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Angola

Pedro Metello de Nápoles and José-Miguel Júdice
PLMJ

Introduction

Since the end of the civil war in 2002, Angola has been experiencing an economic boom, attracting a multitude of foreign investors from all corners of the world.

These investors have been looking to profit not only from the extensive resources the country has – including oil (it is currently the second-largest African oil producer), natural gas, diamonds and agriculture – but also from participation in the gigantic state reconstruction programme that started after the end of hostilities. Roads, railways, ports and airports are being reconstructed or improved, and the same is happening to energy production facilities, notably dams (Angola has vast water resources) and the national grid. Hundreds of thousands of state-funded houses are also being built alongside schools and hospitals, etc. In the private sector, all sorts of projects are being developed, with the goal of replacing imports by national production. The evidence of that boom is clearly shown by the evolution of GDP which, according to the World Bank,[1] increased from US$15.3 billion in 2002 to US$138.4 in 2013.

The current fall in oil prices has been taking its toll on the Angolan economy and although the situation of the country is stable, projects are being delayed and situations of default have become more common.

It is easy to understand that a fast-growing economy, high-value/high-margin contracts, a multitude of foreign investors, investment contracts with the government and partnerships with local players, followed by a sudden shortfall in funds, constitute the perfect ingredients for disputes and, consequently, the perfect scenario for the affirmation of arbitration as a favoured dispute resolution method in Angola.

In this article, we propose to analyse the Angolan law on arbitration, the enforcement of arbitral awards, the situation on the ground, and practical challenges and trends. Finally, we will try to draw some conclusions.

The arbitration law

In general

Arbitration in Angola is currently regulated by Law 16/03 of 25 July, entitled the Voluntary Arbitration Law (VAL). The VAL was inspired by the Portuguese Arbitration Law from 1986[2] and, although it cannot be said that this law strictly follows the UNCITRAL Model Law, it includes many solutions that are common to the ones found in that Model Law. On the other hand, despite following the 1986 Portuguese text, in many aspects it went far beyond that statute, solving some of the problems or issues that had been raised in Portugal over a period of many years. Even if it cannot be dubbed a state-of-the-art law, it is clearly a modern law and, as we expect to demonstrate below, a law that allows arbitration proceedings to be conducted effectively in Angola.

The VAL regulates domestic and international arbitration and most of the provisions of the law are common to both, so regardless of the existence of some different provisions for each type of arbitration, the VAL should still be deemed a monist law. Although a separate section will be devoted to international arbitration, it is important to bear in mind that what will be said below applies in principle to both international and domestic arbitration.

Arbitrability

Any disputes relating to rights that may be exercised at the discretion of the parties can be submitted to arbitration (except if reserved by law to the state courts or to some other type of proceedings) (article 1 of the VAL). The concept of 'disposable rights' – as opposed to rights that cannot be waived – is not completely straightforward and has some grey areas, but it is still wide enough to allow us to say that virtually all commercial disputes are capable of being subject to arbitration.

There are, however, some relevant limitations, to the extent that, although the law admits arbitration, in many cases it requires the lex arbitri to be Angolan law, Portuguese as the language of the process and imposes Angola as the place of arbitration.

When it comes to state and public entities, they are entitled to enter into arbitration agreements provided that they relate to situations where the state acts as a private entity and in the case of administrative contracts.

Arbitral agreement

The arbitral agreement has to be in writing, although the meaning of 'in writing' includes the exchange of any form of written correspondence directly referring to arbitration or some other document that contains an arbitration agreement (article 3).

If the above is standard, there are, however, some particular points relating to the survival of the arbitration agreement. Contrary to what happens in most laws, if an arbitral award is not rendered within the applicable time limit or if, for some reason, the tribunal becomes incomplete and a new arbitrator is not appointed, the proceedings will not only be dismissed, but the arbitral agreement itself will be deemed to have lost its validity (for that specific dispute) (article 5). In those cases, parties will have to resort to state courts.

The law allows the parties to agree the time limit to render the award, but if nothing is said until the acceptance of the first arbitrator, the said time limit will be six months and will only be extended by agreement of the parties (article 25). For this reason (and others) it is strongly recommended that instead of agreeing on a specific limit, the parties may refer the dispute to institutional arbitration (providing that the rules of the institution contemplate the extension of the time limit to render the award).

The tribunal

Arbitrators must be independent and impartial and should disclose to the parties any circumstances that may raise doubts regarding

their independence and impartiality (articles 10 and 15). In case of failure to appoint one arbitrator and unless the parties agreed on another appointing authority (as would be the case in institutional arbitration or proceedings in accordance with the UNCITRAL Rules), the missing arbitrator will be nominated by the president of the local state court (article 14). Tribunals may be constituted by any uneven number of arbitrators and failing agreement on the number (in the arbitration agreement or after), three arbitrators will be appointed (article 6).

