Navigating Specialist Energy and Natural Resources Arbitration in East Africa

Kluwer Arbitration Blog
April 1, 2018

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Please refer to this post as: Wairimu Karanja, 'Navigating Specialist Energy and Natural Resources Arbitration in East Africa', Kluwer Arbitration Blog, April 1 2018, http://arbitrationblog.kluwerarbitration.com/2018/04/01/navigating-specialist-energy-natural-resources-arbitration-east-africa/

The countries of Africa are nascent economies, some with well developed, and most with burgeoning energy and natural resources (ENR) sectors. With the vast resource of wealth comes a greater expectation of economic development and a greater interest in ENR and infrastructure investment. Disputes are often inevitable, considering the vested interests involved. Navigating ENR arbitration has become increasingly important, especially for African arbitrators and arbitration practitioners.

This post will focus on ENR arbitration in the East African countries of Kenya, Tanzania and Uganda, and will discuss: an overview of ENR investment in East Africa; East Africa's international arbitration regimes; dispute provisions in ENR agreements and laws; peculiarities ENR disputes; main causes of ENR disputes; selected ENR disputes in the region; and involvement of East African arbitrators and practitioners. The article will conclude with suggestions for arbitrators and practitioners to be better equipped to navigate specialist ENR arbitration involving East Africa.

ENR Investment in East Africa

East Africa has made major strides in national and cross-border ENR development.

In oil and gas, Uganda's crude oil reserves stand at 3.5 billion barrels, and Kenya's at 750 million barrels. Tanzania's gas reserves stood at 57 Trillion Cubic Feet (TCF) in 2016.

In October 2017, the Kenya Government signed a joint development agreement (JDA) with Tullow Oil, Africa Oil and Maersk Oil for the USD 2.1 Billion, 820 Km Lamu-Lokichar Crude Oil Pipeline. Uganda and Tanzania are constructing a 1,445 Km crude oil pipeline at a cost of USD 3.5 Billion with Tullow, Africa Oil and Maersk Oil.

In mining, Tanzania's 2015 mineral exports amounted to USD 1.37 Billion (24% of total exports). Titanium mining is dominant in Kenya. Uganda's main minerals include cobalt and gold.

In power, all three countries are members of the 10 member Eastern African Power Pool (EAPP). The EAPP aims to increase regional power generation from 63 gigawatts (GW) in 2015, to 6,110 GW in 2025 and regional transmission by 3,000 Kms with a capacity of over 6,000 megawatts (MW).

The above, and others, will require substantial investment by large and small players.

East Africa's International Arbitration Regimes

All countries are members of the International Centre for Settlement of Investment Disputes (ICSID) and signatories to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Kenya and Uganda are members of the Permanent Court of Arbitration (PCA).

Kenya's Arbitration Act of 1995 and Uganda's Arbitration Act of 2000 are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Regionally, the East Africa Court of Justice (EACJ) seated in Arusha, Tanzania, has an arbitration court. Further, IGAD, in partnership with the Djibouti Chamber of Commerce, is developing the Djibouti International Arbitration Centre (DJIAC).

Nationally, Kenya has 3 international arbitration institutions: CIArb – Kenya Branch; the Nairobi Centre for International Arbitration (NCIA) and the ICC Regional Office. Uganda has the Centre for Alternative Dispute Resolution (CADR). Tanzania has the

Tanzania Institute of Arbitrators (TIA).

Dispute Provisions in ENR Agreements

Kenya's 2015 Model Production Sharing Contract (PSC) provides for arbitration under UNCITRAL Rules with ICSID as an appointing authority. Under the Kenya Mining Act 2016, dispute resolution in mineral agreements should be through international arbitration, and mineral rights disputes should undergo mediation or arbitration.

Under the Kenya Energy Act 2006, licensing disputes should undergo arbitration. The Kenya standardized power purchase agreement (PPA) for above 10 MW provides for arbitration under the Kenyan Arbitration Act or the ICC Rules.

In Tanzania, the 2013 Model production sharing agreement (PSA) provides for arbitration under ICC Rules.

In Uganda, the 1999 Model PSC provides for arbitration under the ICSID Rules. Further, Uganda's Mining Act 2003 provides for mineral agreement disputes to undergo international arbitration, and mining rights disputes to be settled by arbitration.

Peculiarities of ENR Disputes

The sovereignty of natural resources is vested in the people and managed by governments and this is recognized under international laws such as the United Nations Convention on the Law of the Sea (UNCLOS) and under National laws. Disputes, therefore, mainly involve governments.

