International Arbitration Focus
Africa

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ReedSmith

Contents

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Welcome

Once again, we are approaching year-end.

For the Reed Smith arbitration practice, 2024 has been a good year. Arbitration activity remains buoyant with ever-increasing participation from stakeholders across diverse sectors and jurisdictions.

In 2024, reform has been a subject in significant jurisdictions. In England and Wales, review of the Arbitration Act 1996 is underway, and Reed Smith has been playing its part. In France, a working group has been convened by the French Ministry of Justice to reform France's arbitration law. In India, the Department of Legal Affairs released a draft Arbitration and Conciliation (Amendment) Bill, proposing extensive changes to the Arbitration and Conciliation Act 1996.

In Africa, the subject of this newsletter, arbitration will undoubtedly continue to feature highly in the transformation taking place across the continent.

We are delighted to include Diamana Diawara's contribution in this final newsletter of 2024 from an ICC and personal perspective, alongside the contributions from our arbitration practitioners around the Reed Smith global network.

We hope you enjoy reading it and welcome your feedback. In the meantime, we wish you all a restful year-end break.

Peter Rosher
Global Chair of International Arbitration
prosher@reedsmith.com

Note from the Editor

"Ambition never comes to an end" is a quote attributed to Kenneth Kaunda, Zambia's first president, elected in the 1960s. After relinquishing power peacefully in the early '90s, he remained engaged with politics and continued the struggle for independence not just of his own country, but of Africa as a continent. He was not alone in that. Pan-Africanism has been an ambition for many notable African politicians. Achieving it has been elusive.

One approach is described by Aden Adde, Somalia's first president in the 1960s:

> When we speak of African Unity we beware of clichés and empty words. Our guiding principles should be idealism, tempered by realism, vision and imagination accompanied by a sober concern for practicability.

Like Kenneth Kaunda, Aden Abbe participated in a peaceful handover of power at the end of his term.

In this edition of the Reed Smith newsletter, we look at Africa through the prism of arbitration and related legal projects whose ambition is to see Africa grow in all senses of the word. Arbitration will play its part in that growth. Africa will, in time, bear witness to developing nations becoming developed nations, with an emphasis on pan-African engagement.

We are delighted to welcome a guest contribution from Diamana Diawara, Director of Arbitration and ADR for Africa at the ICC. Diamana shares her thoughts on investment in Africa, which she recently delivered to the arbitral community during Dubai Arbitration Week, and speaks about the role of arbitration. Diamana reminds us that the demographics of Africa are the biggest driving force behind African economies, with echoes of the guiding principles described by Aden Adde apparent in what she says. She describes a shift in mindset with the caveat that it will take time before this translates into day-to-day business.

The Reed Smith arbitral practitioners who have contributed to this edition from around the world give us insight into matters that are either entirely Africa-specific or which must concern those with investments in Africa.

In France, Ana Atallah addresses the subject of corruption and the trend of the French courts in recent years to adopt an approach that some might criticise when it comes to annulment of awards. At what point does the pursuit of corruption by judicial (over)reach operate to encourage rather than discourage corruption? In particular, where states are concerned, might not the recent willingness of French courts to annul awards based on red flags incentivize the very behavior that is sought to be sanctioned? The balance is not an easy one. And it is a conundrum that is not specific to arbitration in Africa, but which must concern those investing in Africa.

From New York, Juliya Arbisman, Niyati Ahuja and Hyuna Yong address the African Continental Free Trade Area Agreement (AfCFTA) and the energy sector. This is a new, emerging pan-African trade agreement that has attracted 48 ratifications to date, with an ambition to replace all intra-African bilateral investment treaties. Its implementation will test Africa in ways that it has not been tested before. It encapsulates a clear vision for intra-African trade, and resonates with what Diamana describes on this topic. Diamana shares that initiatives to encourage intra-African trade are struggling to produce results. Undoubtedly, that is correct and it will take time to build, but Africa watchers will follow AfCFTA developments with keen interest in this area of African endeavor. And those with an interest in arbitration will watch closely the ongoing negotiations surrounding the dispute settlement mechanisms that will, in time, be adopted to serve AfCFTA's ambitions.

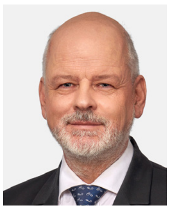
From Dubai and China, leveraging our presence in Hong Kong, mainland China and Dubai, we have a contribution from Antonia Birt, Ranna Musa, Lianjun Li, Steve Tam, Cheryl Yu, Matthew Townsend and Jensen Chang. The subject is arbitration trends in China and Middle East trade and investment in Africa. China is the single largest foreign investor in the African continent with Africa featuring regularly in China's Belt and Road Initiative. Reed Smith contributors look at the types of disputes that are occurring and the dispute resolution trends that are adapting to meet the needs of this market.

From Dubai, Matthew Harley and Avinash Poorooye put the spotlight on the various funding options and how they might be leveraged in Africa-related arbitral disputes.

Finally, from Paris and London, Clément Fouchard, Tallat Hussain and Vanessa Thieffry write about sustainability-related disputes and arbitration in Africa. They describe the emerging trends and focus in this area of all stakeholders with an interest in Africa. Whether by state initiative or by the potentially long reach of international law, this is a subject that cannot be ignored by those with a long-term interest in the future of Africa.

In the midst of this, we at Reed Smith remain focused on serving our clients in their arbitral encounters. In times of political change, as noted by Diamana, arbitration can guarantee what political forces cannot. In an evolving Africa, that must be a key consideration for investors, be they intra-African or foreign investors into Africa.

We hope you enjoy reading this edition of the Reed Smith International Arbitration newsletter, but also that you will find time to take a break from the business of law to enjoy a happy and festive holiday.



Andrew Tetley, Editor
Partner, Paris
atetley@reedsmith.com

Aurélie Lopez Sub Editor
Senior Associate, Paris
alopez@reedsmith.com

Arbitrating disputes arising from investments in Africa

In Dubai Arbitration Week last month, I was invited to speak on the subject of Arbitrating Disputes Arising from Investments in Africa. I am delighted to recount the thoughts I shared on this topic with readers of Reed Smith's international arbitration newsletter.

The International Chamber of Commerce (ICC) places importance on stability and trust, which it aspires to bring to African disputes. At the ICC, we observe that the strength of African economies comes from their natural resources, investments in infrastructures and commodities. We observe disputes in these areas, most of which come quite some years after the underlying transaction took place. However, one can anticipate that the types of disputes arising from African business deals will, in time, increasingly relate to general trading, as found in more developed economies.

One has to ask what is driving these economies. The biggest factor is demographics. The image of a poor and uneducated population with no middle class is outdated; that is not the case anymore. African populations are extremely talented and business savvy, driving change on the continent.

But talking about Africa as a whole is a mistake. There are very different approaches to the same issues from one African country to another, including in relation to international arbitration. In the past, there has been a general movement in the region to get nearer to international standards for investor protection with the sole objective of attracting investments, which, in turn, encourage economic development. Many African countries assessing the results of these investment policies have concluded that they did not necessarily produce the expected benefits. This is why some jurisdictions on the continent are undertaking reforms of their investment policies. It is now the prism of African business as much as the prism of external investors that is being looked at in setting new standards. In Senegal, for example, where there has been executive change after the recent elections, the new regime has strong views on the economy and is determined to impose those views. The prime minister has commissioned an audit to review and possibly amend existing international contracts and investment treaties, and if they are not renegotiable, termination will follow.

There is a shift in the mindset of African dealmakers, but this shift will likely take some time before it translates into day-to-day business. This is suggested by the fact that we observe a timid shift from public to private disputes within ICC African cases. But today's reality is still that around 50% of disputes from Africa involve states as parties. This suggests that it is hard to do business in Africa without state interest and support – not to mention the infrastructure gap and, more broadly, the infrastructure challenges across Africa, which complicate private business transactions. Shipping intra-Africa is expensive and intra-Africa flights between major cities are either unavailable or expensive. As a result, the many initiatives to encourage intra-Africa trade are struggling to produce results. The reality today is that intra-Africa trade remains marginal compared to trading with external business partners.

In sum, Africa is not being driven by the same interests as it used to be, although economic change is likely to take some time and be a progressive process. Similarly, for dispute resolution to effectively support new business dealings in Africa, there needs to be a change of mindset, involving African lawyers and arbitrators, reflecting this different prism. The ICC stands ready to play its part.

The change of prism is further supported from a legal perspective, with instruments such as the Organization for Harmonization of Business Law in Africa (OHADA), a formidable example of a uniform and modern arbitration law applied simultaneously in 17 countries that are party to OHADA, covering West and Central Africa.

Similarly, some arbitration centers in the region have demonstrated their ability to support the development of regional trade. The Kigali International Arbitration Centre is a very good example. Others in West Africa are the CMAG in Cameroon and the CAMC-O in Burkina Faso. These centers do not yet benefit from the support of the entire judicial machinery and legal infrastructure, but it is coming.

In times of political change, arbitration can guarantee what political forces cannot. It is not just about rules; primarily, it is about trust. If you have an ICC arbitration clause in your contract, you can rest assured there will be recourse. Arbitration provides the ultimate safety net.

Diamana Diawara, Guest Contributor
Director, Arbitration and ADR for Africa at the International Chamber of Commerce

Red flags and corruption in annulment proceedings against international arbitration awards

Invented in the United States around fifty years ago as a warning system, “red flags” have become probatory on their journey across the pond. What used to be mere indicators at the hands of compliance officers are now relied upon by French courts in proceedings brought in relation to arbitral awards on allegations of corruption. This shift has also been observed in the global arbitration sphere.

What are red flags?

As the name would suggest, the expression “red flags” designates a type of warning method.

According to the Oxford dictionary (Second Edition, (1989) the expression has been used in the maritime world for many years:

> The first known use of the term “Red flag” dates back to 1585, where Nicolas de Nicolay described a Candian vessel (modern-day Crete) raising a red flag adorned with its coat of arms as it prepared itself for battle. (…)
>
> Throughout history, red has equally been used by damaged ships to indicate that they were about to sink.

As a metaphor that signals some form of danger, constituting an alert, it is only natural that this expression has taken up a similar meaning in legislation where it has been adopted. A “red flag” is a warning signal indicating a potential problem that requires investigation.

