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Energy arbitration in Africa

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Energy arbitration in Africa

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Summary

In summary

This article outlines some of the legal concepts faced by investors and African states involved in large energy projects when a sudden change in the legal and economic context arises, and the disputes around these concepts. It also gives insight into two trending issues for energy projects in Africa that could give rise to contractual renegotiations and arbitrations in the years to come.

Discussion points

- Force majeure
- Hardship
- Price adjustment
- Stabilisation provisions
- Sanctions provisions
- Foreign exchange control
- Energy transition and climate change

Referenced in this article

- ICC Case No. 15051 of 2010
- *RSM Production Corporation v Central African Republic*, ICSID Case No. ARB/07/02
- *National Oil Corporation v Sun Oil*, ICC Case No. 4462
- CEMAC Regulation No. 02/18/CEMAC/UMAC/CM

Introduction

The successive crises we have been experiencing in recent years – covid-19, the war in Ukraine, the increasingly palpable effect of climate change – have had and will continue to have major economic consequences worldwide.

The consequences can cause profound and lasting disruption to the proper performance of current contracts, particularly long-term contracts concluded before the disruptive factors became apparent.

Energy contracts, which by their very nature are long-term contracts, are particularly exposed to changes in circumstances that thwart the most reasonable forecasting efforts.

The risk of a sudden change in the economic and legal landscape is exacerbated in the African context, particularly in light of the rapid economic growth of African states, the greater political instability that continues to affect some of these states and the recent development of certain technologies that may lead to the adoption of new legislation in areas where none existed before.

Whether an investor or a host state, any change in the economic or legal context can profoundly alter the balance struck at the outset of the investment. A project that was profitable upon design may quickly become unprofitable for the investor. Similarly, a project that once fostered the development needs of a state may appear inappropriate under new market conditions, or incompatible with new public policies.

Various contractual mechanisms can anticipate and manage risks of such evolutions affecting major energy projects. Indeed, in practice, it is common for the parties to agree upon:

- force majeure provisions;
- hardship provisions;
- price adjustment provisions;
- stabilisation provisions; and
- sanctions provisions.

Despite the aforementioned contractual provisions and no matter how ingenious or cautious the counsels in charge of drafting contracts may be, most, if not, all large energy projects tend to experience one or more periods of high tension between the parties caused by a sudden change in the economic or legal framework. The reverse would be surprising considering that large energy projects have a life span ranging from 30 years for solar power plants to 50 years for hydroelectric plants.

Periods of tension between the parties are generally resolved in one of two ways, or a combination of both, namely:

- contractual renegotiation, which may result in a readjustment of several aspects of the contracts (eg, price review, increased tax burden, environmental or development obligations upon the investor); or
- resolution of the dispute by a third party, which in an international context is most often an arbitral tribunal.

This article examines some of the legal concepts faced by investors and African states involved in large energy projects when a sudden change in the legal and economic context arises, and the disputes around these concepts.

We also discuss two additional trending issues for energy projects in Africa that could give rise to contractual renegotiations and arbitrations in the years to come.

The legal and contractual response to a sudden change in the legal and economic context of a project

Force majeure

Force majeure is a legal concept that originated in Roman law. It is reflected in the law of most civil law legal systems, and has more or less similar variants in most other systems of law, including common law systems under the concept of frustration.

In addition to what the law chosen by the parties may already provide, energy contracts usually include force majeure provisions. The wording of these clauses varies from one contract to another, but on the whole, parties frequently contractually define force majeure using the three classic criteria resulting from French law and other civil law systems. This is particularly the case for projects in West Africa, where French-speaking African states apply a traditional approach regarding force majeure.[1]

Force majeure will usually be established and the parties relieved from performing certain obligations under their contract when the following three criteria are met.

- Exteriority: to qualify as force majeure, the event must be exterior to the debtor of an obligation. The analysis of this criterion may vary, and some courts and arbitral tribunals tend to consider that it is fulfilled if such an event is beyond the reasonable control of the debtor of the obligation, even if it may not be, strictly speaking, exterior to the debtor. For example, a strike conducted by the employees of an electricity supplier was found to be exterior to the supplier as it was beyond its reasonable control.[2]
- Unpredictability: to qualify as force majeure, the event must not be reasonably foreseeable by a prudent and diligent debtor. In general, the unpredictability must not be absolute but relative, depending on what is reasonably foreseeable when the contract is to be executed. For example, the explosion of an oil pipeline during drainage works was not deemed an unpredictable event, since the party who caused it personally knew there was a pipeline crossing the oil field,[3] and a decree introducing a moratorium on photovoltaic electricity tariffs was not unforeseeable as the possibility of such a moratorium had been provided for in the law.[4]
- Irresistibility: to qualify as force majeure, the event must be irresistible, which requires it to be unavoidable and insurmountable. It is not so much the event itself that would be regarded as unavoidable, but its consequences. The irresistibility must usually be absolute: circumstances that make the contract more onerous to perform will not be regarded as a case of force majeure. Indeed, insufficient financial resources of the debtor of the obligation[5] or a drop in commodity prices[6] can be insufficient to qualify as a force majeure event.

In addition to a general definition of force majeure, with or without reference to the criteria described above, force majeure provisions often include a list of situations that the parties agree are presumed force majeure events (eg, situations of insurrection or pandemic, international sanctions or even excessive fluctuations in certain raw material prices).

A valid claim for force majeure will usually lead to the relief of performance of certain obligations (ie, only obligations that cannot be performed due to force majeure) and, in the long term, can lead to termination of the contract. As such, each party has to bear the potential consequences and delays associated with the force majeure event, meaning that no claim for damages can be filed by the creditor of the obligation.

In practice, it is quite rare for all of the conditions of force majeure to be satisfied.

