any dispute between an investor and a state, a regional economic integration organisation (REIO) or any constituent subdivision or agency of a state or a REIO submitted for resolution pursuant to a treaty providing for the protection of investments or investors; legislation governing foreign investments; or an investment contract.

This covers all types of international investment disputes regardless of the legal basis of consent to adjudicate the dispute and whether the proceedings are conducted under the auspices of a standing mechanism, administered by an arbitral institution, or ad hoc. By contrast, it does not cover disputes between states or disputes arising out of commercial contracts that do not arise out of an investment.

All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

CONTINUED

DEFINITION OF AN ADJUDICATOR

An adjudicator is defined to mean a judge, being a person who is a member of a standing mechanism for the resolution of an international investment dispute or an arbitrator, being a person who is a member of an arbitral tribunal or an ICSID ad hoc committee who is appointed to resolve an international investment dispute.

A candidate, is any person being considered for appointment as an arbitrator or a judge. With respect to an arbitrator, an individual effectively becomes a candidate immediately upon being contacted by a disputing party or an arbitral institution about the possibility of an appointment to a specific case.

A person ceases to be a candidate and becomes an arbitrator upon appointment as an arbitrator and upon accepting the appointment as an arbitrator. A person who has been appointed but has not yet accepted the appointment will be a candidate. This is to reflect the practice of certain arbitral institutions. Under the ICSID framework, for instance, such person would have 20 days to accept the appointment, at which time he or she becomes an arbitrator. A person who declines an appointment or is eventually not appointed by a party or institution, ceases to be a candidate.

SCOPE OF THE CODE

The Code applies to individuals in an international investment dispute, namely an adjudicator or a candidate.

Disputing parties may also agree to apply the Code to individuals involved in other types of disputes or other means of dispute resolution. Examples could include an adjudicator appointed to resolve a state-to-state dispute, or an arbitrator appointed to resolve a commercial arbitration dispute. Such agreement between the disputing parties should be express and in writing, as there is no presumption that the Code applies in any dispute other than an international investment dispute.

All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

CONTINUED

If the investment treaty or legislation governing foreign investments or an investment contract upon which consent to adjudicate is based contains provisions regulating the conduct of an adjudicator or a candidate in an international investment dispute proceeding, such provisions would continue to apply and the Code would complement such provisions. This means that those provisions as well as the Code apply concurrently and hence an adjudicator must comply with all such obligations at once. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency.

INDEPENDENCE AND IMPARTIALITY

An adjudicator shall be independent and impartial. This obligation to be independent and impartial is a continuous one. Independence refers to the absence of any external control, in particular the absence of relations with a party that might influence an adjudicator's decision. Impartiality means the absence of bias or predisposition of an adjudicator towards a disputing party or issues raised in the proceedings.

The Code stresses the fact that an adjudicator must remain vigilant and be proactive in ensuring that he or she does not create any impression of bias. The standard of appearance of a lack of independence or impartiality is an objective one, based on a reasonable evaluation of the evidence by a third party. It is akin to the notion of justifiable doubts. A non-exhaustive list of examples of independence and impartiality listed are, the adjudicator's obligation not to:

- be influenced by loyalty to a disputing party, a non-disputing party, a non-disputing treaty party, or any of their legal representatives;
- take instruction from any organisation, government, or individual regarding any matter addressed in the international investment dispute proceeding;
- allow any past or present financial, business, professional or personal relationship to influence their conduct or judgment;
- use their position to advance any significant financial or personal interest they might have in one of the disputing parties or in the outcome of the international investment dispute proceeding;
- assume a function or accept a benefit that would interfere with the performance of their duties; or
- take any action that creates the appearance of a lack of independence or impartiality.

