



Tips for Managing Emerging Disputes in Africa

A number of African nations are currently facing tough economic challenges, largely as a direct result of the recent oil price collapse and the end of the commodities super-cycle.

Africa's oil producing nations are facing a significant challenge to balance their budgets in this challenging environment. With oil revenues accounting for the majority of the government's budget, Nigeria, Africa's largest economy and biggest oil producer, has seen its growth reduce from 6.3% in 2014 to an estimated 3.3% in 2015, according to World Bank data. Angola, another oil exporter, has similarly seen its budget fall and GDP growth significantly slow.

Staying on Top

In response to these challenges, governments are already taking action to revise their budgets, cut public spending and adjust their monetary and exchange control policies to seek to manage currency depreciations and falling foreign exchange reserves. As African governments seek to drive up tax revenues and curb spending to plug the budget shortfall, we are seeing a renewed focus on bribery and corruption and the informal economy, transfer pricing, as well as an increase in regulatory action in other areas such as environmental protection, technology and telecommunications. There have also been proposals to review, renegotiate and/or suspend contracts or licences with investors operating in the commodities sector to take account of the impact of low prices. There is also a focus on local content requirements to encourage investment in local skills and capacity building to assist in the diversification of local economies. The increase in government intervention and regulation has given (and is likely to continue to give rise) to a number of disputes, both at the investor level and further down the supply chain.

But it's not all doom and gloom. Despite the downturn, growth rates in Africa continue to outperform many other global markets and, as a result, there remains continued interest and investment in Africa. The downturn has also led to an increasing focus on infrastructure investment, particularly in energy and transport, as African nations try to build infrastructure to facilitate the growth and diversification of their economies. Although this provides investment opportunities, the large scale and, in some cases, ambitious time-frames for the delivery of these projects is also likely to lead to disputes if they are not delivered on time or on budget.

Top Tips for Emerging Disputes

In the face of an emerging dispute, early intervention and careful management of the dispute are key to minimising the risk of disruption to the business and long-term damage to reputation and relationships. In this article, we set out our tips for staying on top when a dispute emerges.

1. Identify and preserve your rights. Do you have a leg to stand on?

- a. **Identify** : It is important to quickly identify and assess all relevant legal rights and remedies that may be available to you. In addition to contractual rights and remedies arising out of any contract, you may also have additional rights under the common law or statute. Accordingly, it is important that you identify which laws apply, particularly where the transaction is cross-border or involves agreements governed by different laws.
- b. **Assess** : Assess which claims (or defences) to pursue and consider the time limits, known as limitation periods, applicable to any claim. The applicable limitation periods may be found in the relevant local laws on limitation periods and/or in the relevant contracts specifying when and how certain rights must be exercised. If you are close to the end of a limitation period, you will need to act quickly to preserve any claim by filing proceedings or agreeing to a standstill agreement with the other party to stop time running.
- c. **Preserve**: Many claims are won or lost on documents. Documents do not lie or forget and are often prepared close to the relevant event at a time when a dispute was not in contemplation. Accordingly, contemporaneous documents carry significant evidential weight in a courtroom or arbitration hearing. It is therefore vital that you immediately take steps to identify and secure all documents relevant to the dispute. This includes electronic documents, such as emails and voicemails, as well as hard copy files. This is important for locating evidence to support your claim and, to the extent that there are any damaging documents, to give you the time to develop a strategy to deal with them. Consider restricting access to, or password-protecting highly confidential documents to protect against their wider dissemination and never destroy or amend any relevant documents

2. Get your story straight. *Too many cooks spoil the broth*

- a. **Speak up**: Once you have identified your rights, ensure that you don't lose them by taking any actions or making any statements that could be construed as being inconsistent with the exercise or reservation of those rights. Rights can be lost by a "wait and see" approach and silence may amount to an affirmation of the contract in some circumstances, so consider writing a reservation of rights letter to your counterparty to indicate that you are considering your position.
- b. **Be consistent**: It is important to have a strategy for all internal and external communications about the dispute to ensure that a clear and consistent message is being sent. This includes communications with your counterparty, with external bodies such as insurers or regulators and with your customers or investors. Identify and make clear who within your organisation has the authority to deal with the dispute, especially in large companies with multiple contact points. If you operate in a regulated industry, it is vitally important to additionally consider whether any potential dispute gives rise to reporting obligations under the relevant legislation. There are many advantages to engaging with regulators early and it may help to minimise any penalties if you are ultimately found to be in contravention. There may also be reputational risks to consider, so it is important to also have a strategy for dealing with stakeholder communications.
- c. **Protect communications**: Take advantage of legal privilege protections. Consider involving a lawyer at an early stage as documents provided to a lawyer for the dominant purpose of giving or receiving legal advice and the resulting legal advice notes are generally protected from disclosure in legal proceedings by privilege. Privilege can also extend to documents prepared internally for the dominant purpose of use in contemplated legal proceedings. When communicating with your counterparty, clearly identify those communications that are made for the purposes of settlement because these are likely to be covered by without prejudice privilege, which means that they also cannot be used in any subsequent proceedings.

3. Consider settlement options. Pick your battles wisely

Finally, consider your settlement options at an early stage, including whether a form of Alternative Dispute Resolution such as negotiation or mediation may be appropriate. To help you decide whether it is a battle worth fighting, carry out a cost-benefit analysis, taking into account considerations such as the relationship cost, financial impact, management time, delay and the potential reputational risk of pursuing the matter to a final judgment or award.

The article is a summary of a presentation delivered by Nathan Searle and Rashida Abdulai at the Hogan Lovells Africa Breakfast Briefing held in London on 11 February 2016. Throughout 2016 we will be holding further Hogan Lovells Africa Breakfast Briefings covering practical issues which are likely to be of interest to companies with investments or operations in the region.

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