Arbitrators can be challenged on the basis of not being impartial or independent, or because they do not have the qualifications agreed by the parties. If they do not step down, the decision on this is made by the Tribunal, with the possibility of an appeal to the state courts (article 10).

The proceedings

In line with the Model Law, the parties are free to agree on the procedural rules and, in the absence of such an agreement, the Tribunal will have the power to determine the rules. In this instance, the law expressly states that the parties may opt to elect the rules of an institution administrating arbitrations (article 16). As to the place of arbitration, the parties are free to agree on this and, if they fail to do so, the Tribunal will decide. The law also makes it clear that, regardless of the place of arbitration, the Tribunal may hold meetings or hearings anywhere it deems appropriate (article 17).

In addition to the reference to the absolute equality of the parties and the need to give them a full opportunity to present their case, article 18 also mentions the adversarial principle and the need for the proceedings to being duly served on the respondent. These are the fundamental principles that must be respected in any procedure and their breach may lead to the setting aside of the award.

The law reproduces the original version of article 17 of the Model Law and entrusts the tribunal with the power to issue any interim measures, including asking for security (article 22), although it does not regulate the procedure for that. It also states that this power is without prejudice to the power of the state courts to order interim measures.

The law also states that the tribunal's fees must be expressly agreed with the parties, unless the parties have opted for institutional arbitration and that matter is covered by the rules of the institution (article 23).

Besides generally stating that the parties may produce all legally admitted evidence before the tribunal and regulating the assistance by state courts in the production of evidence (article 21), the law is silent on any other aspects of the proceedings (unlike what happens with the Model Law). This omission (which also existed in the former Portuguese law) often leads to the application of the civil procedure rules, with obvious damage to the purpose of arbitration. In particular, it should be highlighted that, according to the Civil Procedure Code, if the respondent does not file a defence, all allegations of fact may be deemed to be admitted to.

Representation of the parties

Among the provisions regulating the proceedings, there is one that has been raising some concern and thus deserves to be addressed separately.

It is the provision that deals with the representation of the parties (article 19). This provision states that the parties may be assisted or represented by lawyers. This provision was again inspired by the text of the former Portuguese law, which stated that the parties could designate anyone to assist them in the proceedings. In the Portuguese law, the goal was not to limit the representation of the parties in any way, but to explain that the parties were not obliged to be represented by lawyers. The text in the Angolan law has been interpreted to mean exactly the opposite, so that the parties either represent themselves or have to appoint a lawyer and, in that case, it must be a lawyer allowed to practise in Angola (ie, an Angolan lawyer). As membership of the Angolan Bar Association is limited to Angolan lawyers, the practical consequences of this interpretation may be substantial.

A debate has been going on around this subject and there are authors that propose a third way, arguing that it is enough that the party is assisted by at least one Angolan lawyer. This would not prevent the party from also being assisted by foreign counsel or other professionals. This third way has been gaining some strength and has been adopted, at least once, by the Bar Association. It is hoped that this practice will evolve, otherwise there will be a trend to move the place of arbitration (or the hearing venue) outside Angola, not to mention the risk to the party that decides to prevent international lawyers from appearing as counsel, to the extent that if enforcement is to be made in other jurisdictions, such conduct may be construed as a case of violation of due process (a blatant one).

The award

The law contains a number of provisions regarding the award and its preparation (articles 24 to 33). None of them raises any special concern (except the one addressing the time limit for the award, which has already been mentioned above).

In the same chapter, the law deals with the *Kompetenz-Kompetenz* principle, clearly enshrining it and establishing that any decision by the tribunal in this regard may only be challenged after the award is rendered (article 31). In parallel, the Civil Procedure Code contains a provision stating that state court judges should dismiss any proceedings filed before them if there is evidence that there is an agreement to arbitrate.

The last provision of this chapter states that (domestic) arbitral awards produce the same effects as court judgments and may be directly enforced (article 33).

Challenging the award

For domestic arbitrations, the law establishes two challenge methods, appeal (article 36) and request to set aside (article 34). Appeal can be waived by the parties but the latter cannot.

An award can be set aside if:

- the dispute could not be settled through arbitration;
- the tribunal had no jurisdiction, provided that this matter has been raised in due time by one of the parties in the course of the proceedings;
- the arbitral agreement has lost its validity;
- the tribunal was not constituted in accordance with the law or will of the parties, provided that this matter has been raised in due time by one of the parties in the course of the proceedings;
- the award contains no grounds whatsoever, unless the parties expressly agreed on that (also, in case of an award rendered ex aequo et bono, the tribunal only has to provide grounds for the decision on the facts);
- the tribunal violated the fundamental principles established in the law (equality, right to present the case and adversarial), provided that such failure had a decisive influence in the decision;

- the tribunal decided ultra petita (but only this part will be set aside) or failed to decide matters that had been submitted to it (but only if such failure influenced the outcome of the dispute);
- the tribunal was authorised to decide ex aequo et bono but the decision does not respect the principles of public policy of the Angolan state.

