Arbitration hub

DAVID WALDRON DISCUSSES INTERNATIONAL ARBITRATION IN THE AFRICAN OIL AND GAS INDUSTRY AND MAURITIUS AS A FUTURE HUB

International arbitration has traditionally been popular in the hydrocarbons sector, and very much remains so, for a variety of reasons. The possibility of enforcement of awards in over 150 New York Convention States is a key consideration, particularly where assets are located in multiple jurisdictions. The parties' ability to nominate arbitrators to hear a dispute, and to avoid hearings being held in potentially partial local courts, also weighs heavily in favour of arbitration.

Confidentiality is also a major factor, due to the sensitive nature of natural resources contracts, and the greater finality offered by arbitral awards helps to avoid the sometimes glacial pace at which disputes are handled by national courts.

The case of Africa

Africa has seen significantly increased activity in the oil and gas sector in recent years. Most notably, Kenya, Tanzania, Mozambique and Uganda have made major recent discoveries of vast oil and gas deposits. For example, Tanzania now has an estimated 43.1 trillion cubic feet of recoverable natural gas. The commercial development of East Africa has led to investment by numerous non-local oil companies, and has been accompanied by an increasing number of exploration and production contracts. This will inevitably require refereeing, as more players enter the game. The need for adequate dispute resolution in this region, as a result, has never been greater.

Mauritius has taken up the challenge, and its government has repeatedly placed on record its commitment to establishing the country as an African centre for international arbitration. The leading international arbitration centres in London, Paris and Singapore have generally handled arbitration in the African region, with the exception of some West African OHADA arbitration; the latter is not generally highly regarded as a reliable arbitration forum. However, Mauritius appears well positioned to meet the clear demand for a regional arbitration hub. By way of comparison, South Africa, another major African jurisdiction, has a relatively underdeveloped arbitration law, and has recently revoked many of its bilateral investment treaties; its commitment to international arbitration remains very much open to question. Mauritius also benefits from its geographical position between Africa and India, and its status as an investment conduit into India.

Other advantages for Mauritius are its political stability, and its long tradition of democracy, good governance and respect for the rule of law. It has a thriving economy, where services account for 70 per cent of GDP, providing a pool of skilled lawyers, accountants and experts in trade and finance. The country is also bilingual, with both English and French as official languages.

The Mauritian judiciary has traditionally been seen as both independent and supportive of arbitration. Mauritius is a member of the New York Convention, and has signed at least 38 bilateral investment treaties, of which 21 are now in force. Its status as a regional offshore financial centre means that assets are often held there, potentially simplifying the enforcement of arbitral awards.

A major step in establishing Mauritius as a centre for international arbitration was the passing of the Mauritian International Arbitration Act (the "Act"), which entered into force in 2008. It is based on the UNCITRAL model arbitration law, and thus is in conformity with international legal norms. Key features of the Act include:

- A provision giving default jurisdiction over appointments of arbitrators and administrative matters to the Permanent Court of Arbitration;
- A provision giving statutory force to the doctrine of kompetenz-kompetenz, under which an arbitral tribunal can decide on its own jurisdiction and on the validity of an agreement to arbitrate;
- Provisions expressly permitting foreign lawyers to act as

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both counsel and arbitrators in Mauritius;

- A mechanism by which court applications under the Act are heard directly by a three-judge panel at the Mauritian Supreme Court, with a right of appeal to the Privy Council;
- A provision for the award of interim measures, including security for costs.

Following the entry into force of the Act, a host country agreement was concluded with the Permanent Court of Arbitration in 2009, to be implemented by a permanent PCA representative in Port Louis. This was followed by the establishment by the London Court of International Arbitration, in conjunction with the government of Mauritius, of a new arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre.

The LCIA-MIAC: rules and costs

The LCIA-MIAC's rules and administrative procedures are based on those of the LCIA, although the rules are intended to incorporate aspects of both civil and common law systems, to reflect Mauritius' dual legal heritage. The LCIA court acts as both the appointing and supervisory body.