Cases where force majeure has been recognised include the dispute between the US company RSM Production Corporation and the Central African Republic regarding the performance of a contract for the exploration and exploitation of hydrocarbons.[7] In this case, the security situation in the country had deteriorated drastically as a result of continuing political and civil turmoil, armed conflicts, banditry, incursions of foreign military troops, followed by a coup d'état in March 2003. The International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal accepted that all the conditions of force majeure were satisfied. It noted in particular that, because of the security situation, RSM was unable to overcome the subcontractors' refusal to go to the Central African Republic to perform the required work.

The irresistibility of force majeure (ie, the impossibility to perform the contract) is often the criterion over which the establishment of force majeure stumbles. Indeed, in a case between the Libyan national oil company and the American company Sun Oil,[8] the International Chamber of Commerce (ICC) arbitral tribunal rejected the force majeure defence invoked by the foreign investor on the ground that the impossibility to perform its obligations was not absolute. The investor's argument was based on US sanctions: Sun Oil claimed to be unable to fulfil its obligations under an exploration- and production-sharing agreement as a result of a series of sanctions taken by the US government. The sanctions included an order declaring that US passports were no longer valid for travel to Libya, a ban on the importation of Libyan oil into the United States and the export of goods and technical information to Libya being subject to obtaining a licence that was denied to Sun Oil. Although the arbitral tribunal acknowledged that the US sanctions were exterior to the parties and could meet the unpredictability criterion, it also ruled that irresistibility criterion was not met. While the performance of the obligations had become more onerous and difficult as a result of the US sanctions, it was not sufficient to consider that it had become objectively impossible to perform the contract. It remained possible for Sun Oil to use non-US staff and non-US technology.

In a case between the Algerian national oil company and an African company buyer of crude oil, the latter had failed to pay some invoices because its central bank was unable to provide the necessary foreign currency on time. The discussion turned to the issue of foreseeability.-[9] Eventually, the ICC arbitral tribunal ruled that the buyer should have known that there could be difficulties in obtaining foreign currency from the central bank in a timely manner and did not take the precaution of obtaining from the central bank the assurance that it would receive this currency when needed. As such, the event was foreseeable and force majeure was excluded.

Unsurprisingly, the covid-19 pandemic gave rise to multiple situations of tension and declarations of force majeure in the energy sector in Africa. For instance, as a result of lockdown rules imposed in South Africa, the state-owned electricity utility Eskom sent force majeure notices to several wind-power plants and coal suppliers, which raised the question of whether a sudden shortage of electricity demand could qualify as force majeure.[10] Contractors used the impossibility of mobilising workers from China during the pandemic as a basis for declarations of force majeure, for example to delay remedial works required by the state-owned Botswana Power Corporation at the Morupule B power station in Botswana.-[11] The covid-19 pandemic and the resulting fall in oil prices was also the basis for a force majeure defence in the dispute between the Democratic Republic of the Congo (DRC) and Dan Gertler's British Virgin Islands-registered entities Caprikat and Foxwhelp. In response to the DRC's desire to terminate a contract for the exploration and exploitation of two oil blocks for lack of performance of drilling tests by Gertler's companies, the latter invoked force majeure as the reason for the delay, resulting from the fall in oil prices in 2020.[12]

Fait du prince

Fait du prince is a concept similar to force majeure, referring to an act of a government or head of state that affects the performance of a contract. It can be a unilateral decision or a new law or regulation. An embargo or a ban on imports of certain goods imposed by the administration of the country hosting an energy project can also qualify as a fait du prince, if it prevents a party from performing its obligations.

Depending on the legal regime and contractual provisions, the *Fait du prince* can be considered as an event of force majeure and usually leads to the same consequences, (ie, a suspension of performance of the obligations that cannot be performed and potential termination of the contract).

The consequences of the *Fait du prince* will depend on the applicable law and nature of the contract. In any case, we underline that, even if the three criteria of force majeure mentioned above may not have to be demonstrated, the debtor of the obligation will usually need to prove that the relevant measures have rendered performance impossible and not just more difficult or onerous.

When a contract is concluded between two privately owned companies, the *Fait du prince* is indeed a mechanism that can allow parties to get out of their obligations. In the context of large energy projects, however, the concept of *fait du prince* is limited, insofar as the state (directly or through entities it controls) is most often both an investor's co-contracting party and possibly the originator of a decision, law or regulation that could be considered as a *fait du prince*. In these circumstances, it does not appear possible for the state or the state-owned entity to rely on a decision, law or regulation taken by its own administration to justify the termination or non-compliance of its own contractual obligations without compensation.

In this regard, we note that in the dispute between Divine Inspiration Group Pty (DIGOIL) and the DRC state, the latter claimed that production-sharing agreements concluded with DIGOIL could not enter into force because neither had received the required approval from the DRC's president.[13] In fact, no decision (approval or rejection) had been taken by the president. The DRC state was thus relying upon the absence of a decision by its own administration (here the president) to argue in favour of the termination of the agreements. The arbitral tribunal did not follow that reasoning and ruled that the DRC state was the guarantor of the application of its own legislation and had the obligation to do everything in its power to allow the issuance of the presidential order under the conditions provided for by law and within a certain period of time. Although the *fait du prince* was not raised as a defence by the DRC state, this case shows how complex it can be for a state to rely upon the decisions (or lack thereof) of its own administration to get out of its contractual obligations.

Hardship and price review provisions

Hardship is a concept that aims to preserve the economic balance of a contract by providing for renegotiations or exit solutions when the performance of an obligation remains possible but is rendered economically unreasonable due to a change of circumstancesthat was not anticipated at the time of conclusion of the contract.

Force majeure and hardship are two different concepts: a force majeure event usually requires that the performance of an obligation of a party become impossible, while hardship only calls for the performance of such obligation to become economically unreasonable.