All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

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DUTY OF DILIGENCE

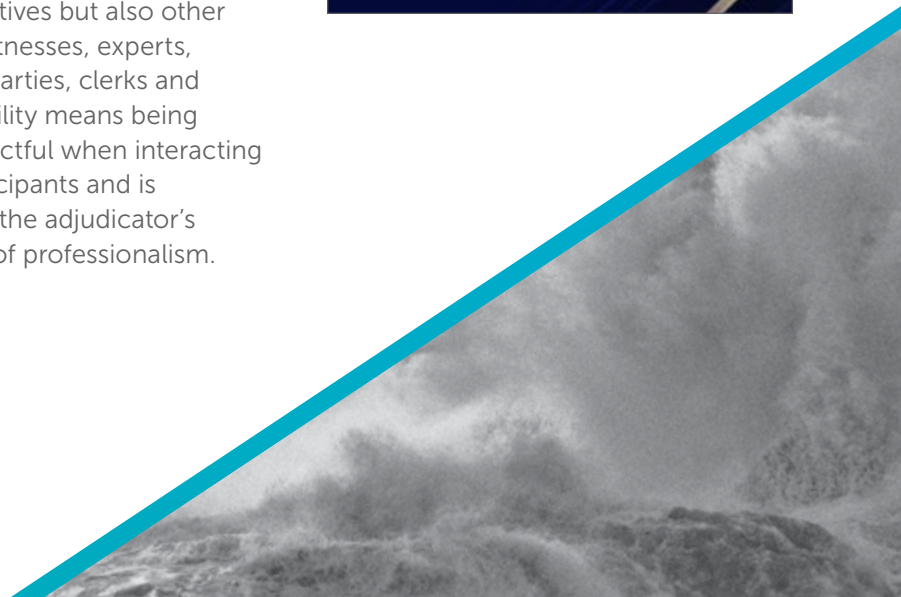
Adjudicators have a duty of diligence. This means that an arbitrator shall perform their duties diligently throughout the international investment dispute proceeding; devote sufficient time to the international investment dispute proceeding; render all decisions in a timely manner; refuse concurrent obligations that may impede their ability to perform the duties under the international investment dispute proceeding in a diligent manner; and not delegate their decision-making function.

Decision-making is the core function of an arbitrator in an international investment dispute proceeding. However, an arbitrator is not precluded from having their assistant prepare a preliminary draft of a decision, provided that all relevant elements pertaining to that decision have been effectively reviewed and determined by the arbitrator. It is also without prejudice to applicable arbitral rules or procedural orders issued in the course of an international investment dispute proceeding which may stipulate that those certain decision-making functions can be delegated, for example, to the presiding arbitrator.

INTEGRITY AND COMPETENCE

Adjudicators are required to act with integrity, fairness, civility, competence and make best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform their duties.

An adjudicator must treat all participants in the proceeding with civility. All participants include not only the disputing parties and their legal representatives but also other adjudicators, witnesses, experts, non-disputing parties, clerks and interpreters. Civility means being polite and respectful when interacting with those participants and is associated with the adjudicator's demonstration of professionalism.



All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

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A candidate shall accept an appointment only if they have the necessary competence and skills and are available to perform the duties of an adjudicator. This is a self-assessment to be conducted by the candidate. As a judge is not appointed by the disputing parties, it is usually the appointing authority within the standing mechanism that would assess such skills and competence. In the selection process, particular consideration should usually be given to a candidate's previous experience in handling international investment disputes, as well as their knowledge of public international law or international investment law.

EX PARTE COMMUNICATION

The Code proposes a general prohibition on ex parte communication, being communication by a candidate or an adjudicator with a disputing party, its legal representative, affiliate, subsidiary or other related person; concerning the international investment dispute; and without the presence or knowledge of the other disputing party or parties.

CONFIDENTIALITY

Adjudicators have a general prohibition not to disclose or use any information relating to the international investment dispute proceeding. The Code does not regulate the disclosure or use of such information for the purposes of the international investment dispute proceeding. For example, adjudicators would be able to freely discuss among themselves information provided by the disputing parties. The confidentiality obligation does not apply if the information is already publicly available but only in accordance with the applicable rules or treaty. For example, if the information was made public in violation of the applicable rules or somehow "*leaked*", the candidate or the adjudicator would be bound by the confidentiality obligation. Another exception to the confidentiality obligation would be if the disclosure is expressly allowed for in the applicable rules or treaty or by the agreement of all the disputing parties. An adjudicator cannot disclose the contents of the deliberations in the international investment dispute proceeding including views expressed by other adjudicators. Adjudicators are prohibited from disclosing earlier drafts of decisions and commenting on a decision which is not publicly available. The confidentiality obligation is a continuing one and an adjudicator must abide by the obligation even after the proceedings. The same would apply to former judges after their term of office. The obligation does not apply where the adjudicator is legally required to disclose the information in domestic courts or requested to do so (for example, in a set aside or an enforcement proceeding) or any other competent body, and where the adjudicator must disclose the information in a court or other competent body to protect their rights.

