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Dispute Resolution in Angola: Arbitration in Focus

Due to the cost concerns, potential delays and other practical uncertainties associated with the Angolan judicial system, arbitration has become the primary form of commercial dispute resolution in Angola. In this briefing, we summarise the key considerations and issues in relation to dispute resolution and the enforcement of arbitral awards in Angola.

The Angolan Court System and Legislative Framework

The Republic of Angola (*República de Angola*) has a civil legal system based on its Constitutions of 1975, 1978, 1980, 1991, 1992 and 2010. Angola's civil framework is largely based on Portuguese civil law.

The primary legislation regulating corporate dealings in Angola is the 2004 Commercial Companies Law (*Lei das Sociedades Comerciais*, Law 1/04 of February 13). Private foreign investment in Angola is regulated by the 2011 Private Investment Act (*Lei do Investimento Privado*, Law 20/11 of May 20).

The Angolan judicial system is made up of the Higher Courts (*Tribunais Superiores*), the Provincial Courts (*Tribunais Provinciais*) and the Municipal Courts (*Tribunais Municipais*).

The Higher Courts are comprised of the Constitutional Court (*Tribunal Constitucional*), the Supreme Court (*Tribunal Supremo*), the Court of Auditors (*Tribunal de Contas*) and the Supreme Military Court (*Supremo Tribunal Militar*).

The Supreme Court is Angola's final court of appeal on all matters other than constitutional matters. Members of the Supreme Court are appointed by the President of Angola on the recommendation of the Supreme Judicial Council (*Conselho Superior da Magistratura Judicial*), which itself is made up of lawyers appointed by the National Assembly (*Assembleia Nacional*).

Created in 2008, the Constitutional Court is responsible for the administration and governance of constitutional matters, including reviewing and deciding upon the constitutionality of any rules or acts of the State and hearing judicial appeals based on the questioning of constitutionality.

The Provincial Courts are located in each of Angola's 18 provincial capital cities and hear both civil and criminal matters. The Provincial Courts are composed of specialised courts (*salas*), of which the Civil and Administrative (*Cível e Administrativo*) Courts hear civil cases. Provincial Court judges are nominated by the Supreme Court.

The Municipal Courts are local courts responsible for hearing claims at first instance. That said, a significant number of the Municipal Courts are reported as being either inactive or closed. Furthermore, Municipal Court judges are often not legally trained.

As such, in practice, many civil cases are initially referred directly to the Provincial Courts, rather than starting at the Municipal Courts.

Bringing civil claims in the Angolan judicial system can often be a slow and costly process. Most civil cases are subject to a judicial tax of 10% of the monetary value in dispute. The World Bank predicts that, on average, legal costs for court cases in Angola amount to approximately 44% of the total value of the claim.

Consequently, arbitration has become the primary form of dispute resolution for major commercial disputes in Angola.

Arbitration in Angola

As Angola is not a Member State of the Organization for the Harmonization of Business Law in Africa ("**OHADA**"), the option of arbitration under the OHADA Uniform Act on Arbitration is not available.

In terms of domestic legislation, the primary law governing both domestic and international arbitration in Angola is the 2003 Voluntary Arbitration Law (Law No. 16/03 of July 25) (the "**VAL**"). The VAL is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") and the Portuguese Law on Voluntary Arbitration of 1986 (Decree Law No. 31/86 of 29 August) – the Portuguese Arbitration Law which was in force at the time. However, unlike the Model Law, the VAL does not address the issue of preliminary decisions. Similarly, and again in contrast to the Model Law, the VAL allows for the appeal of domestic arbitral Awards on the merits of the decision, unless otherwise agreed between the parties. In respect of international arbitration, however, the general rule under the VAL is that decisions are final and are not subject to appeal.

