

# Investments In Sub Saharan Africa: The Role of International Arbitration in Dispute Settlement

Oladiran Ajayi\* and Patricia Rosario\*

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*Africa has grown significantly in this decade and is attracting investors. Economic growth can however be cyclical. The World is now going through a major economic downturn and Africa is not exempted. In different countries, including African States, parties may find themselves in positions where they cannot meet their contractual requirements and this will lead to a dispute. This paper considers the arbitration mechanisms for resolving such disputes relating to investments in Sub Saharan Africa. It will look at Nigeria and Angola and the avenues for arbitration in disputes relating to them. It will conclude that structures exist for international arbitration relating to investments in many African countries but that there is still a need for more countries develop similar structures and sign up to international arbitration initiatives.*

## 1.0 Introduction

A refreshing world economic indicator of the decade of the 2000s has been a consistent growth in Sub Saharan Africa. In 2007 the International Monetary Fund noted that Sub Saharan Africa witnessed its best growth performance in more than three decades.<sup>1</sup> This economic growth, largely fuelled by higher revenues from commodities, has also attracted foreign investors. The current nosedive in the international economy is however beginning to take its toll on African States. It is expected that as pressures mount on host governments from the people, the governments may seek to get a greater share from existing agreements with foreign investors or put in another way, attempt to renegotiate existing agreements. This paper considers the dispute resolution mechanisms that are available to both parties in the event that such transnational disputes arise, to provide a better understanding of resolving transnational disputes involving African States. It will take a look at two of Africa's big economies: Nigeria and Angola and will appraise the current international legal structures available to investors in these countries from the perspective of both the host state and the investor. It will consider the local attitudes to these international rules and local/regional initiatives to international dispute settlement.

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\* International Legal Studies Program, American University Washington College of Law The Author can be Contacted at [diranajayi@yahoo.com](mailto:diranajayi@yahoo.com)

\* LLM Comparative and International Dispute Resolution, Queen Mary, University of London. The Author can be contacted at [patricia.rosario@rosarioconsulting.com](mailto:patricia.rosario@rosarioconsulting.com).

<sup>1</sup> International Monetary Fund, World Economic and Financial Surveys, "Regional Economic Outlook: Sub Saharan Africa." April 2007.

## **1.1 Dispute Resolution in Africa**

African societies have historically resolved disputes through the use of a negotiated settlement.<sup>2</sup> As these countries became colonised, State controlled dispute resolution mechanisms replaced the old systems and the traditional dispute resolution mechanisms survived, to some extent, as informal systems and as lower Courts in the judicial hierarchy.

## **1.2 Arbitration in Africa**

African parties, private and public, are increasingly involved in commercial and investment arbitration disputes. African States have made initiatives to develop the practice of international arbitration and subject themselves to reputable international bodies. Some of these initiatives are discussed below:

### The 1985 UNCITRAL Model Law on International Commercial Arbitration<sup>3</sup>

The Model Law was designed primarily to encourage and assist States harmonise their arbitration procedure. It was formulated under the aegis of the United Nations and therefore contains input from a wide variety of countries. It is generally seen as an international standard for arbitral procedure and has formed the basis of many national arbitration laws. It covers the entire arbitral process and, crucially, seeks to limit court interference with it. It has been noted that the future of commercial arbitration in Africa greatly depends on the adoption of the Model Laws.<sup>4</sup> Many African States have enacted legislation based on the Model Law, they include: Nigeria (1990), Tunisia (1993), Kenya (1995), Egypt (1996), Zimbabwe (1996), Uganda (2000) and Zambia (2000). These States have achieved varying degrees of success in attempting to modernise their arbitration practice and limit Court intervention.<sup>5</sup>

### The Asian-African Legal Consultative Organisation (AALCO)

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<sup>2</sup> D. Kohlhagin, "Alternative Dispute Resolution and Mediation: The Experience of French Speaking Countries" Presentation at EACC Conference: How To Make ADR Work, in Addis Ababa, Ethiopia.

<sup>3</sup> With amendments adopted in 2006.

<sup>4</sup> A. Asouzu, "Some Fundamental Concerns and Issues about International Arbitration in Africa," *African Development Bank Law Development Review*, Vol. 1, p. 81, 2006.