All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

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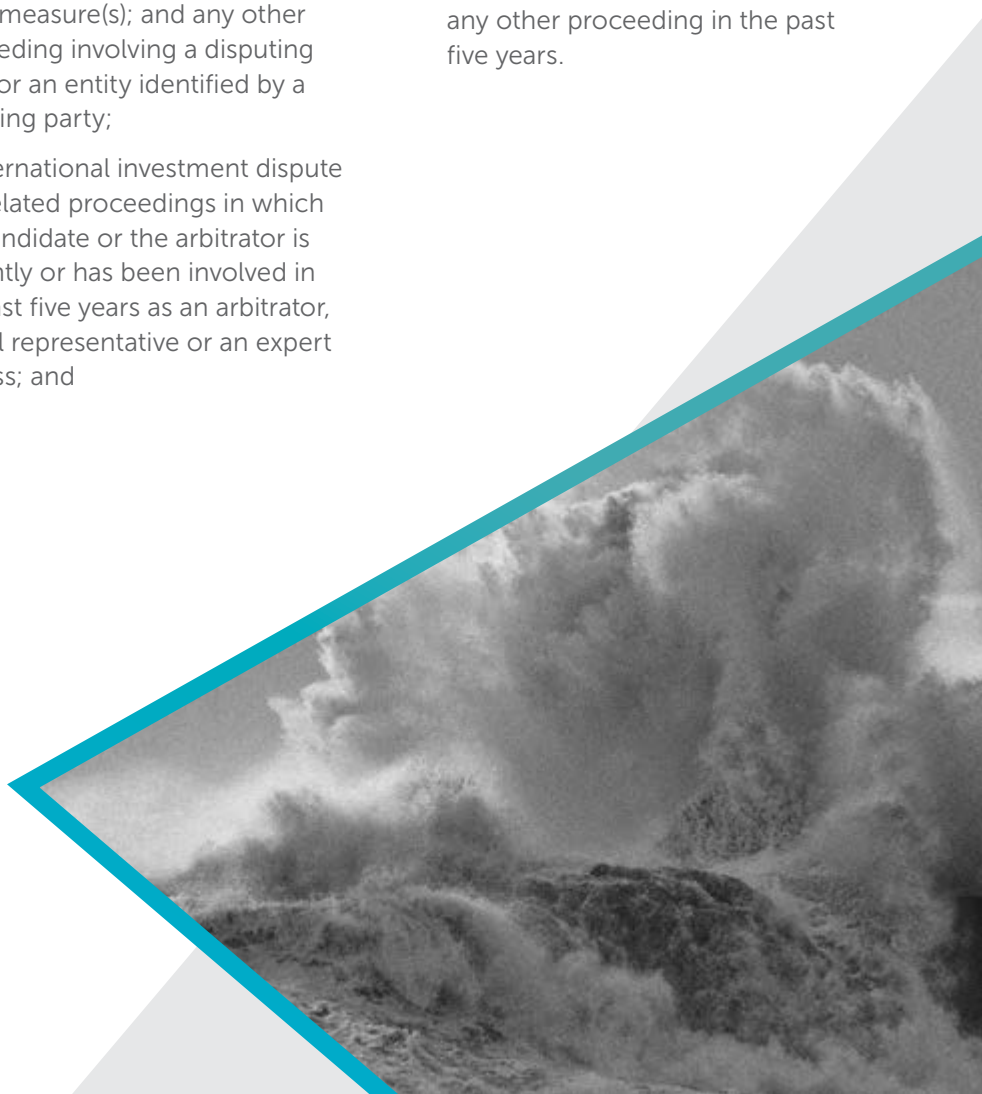
DISCLOSURE OBLIGATIONS

A candidate and an arbitrator are required to disclose any circumstances likely to give rise to justifiable doubts including in the eyes of the disputing parties, as to their independence or impartiality including:

- any financial, business, professional, or personal relationship in the past five years with any disputing party or an entity identified by a disputing party; the legal representative(s) of a disputing party in the international investment dispute proceeding; other arbitrators and expert witnesses in the international investment dispute proceeding; and any entity identified by a disputing party as having a direct or indirect interest in the outcome of the international investment dispute proceeding, including a third-party funder;
- any financial or personal interest in the outcome of the international investment dispute proceeding; any other international investment dispute proceeding involving the same measure(s); and any other proceeding involving a disputing party or an entity identified by a disputing party;
- all international investment dispute and related proceedings in which the candidate or the arbitrator is currently or has been involved in the past five years as an arbitrator, a legal representative or an expert witness; and
- any appointment as an arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an international investment dispute or any other proceeding in the past five years.



All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

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The above disclosure obligations are central to the Code as they assist in identifying conflicts of interest and compliance with other obligations in the Code, mainly, the possible lack of independence and impartiality. The standard of disclosure is a broad one that covers any circumstances, including any past or present interest, relationship or other relevant matter, likely to give rise to justifiable doubts regarding the independence or impartiality of the arbitrator or arbitrator candidate. The circumstances to be disclosed are not limited in time, meaning that a circumstance which arose more than five years before the candidate was contacted about the appointment would need to be disclosed if it is likely to give rise to justifiable doubts. A candidate or arbitrator must be proactive, to the best of their ability, in identifying the existence of circumstances, interests and relationships. The disclosure obligation is a continuing duty.

