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The New Ivorian Investment Code: Tinkering with an Imperfect System or Pioneering a Path?

Jonathan Ripley-Evans (Herbert Smith Freehills) and Jenalee Harrison, Marie Terrien · Saturday, November 30th, 2019

Investor-State Dispute Settlement (ISDS) is facing significant opposition in its current form. Whilst some parties are engaged to find new common ground, others have unilaterally implemented measures aimed at ousting investor-state arbitration altogether.

Over time, more and more attention has been paid to the International Centre for the Settlement of Investment Disputes (ICSID) and its apparent lack of meaningful African representation, particularly in disputes involving African States. In an attempt to address the problem of African participation (amongst others), Côte d'Ivoire has released its revised Investment Code (2018-646).

At a high level, the 2018 Investment Code strives to promote socially responsible investment and employment by encouraging regional development and improving local content whilst increasing the competitiveness of the local business. Social responsibility and legal compliance are preconditions to receiving benefits under the 2018 Code.

Investors are encouraged to rely on local enterprises in exchange for certain benefits offered under the new regime. The new code also provides for the establishment of a dedicated Investment Promotion Agency, aimed at streamlining investment procedures.

The Government believes that the reform will strike the right balance between granting a return for investors on the one hand, and protecting the State's interests through a mechanism of cooperation and shared growth, on the other.

However, this apparent positive development may mean little absent tangible protection of investments. To fully assess the enhancement of protection afforded to investors under the 2018 Code, one needs to consider the position under the 2012 Code.

Dispute Resolution under the 2012 Investment Code

Under article 20 of the 2012 Code, any dispute between natural or legal persons, whether foreign or Ivorian, relating to the application of the 2012 Code was to be submitted to the courts of Côte d'Ivoire or to an arbitral tribunal, unless settled amicably.

Whilst the mention of the amicable settlement was noble, the ambiguity surrounding its implementation rendered the provision relatively ineffective. Attempts at amicable settlement were not mandatory and conciliation required separate agreement between the parties on procedure.

The 2012 Code recognised the binding nature of agreements and treaties relating to the protection of investments and Côte d'Ivoire consented, through the mechanism of article 20, to the submission of investment disputes to ICSID.

The 2012 Code was a clear embrace of the principles espoused under the Washington Convention and this area is where, under the 2018 Code, one sees the most significant departure from the previous regime.

Dispute Resolution under the 2018 Investment Code

Article 20 of the 2012 Code has been entirely re-written, the principles of which are now found in article 50 of the 2018 Code.

Article 50 requires that parties "*shall endeavour to resolve* [their dispute] *through amicable negotiations*". Ostensibly to clarify the ambiguity of the 2012 Code, the 2018 Code now makes it mandatory for parties to *endeavour* to resolve any dispute regarding the interpretation or execution of the 2018 Code, through amicable negotiations. It may, however, be argued that one form of ambiguity has been exchanged for another as the word "*endeavour*" is notoriously open to interpretation.

To complicate matters further, a time limit is imposed upon such amicable negotiations. If no agreement is reached by the parties within twelve months, the text provides that the Conciliation Regulations of the United Nations Commission on International Trade Law ("UNCITRAL") shall apply. No guidance is given as to what constitutes the commencement of the amicable negotiation period which may lead to further uncertainty.

It would appear that the 12-month negotiation period, rather than constituting an extended period of mandatory negotiation, simply acts as a "long-stop" date, after which, the parties must proceed to Conciliation under the rules of UNCITRAL.

Notwithstanding the obligation to *endeavour* to resolve issues amicably, the parties may, by agreement, submit a dispute to arbitration.

The glaring omission from the 2018 Code is the withdrawal of the express consent to ICSID arbitration. Whilst Côte d'Ivoire remains a signatory to the Washington Convention, the Investment Code can no longer be relied upon as a source of consent by the host state to an ICSID arbitration. This omission appears deliberate and seeks to address one of the strongest criticisms against the current format of ISDS – the lack of African participation.