Some African countries' domestic laws already enshrine the concept of hardship, although the definition of a hardship situation and the remedies available are often not harmonised. Moreover, this concept is not provided for in the laws of most French-speaking African states with a civil law tradition.

It is therefore important to include in energy contracts a contractual definition of what the parties consider to be a hardship situation and the consequences they wish to draw from it. In practice, the concept of hardship is usually subject to the following criteria:

- a change in circumstances;
- the change must have been unforeseeable when the relevant agreement is to be executed; and
- the change must render the performance of the relevant agreement excessively onerous for a party who had not agreed to assume the risk.

A valid claim for hardship may lead to a renegotiation of the contract by the parties, or failure to do so, or to the adaption of the contract by the judge or arbitrator. In this respect, the consequences of a hardship situation are very different from a force majeure event. A hardship situation may also lead to termination of the contract.

Price adjustment provisions are also very common in long-term energy contracts and are similar to hardship provisions, in the sense that they also aim at preserving an economic balance between parties to the contract. These clauses differ, however, in that price review clauses (notably in gas and oil supply contracts) are generally much more detailed than hardship provisions. Price review provisions will usually include a list of triggering events whereby a party can initiate a price review under the contract. The price review provisions often include a step-by-step procedure for the revision of the new contract's terms, including guidelines on how the price should be revised and, should the negotiations fail, provisions regarding a binding expert determination or dispute resolution mechanism, which is commonly arbitration.

Price adjustment provisions provide for a commercial solution to risks identified prior to the execution of a contract (whether due diligence has been conducted or not). Parties will usually agree upon a formula designed to protect both parties. The challenge consists of properly defining the risk and addressing it with sufficient clarity and in a commercially acceptable way. When the challenge is too difficult to overcome, the parties to a contract may provide for a rendezvous clause that forces the parties to meet and renegotiate, should the risk identified materialise. The success of the rendezvous clause depends on the bona fide intention of the parties to find an agreement and restore a commercial contractual balance.

ICC Case No. 15051 of 2010 illustrates the difference between the concept of hardship and a standard rendezvous clause.[14] In this case, involving gas sales contracts, the parties had agreed upon ordinary price revision periods as well as an exceptional price revision mechanism (based upon the wording used in the Principles of International Commercial

Contracts 2016 (the UNIDROIT Principles)) in the event of an unforeseeable change of circumstances, which were not of a temporary nature, out of the control of the parties, and caused 'significant hardship' to either party. The alleged change of circumstances was a steep increase in the Brent price. The tribunal ruled that to amount to a significant hardship and trigger an extraordinary price review mechanism, the change of circumstances had to cause a 'deep imbalance', which a price differential of 24 per cent was insufficient to establish.

The importance of carefully drafting these hardship clauses and price review provisions in energy contracts cannot be overstated, and disputes over their application, which have been numerous, are only likely to increase in the coming years. In this regard, we note that the 2022 Future of International Energy Arbitration Survey Report of the Queen Mary University of London described 'price volatility of raw materials and energy supply (oil and gas; other)' as the leading cause (by far) of international energy disputes in the short to medium term.[15]

Stabilisation provisions

Stabilisation provisions are another common way for parties (especially foreign investors) to long-term energy contracts to protect themselves against the risks of changes in the legal framework, and for states to attract investment.

Stabilisation provisions are not uniform but generally provide that, in the case of a change in the applicable legislation or regulation, the rights of the investor and the project company will not be impacted for a protracted period. The general idea behind this type of clause is to allow investors to make long-term financial projections and investment forecasts when implementing their investment decisions on the basis of a set of fixed rules, in particular with regard to tax and customs regimes. It provides assurance that these rules cannot be materially amended by the state at a later stage on a discretionary basis.

Analysis of international arbitral case law shows that stabilisation clauses have generally been recognised and enforced by arbitral tribunals.

These clauses used to be very common and broad in scope in energy contracts involving African states, as they were seen as one of the only ways to protect against political risks and in particular increased resource nationalism.

Stabilisation provisions have the potential to limit the capacity of governments to adopt and implement new legislation, however, which may be difficult to justify in the long term, in particular regarding labour and environmental laws. Moreover, the trend is for African states to try to regain control over their natural resources and avoid undertakings that could be seen as limiting their sovereign prerogatives.

As a result, the practice has changed considerably in recent years and stabilisation provisions in energy contracts are now more limited in their scope, if not banned by African states. Labour, health, environmental and safety laws are increasingly excluded from the scope of stabilisation provisions, which tend to focus on tax and customs measures.

The effects of stabilisation clauses have also evolved in recent years. Some contracts now include stabilisation clauses whose effects no longer freeze a body of rules for a period of time, but rather provide that if there is a change in legislation that affects the investor's rights, the parties shall be bound to renegotiate the terms of the contract to restore the economic balance agreed at the outset. The effects of these clauses are similar to those of the hardship and price revision clauses described above.

Examples of arbitrations relating to energy projects involving stabilisation provisions include the dispute between Maersk and the Republic of Algeria and between Anadarko and state-owned oil company Sonatrach. Following the introduction by the Algerian state of a windfall profits tax in 2006, Maersk and Anadarko alleged the Republic of Algeria was in breach of a stabilisation provision included in their production-sharing contract. This dispute led to the introduction of two arbitration proceedings (ICSID and ad hoc). The parties eventually settled their dispute with a substantive US$3.2 billion being paid to Anadarko, Maersk and Eni in damages on top of an increase of their shares in the oil fields and an extension of the duration of the production-sharing contract.[16]

Looking further back in time, one cannot fail to mention the case of AGIP against the Republic of the Congo. In this case, despite the Congolese government having agreed in stabilisation provisions not to pass any laws altering the corporate form of AGIP's subsidiary, a law was enacted ordering that AGIP subsidiary's rights and assets be transferred to Hydro-Congo, without compensation. The ICSID tribunal gave effect to the stabilisation provisions and ordered the state to compensate AGIP, noting that stabilisation provisions that have been liberally signed by a government do not affect the sovereign power of a state to legislate or regulate as the state retains this power with regard to other investors that do not benefit from the same commitments.[17]

International sanctions provisions

There has been considerable debate in recent years as to whether an international sanction constitutes a force majeure event. In practice, the multiplicity and diversity of new international sanctions enacted each year makes it very difficult to state with certainty whether the enactment of new sanctions prohibiting a foreign investor from conducting all or part of an energy project in an African country would constitute an event of force majeure or fait du prince.