By way of example, under the U.S. Fair and Accurate Credit Transactions Act of 2003, a red flag rule was adopted in 2007 for the establishment of procedures relating to identity theft (section 114). “Red flag guidelines” were set up to “identify possible risks” of such theft.

Red flags and corruption

Red flags were originally used in the world of compliance to identify potential risks that corruption may have occurred.

An archetypal case was that of the director setting small warning flags on his desk when one of his employees returned from a country with high levels of corruption (first red flag) with a very lucrative contract (second red flag) finalized without any negotiations (third red flag) at a record pace (fourth red flag) with the assistance of an intermediary company with close ties to the state but lacking both offices and expertise (fifth red flag). Once a certain number of flags had occupied the desk or mind of the decision-maker, he was alerted and had to conduct an investigation, summoning his employees and probing them through questions. The investigation might lead him to rule out the existence of corruption, conclude that corruption took place, or carry out further investigations.

These elements are useful tools with which to warn a business about potential risks of corruption. Although they are not by themselves conclusive regarding the existence of actual corruption, they invite caution from those in companies required to guard against corruption.

Emmanuel Gaillard, a well-known French legal scholar, noted:

> These indicators are unquestionably utilised when conducting an investigation in compliance policy, in the context of a business acquisition or the choice of a business partner for example.[1]

Similarly, Edward Kehoe and Aloysius Llamzon explain:

> [P]arties alleging corruption have seized upon red flags, sometimes arguing that the mere presence of numerous red flags establishes corruption. But red flags are only indicators that must be pursued to determine what evidence they yield. General red flags—relating to the country or sector—have little probative value, and prove nothing in an individual case, while those that are more specific to a counterparty or transaction—for example, a lack of services provided by a third party in return for significant compensation—have more probative value.
>
> […]
>
> The motivation is to minimize risk that the company will be entering into relationships that may expose it to corruption. This is an ex-ante, preventive approach to corruption which may lead to the conclusion: do not engage in this activity or proceed with the transaction, as there are too many red flags.[2]

The use of red flags in investment arbitration

The use of red flags has progressively moved from the world of compliance to the world of arbitration. It is especially present in investor-state arbitration where allegations of corruption are not uncommon.

However, arbitral tribunals have been reluctant at first to rely on red flags to make findings of corruption, pointing out that they alone do not constitute sufficient evidence.

In *Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No ARB/13/6, paragraph 548), the Tribunal noted:

> [R]ed flags most often provide only circumstantial, as opposed to direct, evidence. As circumstantial evidence, red flags can play an important supporting role in the assessment of guilt. Whether red flags can directly establish, for example, an element of a crime depends on the legal system applicable. There is not a universal answer. … [R]ed flags are useful in triggering an awareness that a transaction does not conform with the characteristics usually found in comparable transactions. Simultaneously, an examination of circumstances that give rise to red flags must take the surrounding context into consideration.

In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No ARB/14/4, paragraph 7.113), the Tribunal considered:

> Even the reddest of red flags does not suffice without proof of corruption before the tribunal. Whilst it can be relatively easy to allege corruption, it is less easy to prove it, as observed in the Metal-Tech award (2013). Suspicion is not equivalent to proof. Unanswered queries may have innocent explanations, not amounting (in the absence of explanations) to proof of corruption.

In *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia* (ICSID No ARB/13/32, paragraph 545), the Tribunal stated:

> The Respondent has laid stress on the concept of the widely recognized, if unofficial, indicators of corruption conveniently tagged as "red flags," several of which can incontestably be noticed in the circumstances of the present case. The Tribunal has no difficulty in accepting that they are a warning signal that corrupt activity may have been at play. "Red flags" are, however, just that: a sign of danger ahead. They were conceived in the corruption context as a warning to decision-makers (who may include judges and arbitrators) to be alert to the threat, and, when it is apparent, to approach the evidence with the proper degree of alertness and caution. That is what the Tribunal has done. The point is, though, that "red flags" are indicators, not proof of whatever it is that requires to be proved in the case in hand.

The use of red flags as evidence of corruption has been criticised by legal scholars and practitioners.

According to Professor Jarrosson, a well-known French legal scholar: "The redness of the indicator is a sign of its gravity, but does not prove corruption."[3]

Edward Kehoe and Aloysius Llamzon also conclude:

> The reality emerging from a brief review of five recent, publicly available international arbitral awards involving corruption issues is that while tribunals employ a red flags analysis that does not perfectly fall in one of these two opposed polarities, red flags have been put in proper context. By and large, red flags have not been allowed to operate as a form of or substitute for proving the elements of bribery, influence peddling, or money laundering.[4]

1 E. Gaillard, La corruption saisie par les arbitres du commerce international, *Rev. arb.* 2017, p. 806.

2 Edward Kehoe and Aloysius Llamzon, "Chapter 12: Proving Corruption in International Arbitration: The Utility of "Red Flags", in W Michael Reisman and Nigel Blackaby (eds), Arbitration Beyond Borders: Essays in Memory of Guillermo Aguilar Álvarez, pp. 205–207.

3 Rev. arb. 2022, issue 4, p.1279.

4 Edward Kehoe and Aloysius Llamzon, op. cit, p. 212.

Taking red flags into account in circumstantial evidence

As early as 2017, Emmanuel Gaillard wondered whether the method of *faisceaux d'indices*, or circumstantial evidence, could be used to prove corruption and whether red flags could be taken into account as circumstantial evidence:

> What is even more tricky is the question of knowing whether such indicators can be used to deduce, from their accumulation, the plausibility of acts of corruption and to take the civil consequences of them.[5]

Before some French courts had transformed a starting point into a point of arrival, the Basel Toolkit for Arbitrators, the use of which was suggested to international arbitrators, has blurred the lines.

In 2019, the Basel Institute on Governance issued "A Toolkit for Arbitrators" to deal with "Corruption and Money Laundering in International Arbitration". In a section setting out the "Burden and standard of proof, circumstantial evidence and red flags", the Toolkit notes:

> In international arbitration, there will hardly ever be direct evidence for corruption and tribunals have no coercive powers. It is well established though that bribery can be proven by circumstantial evidence ("faisceau d'indices"), including the above-mentioned red flags (Tool 1). Red flags are not in themselves proof of corruption (yet). However, they are indicators of corruption that should alert arbitrators that further scrutiny must be applied to the facts of the case. Red flags are part of circumstantial evidence, which can then give rise to proof of corruption. Tribunals may make a firm finding of corruption based on the circumstantial evidence available to them.[6]

Under French law, by some strange phenomenon this alert system has become probatory in some decisions.

In a series of recent cases, the French courts have sought to strengthen their control of the arbitral process where allegations of corruption are made, relying on red flags in so doing.

In the Belokon and Sorelec cases,[7] annulment proceedings were brought against arbitral awards on the allegation that the underlying agreements were tainted by corruption/ money laundering and that the arbitral awards contravened international public order as a result. The Paris Court of Appeal used the method of red flags and concluded that there were sufficient elements to annul the award for violation of international public order. The decisions were confirmed by the French Court of Cassation.

5 E. Gaillard, op. cit, p. 835.

6 Basel Institute on Governance – *Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators*, April 29, 2019, p.13.

7 *The* Belokon case: Paris Court of Appeal, February 21, 2017 (n° 15/01650) and French Court of Cassation, March 23, 2022, (n° 17-17.981); The Sorelec case: Paris Court of Appeal, November 17, 2020 (n° 18/02568) and French Court of Cassation, September 7, 2022 (n° 20-22.118).

In the Belokon case, the Paris Court of Appeal relying on the accumulation of red flags concluded:

> [T]here are serious, precise and convergent indicia that [the bank] was purchased by the buyer to develop, in a State where its privileged relationship with the holder of the economic power guaranteed him no real control over its activities, money-laundering practices.

In so doing, the Court expanded the scope of its control over arbitral awards, moving from a restricted review of the violation of international public order, which had to be "flagrant, effective and concrete," to a broader review based on a "manifest violation."

In the Sorelec case, the judge also admitted new evidence, not presented to the arbitral tribunal, to challenge the arbitral awards on the basis of corruption.

In the Alstom case, in enforcement proceedings of an arbitral award, the Paris Court of Appeal ordered that the proceedings be reopened in order to check the nature of the litigious contract in light of red flags giving rise to a presumption of the existence of a corrupt pact. The Court also provided a list of typical red flags (indicia corresponding at least partly to the items listed in the Basel Toolkit), which might lead to a finding of corruption.[8]

It seems that the use of red flags by French courts has become systematic where an arbitral award is challenged on the basis of allegations of corruption. The courts rely on the accumulation of red flags to conclude that corruption actually existed, justifying the setting aside of the award.

This position adopted by French courts has been critiqued by legal scholars and practitioners who consider that this trend leads to an unlimited review of international public order using approximate evidence founded on a poorly controlled method of evidence itself.

Critically, pursuant to this line of decisions, evidence of corruption no longer requires a precise demonstration of the elements of corruption or of another criminal offence closely associated with corruption, such as bribery, trading in influence, or money laundering.

Commenting on the Sorelec case, Ibrahim Fadlallah, an eminent French professor and arbitrator, stated:

> Proof of corruption consists in proving the constituent, material and intentional elements. But at no point does the judgement under review, nor any of its counterparts, do so. They dispense with this by claiming or suggesting that corruption is, by definition, hidden and thus too difficult to prove for an arbiter or civil judge. They are thus authorised to prove through a series of indicators called "red flags" made of bricks and mortar.[9]

8 The Alstom Case: Paris Court of Appeal, April 10, 2018 (n° 16/11182).

9 JDI 2021, Comm. 18, p.1361, note I. Fadlallah.

Mr Fadlallah, commenting on another decision of the Paris Court of Appeal issued in the Santullo case,[10] was also heavily critical of the adopted method:

> There is a certain permissiveness in the assessment. Suspicions are transformed into proof, cash payments are frozen with no regard for their origin. This sometimes – sorry – amounts to inconsistency; thus when the Court of Appeal retains a deposit of cash made by the claimed corruptor on the 18th April 2013, whilst the alleged corruptor has been paid on the 10th May 2013 and on the 28th May 2013.
>
> This new caselaw isolates France amongst the greats of European arbitration. As of now, the role of the judge has been flipped on its head but tomorrow, the method of material rules, which was so advantageous, could be achieved. The conception of international arbitration, which holds a key position in French law, is also threatened: how can we claim, with the Putrabali judgement, that the arbitral award, which is not connected to any other legal order of the State, is an international justice decision, and submit these awards to a new, in-depth revision in questionable procedural conditions at the time?[11]

There is a view that red flags, in their capacity as a tool in soft law, have no onerous legal value and should not be used as the basis for a legal line of reasoning. They are merely warning signals that should lead to an investigation.

