

DISPUTES IN AFRICA INCREASINGLY SETTLED VIA ARBITRATION - VDA

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Rising foreign investment in Lusophone Africa means more commercial disputes are being resolved through arbitration, though 'neutrality' clauses are vital

The use of arbitration to settle disputes in Africa is on the rise due to the increase in international investment in the continent, according to Vieira de Almeida (VdA) partner Miguel Pinto Cardoso. However, he adds that companies are increasingly aware of the importance of arbitration clauses in order to ensure that cases will be heard in a neutral territory.

"The firm has been very busy with the number of international arbitrations coming out of Portuguese-speaking African countries," Pinto Cardoso says. "We have seen two cases against the state of Cape Verde, another in Angola and another involving São Tomé." VdA was appointed lead counsel on the first ICSID arbitration involving Cape Verde, which launched last year and centred on Portugal Telecom's claim against the state regarding the alleged unilateral termination of a partnership agreement in December 2014 – at present, the proceedings are suspended until 20 April

Arbitration clauses

VdA partner Rui Andrade says that historically, states and companies in Portuguese-speaking countries in Africa have much preferred to try to arbitrate in their own country, though this is usually at odds with foreign investors' preferences. "This may make sense in making it easier to prepare for arbitration but it is not ideal for investors," he adds. "They want to have any disputes heard in a neutral seat with a neutral tribunal, so are looking for hearings in Europe rather than in jurisdictions where it is harder to find arbitrators or get a visa."

Most companies are aware of the need to include arbitration clauses in contracts – often stating the seat or court for a hearing, such as the ICC, ICSID or LCIA – in order to provide certainty regarding the venue. Cases can also be heard in English, Portuguese or even both languages.

"An arbitration clause is effectively a guarantee that, in the event of a dispute, the case will be heard with neutrality," Pinto Cardoso states. He adds that another major challenge is the enforcement. "If you look at countries such as Angola, which are not signatories to the New York convention, then enforcing any foreign arbitral awards can become more difficult."

Oil-related disputes

Andrade points out that arbitration in Africa is gaining momentum. As evidence, he cites recent ICC conferences in Maputo and other similar conferences in Angola, adding that the growing level of investment in the region is giving arbitration more prominence, not just with disputes involving the state but also contracts between foreign investors and local companies.

It is expected that there will be a steady flow of disputes work in Africa in 2016, which is in contrast to the Portuguese market where little change is expected, according to Andrade. He believes that there may also be an increase in litigation work in Africa in the next 12 months.

"I expect to see more litigation cases coming from Africa, especially in markets that have rich natural resources," Andrade observes. "The crash in the price of oil has had a major impact on the economy, certainly in oil producing countries such as Angola, and this has created a great deal of disruption in some very important energy contracts." Andrade believes it will be inevitable that affected parties will seek remedy in the courts in relation to such contractual disputes. He continues: "It is natural that when the market slows down and things get tough, there is an increase in disputes."

Mediation not popular

It is Pinto Cardoso's belief that litigation and arbitration are likely to be the chosen methods for resolving disputes rather than mediation. The process – which involves an independent mediator discussing the case with both sides and trying to reach a settlement without the need to resort to a court ruling – has been growing in popularity in the US and UK but has yet to be embraced in other parts of the world.

"Mediation is still taking its first steps and does have a decent level of awareness in the legal profession," Pinto Cardoso concludes. "I believe that things will develop over the next few years but, at this point, there are very few mediations and not much appetite from clients."