If new relevant information falling within the ambit of this provision emerges or is brought to the knowledge of an arbitrator during the course of the international investment dispute proceeding, they must disclose such information promptly and without delay. Arbitrators should therefore remain proactive and vigilant with regard to their disclosure obligations during the entire course of the international investment dispute proceeding.

A failure to disclose does not in itself establish a lack of impartiality or independence. It is rather the content of the undisclosed or omitted information that determines whether there is a breach of impartiality or independence. Even though it is not in and of itself a ground for disqualification, it could nonetheless be factually relevant to establishing a breach of a candidate or adjudicator's duty of independence and impartiality.

Disputing parties may waive their respective rights to raise an objection with respect to circumstances that were disclosed.

A waiver would preclude that disputing party from raising the objection at a later stage. Each disputing party can waive their respective rights and it need not be done jointly.

All is almost fair in international investment 'woes': Code of Conduct for Adjudicators

CONTINUED

It should be understood that the waiver would only relate to the circumstances that were disclosed. In practice, this would mean that the disputing party would not challenge an arbitrator based on the disclosed circumstances at a later stage.

For instance, if a candidate informs the disputing parties that they have, within the past five years, worked as a counsel in the same law firm as the current legal representative of a disputing party, and both disputing parties agree nonetheless to the appointment of that candidate, it would not be possible for any of the disputing parties to challenge that arbitrator on the basis of the disclosed circumstance. However, as to circumstances that were not disclosed, for example, that they have maintained a close professional relationship with the law firm or the current legal representative, the waiver would not prevent a disputing party from raising a challenge.

CONCLUSION

Over the last few years, growing criticism over investor-state dispute settlement has triggered demands for reform of the existing framework from states, international organisations, and civil society groups. One of the main concerns identified has been the supposed lack of independence, impartiality, and neutrality of adjudicators. The Code should hopefully in some fashion allay the perceived lack of independence, impartiality, and neutrality of adjudicators. The efforts to create a unform code of conduct for Code of Conduct for Adjudicators in international investment disputes should therefore be commended and supported as part of an ongoing effort to reform the framework for investor-state dispute settlement.

The fourth version draft Code was considered at the 43rd session of Working Group III held in Vienna from 5 to 16 September 2022. States and stakeholders have until 14 October 2022 to provide comments on the draft Code. Based on the deliberations at the 43rd session and reflecting decisions taken by the Working Group, the Commentary will be updated and presented to the 44th session of the Working Group scheduled for January 2023.

VINCENT MANKO AND
NOMLAYO MABHENA-MLILO

Mediation in Africa: Part 1

CDH's Alternative Dispute Resolution team is running a series of pieces highlighting the various approaches adopted by higher courts across Africa in connection mediation.

This first article in the series deals with Lesotho.

There are two types of mediation processes associated with court rules:

- Court-affiliated (or court-connected) mediation is a process by which rules are designed to encourage parties, after the institution of litigation, to consider mediation before proceeding further. These rules do not make mediation compulsory.
- Court-annexed mediation is where the rules of court require the parties in certain types of matters, after initiating litigation, to actually participate in the mediation process before continuing with their litigation. Mediation is mandatory before litigation continues.

It must also be noted that when countries have a mediation process adopted into their court rules it does not necessarily mean that mediation outside of these rules is not possible. Mediation is generally always possible as an alternative dispute resolution tool. For example, see Rule 2(b) of Lesotho's Mediation Rules below.

Turning now to the Lesotho High Court's approach to mediation...

HIGH COURT MEDIATION RULES

Lesotho is one of the countries that has adopted a set of court rules governing mediation when litigation proceedings have been instituted.

These rules govern a court-annexed mediation process. In other words, the parties do not have a choice but to mediate before continuing with litigation.

27 May 2011 saw the publication of Lesotho's High Court (Mediation) Rules (Rules). These Rules can be accessed here.

The Rules are applicable to all civil actions and applications filed in the Lesotho High Courts (Rule 2). Rule 2(b) specifically confirms that parties are not precluded from agreeing to mediation outside of the court programme.

Should the mediation take place through court-annexed mediation then the mediator is appointed by the court. The mediator must be trained, competent and certified by the court (See Rule 3).

Mediation in Africa: Part 1

CONTINUED

PROCESS

The cases that were pending before the court at the time of the adoption of the Rules could be referred to mediation by the presiding judge before the entry of a final judgment (Rule 7(1)). Given that it has been over 10 years since the introduction of these Rules, it is unlikely that this Rule is of any practical significance any longer.