Contractual clauses on sanctions, which have rarely been reviewed until a few years ago, have thus become hotly debated points in contractual negotiations for long-term energy projects – all the more so as sanctions programmes frequently target the energy sector.

As a result, new sanctions provisions now need flexibility to adapt to divergent regimes and changing circumstances. Moreover, sanctions clauses must now be designed to operate jointly and consistently with dispute resolution clauses and clauses allowing for the revision of a contract's terms, its suspension or termination.

Additional trending issues

Among the many subjects usually put forward as a source of future conflicts in the energy sector in Africa, we wanted to highlight two themes. The first is little known and yet is the source of heavy conflict between investors and states: the implementation of foreign exchange regulations. The second has been hotly discussed, with particular acuteness when talking about the African continent: energy transition and disputes related to the environment and climate change.

Foreign exchange control

African states generally impose various forms of control over the purchase or sale of foreign currencies by residents, the purchase or sale of local currency by non-residents, or the transfer of any currency across national borders.

The purpose is to allow better management of a country's economy through the control of inflow and outflow of currency, and accordingly limit the risk of speculation against the local currency. As such, foreign exchange control can be used to either limit or encourage foreign investment, depending upon the political and commercial agenda defined by the state.

Foreign exchange control essentially consists of:

- control over the use of foreign currency within the country;
- control over the possession by locals of foreign currency;
- control over the opening of local and foreign accounts in foreign currency by locals;
- control over currency exchanges; and
- control over imports and exports of foreign currency.

Foreign exchange control has recently become a very hot topic in the context of the project financing of energy projects and the foreign distribution of proceeds generated by local operations. The applicable regime can indeed have major impacts upon, for instance, the structuring of financing, as restrictions on the flow of money, the conditions of reimbursement, the opening of accounts and the currency used can have direct consequences on the bankability of an energy project.

In addition to being complex and sometimes ambiguously drafted, foreign exchange control regulations are in some cases not only based upon national laws, but also upon regional laws (eg, the rules of the Central African Economic and Monetary Community, usually referred to as 'CEMAC'). Due to the complexity of the rules and their intertwining, it is not uncommon for divergent interpretations to coexist for the same provisions.

Since they have instant effects upon the proceeds generated by an investment, any new or more stringent interpretation of exchange control rules is likely to immediately raise new challenges for foreign investments in the energy sector, and may also run the risk of being in contradiction with stabilisation provisions or individual authorisations that may have been given by a state to a project at the outset (eg, authorisations to open foreign accounts, repatriation limitations, etc).

This recent discussion in relation to CEMAC's foreign exchange regulation perfectly illustrates this trend.

CEMAC is an economic community comprised of Cameroon, the Central African Republic, the Republic of the Congo, Gabon, Equatorial Guinea and Chad. It was founded in 1994 by a treaty signed in N'Djamena, which entered into force in 1999. CEMAC aims to coordinate and monitor national economic policies and sectoral policies, and to gradually create a single market.

On 1 March 2019, CEMAC foreign exchange Regulation No. 02/18/CEMAC/UMAC/CM entered into force after several years of debate. It cancelled and fully replaced former

Regulation No. 02/00/CEMAC/UMAC/CM dated 29 April 2000. The entry into force of more stringent rules imposed by this new Regulation has led to major concerns among hydrocarbon and mining companies. After several years of discussion and a moratorium on the enforcement of the new Regulation, CMEAC issued two new Regulations, applicable to the extractive sector:

- CEMAC Regulation No. 01/21/CEMAC/UMAC/CM dated 23 December 2021 relating to the enforcement of certain provisions of the 2018 CEMAC Regulation to resident extractive companies; and
- CEMAC Regulation No. 02/CEMAC/UMAC/CM dated 23 December 2021 relating to the protection against seizure of foreign currency accounts opened by entities operating in the extractive sector.

CEMAC adopted and issued three Instructions on 4 February 2022:

- Instruction No. 001/GR/2021 relating to the declaration, domiciliation, payment and clearance of imports by extractive companies;
- Instruction No. 002/GR/2021 relating to the declaration, domiciliation, repatriation and clearance of exports by extractive companies; and
- Instruction No. 003/GR/2021 setting out the rules for the opening and operating foreign currency accounts by extractive companies.

In addition, CEMAC adopted and issued Instruction No. 005/GR/2022 on 20 July 2022 relating to the repatriation and domiciliation of decommissioning funds with the Bank of Central African States.

As CEMAC regulations have prevalence over any local legislation of the CEMAC member states, these new Regulations have created new challenges for companies in the energy sector. The long-term consequences and potential disputes in relation to this matter still need to be assessed.

Energy transition, environmental protection and climate change

Climate change represents a major threat to economic development in Africa. Indeed, according to the African Development Bank and the Environment Programme of the United Nations, despite having contributed the least to global warming and having the lowest emissions,Africa has been the most vulnerable continent to the effects of climate change.[18]

In Europe and the US, the energy transition has aimed to decarbonise the economy, reduce dependence upon fossil fuels and achieve energy sobriety. The African states' needs have proved to be very different, however, insofar as their carbon emissions are proportionately rather low but their energy needs rather significant, bearing in mind that a large proportion of the population does not have access to electricity and the networks are not stable, which hinders their development.[19]

African governments will thus have to find a difficult balance between their development needs and the growing importance of environmental protection measures.