Due to a government being a party, one peculiarity is that national legislation may have a special government dispute procedure. For instance, in Kenya, the Government Proceedings Act has special party and notice requirements.

Investor-State disputes can be directly under investment contract (PSA, PPA, Mining Agreements) or under Bilateral Investment Treaties (BITs).

A dispute can also be state-state, such as the Kenya-Somalia maritime dispute at the International Court of Justice (ICJ) and the Tanzania-Malawi dispute over Lake Nyasa/Lake Malawi.

In ENR arbitration, amounts involved are significant, and disputes can be highly technical. Involvement of forensic experts and technical sectoral experts is common, if not a necessity.

Another peculiarity is that disputes are highly emotive and may have a political angle. Sometimes, termination is not about the facts, but about national sentiments, political opinions and election cycles.

Main issues in ENR disputes

The main ENR dispute issues are:

(a) ***Resource nationalism.*** This can be direct, for instance, after political unrest, where the government takes over projects. It can be indirect through a change in law and change in taxation regimes.

(b) ***Local content.*** The East African countries have growing local content regimes. Local content requirements may cause contract cancellation for not meeting thresholds or disputes between foreign companies and local partners.

(c) ***Resource price volatility in oil, gas and mining.*** Governments globally are known to implement production share, taxation and royalty to cover price volatility.

(d) ***Project delays.*** This leads to cancellation or contracts by governments, or delay compensation claims by investors.

Select East Africa ENR Arbitrations

At ICSID, Tanzania has had four ENR arbitrations, with one concluded and three pending. The parties include the Tanzania government, the Tanzania Electricity Supply Company (TANESCO), Independent Power Tanzania Limited (IPTL) and Standard Chartered Bank (Hong Kong) relating to PPAs.

Uganda has had three petroleum sector investment arbitrations at ICSID, with one concluded and two pending. The claimants have been Tullow Uganda and Total E&P. The Tullow Uganda cases entail petroleum agreements worth about USD 2.9 Billion.

Kenya has two pending ENR arbitrations at ICSID: a 2015 geothermal licence case

by Walam Energy worth approximately USD 620 Million; and a 2015 mining case by Cortec Mining and Stirling Investment, worth about USD 2 Billion.

The ICSID cases are available on the ICSID website.

With the increased investment and recent and on-going changes in law, arbitration in East African ENR has potential to grow.

Involvement of African Arbitrators and Practitioners

Each of the ENR cases discussed had a three-member tribunal. Only two African arbitrators were appointed in two cases: David Unterhalter (South Africa) in Standard Chartered v Tanzania; and Swithin Munyantwali (Uganda) in Walam Energy v Kenya.

African counsels included private practitioners and ministry/state counsels. Generally, there is a shortage of African arbitrators, and further, a shortage of African women arbitrators. Prominent ICSID women arbitrators include: Brigitte Stern (French) – Cortec Mining v Kenya and StanChart v Tanzania; and Jean Kalicki (US) – Tullow v Uganda.

In the ICSID Panel of Arbitrators (women): Kenya has nominated Ms. Jacqueline Kamau and Ms. Njeri Kariuki; Tanzania has nominated Ms. Verdiana Nkwabi Macha; Uganda has no female nominee. It is hoped that these East African women arbitrators and more, will obtain appointments in ICSID cases.

Conclusion

The potential for international investment and commercial arbitration in the East African ENR sector is significant. How can East Africans seize the opportunities?

There should be greater exposure and recognition. Arbitrators should list themselves as energy arbitrators in institutional databases such as CIArb, ICC, LCIA, NCIA and other centres. Arbitrators and Practitioners should publicise their expertise (subject to confidentiality) and participate in arbitration conferences.

There should be an awareness of industry best practices, and country energy and mining laws, noting recent overhaul changes.

There should be an appreciation for the need for technical experts (drilling, piping,

electricity charges, energy charges, taxation) and forensic experts in calculating quantum.

Very importantly, one needs to be aware of local realities, but be objective and steer clear of political issues.

Finally, keep learning. National centres like CIArb-Kenya, CADR in Uganda and TIA in Tanzania can offer courses on ENR arbitration. Other organisations include the International Law Institute-Africa Centre for Legal Excellence (ILI-ACLE) in Uganda and the London Centre for International Law Practice (LCILP) – Centre for Energy and Natural Resource Law.

Opportunities abound for East African arbitrators and arbitration practitioners in ENR arbitration. With targeted efforts, regional practitioners can more strategically compete in the global arbitration market.