10 Paris Court of Appeal, April 5, 2022 (n° 20/03242).
11 *Rev. arb*. 2022, p. 643 I. Fadlallah "La corruption corrompt l'arbitrage."

Ana Atallah
Partner
Paris
+33 (0)1 76 70 40 00
aatallah@reedsmith.com

African Continental Free Trade Area (AfCFTA) Agreement: Powering Africa's energy future

Africa's energy sector is poised for growth. The continent's most electrified nations, concentrated largely in North Africa but including South Africa, Ghana, and Kenya, boast higher urbanization rates, attract more investment, and foster more socio-economic development than their neighbors. Investments in the infrastructures of electrified nations draw innovation and diversification of energy sourcing, with renewables increasingly playing a key role in the coveted green energy transition.

Despite Africa's massive natural resources and potential, its energy production remains highly concentrated, with just five countries generating 75% of the continent's electricity. At the same time, its energy needs remain high: around 40% of Africans lack access to electricity.

The recently implemented Agreement on African Continental Free Trade Area (AfCFTA) has begun to boost production and exchange of energy resources by encouraging intra-African trade and more effective dispute resolution mechanisms. This article describes how AfCFTA is changing the future of the continent's energy sector.

What is AfCFTA?

Established in 2019 to strengthen Africa's economic status and stability, AfCFTA is the world's largest free trade area. Among its objectives is eliminating tariffs on goods traded among and between African countries.[1]

1 Text of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) can be found at: https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area.

To date, 48 countries[2] have ratified AfCFTA as State Parties, with seven of them already implementing and trading under its mechanisms and protocols as of December 2024 (Member States).

AfCFTA market projection is significant, with the combined Gross Domestic Product (GDP) expected to reach US$7 trillion by 2035,[3] and US$29 trillion by 2050.[4] The World Bank foresees an increase in Foreign Direct Investment (FDI) in this trade area of up to 111% by 2035.[5]

Progress on AfCFTA's mechanisms and protocols

As with many multilateral initiatives, AfCTFA's implementation is phased. Recently, in October 2024, the Assembly of Member States met regarding the Protocol on Investment and ancillary dispute resolution mechanisms.[6] Following these negotiations, two additional protocols are anticipated: (1) a mechanism for resolving investment, competition, intellectual property, and women and youth in trade disputes; and (2) a mechanism for resolving disputes involving e-commerce and digital trade.

2 *The Secretary General of the AfCFTA Secretariat Hails Liberia's Ratification of the Agreement as "Remarkable;" Commits to Support Trade and Capacity Development Initiatives in Liberia*, Liberian Ministry of Commerce and Industry, July 31, 2024, https://www.moci.gov.lr/media/press-releases/secretary-general-afcfta-secretariat-hails-liberias-ratification-agreement.

3 *Q&A: H.E. Wamkele Mene, Secretary General, AfCFTA Secretariat,* AU Echo, 16 (2023), https://au.int/sites/default/files/documents/43263-doc-AUECHO_2023_Eng.pdf.

4 Mabingue Ngom, *AfCFTA: Reaping the benefits of the world's most youth and women-friendly trade* agreement, African Renewal, Feb. 23, 2023, https://www.un.org/africarenewal/magazine/february-2023/afcfta-reaping-benefits-world%E2%80%99s-most-youth-and-women-friendly-trade-agreement#:~:text=According%20to%20the%20UN%20Economic,change%20the%20continent's%20business%20environment.

5 Roberto Echandi, Maryla Maliszewska, Victor Steenbergen, *Making the Most of the African Continental Free Trade Area: Leverage Trade and Foreign Direct Investment to Boost Growth and Reduce Poverty*, WBG, 2 (2022), https://openknowledge.worldbank.org/bitstreams/91585eee-eab1-5141-b2f0-031af56e860b/download.

6 @AfcFTA Secretariat Official, X (formerly Twitter) (Oct. 28, 2024, 10:03 A.M.), https://x.com/AfCFTA/status/1850901178152099920?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet.

AfCFTA's specific implementation timeline is depicted below.

Figure 1: AfCFTA's Implementation Progress, May 2018–October 2024

Phase 1	
May 2018	Adoption of the Protocol on Trade in Goods, Protocol on Trade in Services, and Protocol on Rules and Procedures for the Settlement of Disputes.
May 2019	The three protocols come into force.
Phases 2 and 3	
Feb. 2023	Adoption of the Protocol on Investment (Phase 2) and Protocol on Intellectual Property Rights (Phase 2).
Feb. 2024	Adoption of the Protocol on Women and Youth in Trade (Phase 2) and Protocol on E-Commerce/ Protocol on Digital Trade (Phase 3).
Oct. 1–4, 2024	The AfCFTA Secretariat convened meetings to review a draft of the annex on the Rules and Procedures for the Prevention, Management, and Settlement of Disputes under the Protocol on Investment.
Oct. 28–31, 2024	The AfCFTA Secretariat convened meetings to discuss the Rules and Procedures for the Prevention, Management, and Settlement of Disputes under the Protocol on Investment.

AfCFTA's investment incentives

AfCFTA offers both immediate and long-term incentives by:[7]

- Reducing tariffs and enhancing the efficiency of customs procedures.[8] Specifically, the Protocol on Trade in Goods requires Member States to progressively eliminate import duties[9] and its Protocol on Trade in Services eliminates restrictions on international transfers and payments.[10]
- Replacing all intra-African bilateral investment treaties (BITs) and harmonizing and modernizing trade laws, with 43 Member States agreeing to align with the Investment Protocol within five years of its entering into force.[11]
- Specifically stimulating infrastructure development[12] to include power, transportation, and telecommunications access and, in turn, lowering business costs.[13]
- Promoting greater investment protection to enable a unified, transparent dispute resolution regime by determining through international arbitration.

7 AfCFTA, 36, *supra* note 4.
8 Protocol on Trade in Goods, Art. 2.
9 *Id.*, Art. 7.
10 *Id.*, Art. 13.
11 *AfCFTA Investment Landscape*, International Trade Administration, July 8, 2024, https://www.trade.gov/market-intelligence/afcfta-investment-landscape.
12 *Id.*, Art. 3; AfCFTA, Preamble; Protocol on Trade in Goods, Preamble.
13 *Implications of the African Continental Free Trade Area for Demand for Transport Infrastructure and Services*, Africa Business Forum, UN Economic Commission For Africa (2022), https://archive.uneca.org/sites/default/files/uploaded-documents/abf/abf2022/eng-summary_of_ecas_report_on_implications_of_afcfta_on_transport_services_.pdf

Protection of investments made under AfCFTA and its dispute resolution mechanisms

Historically, investments in Africa – including in energy and related sectors such as mining – were made by non-African investors under the protection provided by BITs to foreign investors. Most BITs were concluded between African states and European states, the Americas or Australia. BITs between African countries were rare, many have become inoperative, and of those that are in effect many have fragmented and incomplete provisions.

The AfCFTA phases out all intra-African BITs in favor of an integrated and modern regime. This means that African capital can be deployed on African projects with much greater legal certainty. Given the rebalancing of geopolitical events, it is expected that the appetite for intra-African investment will be abundant, and bolstered still by these legal protections. This will pave the way for a more diversified investor base in Africa. The hope and expectation is that African investors will promote African content, resulting in more or better stakeholder and cultural engagement. The economic proposition should generate more jobs, bring better business practices and innovation, and enhance revenue.

Provisions addressing private investment (including public-private partnerships) under the AfCFTA are set out in the Protocol on Investment (the Protocol) .[14] The Protocol sets out the framework of protections in respect of eligible investments made pursuant to the AfCFTA.

14 A separate Dispute Resolution Protocol is also included relating to intra-member dispute resolution provisions; however, this is outside the scope of this article.

Eligible investment is defined to include the requirement for investors to maintain substantial business activity in the host state, and requires investments to involve commitment of capital, expectation of profit, certain duration, assumption of risk, and contribution to the host state's sustainable development.

Reflecting its modernity, the Protocol seeks to strike a more balanced set of performance obligations by the host state and the investor. Compared to BITs, which often are silent on the specific scope of obligations on the investor, the Protocol expressly avails host states with the option to file counterclaims against the investor relating to its compliance with laws on human rights and labor rights, environmental protection, anti-corruption, and taxation. When read extensively, these obligations may enable nations to bring claims and counterclaims against investors. These are unique, progressive provisions.

International arbitration is the typical recourse should a dispute manifest in relation to the investment. The energy sector is specifically marked by large-scale and high-capital investments, and disputes tend to arise over the course of the project's history. Disputes concern a variety of issues, including onerous or arbitrary legal or fiscal features; legal terms of investment relating to distribution and utilization of national grids; participation requirements; stakeholder issues relating to shareholder, government or community affairs issues; and expropriation. Additionally, disputes over pricing, transfer of funds, energy tariffs, or *force majeure* events are prevalent.

Annex 1 of the Protocol includes a proposed dispute settlement mechanism under various arbitration rules (including ICSID, ICSID Additional Facility, UNCITRAL, and African arbitration institutions).

AfCFTA's impact on cross-border energy sector investment

AfCFTA is already stoking considerable cross-border interest in Africa's energy sector. By dismantling trade barriers such as tariffs, it is set to increase cross-border trade, reduce energy costs, and spur the development of a more comprehensive and better-integrated infrastructure.