Access to water resources is an obvious example. The construction of Africa's largest dam in Ethiopia on the Blue Nile fulfils a compelling need for the country's development, but will necessarily have consequences for the millions of people downstream in Sudan and Egypt whose lives depend upon the Nile's waters. This project, like others on the Nile and other major African rivers, is creating tensions between countries, affecting populations and investors, and may lead to disputes.

In response to climate change, African states will progressively adopt more protective environmental laws that may affect some energy projects and lead to commercial or investment treaty-based arbitrations. The Netherlands provides an example: the country banned the use of coal in electricity generation to comply with the 2015 Paris Agreement. The ban led to the introduction of two ICSID arbitration proceedings against it under the Energy Charter Treaty (ECT) by German energy suppliers RWE and UNIPER.[20] Although no African country is a signatory to the ECT, similar causes could produce similar effects. The enactment of environmental protection legislations by the African states could lead to the commencement of arbitration proceedings by foreign investors, which may find a legal basis for their actions in the protections offered by bilateral treaties that were often concluded at a time when environmental concerns were not at the forefront.

In recent years, African states have also increasingly (and successfully) raised environmental issues as a defence to investors' claims in the framework of arbitration proceedings and this trend is expected to increase in the coming years.

For example, in 2018, an ICSID tribunal declined jurisdiction over a claim filed by subsidiaries of a Canadian mining company against Kenya on the basis of violations by the Kenyan authorities of environmental local laws in the attribution of the mining licence.[21] The tribunal ruled that the ICSID Convention and the UK–Kenya bilateral investment treaty both imply that investments should be lawful to ensure protection. The tribunal concluded that, in light of the violation of Kenyan environmental laws, the licence was void ab initio and that it had no jurisdiction.[22]

Conclusion

While the challenges facing energy projects in Africa are numerous, everything indicates that the coming years will be fertile in new developments. In this context, energy will undoubtedly remain one of the main industries subject to international arbitration proceedings in the years to come.

* *The authors wish to thank Yoann Lin, international trainee, for his assistance in the preparation of this article.*

Footnotes

[1] To name only a few, similar definitions of force majeure can be found in articles 1104 of the Civil Code in Guinea, 129 of the Code of Civil and Commercial Obligations in Senegal, 120 of the General Regime of Obligations in Mali, 282–283 of the Code of Obligations and Contracts in Tunisia, 268–269 of the Code of Obligations and Contracts in Morocco, as well as in article 294 of the OHADA Uniform Act on General Commercial Law applicable in 17 African states.

[2] French Cour de cassation, Commercial Chamber, 8 March 1983, No. 81-11.075: the supplier had no effective means to curb the effects of the strike, nor did it have the power to requisition some of the employees.

[3] French Cour de cassation, 2ndCivil Chamber, 20 April 1983, No. 82-11.234.

[4] French Cour de cassation, Commercia Chamber, 9 June 2015, No. 14-15.074.

[5] French Cour de cassation, Commercial Chamber, 16 September 2014, No. 13-20.306. The Court refused to recognise insufficient financial resources from a debtor of a monetary obligation following its court-organised liquidation as an irresistible event that the debtor's guarantor could rely upon.

[6] ***Buyer (Switzerland) v Seller (Kosovo)***, ICC Case No. 16369, in Collection of ICC Arbitral Awards 2012–2015, Kluwer Law International: a drop in the commodity's price did not qualify as a force majeure event under Swiss law, since it did not render the commodity's delivery impossible.

[7] ***RSM Production Corporation v Central African Republic***, ICSID Case No. ARB/07/02.

[8] ***National Oil Corporation v Sun Oil***, ICC Case No. 4462, in 'Collection of ICC Arbitral Awards 1991–95', Kluwer Law International.

[9] ICC Cases Nos. 3099 and 3100, in Collection of ICC Arbitral Awards 1974–85, Kluwer Law International.

[10] 'Eskom's COVID-19 Force Majeure', Michael Ward, University of Pretoria Gordon Institute of Business Science, Johannesburg, South Africa, 2020.

[11] Botswana Power Corporation electricity tariff adjustment proposal for the 2021/22 financial year.

[12] https://globalarbitrationreview.com/article/drc-brings-icc-claim-against-gertler-companies.

[13] ICC Case No. 22370. https://jusmundi.com/en/document/decision/pdf/en-republique-democratique-du-congo-v-divine-inspiration-group-pty-award-wednesday-7th-november-2018.

[14] ICC International Court of Arbitration Bulletin Vol. 25 No. 2.

[15] https://arbitration.qmul.ac.uk/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf.

[16] https://globalarbitrationreview.com/article/anadarko-and-maersk-settle-sonatrach.

[17] https://jusmundi.com/en/document/decision/pdf/fr-agip-s-p-a-v-peoples-republic-of-the-congo-sentence-friday-30th-november-1979.

[18] https://www.afdb.org/en/cop25/climate-change-africa; https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change.

[19] https://carnegieendowment.org/2023/01/31/how-u.s.-can-better-support-africa-s-energy-transition-pub-88899.

[20] https://globalarbitrationreview.com/article/netherlands-faces-first-icsid-claim-over-coal-plant-ban; https://globalarbitrationreview.com/article/uniper-withdraw-ect-claim-part-of-german-bailout. The two ICSID arbitration proceedings are suspended, and on 1 September 2022 the higher regional court of Cologne ruled that both ICSID arbitration proceedings are inadmissible and that no intra-EU investment arbitration proceedings can be made on the basis of the ECT. https://jusmundi.com/en/document/decision/en-uniper-se-uniper-benelux-holding-b-v-and-uniper-benelux-n-v-v-kingdom-of-the-netherlands-decision-of-the-higher-regional-court-of-cologne-thursday-1st-september-2022#decision_28857; https://jusmundi.com/en/document/decision/en-rwe-ag-and-rwe-eemshaven-holding-ii-bv-v-kingdom-of-the-netherlands-decision-of-the-higher-regional-court-of-cologne-thursday-1st-september-2022#decision_28856.