The LCIA-MIAC is a neutral and independent arbitral institution, providing administrative services only under its own, and under ad hoc, rules and procedures. These rules, in the absence of variation by the parties, are universally applicable for all types of arbitrable disputes, and are intended to offer a combination of the best features of the civil and common law systems.

These features include:

1. Maximum flexibility for parties and tribunals to agree on procedural matters.
2. Speed and efficiency in the appointment of arbitrators, including expedited procedures.
3. Provisions intended to reduce delays and counteract delaying tactics.
4. The power for tribunals to rule as regards their own jurisdiction.
5. A range of interim and conservatory measures.
6. Tribunals' power to order security for claims and for costs.
7. Special powers for joinder of third parties.
8. Waiver of right of appeal.
9. Costs computed without regard to the amount in dispute (discussed in further detail below).
10. Staged deposits, whereby parties are not required to pay for the whole arbitration in advance.

Parties to LCIA-MIAC arbitration may be domiciled in any jurisdiction and are free to agree the seat of the arbitration; in the absence of party choice, the default seat is Mauritius. Hearings may be held in Mauritius even if the seat is elsewhere, or in any other location convenient to the parties and the Tribunal. Although this article deals with LCIA-MIAC arbitration in the hydrocarbons sector, there is no bar to submission to LCIA-MIAC arbitration of disputes in relation to any commercial contract.

Each party, as is typical in arbitration, has the right to nominate one arbitrator. The LCIA Court has the sole right to appoint the remaining arbitrator in the absence of agreement between the parties, though always having due regard for any method or criteria for selection contractually specified by the parties. The LCIA-MIAC states that it will attempt to ensure that each arbitrator is appropriately qualified as to experience, expertise, language and legal training. They will also ensure that the arbitrator is available to deal with the dispute as expeditiously as possible.

The LCIA Court may refuse to ratify a party-nominated arbitrator if it determines that the nominee is not independent or impartial or is not "suitable". There is a presumption in favour of a sole arbitrator unless the parties have agreed in writing otherwise, or unless the LCIA Court decides that the circumstances of the case require that it be heard by three arbitrators.

As regards costs, the LCIA-MIAC's charges, and the fees charged by the Tribunals it appoints, are not based on the sums claimed. A non-refundable registration fee is payable on filing the Request for Arbitration, and thereafter hourly rates are applied both by the LCIA-MIAC and by the arbitrators, with part of LCIA-MIAC's charges calculated by reference to the Tribunal's fees. The LCIA-MIAC sets a maximum hourly rate, at or below which the arbitrators it appoints must (other than in exceptional cases) set their fees. The LCIA Court will finally determine the costs of each arbitration, whilst ensuring that they are 'reasonable'.

The Tribunal's fees will be calculated by reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular circumstances of the case, including its complexity and the special qualifications of the arbitrators. The rates will be advised by the Registrar to the parties at the time of the appointment of the Tribunal, but may be reviewed annually depending on the duration of the arbitration.

The ICC (International Chamber of Commerce) has traditionally been the preferred forum for African oil and gas arbitration. However, it may often prove more expensive than the LCIA-MIAC Arbitration Centre, because it calculates administrative and arbitrator fees according to the amount at stake in the dispute, not at an hourly rate; this makes it cost-effective for highly complex low-value disputes, but the reverse (which is a more common scenario) is not the case. In practice, ICC arbitration also often moves more slowly than that of other arbitral bodies, due to additional stages in the arbitral process such as the need for the parties to agree terms of reference for the dispute. Its rules, however, give far more scope than those of other arbitral institutions for effective multi-party and multi- contract arbitration provisions. The ICC is based in Paris, which, although convenient where one or both parties is based in French-speaking Africa, may often give the LCIA-MIAC a further advantage in terms of logistics.

As Africa emerges as the potential centre of an oil and gas boom, it is increasingly important to have an arbitration hub that caters for the increase in disputes amongst natural resources investors. Mauritius' establishment of its own arbitral body in order to serve as such a hub is an ambitious attempt to do so. Its endorsement by the LCIA gives it every chance of achieving this; whether it has been successful in this venture will become apparent in the near future. OEG