Both the appeal and the request to set aside are lodged directly with the Supreme Court. However, if the parties have not excluded the possibility of appeal (in the case of domestic arbitration) or if they have agreed expressly on it (in the case of international arbitration), the grounds for setting aside will have to be discussed within the appeal. Therefore, although two means of challenge are presented, in practice the parties may only resort to one.

In addition to these means of challenge, a party may also oppose the enforcement of the award, and is entitled to use a wide array of arguments (see below).

International arbitration

As mentioned at the outset, the large majority of the provisions of the VAL are applicable to both domestic and international proceedings, but there are some provisions that are exclusive to international arbitration.

Beginning with the definition of what 'international' means, the VAL adopts the French definition referring to 'international trade interests', but then goes on to complete it along the lines of article 1 of the Model Law (article 40 of the VAL).

Besides this definition, the chapter contains a provision regarding the definition of the language of the proceedings (article 42), somehow implying the conclusion that the legislator did not consider the possibility of domestic proceedings being conducted in a foreign language.

Article 43 of the VAL deals with the law applicable to the merits and it is practically a translation of article 28 of the Model Law.

Finally, article 44 states that the award rendered within an international arbitration is not appealable, unless the parties have expressly agreed such possibility and regulated the terms of the appeal.

As to the rest, international arbitration is regulated by the same provisions applicable to domestic arbitration (article 41).

Enforcement of arbitral awards

Awards rendered in domestic arbitrations

Domestic awards are enforceable exactly as if they were decisions rendered by the state court, but the parties are allowed to invoke certain additional grounds for challenge. In fact, besides the list of grounds for opposition common to all Angolan enforcement proceedings (ranging from the forgery of the enforcement title to res judicata), article 814 of the Civil Procedure Code adds (1) the loss of validity or nullity of the arbitration agreement; and (2) the nullity of the award if the parties have waived the right to appeal. The causes for nullity appear to be the same as the ones that could ground a request to set aside and, therefore, we may find a third way to challenge arbitral awards in the opposition to the enforcement.

Awards rendered in Angola within international arbitrations

These awards are enforceable in exactly the same way as if they were domestic awards.

Awards rendered abroad

According to article 1094 of the Angolan Civil Procedure Code, no foreign award may be enforced in Angola without being reviewed and confirmed. Furthermore, Angola is not a signatory to the New York Convention of 1958.[3]

Despite this daunting framework, from a legal point of view things are not as difficult (at least at the legal and procedural level) as they may seem. In fact, Angolan law contains provisions regarding the enforcement of foreign decisions according to which cases will not be reheard and revision of the merits should not take place.

Under articles 1096 and 1097 of the Angolan Civil Procedure Code, in order for an arbitral to be reviewed and confirmed it is necessary that:

- there are no doubts regarding the authenticity of the decision;
- it is res judicata according to the laws of the country where it was rendered;
- lis pendens or res judicata cannot be invoked regarding any case judged by an Angolan court;
- the respondent has been duly served;
- it does not contain decisions contrary to the public policy of the Angolan state; and
- if rendered against an Angolan citizen, it does not violate Angolan private law when, according to Angolan conflict rules, the Angolan material law should have been applied to the merits of the dispute;

Except for the last paragraph, where a wider margin of discretion is granted to state courts, the grounds for refusal of confirmation are not, after all, substantially different from the ones listed in article V of the New York Convention.

The request for review is filed at the Supreme Court and once the exequatur is granted, the enforcement may be filed in the first instance court, as if it were a domestic award.

The practice

Up to this point, we have been going through the provisions of the law. The aim is now to understand how matters are being dealt with in practice.

Decisions from the Supreme Court are neither published nor easily accessible. This means there is no information regarding the number of requests to set aside, appeals or revision and confirmation procedures ever filed or decided. The same applies to the enforcement of arbitral awards, so we have to rely on our experience in the field to provide some practical input.

Recourse to arbitration and institutionalised arbitration

From a legislative point of view, one can see that the Council of Ministers adopted a resolution in 2006 recommending that the state and state companies should include arbitration clauses in the agreements they conclude and the Angolan state often includes arbitration clauses in the investment contracts it enters into with foreign investors.

In the same way, a number of laws have been passed making direct references to arbitration, even if in some cases arbitration is allowed only to the extent that it is regulated by the VAL, which has been interpreted as an imposition that the seat of arbitration must be Angola.