[21] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018. See also 'Kenya defeats mining claim after local law violation', GAR, 23 October 2018.

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IN SUMMARY

This article outlines some of the legal concepts faced by investors and African states involved in large energy projects when a sudden change in the legal and economic context arises, and the disputes around these concepts. It also gives insight into two trending issues for energy projects in Africa that could give rise to contractual renegotiations and arbitrations in the years to come.

DISCUSSION POINTS

- Force majeure
- Hardship
- Price adjustment
- Stabilisation provisions
- Sanctions provisions
- Foreign exchange control
- Energy transition and climate change

REFERENCED IN THIS ARTICLE

- ICC Case No. 15051 of 2010
- *RSM Production Corporation v Central African Republic*, ICSID Case No. ARB/07/02
- *National Oil Corporation v Sun Oil*, ICC Case No. 4462
- CEMAC Regulation No. 02/18/CEMAC/UMAC/CM

INTRODUCTION

The successive crises we have been experiencing in recent years – covid-19, the war in Ukraine, the increasingly palpable effect of climate change – have had and will continue to have major economic consequences worldwide.

The consequences can cause profound and lasting disruption to the proper performance of current contracts, particularly long-term contracts concluded before the disruptive factors became apparent.

Energy contracts, which by their very nature are long-term contracts, are particularly exposed to changes in circumstances that thwart the most reasonable forecasting efforts.

The risk of a sudden change in the economic and legal landscape is exacerbated in the African context, particularly in light of the rapid economic growth of African states, the greater political instability that continues to affect some of these states and the recent development of certain technologies that may lead to the adoption of new legislation in areas where none existed before.

Whether an investor or a host state, any change in the economic or legal context can profoundly alter the balance struck at the outset of the investment. A project that was profitable upon design may quickly become unprofitable for the investor. Similarly, a project that once fostered the development needs of a state may appear inappropriate under new market conditions, or incompatible with new public policies.

Various contractual mechanisms can anticipate and manage risks of such evolutions affecting major energy projects. Indeed, in practice, it is common for the parties to agree upon:

- force majeure provisions;
- hardship provisions;
- price adjustment provisions;
- stabilisation provisions; and
- sanctions provisions.

Despite the aforementioned contractual provisions and no matter how ingenious or cautious the counsels in charge of drafting contracts may be, most, if not, all large energy projects tend to experience one or more periods of high tension between the parties caused by a sudden change in the economic or legal framework. The reverse would be surprising considering that large energy projects have a life span ranging from 30 years for solar power plants to 50 years for hydroelectric plants.

Periods of tension between the parties are generally resolved in one of two ways, or a combination of both, namely:

- contractual renegotiation, which may result in a readjustment of several aspects of the contracts (eg, price review, increased tax burden, environmental or development obligations upon the investor); or
- resolution of the dispute by a third party, which in an international context is most often an arbitral tribunal.

This article examines some of the legal concepts faced by investors and African states involved in large energy projects when a sudden change in the legal and economic context arises, and the disputes around these concepts.

We also discuss two additional trending issues for energy projects in Africa that could give rise to contractual renegotiations and arbitrations in the years to come.

THE LEGAL AND CONTRACTUAL RESPONSE TO A SUDDEN CHANGE IN THE LEGAL AND ECONOMIC CONTEXT OF A PROJECT

Force Majeure

Force majeure is a legal concept that originated in Roman law. It is reflected in the law of most civil law legal systems, and has more or less similar variants in most other systems of law, including common law systems under the concept of frustration.

In addition to what the law chosen by the parties may already provide, energy contracts usually include force majeure provisions. The wording of these clauses varies from one contract to another, but on the whole, parties frequently contractually define force majeure using the three classic criteria resulting from French law and other civil law systems. This is particularly the case for projects in West Africa, where French-speaking African states apply a traditional approach regarding force majeure.[1]

Force majeure will usually be established and the parties relieved from performing certain obligations under their contract when the following three criteria are met.

- Exteriority: to qualify as force majeure, the event must be exterior to the debtor of an obligation. The analysis of this criterion may vary, and some courts and arbitral tribunals tend to consider that it is fulfilled if such an event is beyond the reasonable control of the debtor of the obligation, even if it may not be, strictly speaking, exterior to the debtor. For example, a strike conducted by the employees of an electricity supplier was found to be exterior to the supplier as it was beyond its reasonable control.[2]
- Unpredictability: to qualify as force majeure, the event must not be reasonably foreseeable by a prudent and diligent debtor. In general, the unpredictability must not be absolute but relative, depending on what is reasonably foreseeable when the contract is to be executed. For example, the explosion of an oil pipeline during drainage works was not deemed an unpredictable event, since the party who caused it personally knew there was a pipeline crossing the oil field,[3] and a decree introducing a moratorium on photovoltaic electricity tariffs was not unforeseeable as the possibility of such a moratorium had been provided for in the law.[4]
- Irresistibility: to qualify as force majeure, the event must be irresistible, which requires it to be unavoidable and insurmountable. It is not so much the event itself that would be regarded as unavoidable, but its consequences. The irresistibility must usually be absolute: circumstances that make the contract more onerous to perform will not be regarded as a case of force majeure. Indeed, insufficient financial resources of the debtor of the obligation[5] or a drop in commodity prices[6] can be insufficient to qualify as a force majeure event.

In addition to a general definition of force majeure, with or without reference to the criteria described above, force majeure provisions often include a list of situations that the parties agree are presumed force majeure events (eg, situations of insurrection or pandemic, international sanctions or even excessive fluctuations in certain raw material prices).