Under the VAL, any interested parties may submit disputes to arbitration, provided that they have entered into a written agreement which includes an arbitration clause or a "submission agreement" (i.e. an ad hoc arbitration agreement made once a dispute has arisen), which is valid and enforceable. That said, certain disputes are not arbitrable (i.e. may not be referred to arbitration), such as those matters which fall under the Angolan courts' exclusive jurisdiction, for example disputes relating to insolvency, family, labour and employment, criminal matters and Angolan land law.

Under the VAL, arbitral tribunals are entitled to decide on their own jurisdiction and may rule on the existence, validity and effectiveness of an arbitration agreement.

Further, pursuant to the VAL, the Angolan courts may assist an arbitral tribunal during proceedings by granting interim measures or by assisting with the taking of evidence.

Domestic Awards rendered in arbitration proceedings held pursuant to the VAL will be treated and enforced in the same manner as a judgment of the Angolan courts.

The VAL additionally confirms that, if expressly agreed between the parties, arbitration proceedings seated or taking place in Angola may be governed by the laws of States other than Angola. For example, a contractual dispute regarding breach of an agreement governed by English law could be heard in arbitration proceedings held in Angola. Nevertheless, the formation, validity and legality of an arbitration clause or agreement must be considered pursuant to the VAL for any arbitration seated in Angola, regardless of the governing law of the underlying agreement selected by the parties.

The VAL is silent as to procedural rules governing the procedure of arbitration in Angola. The parties, therefore, may agree for arbitration to be subject to conventional institutional procedural rules, such as the ICC Rules of Arbitration or the LCIA Arbitration Rules.

In addition, Decree No. 4/06 of 27 February 2006 authorises the establishment of Angolan arbitration centres under the supervision of the Minister of Justice and Human Rights. The following centres were authorised in 2012:

- Arbitral Iuris S.A.;
- Harmony – the Integrated Centre for Studies and Conflict Resolution (*Harmonia – Centro Integrado de Estudos e Resolução de Conflitos*);
- the Centre for Mediation and Arbitration of Angola (*Centro Angolano de Arbitragem, Conciliação e Mediação*); and
- the Angolan Centre for Arbitration of Disputes (*Centro Angolano de Arbitragem de Litigios*).

However, the Angolan Centre for Arbitration of Disputes is, currently, the only functioning arbitration centre operating in Angola.

Enforcement of Arbitral Awards

Domestic arbitral Awards rendered in Angola pursuant to the VAL should be treated and enforced in the same manner as a judgment of the Angolan courts.

In cases of non-compliance with any domestic arbitral Award, after the expiry of a 30-day grace period for the parties to comply voluntarily with the terms of the arbitral Award, a party may seek direct enforcement through the Angolan courts. Enforcement proceedings will place before the Provincial Court of the seat of arbitration. During enforcement, the defendant may file an opposition to the enforcement proceedings, although such opposition will not stay any enforcement proceedings.

The Angolan courts may refuse the enforcement of an arbitral Award if the dispute is not deemed to be arbitrable under Angolan law, or falls under the exclusive jurisdiction of the Angolan courts.

Although Angola is not a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NYC**"), the Angolan Ministries of Justice and Foreign Affairs have indicated that they are in the process of negotiating Angola's signing and accession to the NYC.

Until such time as the NYC enters into force in respect of Angola, foreign arbitral Awards are not automatically recognised, and parties must instead look to Angolan law for the enforcement of their foreign arbitral Awards against assets in Angola.

As the VAL does not expressly provide a particular enforcement regime for foreign arbitral Awards, the enforcement of such Awards is subject to the provisions regarding the enforcement of decisions made by foreign courts under the Angolan Code on Civil Procedure (the "**CCP**").

The CCP provides that foreign decisions are subject to the confirmation and recognition of the Supreme Court, a process called "revision and confirmation", which includes, amongst other things, the consideration of whether:

(a) the award is valid and binding under the law of the seat of arbitration;
(b) any identical disputes are pending in the Angolan courts;
(c) recognition and enforcement is contrary to Angola's international public policy; and/or
(d) the award contradicts another award or decision previously rendered by a tribunal or court in a case between the same parties.