In addition, its Member States have established economic incentives specifically relevant to the energy sector. For instance, electrical energy produced by Member States, along with "mineral [p]roducts and other non-living natural resources extracted from the ground, seabed, below seabed and in the Territory of a State Party," are defined as "wholly obtained" and eligible for preferential tariff treatment when traded within AfCFTA.[15] The U.N. Economic Commission for Africa predicts that tariff removal alone will boost intra-African exports of energy and mining products between 5% ($4.5 billion) to 11% ($9 billion),[16] even though means of production, such as electrical power and fuel, used in the process of manufacturing a product but not incorporated or included in a final product are deemed "neutral elements" and without preferential treatment.[17]

As AfCFTA meets its economic objectives, Africa's energy sector will see growth in both domestic and global trade and investment. Larger-scaled renewable energy projects – such as Namibia's and Botswana's solar energy project that is already set to trade and share energy among 12 neighboring countries – will increase, with fewer cross-border barriers.

Similarly, South Africa, Nigeria, and Egypt are positioned to take advantage of AfCFTA's energy-sharing platform by increasing their exports of solar, wind, and gas energy to neighboring countries. The trade area also has the potential to expand the natural gas sector – particularly for major gas producers in Mozambique, Nigeria, and Tanzania – and attract investors to Kenya's geothermal energy sector.

The African Union (AU) launched the Africa Single Electricity Market initiative in 2021 to sustainably advance the continent's electricity sector; create a unified continental market; enhance human development; expand economic opportunities across the continent; and drive productive transformation, industrialization, digitalization, and job creation.[18] Although there are other efforts to develop functional regional electricity markets, such as the Eastern Africa Power Pool (EAPP), Southern African Power Pool (SAPP), West African Power Pool (WAPP), Central Africa Power Pool (CAPP), and Comité Maghrébin de l'Electricité (COMELEC), most of the continent's national electricity markets remain independent in practice.[19] AfCFTA thus presents an opportunity and impetus to create a truly interconnected continental electricity market in Africa.

Global support for AfCFTA

The global community has already shown support for the implementation of AfCFTA. For instance, on May 6, 2024, the U.S.-Africa Strategic Trade and Investment Partnership Act[20] was introduced in the U.S. House of Representatives. Created to bolster the U.S.-Africa partnership and with significant potential to advance the AfCFTA, this legislation has been hailed as "a crucial step in the evolution of U.S.-Africa trade relations."[21]

15 AfCFTA Rules of Origin Manual, 12–13.
16 *The African Continental Free Trade Area and Demand for Transport Infrastructure and Services*, UN Economic Commission for Africa (2022).

17 AfCFTA Rules of Origin Manual, 35.
18 Regional Electricity Market under the AfCFTA: Prospects and Challenges for Ethiopia, Tralac, Dec. 16, 2023, https://www.tralac.org/blog/article/16245-regional-electricity-market-under-the-afcfta-prospects-and-challenges-for-ethiopia.html.
19 AFREC (2019). Designing the African Energy Transition: An approach for social and economic transformation in a climate compatible manner. African Energy Commission (AFREC), African Union
20 U.S.-Africa Strategic Trade and Investment Partnership Act of 2024, H.R. 8249, 118th Congress. (May 6, 2024).
21 *Id.*

The Gulf Cooperation Council (GCC) has taken steps to enhance trade and economic engagement with Africa,[22] with Council member companies announcing 73 foreign direct projects with a value of more than $53 billion in 2023 alone.[23] AfCFTA will also accelerate trade and investments with China, Africa's largest trading partner and creditor, and Europe by offering access to a larger unified market to businesses set in these countries.

Conclusion

AfCFTA is set to unlock unparalleled opportunities for investors eager to engage in Africa's dynamic energy markets. By streamlining market access and fostering cooperation among African nations on joint renewable energy ventures, this huge free trade area creates fertile ground for transformative public-private partnerships with the potential to reshape the continent's energy landscape.

The introduction of robust and equitable investment schemes further demonstrates the Member States' dedication to establishing a secure, predictable investment environment. This legal framework, which balances investor protections with state responsibilities, mitigates many of the current challenges of cross-border investments within Africa, making the continent increasingly attractive to global stakeholders. However, the effectiveness of the dispute settlement mechanism under the Investment Protocol remains uncertain, especially in situations where it may conflict with the domestic dispute resolution mechanisms of Member States. It remains to be seen whether the provisions relating to dispute settlement will withstand the negotiation process, with the final text of the Investment Protocol offering a conclusive resolution.

22 Hubert Kinkoh, *Gulf states' trade and investment relations with Sub-Saharan Africa,* Gulf Africa Programme, 2 (July 2024). https://www.agda.ac.ae/docs/default-source/2024/gcc-ssa-economic-and-trade-relations.pdf?sfvrsn=bc3c653b_1.
23 Alex Irwin-Hunt, *FDI into Africa from GCC hits new heights*, FDI Intelligence, Feb. 12, 2024, https://www.fdiintelligence.com/content/data-trends/fdi-into-africa-from-gcc-hits-new-heights-83453

Juliya Arbisman
Partner
New York
+1 212 549 0454
jarbisman@reedsmith.com

Niyati Ahuja
Senior Associate
New York
+1 212 549 4649
nahuja@reedsmith.com

Hyuna Yong
Associate
New York
+1 212 549 0299
hyong@reedsmith.com

China and Middle East trade and investment in Africa: Arbitration trends

Introduction

The rapid growth of trade and investment between China, the Middle East, and Africa has been propelled by China's Belt and Road Initiative (BRI) and the strategic importance of the Red Sea as a key trade corridor. As investments diversify across sectors – from infrastructure to energy and natural resources – cross-border transactions are becoming increasingly complex. The specific complexities of contracts across these regions introduce unique dispute risks, which should be carefully considered to safeguard their interests and projects.

1. Growth in trade and investment

China's investment focus

In 2000, China–Africa bilateral trade reached $10 billion for the first time in history,[1] and since then China–Africa trade has grown rapidly. With the launch of the BRI in 2013, China and African countries have deepened their strategic cooperation across multiple fields, seeing a surge of investments by China in infrastructure construction and energy projects in Africa. The Forum on China–Africa Cooperation (FOCAC), formed in October 2000, serves as a platform for China and Africa to strengthen their collaboration under the BRI and achieve coherence with Agenda 2063 of the African Union, the 2030 Agenda for Sustainable Development of the United Nations, and development strategies of individual African countries.[2]

A number of projects in numerous African countries have been backed and undertaken by Chinese enterprises, including transport projects, energy projects, and digitization projects.

- **Transport projects:** The Mombasa–Nairobi Standard Gauge Railway in Kenya, built and operated by China Road and Bridge Corporation,[3] is the largest infrastructure construction project in Kenya since its independence in 1963[4] and is a critical component of the Northern Corridor of the East African Railway Network.[5] Elsewhere, the Addis Ababa–Adama Expressway, opened for traffic in September 2014, is the first expressway in Ethiopia. It was built by the China Communications Construction Company and its construction cost was partially supplied by a loan from the Exim Bank of China.[6]
- **Energy projects:** The Mali Gouina hydropower station in West Africa, with PowerChina Sinohydro Bureau 16 Co., Ltd as the EPC general contractor and funded by the Exim Bank of China, was inaugurated in December 2022 and aims to alleviate electricity shortages in Mali as well as transmit power to Senegal and Mauritania.[7] In addition, the Reppie waste-to-energy plant in Addis Ababa, Ethiopia was the first waste-to-energy plant in Africa. It began operations in August 2018 and was constructed by China National Electrical Engineering Company.[8] A solar power plant, which came into operation in December 2019, was constructed by the China Jiangxi Corporation for International Economic and Technical Co-operation in Garissa, Kenya.[9] This was (and still is) the largest photovoltaic power generation construction in East Africa, and has cut carbon dioxide emissions by 64,000 tonnes annually.[10]
- **Digitization projects:** The National ICT Broadband Backbone in Tanzania was financed by loans from the Exim Bank of China and implemented by Chinese International Telecommunications Construction Corporation, a subsidiary of China Telecom, in collaboration with Huawei.[11] This project decreased

1 The Information Office of the State Council of PRC, "中国与非洲的经贸合作," *The Information Office of the State Council of PRC, December 23, 2010* https://www.gov.cn/zwgk/2010-12/23/content_1771638.htm accessed November 5, 2024.

2 Ruobing Mao, "中非合作将为高质量共建"一带一路"注入新动能," *Sinopec News, September 13, 2024* http://www.sinopecnews.com.cn/xnews/content/2024-09/13/content_7105937.html accessed November 5, 2024.

3 Xinhua Net, "Chinese-built modern railway benefits people in Kenya," *Xinhua Net, September 21, 2023* https://english.news.cn/20230921/01eb8566fcc343dfb1013e8e1ed366ed/c.html accessed November 5, 2024.

4 Office of the Belt and Road Construction Leadership Group, 中国—非洲国家共建"一带一路"发展报告, December 2023 https://www.yidaiyilu.gov.cn/a/icmp/2023/12/15/20231215179983118/bcb251af3c01496eb5f1cf47c7557171.pdf accessed November 5, 2024.

5 Xinhua Net, "Chinese-built modern railway in Kenya extolled for its myriad benefits," *Xinhua Net, October 7, 2023* https://english.news.cn/20231007/4bd8ea404cbd4648b4f4025422c8a71d/c.html accessed November 5, 2024.

6 Xinhua Net, "News Analysis: Chinese-built toll road wins acclaim for Ethiopia's economic achievements" (*Xinhua Net, June 21, 2019*) http://www.xinhuanet.com/english/2019-06/21/c_138162531.htm accessed November 6, 2024.

7 Shenyoujia Tian, "PowerChina-constructed Mali Gouina hydropower station enters on-grid trial operation" (*Belt and Road Portal, March 15, 2022*) https://eng.yidaiyilu.gov.cn/p/227923.html accessed November 5, 2024.

8 Ping Dong, "Ethiopia inaugurates Africa's first waste-to-energy project" (*Belt and Road Portal, August 20, 2018*) https://eng.yidaiyilu.gov.cn/p/63256.html accessed November 5, 2024.

9 Xinhua, "Kenya launches Chinese-built 50MW solar power plant" (*The State Council of the People's Republic of China, December 15, 2019*) https://english.www.gov.cn/news/photos/201912/15/content_WS5df571bac6d0bcf8c4c18dd1.html accessed November 6, 2024.