More relevant are those matters instituted after the commencement of the Rules. In those instances:

- parties must file a brief statement in the pleadings as to whether they consent or oppose referral to mediation under the Rules (Rule7(2));
- in the absence of such a statement it will be presumed that objections to mediation under the Rules have been waved (Rule 7(3));
- in relation to those matters which are referred to mediation, all litigation activities and time limits shall pend from the date of referral to mediation until the mediator has issued and filed their report upon completion of the mediation process (Rule 7(4);
- where a statement has noted an objection to mediation the court shall issue a notice within 15 days after the filing of the first defence inviting the parties to attend a hearing before the mediation administrator (designated under Rule 5) where the objection will be raised (Rule 8(1);

Mediation in Africa: Part 1

CONTINUED

- as per Rule 8(2), at that hearing the administrator shall issue directions in relation to:
  - those issues that are to be mediated;
  - the time within which the mediation session is to be completed;
  - whether the parties are required to attend such session in person; and
  - any other matter the administrator feels is necessary or desirable to the facilitation of the mediation process;
- should a proper cause be shown which validates the objection to mediation the administrator may make recommendations for the exception of the matter from the mediation Rules (Rule 9);
- Rules 10, 11, 12, 13, 14 and 15 then deal with the conduct of the mediation itself;
- Rule 10 emphasises that unless an exemption is obtained from the administrator, the mediation process must be completed within 30 days of the mediator's receipt of the order to mediate;
- Rule 13 deals specifically with matters where Government or an entity of Government is party to the mediation. It focuses on ensuring the representative mediating on behalf of the Government has the necessary authority;
- Rule 16 confirms the confidentiality of the mediation process, with certain applicable exemptions;
- Rules 19 and 20 deal with instances where settlement is reached during the mediation process; and
- Rule 20 also deals with a mediator's proposals for the parties to discuss further efficient case development or further exploration of settlement.

RATIONALE FOR INTRODUCING THE RULES

A paper published introducing the Mediation Rules highlights that the reason for introducing the process is that the judiciary's goals and functions include *"providing easy access to justice and the speedy resolution of cases"*.

Mediation is meant to be a dispute resolution solution introduced by the courts as an alternative to the adversarial dispute resolution of litigation.

Mediation in Africa: Part 1

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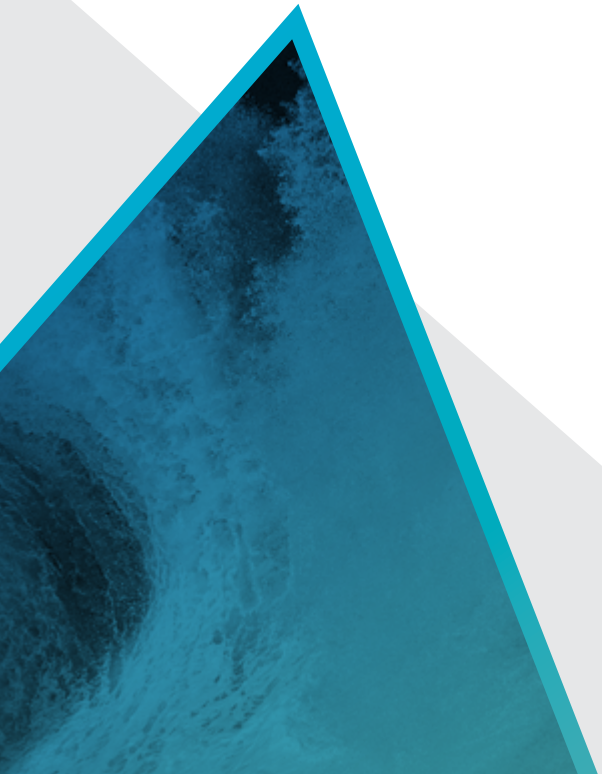

Mediation is also designed to be quicker and to avoid the costs of lengthy litigation.

The added advantage of successful mediation is that it reduces the backlog of cases before the courts.

The paper also confirms that the choice of court-annexed mediation, as opposed to court-affiliated mediation, was deliberate and purposeful.

The paper referred to is titled, "*Part I: The Introduction of Court Annexed Mediation in the High Court and Commercial Court of Lesotho*", and can be found here.

CONCLUSION

When considering litigation, check with your legal advisors as to whether mediation is included in the relevant court rules, and what it means if it is.

The appropriateness and timing of mediation, court related or otherwise, is fact and rule dependent. Although different from arbitration and litigation, mediation does require a level of strategic manoeuvring and we recommend you seek legal advice when considering mediation as an alternative dispute resolution mechanism and/or investigating how certain court rules deal with mediation once litigation proceedings have commenced.

