The Often-Overlooked Value of African Seats for African-Chinese Disputes

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On 12 March 2021, Fangda Partners, ASAFO & CO and Delos Dispute Resolution hosted an interactive roundtable on "*The Often-Overlooked Value of African Seats for African-Chinese Disputes*". The panelists for the roundtable discussion were Tunde Fagbohunlu SAN , Julia (Zhang) Le Roux, Michael Tam, Olga Boltenko and Peter Po Kwong Yuen, and it was moderated by Andrew Skudder and Thomas Granier. With the steady increase of foreign investments in Africa, and the desire for African countries to achieve international recognition as prospective seats and venues for the resolution of international disputes, this event was timely and covered perspectives relevant to both investment arbitration and commercial arbitration. This post highlights the key takeaways from the roundtable discussion.

Nature of disputes between China and African States

Tunde Fagbohunlu SAN, spoke about the growing involvement of Chinese firms in oil and gas exploration and production activities, as well as infrastructure projects for the construction of roads and bridges in Africa. From his experience, Chinese investors have a pragmatic approach to the resolution of disputes. Using the Mambilla Hydropower Project (potentially West Africa's biggest hydro-power plant), as an example, he explained how the Chinese investors insisted that the dispute

involving this project should be settled with the Nigerian Government, and how the Chinese export bank played a role in ensuring the dispute was settled. However, it has been reported, that Nigeria is facing a new ICC claim, for reneging on the settlement terms.

He highlighted that, although Nigeria has been a signatory to the ICSID Convention since the late 1960's, only four claims have been brought against Nigeria. On the other hand, it is generally rare to see arbitrations initiated by State parties, since governments usually have other means of achieving their objectives in dispute scenarios, including through legislative change and regulatory measures. From his perspective, this fact suggests that Chinese parties would rather explore settlement, as well as that African States might prefer to resolve disputes through other means as mentioned above. This, however, has the potential to trigger stabilization claims from investors.

He however noted that there have been some recent contractual and investor-State arbitration claims filed against African States or companies. Examples are the claim filed by Chinese investors against Nigerian National Oil Company and the recent construction claim filed by a Chinese company against Ghana.

Finally, Tunde Fagbohunlu SAN noted that dispute resolution clauses between Chinese investors and African States may be different in contracts between private entities and public entities. In explaining this, he noted that Nigerian contracts with public entities, particularly production sharing contracts, tend to reflect standard format embodying the nature in which the Government would prefer disputes to be resolved (e.g., with the application of Nigerian law and with a Nigerian seat for the dispute). On the other hand, contracts with private entities reflect more pronounced freedom of contract, with the agreed terms being largely based on negotiating and bargaining strength of the parties.

He also noted that governments are now paying increasing attention to arbitration clauses and adopting policies to implement similar clauses across all sectors. This is where the input of local counsel or local co-counsel is needed, as they can assist Chinese investors in understanding attitudes and behaviors of the government.

Chinese investors and African host states are advised to conduct detailed negotiations to agree on a dispute resolution mechanism that considers the interests and approaches of both cultures to the resolution of disputes. From his

understanding, governments should also try to be flexible to accommodate investors' needs.

The importance of the arbitral seat and distinctive features that make specific seats fit for Chinese disputes

Julia (Zhang) Le Roux expressed that the judiciary has a huge role in encouraging arbitration, which would in return provide parties with the confidence needed to choose African seats. She noted that the constitutional court in South Africa and the International Arbitration Act 15 of 2017 recognize the role the judiciary plays in encouraging arbitration and spoke about the Johannesburg commercial court's works to expedite arbitration matters. She also highlighted that countries in Southern Africa are currently seeking to replicate international adjudicatory bodies like the Chinese International Commercial Court (which deals with China-related international disputes and was created to provide support for the Belt and Road Initiative), by working to harmonize their laws to encourage the use of African seats.

Michael Tam explained that Chinese investors usually inquire about the laws, culture, nature, and political environment of the host State, to ensure that its environment is suitable for their investments and that their investments will be protected. He further highlighted that this is important to Chinese investors because of sovereign risks insurance, such as expropriation or situations where a State's local judiciary disputes an arbitral tribunal's jurisdiction on the grounds that the dispute in question should be resolved by the local judiciary. He noted that insurers are usually reluctant to cover risks of this nature, and will usually argue that such risks are not covered under the insurance.