10 Office of the Belt and Road Construction Leadership Group, 中国—非洲国家共建"一带一路"发展报告 (December 2023) https://www.yidaiyilu.gov.cn/a/icmp/2023/12/15/20231215179983118/bcb251af3c01496eb5f1cf47c7557171.pdf accessed November 5, 2024.

11 Peltola Motolani *et al.*, "China-powered ICT Infrastructure: Lessons from Tanzania and Cambodia" (*South African Institute of International Affairs, December 15, 2021*) https://saiia.org.za/research/china-powered-ict-infrastructure-lessons-from-tanzania-and-cambodia/ accessed November 5, 2024.

the communication costs in Tanzania by 57%[12] and underscores the importance of the Digital Silk Road as a component of the BRI.

These investments demonstrate that Chinese state-owned contractors and financiers have played a pivotal role in the infrastructural development across Africa.

Middle East investment focus

The Arabian Peninsula, particularly the Gulf Cooperation Council (GCC) countries, is similarly establishing substantial economic links with Africa. The Red Sea serves as a vital maritime route connecting the Arabian Peninsula with East Africa, enabling projects in agriculture, energy, and infrastructure and facilitating regional integration through the Suez Canal.

For example, during COP28, Abu Dhabi Future Energy Company PJSC (known as Masdar) announced their partnership agreements with governmental and private entities in six sub-Saharan countries (Angola, Uganda, Kenya, Mozambique, Zambia, and the Republic of the Congo). Masdar plans to invest $10 billion in these countries to deliver 10 GW of capacity for clean energy to be achieved by 2030.[13]

More recently, in August 2024, Saudi Arabia entered a 92-year deal to develop Djibouti International Free Trade Zone. The Saudi Ajyal Petroleum and Energy Company commenced construction of a new oil refinery in Djibouti. The project aims to attract Saudi investors to Africa and capitalize on Djibouti's strategic position with respect to trade in the region.[14]

As GCC investments in African infrastructure and other sectors are expanding, the need for reliable dispute resolution mechanisms becomes paramount to support foreign investment and growth.

12 Office of the Belt and Road Construction Leadership Group, 中国—非洲国家共建“一带一路”发展报告 (December 2023) https://www.yidaiyilu.gov.cn/a/icmp/2023/12/15/20231215179983118/bcb251af3c01496eb5f1cf47c7557171.pdf accessed November 5, 2024.

13 https://masdar.ae/en/news/newsroom/masdar-advances-10gw-africa-growth-plan

14 https://www.worldcargonews.com/news/2024/08/saudi-arabia-to-develop-logistics-hub-in-djibouti/

2. Types of disputes arising

Construction disputes

Large-scale construction projects in Africa often face a multitude of challenges, such as delays, cost overruns, performance issues, and regulatory obstacles, often due to financing issues, government changes, or logistical complexities. These disputes are especially common in African infrastructure projects, where political changes can impact and disrupt project timelines and cost structures.

The Nairobi–Mombasa Highway project in Kenya, involving Chinese entities such as China Road and Bridge Corporation and China Communications Construction Company, has faced several issues. The original cost of the project was estimated to be $1.5 billion but has increased to more than $3 billion due to the high cost of land acquisition and the need to make changes to the design to address environmental concerns. Allegations of corruption have also led to investigations by the Kenyan government.[15]

Energy sector disputes

In sectors such as oil, gas, and renewable energy, a multitude of challenges may contribute to potential disputes. Regulatory uncertainty and inconsistent policy enforcement by local governments often create a volatile business environment, making it difficult for investors to plan and execute projects smoothly. Environmental and social concerns, such as the impact of projects on local communities and ecosystems, can also lead to legal and contractual conflicts, particularly when stakeholders have differing views on compliance and sustainability practices. Security risks, including political instability and localized conflicts, can disrupt operations and challenge the continuity of energy projects, further complicating partnerships and heightening the risk of disputes.

Joint ventures involving Chinese, Middle Eastern, and African entities are also frequent. These partnerships, though promising, are prone to disputes over production-sharing agreements, supply contracts, and performance standards, especially as each party navigates varying expectations and operational frameworks. For example, the Nigerian National Petroleum Corporation was facing a dispute with its joint venture partners, China National Offshore Oil Corporation and South Atlantic Petroleum, over the OML 130 block in the Niger Delta. This dispute centered on disagreements over fiscal terms and tax issues in the production-sharing contract.[16]

Long-term agreement disputes

Disputes arising from supply chain agreements, distribution deals, and franchising agreements are particularly common. Issues such as pricing adjustments – in particular, those related to currency fluctuation, contract renewals, and performance benchmarks – can disrupt business relationships, emphasizing the need for thorough, clear contractual terms from the outset, and continuous and solid communication to minimize disputed issues.

Sovereign debt and investor-state disputes

Investor-state disputes often involve sovereign debt or regulatory changes, particularly in the context of large-scale, long-term projects. Chinese and Middle Eastern entities working on state-backed projects in Africa may face disputes over perceived regulatory shifts, especially in situations where host governments alter investment terms and policies, implement abrupt changes to local content, or alter taxation laws or agreements. Such adjustments can significantly impact the financial position of projects, especially when investors find themselves required to adjust to sudden new obligations or additional costs.

15 https://ij-reportika.com/download/8991/?tmstv=1685257761

16 https://globalarbitrationreview.com/settlements/nigerian-oil-block-dispute-settle

3. Dispute resolution trends

Commercial arbitration

International arbitration remains the go-to mechanism for resolving complex cross-border disputes, with institutions such as the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA) commonly chosen for these cases. In its 2023 statistics, the LCIA has reported the percentage of African parties doubling compared to previous years. The leading African countries represented remained Mauritius and Nigeria. This growing engagement highlights Africa's expanding reliance on international arbitration to manage complex disputes, especially in sectors such as energy and commodities, where geopolitical and market instabilities have made clear and neutral dispute resolution critical. The rise of regional institutions such as CRCICA (Cairo) and LCA (Lagos) is also notable, although many international parties still lean toward international venues.

Based on a study conducted by the Beijing Arbitration Commission/Beijing International Arbitration Center, China International Contractors Association, and the Engineering Management Faculty of the Tianjin University,[17] Chinese entities often prefer arbitration seats such as Singapore, Hong Kong, or London, and the key factors in choosing a particular arbitral institution include its reputation and independence, fairness, and neutrality. These preferences shape dispute resolution clauses, balancing the need for neutrality and accessibility.

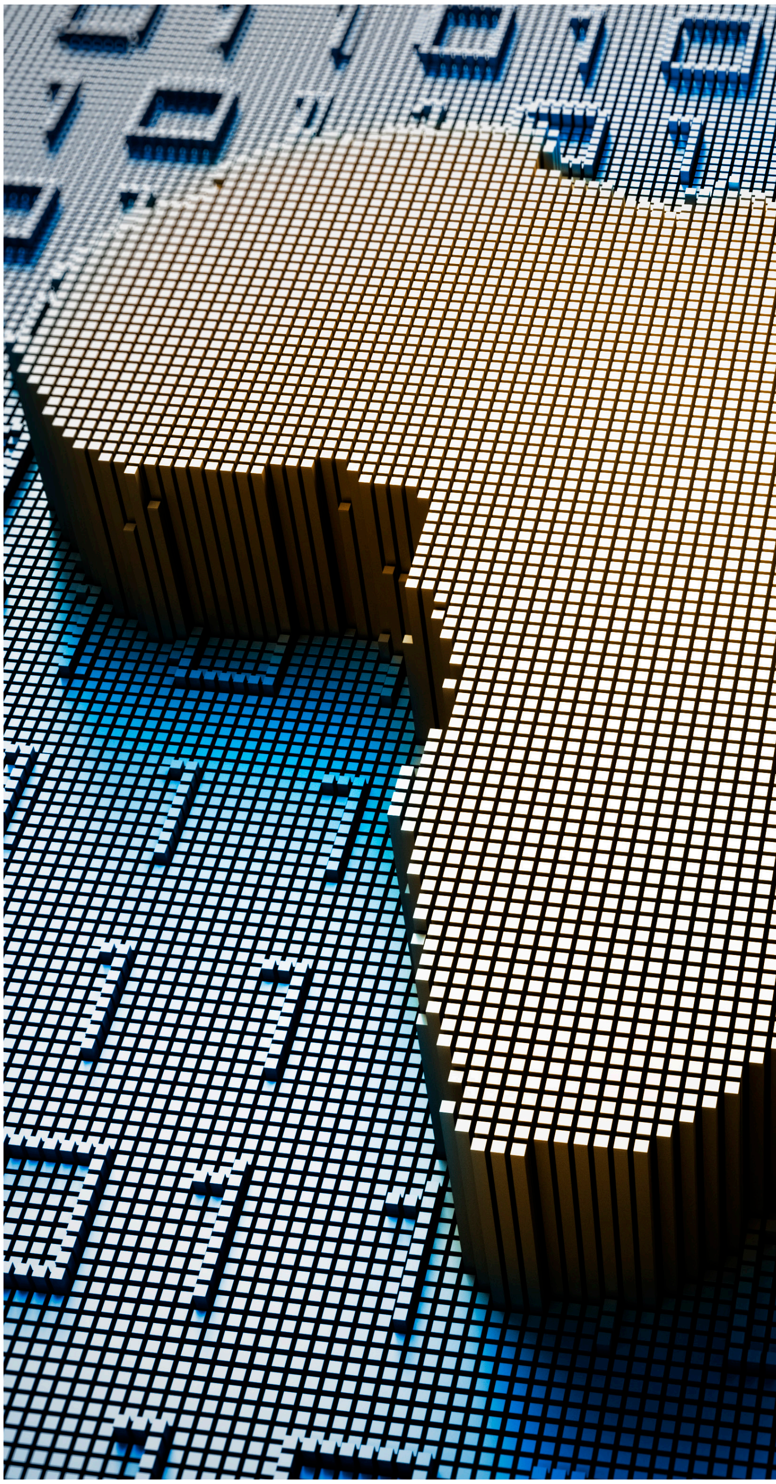
Dedicated Chinese local courts

On June 29, 2018, the Supreme People's Court of China (SPC) established the First and Second International Commercial Courts (CICC) in Shenzhen and Xi'an, respectively. This was followed by the establishment of CICC in various local courts, including those in Beijing and Hangzhou.[18] The CICC is a permanent adjudication organ of the SPC for handling international commercial disputes, either as the dispute forum or in support of arbitration processes. The *Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court* (the *Provisions*) stipulate that the aims of establishing the CICC include the provision of services and protection for BRI construction. The judgments and rulings rendered by the CICC are final and binding on the parties.