A valid claim for force majeure will usually lead to the relief of performance of certain obligations (ie, only obligations that cannot be performed due to force majeure) and, in the long term, can lead to termination of the contract. As such, each party has to bear the potential consequences and delays associated with the force majeure event, meaning that no claim for damages can be filed by the creditor of the obligation.

In practice, it is quite rare for all of the conditions of force majeure to be satisfied.

Cases where force majeure has been recognised include the dispute between the US company RSM Production Corporation and the Central African Republic regarding the performance of a contract for the exploration and exploitation of hydrocarbons.[7] In this case, the security situation in the country had deteriorated drastically as a result of continuing political and civil turmoil, armed conflicts, banditry, incursions of foreign military troops, followed by a coup d'état in March 2003. The International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal accepted that all the conditions of force majeure were satisfied. It noted in particular that, because of the security situation, RSM was unable to overcome the subcontractors' refusal to go to the Central African Republic to perform the required work.

The irresistibility of force majeure (ie, the impossibility to perform the contract) is often the criterion over which the establishment of force majeure stumbles. Indeed, in a case between the Libyan national oil company and the American company Sun Oil,[8] the International Chamber of Commerce (ICC) arbitral tribunal rejected the force majeure defence invoked by the foreign investor on the ground that the impossibility to perform its obligations was not absolute. The investor's argument was based on US sanctions: Sun Oil claimed to be unable to fulfil its obligations under an exploration- and production-sharing agreement as a result of a series of sanctions taken by the US government. The sanctions included an order declaring that US passports were no longer valid for travel to Libya, a ban on the importation of Libyan oil into the United States and the export of goods and technical information to Libya being subject to obtaining a licence that was denied to Sun Oil. Although the arbitral tribunal acknowledged that the US sanctions were exterior to the parties and could meet the unpredictability criterion, it also ruled that irresistibility criterion was not met. While the performance of the obligations had become more onerous and difficult as a result of the US sanctions, it was not sufficient to consider that it had become objectively impossible to perform the contract. It remained possible for Sun Oil to use non-US staff and non-US technology.

In a case between the Algerian national oil company and an African company buyer of crude oil, the latter had failed to pay some invoices because its central bank was unable to provide the necessary foreign currency on time. The discussion turned to the issue of foreseeability.[9] Eventually, the ICC arbitral tribunal ruled that the buyer should have known that there could be difficulties in obtaining foreign currency from the central bank in a timely manner and did not take the precaution of obtaining from the central bank the assurance that it would receive this currency when needed. As such, the event was foreseeable and force majeure was excluded.

Unsurprisingly, the covid-19 pandemic gave rise to multiple situations of tension and declarations of force majeure in the energy sector in Africa. For instance, as a result of lockdown rules imposed in South Africa, the state-owned electricity utility Eskom sent force majeure notices to several wind-power plants and coal suppliers, which raised the question of whether a sudden shortage of electricity demand could qualify as force majeure.[10] Contractors used the impossibility of mobilising workers from China during the pandemic as a basis for declarations of force majeure, for example to delay remedial works required by the state-owned Botswana Power Corporation at the Morupule B power station in Botswana.-[11] The covid-19 pandemic and the resulting fall in oil prices was also the basis for a force majeure defence in the dispute between the Democratic Republic of the Congo (DRC) and Dan Gertler's British Virgin Islands-registered entities Caprikat and Foxwhelp. In response to the DRC's desire to terminate a contract for the exploration and exploitation of two oil blocks for lack of performance of drilling tests by Gertler's companies, the latter invoked force majeure as the reason for the delay, resulting from the fall in oil prices in 2020.[12]

Fait Du Prince

Fait du prince is a concept similar to force majeure, referring to an act of a government or head of state that affects the performance of a contract. It can be a unilateral decision or a new law or regulation. An embargo or a ban on imports of certain goods imposed by the administration of the country hosting an energy project can also qualify as a fait du prince, if it prevents a party from performing its obligations.

Depending on the legal regime and contractual provisions, the *Fait du prince* can be considered as an event of force majeure and usually leads to the same consequences, (ie, a suspension of performance of the obligations that cannot be performed and potential termination of the contract).

The consequences of the *Fait du prince* will depend on the applicable law and nature of the contract. In any case, we underline that, even if the three criteria of force majeure mentioned above may not have to be demonstrated, the debtor of the obligation will usually need to prove that the relevant measures have rendered performance impossible and not just more difficult or onerous.

When a contract is concluded between two privately owned companies, the *Fait du prince* is indeed a mechanism that can allow parties to get out of their obligations. In the context of large energy projects, however, the concept of *fait du prince* is limited, insofar as the state (directly or through entities it controls) is most often both an investor's co-contracting party and possibly the originator of a decision, law or regulation that could be considered as a *fait du prince*. In these circumstances, it does not appear possible for the state or the state-owned entity to rely on a decision, law or regulation taken by its own administration to justify the termination or non-compliance of its own contractual obligations without compensation.

In this regard, we note that in the dispute between Divine Inspiration Group Pty (DIGOIL) and the DRC state, the latter claimed that production-sharing agreements concluded with DIGOIL could not enter into force because neither had received the required approval from the DRC's president.[13] In fact, no decision (approval or rejection) had been taken by the president. The DRC state was thus relying upon the absence of a decision by its own administration (here the president) to argue in favour of the termination of the agreements. The arbitral tribunal did not follow that reasoning and ruled that the DRC state was the guarantor of the application of its own legislation and had the obligation to do everything in its power to allow the issuance of the presidential order under the conditions provided for by law and within a certain period of time. Although the ***fait du prince*** was not raised as a defence by the DRC state, this case shows how complex it can be for a state to rely upon the decisions (or lack thereof) of its own administration to get out of its contractual obligations.