Olga Boltenko highlighted the dynamic nature of the South African and Nigerian environments, which allow for easy location of local co-counsel and arbitration practitioners. Transparency of legal systems, adoption of the UNCITRAL Model Law and ratification of international conventions, such as the ICSID Convention were also mentioned as key features that make specific seats attractive for Chinese investors.[fn]46 out of the 55 African States are parties to the ICSID Convention and 40 out of the 55 African states are parties to the New York Convention.[/fn]

Tunde Fagbohunlu SAN emphasized the importance the seat plays in enforcing an

arbitration agreement and/or award. From his experience, host States may renege on their obligations under clauses in a bid to bring more disputes before their local courts, and Chinese investors should be aware of this. However, States which are signatories to the New York Convention (NYC) have a treaty obligation to enforce arbitration agreements and awards, which allows for easier enforcement of assets in host States. He highlighted that in Nigeria, the Arbitration and Conciliation Act implements the NYC, thereby attracting investors to Nigeria as a seat and potential venue for arbitration proceedings.

While the resolution of disputes in developed seats and under international conventions has its obvious advantages, such as the attainment of an independent and fair resolution of the dispute, choosing African seats for the resolution of African disputes has its benefits. It allows for easy enforcement of the host State's assets in situations where most of its assets are located in its local territories. Moreover, selecting an African seat might encourage arbitrators to develop a better understanding of the dispute, because the dispute is being resolved in the location where the subject matter was performed or is being performed, which has the potential to assist the arbitrators understand the often nuanced cultural aspect of the dispute. It also allows for easier and efficient collaboration between local and foreign counsel in representation of clients during the dispute resolution process either during negotiations or the arbitration proceedings.

More importantly, selecting African seats for the resolution of Africa-related disputes presents a unique opportunity to aid development of the host State's international and arbitration laws. This will allow African courts, when determining arbitration-related applications, to analyze, examine and review their arbitration laws in relation to local and international aspects that the arbitration might raise. This has the potential to improve African States' jurisprudence on international law and arbitration related matters, and provide opportunities to update arbitration laws in order to ensure that statutes are up-to-date with the constant developments in international arbitration.

What African States are currently doing to encourage Chinese investors to choose African seats

Julia (Zhang) le Roux explained that through the China-Africa Joint Arbitration

Centre (CAJAC), China and African countries are working on a practical and effective dispute resolution mechanism to cater to the wider jurisdiction in African States. She highlighted that most Chinese investors view Africa as *a country* rather than a contintent comprised of more than fifty distinct legal jursidictions, and as such, may not be aware of the various and distinct laws that apply to each African State. This is why there has been a co-operation between neighboring African States to divide Africa into regions with similar backgrounds and laws. Examples of these are North Africa, West Africa, East Africa, the OHADA and the SADC regions.

This division influenced the development of the CAJAC rules which seeks to cater to the regions in Africa, as well as to Chinese investors. The rules are largely based on the Chinese Arbitration Rules, and allow for the parties to agree on (a) a full document only hearing,[fn]Article 5 of the CAJAC Rules.[/fn] (b) the arbitration to be conducted in Chinese,[fn]Article 34 of the CAJAC Rules.[/fn] and (c) a short timeline for conclusion of the arbitration.[fn]Article 34 of te CAJAC Rules.[/fn] These Rules can be adopted by Chinese investors and African parties for the resolution of their disputes.

While referring to African seats, Tunde Fagbohunlu SAN explained that Nigeria and South Africa complement each other and highlighted the sensitive nature of Nigerian judiciary to arbitration and that the Nigerian Arbitration and Conciliation Act reflects the UNCITRAL Model Law and NYC.

In addition, Andrew Skidder highlighted that (a) Mauritius is a stable and neutral seat for arbitration in Africa; (b) the judiciary is supportive without being intrusive; and (c) the LCIA-MIAC and PCA have offices in Mauritius. He further highlighted the quality of the local bar and practitioners, and that Mauritius allows foreign arbitration lawyers to practice without going through the local bar qualification and/or registration process.

Olga Boltenko stated that Hong Kong is one of the most advanced arbitration jurisdictions in the world: its laws reflect the UNCITRAL Arbitration Rules, the courts are arbitration-friendly, the practitioners pool is diverse, multiple languages are spoken – including African languages – and Hong Kong has a mutual agreement with China on enforcement of interim disputes.

Arbitral institutions in African jurisdictions have also played an important role by training legal practitioners on relevant factors to consider when drafting contracts

and dispute resolution clauses.

Conclusion

This roundtable discussion highlighted the overlooked value of selecting African countries as the arbitration seat, particularly in relation to Africa-based projects. Although the discussion was focused on Chinese investors, the insights provided apply to all Africa-based investments. By raising awareness to the value of choosing seats in African jurisdictions, law practitioners and investors will undoubtedly improve African States' prospects of becoming important arbitral seats.