The CICC may have jurisdiction to hear international commercial disputes under a number of circumstances, including where there is a jurisdiction clause in favor of the SPC or where the pertinent first instance international commercial case is of nationwide significant influence. However, the CICC only accepts international commercial

17 https://www.bjac.org.cn/page/data_dl/%E3%80%8A%E4%B8%80%E5%B8%A6%E4%B8%80%E8%B7%AF%E5%B7%A5%E7%A8%8B%E9%A1%B9%E7%9B%AE%E4%BA%89%E8%AE%AE%E8%A7%A3%E5%86%B3%E6%9C%BA%E5%88%B6%E8%B0%83%E7%A0%94%E6%8A%A5%E5%91%8A%E3%80%8B.pdf

18 https://cicc.court.gov.cn/html/1/219/208/209/2427.html



disputes that arise between equal commercial entities[19] (i.e., it does not hear cases between states or involving investor-state disputes, including applications as regards international commercial arbitration awards). Further to this, in the event of an SPC jurisdiction clause, it only accepts in first instances cases with a disputed amount of at least RMB 300 million (about $40 million). These limitations may have an impact on parties' willingness to incorporate a CICC jurisdiction clause in their BRI contracts.

19 https://cicc.court.gov.cn/html/1/219/208/210/769.html

The CICC also provides support to arbitration processes.

- Article 2(4) of the *Provisions* provides that the CICC accepts “cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions.” For setting aside applications, these are limited to arbitral awards seated in mainland China.

- Under article 14, parties who have agreed to submit their dispute to arbitration by an international commercial arbitration institution under article 11, paragraph 1 may apply to the CICC for a ruling on preservation of property, evidence, or conduct before or after the commencement of arbitral proceedings. Such preservation measures are interim.

- Pursuant to article 11, the SPC has selected a number of international commercial arbitration institutions to build with the CICC a dispute resolution platform on which mediation, arbitration, and litigation can be efficiently linked, thereby creating a one-stop international commercial dispute resolution mechanism. These institutions include the China International Economic and Trade Arbitration Commission, the Beijing Arbitration Commission, and the Hong Kong International Arbitration Centre (HKIAC).

Other initiatives

Alongside China's effort to set up a new institution to resolve BRI disputes, a number of jurisdictions have also adapted to the BRI.

***Hong Kong*:**

- HKIAC has established a Belt and Road Advisory Committee comprising independent authorities combining expertise in the financial, infrastructure, insurance, construction, and maritime sectors.
- HKIAC has issued recommended model clauses for arbitration under the HKIAC Administered Arbitration Rules and arbitration administered by HKIAC under the UNCITRAL Rules, respectively, for Belt and Road contracts.

Parties to arbitrations administered by HKIAC may benefit from the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region*. Pursuant to this Arrangement, the parties may apply to the Intermediate People's Court of the place of residence of the party against whom the application is made or the place where the property or evidence is situated for (among other things) an order to preserve property, evidence, and/or conduct.

***Singapore*:** On April 1, 2023, the Supreme Court of Singapore and the SPC signed a memorandum of understanding to manage international commercial disputes involving BRI through a litigation-mediation-litigation framework. Such a framework remains to be developed and implemented by the Singapore International Commercial Court (SICC) and CICC. The framework is expected to provide case management conferences, to determine procedural steps and give case management directions, as well as the power of the CICC and SICC to stay proceedings where the parties seek to settle their disputes through mediation.

The ICC has created a Belt and Road Commission to focus on the dispute resolution needs of the full Belt and Road spectrum. In 2019, the ICC published the *ICC Guidance on Mediation of Belt and Road Disputes*, recognizing mediation as a highly effective tool to resolve BRI disputes.

Investment disputes

Bilateral investment treaties have become essential tools to protect Chinese and Middle Eastern investments in Africa. These treaties allow investors to resolve disputes with host states through arbitral institutions such as the International Centre for Settlement of Investment Disputes (ICSID) particularly in cases where investors believe their rights have been infringed by state actions.

To maintain long-term partnerships and minimize disruption, many investors are increasingly exploring alternative dispute resolution methods beyond arbitration, including settlement discussions, mediation, expert determination, and other informal processes. These methods offer more collaborative and flexible approaches to resolving conflicts, helping parties avoid the rigidity of formal arbitration or litigation. Mediation, in particular, is valued for its emphasis on dialogue and cooperation, allowing parties to reach mutually agreeable solutions that maintain the goodwill necessary for ongoing or future projects. Mediation has experienced a revival with Africa-based dispute resolution practitioners often opting for mediation certification.

4. Arbitration is attractive but brings challenges

Arbitration provides a region-specific neutral platform with arbitrators who possess industry-specific knowledge, making it particularly valuable for sectors such as energy and construction, where technical expertise is essential. The ability to select arbitrators from Africa offers reassurance to African parties, enhancing the credibility and fairness of the process by incorporating local perspectives and understanding of regional culture and contexts. Additionally, arbitration maintains neutrality and confidentiality, which is essential for preserving sensitive business information in high-stakes international transactions. The enforceability of arbitral awards under the New York Convention further adds to the reliability of arbitration, supporting a stable environment that encourages continued investment in Africa. As of the date of this article, forty-two African states are party to the New York Convention.

However, arbitration does have challenges, especially given the need to navigate jurisdiction-specific requirements. First, the diversity of legal frameworks across China, the Middle East, and Africa – including civil law, Sharia law, and customary law systems – can introduce cultural and procedural complexities, adding a layer of challenge to effective dispute resolution. Second, political risk is a major consideration, particularly in disputes involving sovereign states, where regional political complexities may influence both arbitration outcomes and enforcement processes. Third, enforcement can be complicated in certain African jurisdictions where local legal disparities and judicial practices may impact the process. In certain African jurisdictions, arbitration continues to be viewed as competition to the local courts, increasing the difficulty of a smooth enforcement process. Handling disputes emanating from the China and Middle East trade with Africa requires a deep understanding of the specific legal environments of each jurisdiction.

5. Strategies for effective arbitration

Seeking legal advice when drafting arbitration clauses is essential to minimize ambiguity and hence avoid costly procedural disputes. Well-defined clauses should outline critical elements such as the seat of arbitration, the governing law, the number of arbitrators, and the language of proceedings.

Next, selecting experienced arbitrators with relevant industry expertise and familiarity with the specific legal and cultural nuances of the jurisdictions involved is crucial for achieving fair and well-informed decisions. Arbitrators who understand the unique regulatory, commercial, and cultural factors of the regions in question can help mitigate misunderstandings and build trust in the arbitration process.

Leveraging established arbitration institutions provides added credibility and procedural structure, which is invaluable in high-stakes, cross-border disputes. Institutions such as the ICC and LCIA offer established frameworks that lend confidence to both parties, ensuring consistency and transparency in proceedings. Additionally, preparing for enforcement from the outset by structuring contracts to address enforceability challenges can significantly reduce the risk of non-compliance with arbitral awards. Opting for asset tracing at the very beginning of the dispute (or on entering the contractual relationship) provides invaluable information. Contract management and early case assessment become ever more critical in this context, avoiding delays and potentially costly legal proceedings.

6. Future trends and conclusion

With trade links between China, the Middle East, and Africa projected to grow even further, particularly as Africa's economy expands, the number of cross-border trade and infrastructure projects is set to rise. To support this growth, it is crucial to manage existing projects and investments carefully and address any disputes efficiently. Mediation and alternative dispute resolution options offer pathways to amicable conflict resolution while preserving commercial relationships. Meanwhile, future agreements should be structured with well-defined dispute resolution mechanisms to protect all parties and mitigate potential risks effectively.

Antonia Birt
Partner
Dubai
+971 (0)4 709 6328
abirt@reedsmith.com

Lianjun Li
Partner
Hong Kong
+852 2507 9857
lianjun.li@reedsmith.com

Cheryl Yu
Partner
Hong Kong
+852 2507 9819
cheryl.yu@reedsmith.com

Ranna Musa
Senior Associate
Dubai
+971 (0)4 709 6377
rmusa@reedsmith.com

Steve Tam
Partner
Hong Kong
+852 2507 9804
steve.tam@reedsmith.com

Matthew Townsend
Partner (Registered Foreign Lawyer)
Hong Kong
+852 2507 9728
matthew.townsend@reedsmith.com

Jensen Chang
Associate
Hong Kong
+852 2507 9461
jensen.chang@reedsmith.com

Leveling the costs playing field: Third-party funding and other funding options for African parties

Introduction

Users of international arbitration consistently rank its costs as one of their principal concerns.

The costs of arbitration may affect African parties more acutely than parties from other continents. Moreover, many African parties perceive costs to be a barrier, contributing to broader concerns that arbitration may systemically disadvantage African parties; in the eyes of certain commentators, this contributes to concerns about the legitimacy of arbitration.

Alternative funding options exist to help overcome the costs barrier for African parties. Most prominent among these is third-party funding (TPF). We consider whether TPF and other funding options can help overcome the arbitration costs barrier for African parties.

The costs of international arbitration

The costs associated with international arbitration can be substantial, including (among others) tribunal fees, the fees of arbitral institutions, legal expenses, expert fees, and hearing expenses. The average cost of a commercial arbitration varies widely, influenced by factors such as the value of the dispute, the number of arbitrators, and the arbitral institution involved (if any). For high-value and/or complex arbitrations, the total costs of an arbitration will likely run to millions of U.S. dollars.

The potentially significant costs of arbitration can present a barrier to accessing justice for African parties. When foreign investors and parties insist on international arbitration as the mode of dispute resolution, their African counterparties may lack effective negotiating power, possibly leading some African parties to agree to arbitration without fully understanding the potential financial consequences.