<sup>5</sup> For a commentary, see M. Coleman, "Africa: Arbitration Nation" in *Bilaterals.Org* available at [http://www.bilaterals.org/article.php3?id\\_article=6328](http://www.bilaterals.org/article.php3?id_article=6328) (last visited 25 March 2009).

AALCO is an international organisation comprising of 47 States in Africa and Asia. The objective of the organisation is to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern. Further to its objectives, and in consideration of the work of UNCITRAL in the field of international law, AALCO at its Doha session in 1978 proposed the establishment of Regional Centres for International Commercial Arbitration.<sup>6</sup> Today AALCO has established four Regional Centres: The Regional Centre for Arbitration, Kuala Lumpur (RCAKL),<sup>7</sup> the Cairo Regional Centre for International Commercial Arbitration (CRCICA),<sup>8</sup> the Lagos Regional Centre for International Commercial Arbitration (LRCICA)<sup>9</sup> and the Tehran Regional Arbitration Centre (TRAC).<sup>10</sup>

AALCO Regional Centres are to promote the wider use of the UNCITRAL arbitration rules and are to take such steps as to promote the wider application of the Rules. The Regional Centres thus aim to provide arbitration facilities of a widely acceptable international standard. The Centre's deal with disputes of an international character, although domestic referrals may be made to the Centre such an arbitration will be governed by the domestic arbitration law.<sup>11</sup> The use of the Centres and its facilities appear to enjoy growing popularity, for instance, in the six years of its operation, the disputes referred to the Lagos Centre increased sharply by 2006.<sup>12</sup>

Awards made under the aegis of the AALCO Centre will benefit from the enforcement mechanism provided for under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").<sup>13</sup> The host States of the Regional Centre's are parties to the New York Convention and by its provisions awards may be enforced against a disputing party in any other signatory State where its assets may be

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<sup>6</sup> For a discussion of the history and purposes of AALCO see its website: [www.aalco.int](http://www.aalco.int) (last visited 25 March 2009).

<sup>7</sup> Established in Malaysia in 1978.

<sup>8</sup> Established in the Arab Republic of Egypt in 1979.

<sup>9</sup> Established in 1989 in Nigeria

<sup>10</sup> The agreement for establishment of the Centre was reached between AALCO and Islamic Republic of Iran on 3 May 1997 and ratified by the President of the Republic of Iran on 10 June 2003

<sup>11</sup> See LRCICA website at <http://rcicalagos.org>

<sup>12</sup> Report of the Director, LRCICA Mrs Eunice. Odiri to the 45th Session of AALCO (3-8 April 2006) New Delhi India.

<sup>13</sup> New York, 10 June 1958.

found.<sup>14</sup> A drawback that the Regional Centre's may face is a lack of sufficient local judicial awareness about the arbitral process.<sup>15</sup>

### Investment Arbitration

Where a foreign party has an investment claim against a government, like any other dispute, they may decide to resolve differences through arbitration. A notable mechanism for doing this is the International Centre for Settlement of Investment Disputes (ICSID). The Centre was established under the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of other States (the "Washington Convention").<sup>16</sup> It was created as a mechanism to resolve investment disputes within the structure of the World Bank although ICSID is an autonomous international institution. ICSID settles investment disputes between States and national's of other States that are parties to the Convention.<sup>17</sup> To give rise to ICSID jurisdiction the dispute must arise directly out of an investment. An advantage of ICSID arbitration is that a disputing investor does not have to enter into an agreement with the government to submit their dispute to ICSID. The Centre's jurisdiction is often triggered by Bilateral Investment Treaties (BITs) entered into between the host state and the government of the foreign investor's State. The BITs set the terms and conditions for private investment by investor's of one State in the host State of the other. They usually have dispute settlement provisions which provides for ICSID jurisdiction. Today, BITs are commonly used to settle disputes with governments, however, it is noted that African States do not have many BITs in force. Nigeria has eleven (11) BITs that have entered into force,<sup>18</sup> Angola has three (3)<sup>19</sup> and Ghana has eight (8).<sup>20</sup>

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<sup>14</sup> Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>15</sup> See for example, *Supra note 5*.

<sup>16</sup> The Convention opened for signature on 18 March 1965 and entered into force on 14 October 1966.