Have a discussion with your legal advisors on whether mediation outside of a court assisted or mandated process is desirable in the circumstances surrounding your matter.

BELINDA SCRIBA

A disjointed approach to the enforcement of arbitral awards

There is little doubt that the promulgation of the International Arbitration Act 15 of 2017 that incorporated the United Nations Commission on International Trade Law (UNCITRAL) Model Law into the national law, was meant to improve South Africa's lure as an international commercial arbitration hub. The duty of our courts to support international arbitration and to give effect, where they can, to international arbitration agreements is therefore similarly unquestionable.

This context is necessary when considering the recent judgment of the High Court of South Africa, Gauteng Division, Johannesburg in *Kingdom of Lesotho and Another v Frazer Solar GMBH and Others* (33700/20) ZAGPJHC (9 May 2022). The dispute in Fraser Solar had its genesis in a supply agreement purportedly concluded between Fraser Solar and the Kingdom of Lesotho on 24 September 2018. The supply agreement was signed by a former Minister in the Office of the Prime Minister of the Kingdom of Lesotho at the time. The kingdom contended that the cabinet member, in purporting to act on behalf of the kingdom, had no authority to conclude the supply agreement or bind the kingdom to its terms. It further contended that despite purporting to oblige the kingdom to incur massive debt in order to purchase renewable energy products from Fraser Solar, the supply agreement was signed without any attempt to conduct a lawful procurement process, as required by the laws of the kingdom.

In the supply agreement, the parties chose arbitration as a mode of settling their disputes. They further nominated South African law as the law of arbitration to determine any disputes, chose Johannesburg as the seat of the arbitration, and agreed that arbitration would be conducted in terms of the rules of arbitration in force of the South African Association of Arbitrators.

Upon breach, Fraser Solar referred the matter to arbitration and obtained an arbitral award against the kingdom for an amount of €50 million, including interests and costs. The award was made an order of court by the High Court of South Africa, Gauteng Division, Johannesburg at the instance of Fraser Solar.

A disjointed approach to the enforcement of arbitral awards

CONTINUED

Both the award and the order were granted in the absence of the kingdom. Fraser Solar then took steps to attach the kingdom's assets in South Africa and Mauritius.

THE KINGDOM'S APPLICATIONS

Subsequent to the award being made an order of court, the kingdom brought three substantive applications, namely:

- an application in the Lesotho High Court to review, set aside and declare as void the supply agreement and the arbitration agreement embedded in the supply agreement;
- an application in the High Court of South Africa to rescind the court order that made the arbitral award an order of court and to review and set aside the arbitral award; and
- an application in the High Court of South Africa to stay the execution of notices of attachment and writs of executions arising from the award being made an order of court pending the outcome of the review application and the rescission application.

The Trans-Caledon Tunnel Authority also brought an application before the High Court of South Africa to challenge the writ of execution and notices of attachment issued in respect of its bank accounts.

POSTPONEMENT

The applications were consolidated and were due to be heard in the week of 16 May 2022. On the eve of the hearing, the kingdom sought a postponement of the rescission application indefinitely pending the review application in the Lesotho High Court. The kingdom contended that the rescission application should be postponed indefinitely to enable the review application in Lesotho to be finalised. The review application in Lesotho was to challenge the lawfulness and constitutionality of the decision to enter into the supply agreement, including the embedded arbitration clause.

Fraser Solar opposed the application on the basis that the South African court could not be asked to defer its determination to another country's courts and that the South African court was under an obligation imposed by national and international law to itself determine whether a ground existed for non-recognition or non-enforcement of the arbitral award.

VALIDITY OF THE SUPPLY AGREEMENT

In granting the indefinite postponement, the court in *Fraser Solar* found that it was *"pragmatic"* to let the review application in the Lesotho High Court (which the court said had prospects of success)