In place of an express reference to ICSID, the 2018 Code now provides for the submission of an investment dispute to the Arbitration Centre of the Common Court of Justice and Arbitration ("CCJA") of the Organization for Harmonization in Africa of Business Law ("OHADA"). Unfortunately, however, such submission requires further agreement between the parties which is likely to present challenges in the future.

The 2018 Code also implements a “fork in the road” mechanism in terms whereof a disputant is bound to elect one method of dispute resolution, waiving any right to resort to an alternative forum.

Conclusion

Notwithstanding the existence of certain ambiguities, the 2018 Code has not only addressed most of the shortcomings of the 2012 Code (insofar at least as dispute resolution is concerned), but it has presented what appears to be a viable alternative to ICSID arbitration.

Rather than resorting to drastic measures such as the outright termination of BITs or the renunciation of all forms of investor-state arbitration, the 2018 Code seeks to protect the interests of the country whilst providing protection to investors in a manner more palatable to the African state.

ICSID arbitration remains a possibility under the 2018 Code but importantly, it is no longer the preferred option. Côte d’Ivoire has made a clear statement in support of African seated arbitrations by incorporating a reference to the CCJA.

There is no doubt that the 2018 Code appears to be a step in the right direction, the requirement that the parties reach an agreement before a submission to arbitration, places the dispute resolution mechanism of the 2018 Code at risk. For this reason, investors may still require a more deliberate and express commitment to the protection of investments from the government than is offered in the 2018 Code.

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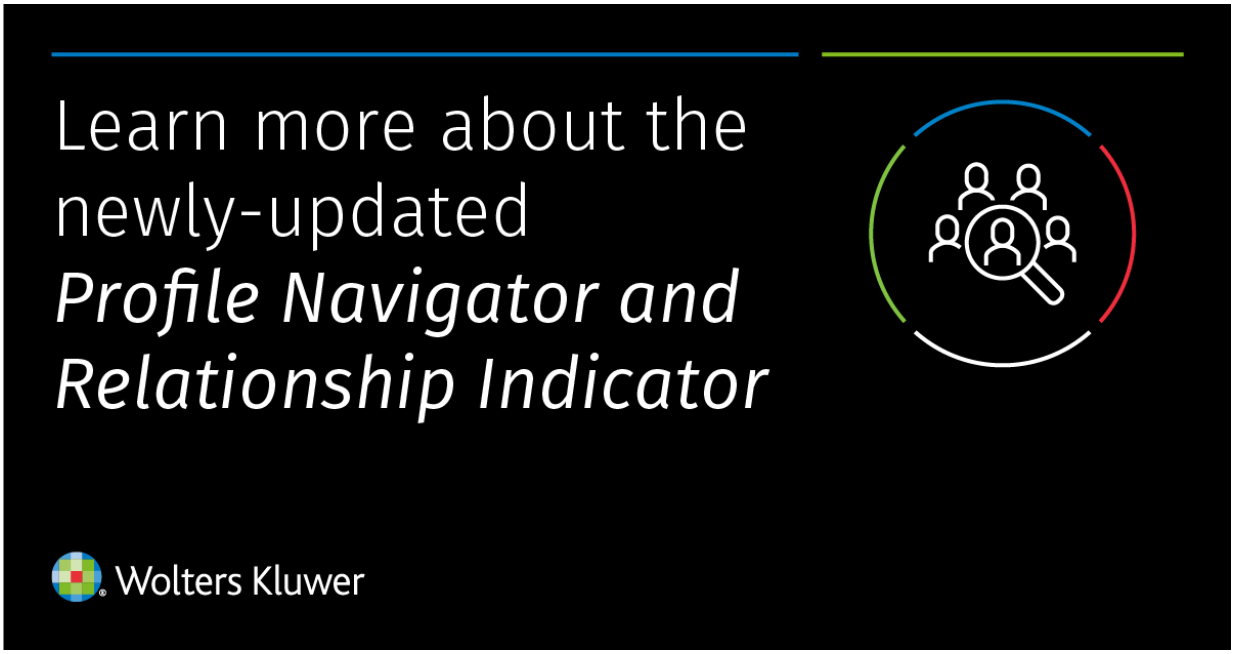

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