<sup>17</sup> In April 2006 the Administrative Council of the Centre adopted the Additional Facility Rules which authorise the Centre to administer certain categories of disputes which fall outside the scope of the Convention. They include: (i) fact finding proceedings; (ii) arbitration or conciliation proceedings between parties one of whom is not a contracting state or national of another contracting state; and (iii) arbitration or conciliation proceedings between parties at least one of whom is a contracting state or a national of another contracting state that do not directly arise out of an investment provided the underlying transaction is not an ordinary commercial transaction.

<sup>18</sup> With Finland (20 March 2007), France (19 August 1991), Italy (22 August 2005), Republic of Korea (1 February 1999), Netherlands (1 February 1994), Romania (3 June 2005) Serbia and Montenegro (7 February 2003), Spain (19 January 2006), Switzerland (1 April 2003), China (7 April 1994) and the United Kingdom (11 December 1990).

<sup>19</sup> With Cape Verde (15 December 1997), Germany (1 March 2007) and Italy (21 May 2007)

## OHADA

OHADA literally means *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* or the Organization for the Harmonization of Business Law in Africa. It is a supranational organization established by treaty signed on 17 October 1993 in Port Louis, Mauritius. It is composed of 16 sub-Saharan African member states.<sup>21</sup> Its members are mostly Francophone countries with the exception of Guinea-Bissau and Equatorial Guinea (Portuguese and Spanish-speaking countries respectively). Membership is, however, open to any member of the African Union.

Its purpose is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonization of business law among its member states. The basic instruments for harmonization of national law by OHADA are the “Uniform Acts” adopted by the Council of Ministers that lay down common rules governing business. Once a Uniform Act comes into force, it overrides all incompatible national law in the member states.<sup>22</sup>

The OHADA Uniform Act on Arbitration entered into force in 1999. It authorizes the practice of ADR, lays out rules of procedure, provides for the enforcement of arbitral awards in member states, and creates a key regional ADR centre: the Common Court for Justice and Arbitration (CCJA), in Abidjan, Cote d’Ivoire.<sup>23</sup>

## **2.0 Nigeria**

Nigeria is Africa’s most populous country. It is the biggest economy in West Africa and the 11th largest producer of crude oil in the world.<sup>24</sup> Nigeria has also shown a steady GDP

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<sup>20</sup> With China (22 November 1991), Denmark (6 January 1995), Germany (23 November 1998), Malaysia (18 April 1997) Netherlands (1 July 1991), Serbia and Montenegro (July 2000), Switzerland (16 June 1993) and the United Kingdom (25 October 1991). For a country specific list of BITs, see UNCTAD website at <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> (last visited 25 March 2009).

<sup>21</sup> Benin, Burkina Faso, Cameroon, Central Africa, Comoros, Congo, Côte d’Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo.

<sup>22</sup> For further reading about OHADA see T. Sutherland, and G. Sezneck, “Alternative Dispute Resolution Services in West Africa: A Guide For Investors” A guide sponsored by the Commercial Law Development Program United States Department of Commerce (2003).

<sup>23</sup> For further reading, see the OHADA website at <http://www.ohada.com/> (last visited 25 March 2009).

<sup>24</sup> For further reading on Nigeria’s oil and gas industry see US Energy information Administration website at <http://www.eia.doe.gov/emeu/cabs/Nigeria/Oil.html> (last visited 25 March 2009).

growth rate in recent years.<sup>25</sup> Most of the investment capital coming into Nigeria goes into the oil and gas industry, however, in recent years, large investments have been made in the telecoms, mining and banking sectors of the economy. Nigeria has 36 states and operates a federal system of government. Each state has its own judiciary and appeals from the state courts move to higher courts at the federal level.

## **2.1 Arbitration in Nigeria**

### Legal Regime

Modern day arbitration was introduced into the Nigerian legal lexicon by the Arbitration Ordinance of 1914. The laws of Nigeria were compiled in 1958 as Laws of the Federation of Nigeria (LFN) and the Arbitration Ordinance was included as Chapter 13. In 1988, the government enacted the Arbitration and Conciliation Act which was compiled in the Laws of the Federation of Nigeria 1990 as Chapter 19. The Act, modelled after the UNCITRAL Model Law provides a regime for settlement of commercial disputes through arbitration and conciliation. It also implements the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.<sup>26</sup>

Part I of the Act comprises of Ss 1 to 36. It deals with arbitration proceedings from the agreement to arbitrate to enforcement. Part II of the Act (Ss 37 to 42) make provisions for conciliation. The Act contains other provisions that deal with issues such as, appointment of the arbitrator and rules relating to the substance of the dispute.