A disjointed approach to the enforcement of arbitral awards

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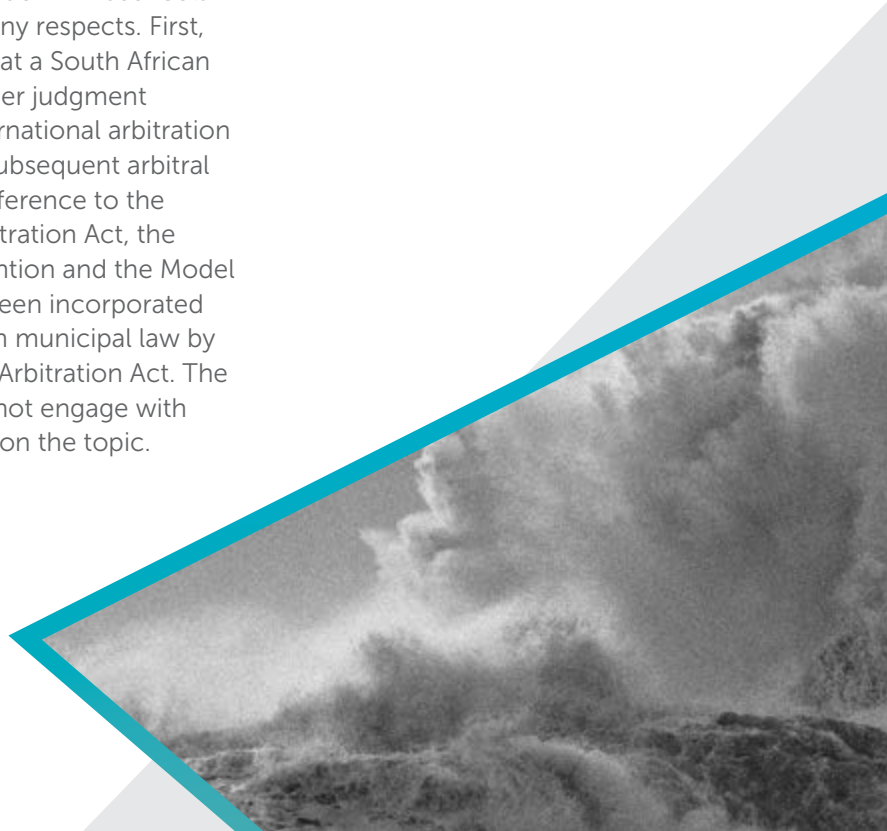
proceed to determine the validity of the supply agreement and only thereafter would the validity of the subsequent act be determined in the rescission application. This was because the court was of the view that if the supply agreement was a nullity from the outset, every subsequent act which depended on the validity of the supply agreement would also be invalid. The court cited no authority for this finding.

The court in *Fraser Solar* was also of the view that if the rescission application was decided before the review application in the Lesotho High Court, the South African court determining the rescission application would be deprived of the benefit of the Lesotho High Court's first instance determination of the validity of the supply agreement. This would mean that the South African court in the rescission application would be at a serious risk of giving effect to an arbitral award and default judgment which could subsequently be based upon unlawful and invalid breaches of the kingdom's procurement laws and Constitution. The court found that this would constitute significant prejudice to the broader public interest and administration of justice. The court cited no authority for these propositions either.

A TROUBLING APPROACH

The court's approach in *Fraser Solar* is troubling in many respects. First, it is worrisome that a South African court would render judgment regarding an international arbitration agreement and subsequent arbitral award without reference to the International Arbitration Act, the New York Convention and the Model Law, which has been incorporated into South African municipal law by the International Arbitration Act. The court simply did not engage with international law on the topic.

Second and perhaps even more troublingly, it is for a South African court to determine whether a ground for recourse against an arbitral award is established; not the courts of Lesotho. The New York Convention, the Modal Law and the International Arbitration Act are all clear on this score. The South African court could not permissibly defer its determination to the Lesotho courts.



A disjointed approach to the enforcement of arbitral awards

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Third, the court in *Fraser Solar* relied on *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) for the proposition that it was for the domestic courts to exercise jurisdiction to hear and determine the validity of decisions and international tribunals must "*give appropriate weight to the determination by the domestic courts of such issues*" and that "*exercise restraint when evaluating decisions of municipal courts despite not being bound by those decisions*". Putting aside the fact that the thrust of that proposition came from the minority judgment, it is important to keep in mind that in international law, states bear responsibility for unlawful acts of state organs, even if accomplished outside the limits of their competence and contrary to domestic law[1]. So the fact that the High Court in Lesotho may ultimately review and set aside the supply agreement as null and void, is but one of the many factors that the arbitral tribunal would consider. It is not decisive.

Perhaps even more importantly, the court in *Fraser Solar* was not sitting as an international tribunal. It was rather sitting to consider a postponement of the rescission application of the court order that made the arbitral award an order of court and the application to review and set aside the arbitral award. The International Arbitration Act, the New York Convention and the Model Law were therefore aptly applicable.

While the pronouncement in *Fraser Solar* will probably have no precedent-setting effect and will most likely be overturned in future matters, such findings can potentially undermine South Africa's efforts in establishing itself as a regional "*go-to*" hub for international commercial arbitration.