State courts have a poor record for efficiency and quality. This circumstance alone justifies recourse to arbitration and, as a matter of fact, it is very common to find contracts (even state contracts), even involving only Angolan parties, that refer disputes to arbitration.

The opening of an arbitration centre for institutionalised arbitration is subject to state authorisation and in 2012 and 2013 four centres were authorised. However, according to the information available, all the centres have engaged in little activity. An additional arbitration centre, also involving a structure to promote arbitration and mediation, was created and started operating in 2015. The centre, directly administrated by the Ministry of Justice has been successful in dealing with mediation, but while it is still waiting for arbitration cases it is suffering the effects of the current economic downturn and its activity has been reduced.

Recent developments

There is still little information available on what is happening on the ground.

There is a growing interest in the matter on the part of the legal community, which is a sign that arbitration is already – or, more likely, is expected to become – popular. In spite of this, Angolan doctrine on arbitration is very scarce.

Likewise, the level of expertise shown in arbitrations in Angola has yet to develop, as it is not uncommon to see parties resort to the state courts as soon as any problem arises, thus jamming the courts with requests for assistance or challenges and preventing the arbitration procedure from reaching an end.

Even in large international arbitrations, there is still a long way to go, and the level of sophistication is low, with parties still relying on the procedural framework established by the local procedural law.

Another downside is that Angola is an expensive country, with entry visa requirements that may not be easy to meet (at least quickly) and where there is not yet adequate infrastructure to hold arbitration hearings.

Finally, there have been situations in which it appears that state courts were sympathetic towards government entities to avoid arbitration proceedings reaching the stage of a final award.

Despite all this, we have no doubt that as a consequence of the high volume of foreign investment in the past decade associated with the still recent fall in the oil prices, the number of disputes is increasing and the same seems to apply to the number of arbitrations. For this reason, we are certain that we will start to hear more and more about major arbitration cases involving Angola in the not too distant future.

Conclusions

On the basis of the above, we are convinced that *GAR* readers will agree that the Angolan law is suitable to allow domestic or international arbitration proceedings in accordance with modern standards.

We would also go so far as to say that, in view of the internal rules applicable to the recognition of foreign awards, readers will not be too concerned about the fact that Angola is not a party to the New York Convention.

From the point of view of its legal framework, Angola is in the process of becoming an arbitration-friendly jurisdiction.

Clearly, arbitral proceedings are ongoing and the number of cases seems to be increasing.

There are, however, a number of question marks over how things are going to evolve: Will foreign lawyers be authorised to act in the proceedings? Will the entry visa constraints make the appointment of foreign arbitrators more difficult in practice? How will state courts respond when their intervention is requested? Will they uphold arbitration awards? Will foreign awards be enforced?

What actually happens in practice will answer these questions and the coming years will be decisive.

Notes

1 http://data.worldbank.org/indicator/NY.GNP.PCAP.CD.

2 Law 31/86 of 29 August, replaced by Law 63/2011 of 14 December.

3 Nor to the Washington Convention.

José-Miguel Júdice
PLMJ

José-Miguel Júdice is a name partner and the coordinator of PLMJ Arbitration. For the last six years he has been the Portuguese member of the ICC International Court of Arbitration, and is a member of the ICSID Arbitrators and Conciliators Roster and the Permanent Court of Arbitration list, and of other arbitration centres in Brazil, Spain, Mozambique, Angola, Korea and Portugal. He was the first president of the Spanish Arbitration Association (CEA) Portuguese Chapter and is now a member of the CEA International Board of Directors, president of the Portuguese Chamber of Commerce and Industry Arbitration Centre (CAC) and visiting professor of the Management School of Business and Economics in Lisbon's Universidade Nova.

Pedro Metello de Nápoles
PLMJ

Pedro Metello de Nápoles is a senior partner at PLMJ, Vice-President of the ICC Arbitration National Committee, a member of the ICC Commission on Arbitration and ADR, of the Direction of the Portuguese Chapter of Club Español del Arbitraje, former executive secretary of the Portuguese Arbitration Association and was the coordinator of PLMJ's Angola Desk between 2012 and 2015.

PLMJ
SOCIEDADE DE ADVOGADOS, RL

Av. da Liberdade, 224
Edifício Eurolex
1250-148 Lisbon
Portugal
Tel: +351 213 197 300

Rua Marechal Brós Tito, 35-37
Piso 13, Fracção B
Edifício Escom
Luanda
Angola
Tel: +244 935 147 570

Pedro Metello de Nápoles
pedro.metellodenapoles@plmj.pt

José-Miguel Júdice
josemiguel.judice@plmj.pt

www.plmj.com
www.gla-advogados.com

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