Further, the costs of arbitration disproportionately impact African parties for several reasons:

i. Economic disparity: the costs of arbitration can create an uneven playing field, as many African parties may not be as well-resourced as their international counterparts.

ii. Limited familiarity with arbitration: some African parties may lack experience with arbitration, which can lead them to underestimate the costs involved.

iii. Logistical challenges: the expenses associated with international arbitration, including travel and accommodation, add to the cost for African parties, who typically have to travel outside the continent as most international arbitrations relating to Africa will be heard outside Africa.

iv. Exchange rate fluctuations: discussed below.

Exchange rates

No African currency is a dominant, global currency. Leaving aside the CFA franc (which is pegged to the Euro), the currencies of many African nations are more volatile than major global currencies in which international parties may primarily conduct their business. For example, measured against the USD, in the five-year period from March 2019 to March 2024, the South African rand (rand) fell by 19%; the Kenyan shilling by 38%; the Egyptian pound by nearly 300%; and the Nigerian naira by more than 400%.

The world's foremost arbitral institutions invariably price their fees in global currencies, such as USD. With the notable exception of the Arbitration Foundation of Southern Africa (AFSA), whose fees are denominated in rand, the most well-known arbitration institutions based in Africa also denominate their fees for international arbitrations they administer in USD. Similarly, international and boutique law firms that specialize in international arbitration will typically charge their fees in USD, sterling or euros.

This presents a significant problem for African parties. By the time a dispute arises, often years after the relevant arbitration agreement was concluded, African parties may find that arbitration is, in their own currencies, much more expensive than they reasonably expected when they agreed to arbitrate – potentially, many multiples more expensive. Indeed, arbitration may be beyond the reach of some African parties, such that they cannot feasibly bring or defend claims in arbitration by the time a dispute arises.

Could TPF be the answer?

There are many types of third-party funding arrangements. Broadly, however, TPF is typically a form of non-recourse financing. In a TPF arrangement, a third party (the funder) provides a party with funds to finance all or part of the costs of the arbitration. In exchange, the funder is typically paid only if (1) the funded party prevails with its claims; and (2) the funded party receives sums from the unsuccessful party, whether through voluntary compliance with the arbitral award or enforcement. The funder often receives an agreed proportion of the funds recovered.

As the funding is provided on a non-recourse basis, the funded party typically has no obligation to pay the funder if its claims fail and/or if, despite success in the arbitration, it cannot recover the money awarded. Further, the costs of a funded arbitration do not feature in the funded party's accounts, because the funder assumes the risk of paying the legal fees and other costs in connection with the arbitration.

A discussion of all the advantages and disadvantages of TPF for African parties is beyond the scope of this article. However, some of the advantages of TPF for African parties are described below.

i. A party may be able to fund a claim that it might otherwise be unable to pursue, hence giving African parties increased opportunities to pursue claims. This is brought into sharp focus when a party is in financial distress because of its counterparty's wrongful actions and may struggle to pursue its claims without funding.

ii. Money that would be spent on legal fees and other arbitration costs can instead be spent more profitably: for example, by investing these sums into the party's business.

iii. Parties that can afford to fund legal fees may choose to use TPF to remove the costs of arbitrations from their balance sheets. Portfolio TPF financing may also be available for companies with multiple arbitrations, spreading risk and potentially leading to improved funding terms.

On the other hand, TPF is not a panacea for African parties. It has the following limitations.

i. TPF is usually only available for claimants. Limited funding options are available for respondents (unless they also have counterclaims).

ii. The prospects of obtaining funding may not be strong. International funders have rigorous investment criteria. Anecdotally, perhaps only 5–10% of cases submitted to international funders receive funding. It would be unrealistic to expect TPF to lower or remove the costs barrier for all African parties in all arbitrations.

iii. If an African claimant obtains funding, it will typically be required to disclose the fact of that funding in the arbitration. Some arbitration users perceive this as a disadvantage and have expressed concerns that such disclosures may prompt security for costs applications and create a perception that a claimant is in financial distress. However, the converse can be true: in view of funders' stringent investment criteria, the fact that a claim has received funding can be portrayed as an endorsement of its strength.

iv. For African respondents, a funded claimant may increase, not reduce, its costs risk. If a funded claimant succeeds, it is possible that the African respondent will be ordered to pay the claimant's funding costs, which can be substantial.

v. Finally, TPF is not available in all African jurisdictions. In certain common law African jurisdictions (such as Ghana and Uganda), TPF is prohibited based on the doctrines of champerty and maintenance. In most of Africa's civil law jurisdictions (such as Ethiopia, Rwanda, Algeria, Angola, and Senegal, among others), it is uncertain whether TPF is permissible, and hence funders may be reluctant to provide funding and run the risk of being unable to recover their investments. By contrast, in 2023, Nigeria became only the third country in the world to introduce legislation expressly permitting third-party funding of arbitrations.

The future of TPF in Africa

Outside of South Africa, the continent's most mature TPF market, TPF is uncommon in Africa and awareness of it can be limited in certain African jurisdictions. The perception of TPF can also be negative. There have been several high-profile investor-state arbitrations in which funded investors have won substantial awards against African states (including Tanzania and the Democratic Republic of the Congo). In some of those arbitrations, projects that were the subject of the disputes were at very early stages and had never generated any income. These decisions have led to disquiet among some commentators. Some African parties may therefore be wary of TPF.

Nevertheless, despite its limitations, TPF should not be overlooked by African parties. Although TPF is not appropriate or possible in all arbitrations, it will be for some and it can help level the costs playing field for African parties, thus helping to improve access to arbitral justice. Indeed, the South African courts have expressly recognized the role TPF plays in ensuring access to justice.

Alternative funding options for African parties in international arbitrations

African parties can consider funding options in addition to TPF. Such options are typically available for both claimants and respondents. These include After-the-Event (ATE) insurance; Before-the-Event (BTE) insurance; Damages-Based Agreements (DBAs); and Conditional Fee Arrangements (CFAs).

ATE and BTE insurance policies have become important tools for parties. ATE insurance is taken out after a dispute has emerged, covering the risks of legal fees and potential liability for the opponent's costs.

Unlike ATE insurance, BTE insurance is secured before any dispute arises, typically as part of broader insurance coverage, to cover the costs of potential future legal costs. It ensures that parties have access to legal representation should a dispute later arise. Though traditionally less common in Africa, BTE insurance is gaining traction as African businesses become more sophisticated purchasers of international legal services.

DBAs, a form of "no win, no fee" arrangement, allow lawyers to recover a percentage of the damages awarded if the case is successful. By aligning the financial interests of the lawyer and client, DBAs incentivize lawyers to secure the best possible outcome. However, this model is not universally permitted across Africa. DBAs are permitted in certain African jurisdictions, such as South Africa, Mauritius, and Ghana. However, they are prohibited in other jurisdictions, including Kenya, the Democratic Republic of the Congo, Tanzania, and Uganda. For African parties that can access DBAs, this funding structure offers a way to avoid upfront costs in return for foregoing a share of any recovered proceeds.

CFAs offer an alternative funding model by tying the amount of legal fees to the outcome of the arbitration, but they differ in important ways from DBAs. Under a CFA, the client is still obliged to pay legal fees. However, during the arbitration, the client usually does so at significantly reduced rates. In the event of success (which will be defined in the CFA agreement), the lawyers receive an uplift to their rates, taking those rates beyond 100% of their usual rates to compensate for the risk that they are paid below-usual rates in the event the client is unsuccessful in the arbitration. CFAs are widely used in South Africa, but also encountered in some other African jurisdictions such as Mauritius and Ghana.

The future

While regulatory frameworks across Africa vary, jurisdictions open to TPF, ATE, and BTE insurance, DBAs, and CFAs offer parties options with respect to their legal fees, potentially making arbitration more affordable and more available for African parties. It is therefore hoped that these options become more widely permitted across Africa; if they are not, African parties may continue to experience an unlevel arbitration costs playing field compared with international parties for whom these funding options are available.

Matthew Harley
Senior Associate
Dubai
+971 (0)4 709 6311
mharley@reedsmith.com

Avinash Poorooye
Associate
Dubai
+971 (0)4 709 6300
apoorooye@reedsmith.com

Sustainability-related disputes and arbitration in Africa

The African continent is poised for a significant rise in sustainability-related disputes. Factors such as the continent's vulnerability to climate change, reliance on extractive industries, and its aspirations for sustainable infrastructure investment – while adhering to global commitments toward green or "clean" investments – place it at the forefront of such disputes. As Africa increasingly becomes a hub for renewable energy projects, mining reforms, and environmentally and socially focused policies, arbitration has the potential to be a critical mechanism for resolving sustainability-related disputes[1].

Sustainability in the African context

Several factors underscore the centrality of sustainability-related issues in Africa:

1. **Abundant renewable energy potential:** Africa boasts 40% of the world's solar energy potential (but has an installed capacity of slightly more than 1%) and has resources for all types of renewable energy, including hydropower, which remains the continent's primary source of renewable energy at over 38 GW of installed capacity. [2] However, much of this potential remains untapped.
2. **Rich mineral reserves:** The continent is home to some of the largest reserves of critical minerals essential for energy transition and low carbon technologies, including solar, electric vehicles, energy storage, and green hydrogen. The Democratic Republic of the Congo (DRC) holds the world's largest reserves of cobalt; Mozambique is the world's second-largest producer of graphite; and the DRC, Mali, and Zimbabwe have combined untapped resources of 4.2 million tons of lithium. To meet the expected rise in global demand, production of these minerals will need to increase by nearly 500% by 2050. This will not be possible unless African mineral reserves are utilized. [3]
3. **Commitment to global agreements:** The Paris Agreement has been signed by 54 African countries, emphasizing their commitment to combat climate change. Agenda 2063 of the Africa Union aims to align economic growth with the UN Sustainable Development Goals (SDGs). These commitments are resulting in growing pressure from investors, civil society, governments, and regulators.

1 For the purposes of this article, '*sustainability-related disputes*' refer to disputes arising from obligations or issues tied to environmental, social, and governance (ESG) standards, climate change impacts, green investments, community welfare, and adherence to SDGs, for example.
2 "The Road to COP27: Making Africa's Case in the Global Climate Debate," Mo Ibrahim Foundation (July 2022), p. 46.
3 *Ibid*, p. 71.