VINCENT MANKO

[1] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3); Ioannis Kardassopoulos v Georgia (ICSID Case No. ARB/05/18) and Amco Asia Corporation v Republic of Indonesia (ICSID Case No. ARB/81/1)*

AfCFTA Investment Protocol: Critical for encouraging intra-Africa investment in infrastructure projects

The African Continental Free Trade Area (AfCFTA) is the continent's most ambitious economic project yet. The realisation of the AfCFTA's objectives will significantly contribute to the growth and development of African economies over the next few years. However, there remain several hurdles that African states must overcome in the short to medium term in order to effectively implement and realise the objectives of the AfCFTA. The biggest of these challenges will be dealing with the poor state of roads, railways, port facilities and telecommunications infrastructure. There is thus a need for significant investment in trade-related infrastructure through initiatives such as the African Union's (AU) Programme for Infrastructure Development.

The Protocol on Investment (Protocol) is a critical AfCFTA instrument to foster intra-Africa investments in trade-related infrastructure by African investors. The terms of the Protocol are, however, still being negotiated as part of Phase II of the AfCFTA negotiations, which started in earnest at the end of 2021. The Protocol is important because it will provide investors with additional legal protection to mitigate against investment risk on the continent. Such protections are expected to include several protection standards typically found in new generation investment treaties on the continent and to reflect the policy position of African states on investment protection as espoused in the Draft Pan African Code on Investment of 2015 (Draft Investment Code). This is evident from the zero-draft of the Protocol that is currently available in the public domain.

It is understood that that the state parties had two further rounds of negotiations in September 2022 in order to finalise the version of the Protocol.

BILATERAL TREATIES

What is evident from the zero-draft of the Protocol is that the Draft Investment Code has provided the basis for the investment protection being contemplated for intra-Africa investments. A fundamental position that has found its way into the Protocol is that intra-Africa bilateral investment treaties will terminate upon the Protocol coming into effect. However, such bilateral investment treaties will continue to provide protection to investors and their investments post-termination in accordance with such applicable sunset provisions.

AfCFTA Investment Protocol: Critical for encouraging intra-Africa investment in infrastructure projects

CONTINUED

What we also foresee is that some of the drafting in the zero-draft of the Protocol will probably not drastically alter. The following standards of protection that can be expected in the Protocol are:

- Guarantee against unlawful expropriation, with exceptions.
- The most favoured nation treatment standard, with exceptions.
- National treatment standard, with exceptions.
- Physical protection and security, with exceptions.
- Free transfer of funds, with exceptions.

Save for these protections, the Protocol will omit the Fair and Equitable Treatment (FET) Standard and incorporate the concept of *"administrative and judicial treatment"*.

This is a concept in international law, but has found its way into treaty drafting as a consequence of South African policymakers attempting to develop some form of "*fair administrative*" principle as a substitute for FET.

The Protocol will then, amongst other things, confirm the following new generation investment principles:

- the right of each Africa state to regulate in the public interest to achieve sustainable development, and other legitimate social and economic policy objectives;
- investors must comply with laws and policies to protect human rights, labour rights and the environment; and
- investors must promote and enforce anti-corruption and anti-bribery measures, and protect the rights of indigenous peoples.

CONSENT TO ARBITRATION

Disputes, as provided for under the zero-draft of Protocol, are intended to be resolved between investors and states on the following basis:

- mediation between the investor and host state;
- where an amicable resolution is not achieved through mediation or other means, an investor may deliver a written notice to the state to refer the dispute to arbitration. The investor has a choice of arbitration forms under either the International Centre for Settlement of Investment Disputes or any African institution.

It appears that despite the position of some states towards arbitration, there may well be an option for African investors to refer disputes to arbitration.

AfCFTA Investment Protocol: Critical for encouraging intra-Africa investment in infrastructure projects

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This is different to the Draft Investment Code which records that investment disputes between investors and African states *"may be resolved through arbitration, subject to the applicable laws of the host state and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies"*. This did not contemplate an automatic consent to arbitration by an African state. The result being that there will be no automatic right by any intra-African investor to enforce the guarantees under the Protocol, watering down the guarantees and commitment to investors. The wording suggested in the zero-draft of the Protocol, however, appears to contemplate express consent to arbitration, including to provide the investor with an election to choose the forum.

The developments with the zero-draft of Protocol are positive, however, it is important that AfCFTA member states fast-track the negotiation of the Protocol as it plays a critical role in driving private sector investment in trade-related infrastructure. There is also a need for more transparency from the AU on the status of various critical instruments of the AfCFTA, including the Protocol. Such transparency will ensure that the private sector can actively participate in providing input to the Protocol and provide support were necessary to ensure the AfCFTA's success for all Africans.

JACKWELL FERIS

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
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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