An arbitration involving a Nigerian party will be with either the government (including government agencies) or a private party. The government, particularly in resource agreements, is generally perceived to have greater leverage than the other side in negotiating agreements; therefore, the dispute resolution clause may reflect this leverage.

A dispute with the government may effectively be dealt with by the dispute resolution clause contained in the contract. While negotiating this clause, it is likely that the government's best negotiating position will be to chose Nigeria as the seat of the arbitration while the company will want some other seat. This can be resolved by the choice of a third neutral country or by using a reputable arbitration institution within Nigeria, such as AALCO. It may however be

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<sup>25</sup> See US Central Intelligence Agency, *The World Factbook - Nigeria* (5 March 2009) available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited 25 March 2009).

<sup>26</sup> Arbitration and Conciliation Act, CAP 19 Laws of the Federation of Nigeria 1990.

that an investor is in a situation where a dispute arises with the host government and there is no contract with a dispute resolution clause between the investor and the government. In such a situation, where there is an investment treaty between the investors home country and the host country, BITs often contain dispute resolution clauses that will avail the investor *vis* the government.

### **3.0 Angola**

The Republic of Angola is situated in Southern Africa, it is bordered on the west by the Atlantic Ocean and shares borders with the Democratic Republic of the Congo, Zambia, Namibia Republic of the Congo. It has an estimated population of 16.5 million. Its official language is Portuguese and the Angolan legal system is based on Portuguese civil law system and customary law.

Angola is an attractive destination for foreign direct investment in Africa. It is blessed with a wide array of natural resources including oil and gas, diamonds, iron ore, phosphates, copper, feldspar, gold, bauxite and uranium. In recent years, Angola has shown strong economic performance, with both the oil and non oil economy performing well. GDP increased from US\$19.8 billion in 2004 to US\$60.4 billion in 2007.<sup>27</sup> It is one of Africa's fastest expanding economies and is a leading oil producer on the continent. Angola became a member of OPEC in January 2007.

With specific regard to foreign investment, Angola has started several measures to encourage investment. It set up a National Private Investment Agency and *Portal das Empresas*, a “one-stop shop” for investors with the aim of simplifying the investment process and reducing registration times for companies.<sup>28</sup> Also, the government has paid increased attention to dispute settlement mechanisms with the approval of the Voluntary Arbitration Law,<sup>29</sup> Private Investment Law<sup>30</sup> and The Petroleum Activities Law.<sup>31</sup> Angola is also a signatory to the

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<sup>27</sup> See World Bank Country Report: Country Brief: Angola at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/ANGOLAEXTN/0,,menuPK:322500~pagePK:141132~piPK:141107~theSitePK:322490,00.html> (last visited on 25 March 2009).

<sup>28</sup> See the *Portal das Empresas* website at <http://www.angolanainternet.ao/portalempresas/index.php> (last visited 25 March 2009).

<sup>29</sup> Law No. 16/03, of 25 July 2003.

<sup>30</sup> Law No. 11/03, of 13 May 2003.

Convention that established the Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group. The MIGA Convention entered into force on 12 April 1988. MIGA aims at promoting foreign investment and provides political risk insurance to companies covering losses resulting from any kind of risks, such as war, expropriation or non-payment of judicial or arbitration decisions against a host State. MIGA has also its own arbitral rules<sup>32</sup> to solve disputes arising under its guarantee agreements.

### **3.1 Arbitration in Angola**

#### Legal Regime

Angola is one of the largest recipients of foreign direct investments in Africa, particularly in the oil and minerals sectors. This is due partly to the abundance of natural resources but also to the various initiatives by the Government to attract foreign direct investments. The initiatives include: granting investors easier entry to the market, improving their regulatory framework, implementing fiscal and financial incentives and privatization programs among others. However, a useful tool remains underdeveloped. Angola has not taken measures to bring its arbitration practice fully in line with international standards. It is also not a signatory to the New York Convention<sup>33</sup> and the Washington Convention.<sup>34</sup> Accession to the New York Convention is not only desirable but crucial. It creates an international framework for the enforcement of arbitral awards. It also increases investor confidence that their awards will be enforced.

Alternative conflict settlement mechanisms encourage investment and consequently promote economic growth. They are therefore seen by investors as a useful alternative to the drawbacks often associated with the judicial system.<sup>35</sup> By enhancing alternative dispute resolution mechanisms and establishing rules and institutions that are international and

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<sup>31</sup> Law No. 10/04, of 12 November 2004.