Adding to these challenges, the World Economic Forum's Global Risks Report 2024[4] highlights risks likely to affect African nations, many of which intersect with sustainability concerns. Environmental risks such as climate adaptation failures, extreme weather, and resource scarcity rank among the top threats.

Inevitably, these dynamics will lead to legal disputes, which in turn call for adequate and effective dispute resolution mechanisms.

For example, in *AngloGold Ashanti v. Tanzania* [5], arbitration was initiated following Tanzania's reforms aimed at ensuring environmental protection and local benefits from mining operations. This case illustrates the tension between regulatory changes intended to promote sustainability and investor expectations under bilateral investment treaties (BITs).

Part I of this article aims to provide an overview of the types of sustainability-related disputes that may arise in Africa. Part II looks at how international arbitration may constitute a means to resolve such disputes practically and productively.

4 https://www.weforum.org/publications/global-risks-report-2024/, Annex 1.
5 https://globalarbitrationreview.com/article/second-mining-company-takes-tanzania

I. Typology of sustainability-related disputes in Africa

As a preliminary, the prerequisite to resorting to arbitration is the existence of an agreement to apply such a mechanism, whether through a contract, an ad hoc agreement, a bilateral investment treaty, the law of a State to promote certain types of investments, or a multilateral treaty.

Against this background, three main categories of sustainability-related disputes in Africa can be distinguished: contractual disputes, treaty-based disputes, and disputes in tort.

Contractual disputes. Many of Africa's future sustainability-related disputes will stem from contracts in sectors such as energy, mining, and infrastructure. Common clauses include:

- ESG clauses: Increasingly included in African investment contracts, ESG clauses [6] impose obligations related, among others, to emissions reduction, labor practices, and community impact [7]. Non-compliance with these clauses – whether due to resource constraints, mismanagement, or external factors – often results in a dispute.
- Force majeure and hardship clauses: As extreme weather events and other climate-related disruptions become more frequent, these clauses are invoked with greater regularity. For example, droughts affecting hydropower projects in Ethiopia, Tanzania, and Kenya could lead to disputes over performance delays.
- Hold harmless clauses: Local communities or third parties may claim damages from projects causing environmental harm. For example, disputes could arise from mining operations in South Africa where environmental degradation impacts water sources critical to agriculture and local livelihoods.

Additionally, regulations such as the European Corporate Sustainability Due Diligence Directive (CSDDD) [8], the Corporate Sustainability Reporting Directive (CSRD) [9], the Carbon Border Adjustment Mechanism (CBAM) [10], and the EU Deforestation Regulation (EUDR) [11] may directly or indirectly impact African projects. For example, EU-based investors might enforce ESG standards throughout their African supply chains, resulting in compliance disputes. European companies sourcing cobalt from the DRC could be impacted by the CSDDD, which compels companies to ensure their supply chains do not contribute to human rights infringements, including child labor and unsafe working conditions. The various EU due diligence requirements will apply to agricultural supply chains, such as cocoa production in the Ivory Coast or Ghana.

Treaty-based disputes. New generation investment treaties include provisions in respect of fundamental rights (including those of indigenous communities and future generations), climate change impact and adaptation, and ESG to strengthen the state's right to regulate, particularly in environmental issues. BITs concluded by African

6 These clauses include (i) representations and warranties, (ii) due diligence, (iii) performance metrics, monitoring, and reporting, (iv) compliance requirements, (v) remedies requiring a party to prevent or mitigate potential adverse impacts and remediate actual adverse impacts, (vi) indemnities and/or termination, notably for breach of sustainable requirements, adverse impact, or failure to meet performance requirements.

7 See report on use of ESG contractual obligations and related disputes, ESG Subcommittee of the IBA Arbitration Committee, October 2023. https://www.ibanet.org/report-on-use-of-ESG-contractual-obligations.

8 Directive (EU) 2024/1760 of the European Parliament and of the Council of June 13, 2024 on corporate sustainability due diligence; amending Directive (EU) 2019/1937; and Regulation (EU) 2023/2859 (CSDDD).

9 Directive (EU) 2022/2464 of the European Parliament and of the Council of December 14, 2022 amending Regulation (EU) No 537/2014; Directive 2004/109/EC; Directive 2006/43/EC; and Directive 2013/34/EU, as regards corporate sustainability reporting (CSRD).

10 Regulation (EU) 2023/956 of the European Parliament and of the Council of May 10, 2023 establishing a carbon border adjustment mechanism (CBAM).

11 Regulation (EU) 2023/1115 of the European Parliament and of the Council of May 31, 2023 on the making available on the Union market and export from the Union of certain commodities and products associated with deforestation and forest degradation, and repealing Regulation (EU) No 995/2010 (EUDR).

countries are no exception. For example, the Morocco–Nigeria BIT provides for environmental and social impact assessments to be conducted by investors, and states that investments shall not be conducted "in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or the home state are Parties."[12]

At the continent level, the Protocol on Investment to the African Continental Free Trade Area (AfCFTA)[13], adopted in February 2023 and destined to replace all intra-African BITs and serve as a model for BITs concluded between member countries and non-African countries, confirms this trend. The Protocol emphasizes sustainability as a core principle in its preamble, which frames the objectives around promoting inclusive growth and sustainable development. It aims to attract investments that support poverty reduction, human rights, and the inclusion of marginalized groups such as indigenous peoples, women, and future generations. It integrates the UN SDGs to ensure that African countries' varying levels of development are recognized during implementation. The Protocol also addresses climate change by regulating incentives for sustainable investments, providing for commitments to the 2015 Paris Agreement, encouraging renewable energy projects, and taking into account public health and environmental concerns in investment decisions.

At the time of writing, it is uncertain whether the AfCFTA Protocol on Investment will provide for the possibility of recourse to investor-State arbitration (the annex is currently under negotiation). This raises the question of whether arbitration can be invoked where multilateral international treaties do not contain offers to arbitrate (for example, the 2015 Paris Agreement). The provisions of these treaties may not be capable of serving as a basis to find liability but may arguably be invoked to explain the context in which an investment was agreed or interpret contractual and/or treaty provisions.

Tort disputes. Though traditionally rare in arbitration, tort-based sustainability disputes may increase, especially where local communities are adversely affected by large-scale projects, such as in the extractive sector. In some circumstances, project developers or owners might not consider the features of arbitration a sufficient reason to consent to dispute resolution in a class action or mass claims arbitration. Such features are addressed below.

12 Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, articles 14 and 18(4).

13 See "African Continental Free Trade Area (AfCFTA) Agreement: Powering Africa's energy future" by Juliya Arbisman, Niyati Ahuja, Hyuna Yong p. 10 et seq... The AfCFTA is a trade agreement aimed at creating a single market for goods and services across Africa. Launched in 2018 and effective from 2019, it seeks to reduce trade barriers, eliminate tariffs on 90% of goods, and promote regional integration. The AfCFTA is expected to enhance intra-Africa trade, drive economic growth, and foster sustainable development by promoting inclusive growth and improving the continent's global competitiveness. As of August 2024, 47 member states have ratified the agreement. In February 2023, a Protocol on Investment was adopted in the framework of the AfCFTA.

II. Adequacy of arbitration for resolving sustainability-related disputes

In 2014, the International Bar Association's Task Force on Climate Change Justice and Human Rights[14] called on arbitral institutions to ensure that their rules were compatible with climate change objectives. In response, the ICC Commission on Arbitration and ADR issued a report[15] in 2019 examining the adequacy of arbitration and ADR for the resolution of disputes relating to climate change. It highlighted the following advantages for resolving sustainability disputes in Africa.

i. **Expertise:** Arbitrators and experts in fields such as environmental science, mining, and renewable energy can address the technical complexities of sustainability disputes.

ii. **Flexibility and efficiency:** Arbitration is often faster than overburdened court systems in African countries. Furthermore, the process is adaptable, allowing parties to customize proceedings for sustainability-related challenges.

iii. **Provisional measures:** Urgent measures, such as halting adversely impacting activities, can be ordered through arbitration, subject to the tribunal's jurisdiction.

iv. **Transparency and public participation:** Although arbitration is typically private, disputes involving public interest can incorporate transparency measures, including the publication of awards or participation by non-parties such as NGOs.

v. **Promoting ESG compliance:** Arbitration can indirectly encourage sustainability by holding parties accountable for ESG obligations. For example, tribunals could factor ESG compliance into cost allocation decisions, incentivizing parties to adopt sustainable practices.

vi. **Adaptability:** Parties can agree to incorporate ESG principles, international standards (e.g., UN Guiding Principles on Business and Human Rights), and innovative remedies tailored to sustainable outcomes.

The role of arbitration centers across the continent, such as the Lagos Court of Arbitration, the Cairo Regional Centre for International Commercial Arbitration, and the Kigali International Arbitration Centre are crucial for fostering the resolution of sustainability disputes through arbitration. These centers can provide regional expertise tailored to local ESG challenges and concerns. They can also promote affordable arbitration services, improving feasibility for smaller entities and communities. Furthermore, they can develop model clauses addressing ESG issues, including transparency and third-party involvement.

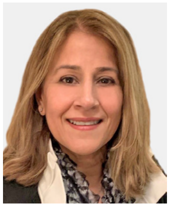
14 IBA Climate Change Justice and Human Rights Task Force Report, "Achieving Justice and Human Rights in an Era of Climate Disruption," p. 144.

15 ICC Commission on Arbitration and ADR, "Resolving Climate Change Related Disputes through Arbitration and ADR," ICC Publication No. 999 ENG, 2019.

Despite its promise, several challenges could limit the effectiveness of arbitration for sustainability disputes in Africa such as enforcement issues. While many African jurisdictions are party to the 1958 New York Convention, enforcement of arbitral awards can face delays and judicial interference.

Addressing these challenges requires strategic investments in capacity building, stronger regional cooperation, and enhanced public awareness of the role arbitration can play in resolving sustainability disputes equitably and efficiently.

Clément Fouchard
Partner
Paris
+33 (0)1 76 70 40 40
cfouchard@reedsmith.com



Tallat Hussain
Partner
London
+44 (0)79 1259 6149
thussain@reedsmith.com

Vanessa Thieffry
Senior Associate
Paris
+33 (0)1 86 65 42 11
vthieffry@reedsmith.com

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Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City/DX18 London