An arbitral Award rendered against the Angolan State is enforceable against the assets of the State, other than specific assets outlined in the CCP (e.g. assets of public importance or assets belonging to diplomatic representations abroad).

Generally, Angola may waive its sovereign immunity and has a tradition of complying with arbitral Awards rendered against it. It is noted that in some previous arbitration proceedings, the question of Angola's sovereign immunity has been raised. That said, to our knowledge, sovereign immunity has not been raised by Angola as a method of avoiding the enforcement of an arbitral Award rendered against it.

Investment Protection

Angola has entered into Bilateral Investment Treaties ("**BITs**") with eight (8) different countries, four (4) of which are currently in force, namely those with Cape Verde, Germany, Italy and Russia.

BITs are treaties which are short in length, often no more than ten or so pages, entered into between two States. BITs provide for the mutual promotion and protection of investments made by investors of the two States by prescribing certain minimum standards of protection to such investments. "Investment" for these purposes generally refers to any kind of asset with economic value, such as physical assets or equity interests in a company. These standards of protection commonly provide for protection against government interference, the fair and equitable treatment of investments, and compensation in the event of an expropriation. However, the formulation and wording of such standards vary from BIT to BIT, and their interpretation continues to undergo a constant process of development through international case law.

In June 2014, Angola passed Decree No. 122/14 which provides the model provisions for future BITs to be entered into by Angola (the "**Model Agreement**"). The Model Agreement provides for the fair and equitable treatment for investments and protects against expropriation of assets, less favourable treatment being granted to investors, and arbitrary actions being taken by the state.

The 2011 Private Investment Act further strengthens the protections available to foreign investors in Angola by providing an additional basis of investment guarantees and government incentives, including equality of treatment for foreign investors and the protection of certain property rights. The 2011 Private Investment Act permits the repatriation of profits, provided that the repatriation of profits is proportionate to the particular investment in question, taking into

account the amount invested, the investment period, and the socio-economic impact of the investment and repatriation.

Angola is not a signatory to the ICSID Convention and, therefore, foreign investors will not have the right to refer disputes arising out of contracts entered into with Angolan State entities to ICSID arbitration. Nevertheless, the Private Investment Act establishes that any private investment agreement entered into between a private investor and the Angolan National Agency for Private Investment (*Agência Nacional para o Investimento Privado*) on behalf of the State may include arbitration provisions, provided that such arbitration shall be held in Angola and shall be governed by the VAL. An arbitral Award rendered pursuant to such provisions within a private investment agreement shall be classified as a domestic award, and will be immediately enforceable in Angola.

That said, Angola is a member of the Multilateral Investment Guarantee Agency (MIGA), which provides certain political risk guarantees and assurances for private investors.

Conclusion

The VAL provides that foreign and domestic investors in Angola may settle commercial disputes through arbitration. As such, investors have access to a neutral form of dispute resolution which is likely to be speedier and less costly than litigation before the Angolan courts.

Foreign arbitral Awards may be enforced against assets in Angola, provided that the requisite procedure of obtaining the confirmation and recognition of the Angolan Supreme Court has been complied with. Domestic arbitral Awards will be treated and enforced in the same manner as a judgment of the Angolan courts.

Unfortunately, decisions as to the enforcement of foreign arbitral Awards in Angola may take a considerable amount of time. Nevertheless, since the enactment of the VAL, it has been reported that the Angolan courts and institutions have been increasingly responsive to arbitration, and it appears that an arbitration community in Angola is slowly growing. Such developments would be greatly assisted by Angola becoming a signatory and acceding to the NYC.

Investors in Angola should therefore give careful consideration to the structuring of their investments and dispute resolution mechanisms, in particular the seat of arbitration, when considering the enforceability of any potential arbitral Awards in Angola.

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