<sup>32</sup> MIGA arbitration rules are quite similar to ICSID arbitration rules.

<sup>33</sup> In 1995 Portugal and Angola signed an Agreement on Legal and Judicial Cooperation which entered into force in May 2006. The agreement creates a mechanism for the review and confirmation of judicial decisions and arbitral awards.

<sup>34</sup> The Convention opened for signature on 18 March 1965 and entered into force on 14 October 1966.

<sup>35</sup> A recent World Bank survey estimates that commercial contract enforcement takes 1011 days in Angola. See World Bank publication "Doing Business 2009: Country Profile for Angola."



respect local views, the government will promote legal security and predictability within the commercial environment.

Below we will discuss the existing alternative dispute resolution mechanisms in Angola. The Angolan Voluntary Arbitration Law provides a general legal framework and other laws like the Private Investment Law and Petroleum Activities Law provide for arbitration as an alternative method to solve particular disputes.

### Voluntary Arbitration Law

The Voluntary Arbitration Law<sup>36</sup> provides for both domestic and international arbitration and consists of 50 articles divided into 8 chapters dealing with the entire arbitral process from the arbitration agreement to the enforcement. It provides for parties to agree to the settlement of disputes *that put at stake interests of international trade*<sup>37</sup> through arbitration. The law, however, falls short of current international practice with respect to international arbitration. For example, regarding enforcement, it provides that parties should enforce the award according to what was determined by the arbitral tribunal. It further provides that parties must comply within 30 days failing which the other party will request compulsory enforcement through the national courts.<sup>38</sup>

Angola is not a signatory to the New York Convention; therefore, in an arbitration subject to the Voluntary Arbitration Law the successful party is limited to enforce its award in Angola<sup>39</sup> and has to go through the Angolan judicial process.

### Private Investment Law

In 2003 Angola approved a new legal framework for foreign investment through the Private Investment Law of 13 May 2003. It sets forth the general basis for private investment. For example, in Article 12, Angola guarantees, irrespective of the origin of the capital, fair, non-

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<sup>36</sup> Based on the Portuguese Voluntary Arbitration Law: Law No. 31/86, of 29 August 1986.

<sup>37</sup> Article 40 defines international arbitration as "*arbitration in what international trade interests are at stake*". This is an unclear definition because it is not always possible to determine what these interests might be.

<sup>38</sup> Article 37(1) & (2) Angolan Voluntary Arbitration Law.

<sup>39</sup> By virtue of Article I of the New York Convention a successful party can take his award to any country where the unsuccessful party has assets as long as that third country is a signatory to the New York Convention.

discriminatory and equitable treatment and in case of expropriation and nationalization guarantees payment of a fair, prompt and effective compensation.

The Private Investment Law provides that disputes may be resolved by arbitration taking place in Angola and governed by Angolan Laws.

### The Petroleum Activities Law

The Petroleum Activities Law establishes the rules of access to and the exercise of petroleum operations. In case of any disputes article 89 provides that they should be resolved by agreement between the parties, according to the principles of good faith and of equity and balance between the interests of the parties. If amicable settlement fails disputes shall be resolved by resorting to arbitration, under the terms set forth in the prospecting licenses, corporation agreements, consortium agreement or production sharing agreements. The arbitral tribunal will have its seat in Angola and will apply Angolan law. The arbitration proceedings will be conducted in Portuguese.

An investor in Angola would be well served by including an arbitration clause in the agreement with an Angolan party. An option that may suit both parties is an *ad hoc* arbitration where the arbitration takes place outside institutional rules and parties decide on the procedure to govern the arbitration.

## **4.0 Conclusion**

The legal landscape for resolving disputes concerning investments made in Africa varies from country to country. Some countries have signed up to internationally regarded treaties while others have not. There have been efforts to unify the legal regime relating to arbitration, but, so far, these reflect the Anglophone/Francophone divide or simply reflect the countries that have made their laws based on the UNCITRAL Model Law and those that have not. It is however encouraging that a lot of African countries are signatories to the New York Convention. Also, investors can enter into agreements to arbitrate with African parties outside institutional rules. There is still the need to inform government officials, legal practitioners and the society at large on the practice of international arbitration and its benefits as an independent dispute resolution mechanism.