Hardship And Price Review Provisions

Hardship is a concept that aims to preserve the economic balance of a contract by providing for renegotiations or exit solutions when the performance of an obligation remains possible but is rendered economically unreasonable due to a change of circumstancesthat was not anticipated at the time of conclusion of the contract.

Force majeure and hardship are two different concepts: a force majeure event usually requires that the performance of an obligation of a party become impossible, while hardship only calls for the performance of such obligation to become economically unreasonable.

Some African countries' domestic laws already enshrine the concept of hardship, although the definition of a hardship situation and the remedies available are often not harmonised. Moreover, this concept is not provided for in the laws of most French-speaking African states with a civil law tradition.

It is therefore important to include in energy contracts a contractual definition of what the parties consider to be a hardship situation and the consequences they wish to draw from it. In practice, the concept of hardship is usually subject to the following criteria:

- a change in circumstances;
- the change must have been unforeseeable when the relevant agreement is to be executed; and
- the change must render the performance of the relevant agreement excessively onerous for a party who had not agreed to assume the risk.

A valid claim for hardship may lead to a renegotiation of the contract by the parties, or failure to do so, or to the adaption of the contract by the judge or arbitrator. In this respect, the consequences of a hardship situation are very different from a force majeure event. A hardship situation may also lead to termination of the contract.

Price adjustment provisions are also very common in long-term energy contracts and are similar to hardship provisions, in the sense that they also aim at preserving an economic balance between parties to the contract. These clauses differ, however, in that price review clauses (notably in gas and oil supply contracts) are generally much more detailed than hardship provisions. Price review provisions will usually include a list of triggering events whereby a party can initiate a price review under the contract. The price review provisions often include a step-by-step procedure for the revision of the new contract's terms, including guidelines on how the price should be revised and, should the negotiations fail, provisions regarding a binding expert determination or dispute resolution mechanism, which is commonly arbitration.

Price adjustment provisions provide for a commercial solution to risks identified prior to the execution of a contract (whether due diligence has been conducted or not). Parties will usually agree upon a formula designed to protect both parties. The challenge consists of properly defining the risk and addressing it with sufficient clarity and in a commercially acceptable way. When the challenge is too difficult to overcome, the parties to a contract may provide for a rendezvous clause that forces the parties to meet and renegotiate, should the risk identified materialise. The success of the rendezvous clause depends on the bona fide intention of the parties to find an agreement and restore a commercial contractual balance.

ICC Case No. 15051 of 2010 illustrates the difference between the concept of hardship and a standard rendezvous clause.[14] In this case, involving gas sales contracts, the parties had agreed upon ordinary price revision periods as well as an exceptional price revision mechanism (based upon the wording used in the Principles of International Commercial Contracts 2016 (the UNIDROIT Principles)) in the event of an unforeseeable change of circumstances, which were not of a temporary nature, out of the control of the parties, and caused 'significant hardship' to either party. The alleged change of circumstances was a steep increase in the Brent price. The tribunal ruled that to amount to a significant hardship and trigger an extraordinary price review mechanism, the change of circumstances had to cause a 'deep imbalance', which a price differential of 24 per cent was insufficient to establish.

The importance of carefully drafting these hardship clauses and price review provisions in energy contracts cannot be overstated, and disputes over their application, which have been numerous, are only likely to increase in the coming years. In this regard, we note that the 2022 Future of International Energy Arbitration Survey Report of the Queen Mary University of London described 'price volatility of raw materials and energy supply (oil and gas; other)' as the leading cause (by far) of international energy disputes in the short to medium term.[15]

Stabilisation Provisions

Stabilisation provisions are another common way for parties (especially foreign investors) to long-term energy contracts to protect themselves against the risks of changes in the legal framework, and for states to attract investment.

Stabilisation provisions are not uniform but generally provide that, in the case of a change in the applicable legislation or regulation, the rights of the investor and the project company will not be impacted for a protracted period. The general idea behind this type of clause is to allow investors to make long-term financial projections and investment forecasts when implementing their investment decisions on the basis of a set of fixed rules, in particular with regard to tax and customs regimes. It provides assurance that these rules cannot be materially amended by the state at a later stage on a discretionary basis.

Analysis of international arbitral case law shows that stabilisation clauses have generally been recognised and enforced by arbitral tribunals.

These clauses used to be very common and broad in scope in energy contracts involving African states, as they were seen as one of the only ways to protect against political risks and in particular increased resource nationalism.

Stabilisation provisions have the potential to limit the capacity of governments to adopt and implement new legislation, however, which may be difficult to justify in the long term, in particular regarding labour and environmental laws. Moreover, the trend is for African states to try to regain control over their natural resources and avoid undertakings that could be seen as limiting their sovereign prerogatives.

As a result, the practice has changed considerably in recent years and stabilisation provisions in energy contracts are now more limited in their scope, if not banned by African states. Labour, health, environmental and safety laws are increasingly excluded from the scope of stabilisation provisions, which tend to focus on tax and customs measures.

The effects of stabilisation clauses have also evolved in recent years. Some contracts now include stabilisation clauses whose effects no longer freeze a body of rules for a period of time, but rather provide that if there is a change in legislation that affects the investor's rights, the parties shall be bound to renegotiate the terms of the contract to restore the economic balance agreed at the outset. The effects of these clauses are similar to those of the hardship and price revision clauses described above.

Examples of arbitrations relating to energy projects involving stabilisation provisions include the dispute between Maersk and the Republic of Algeria and between Anadarko and state-owned oil company Sonatrach. Following the introduction by the Algerian state of a windfall profits tax in 2006, Maersk and Anadarko alleged the Republic of Algeria was in breach of a stabilisation provision included in their production-sharing contract. This dispute led to the introduction of two arbitration proceedings (ICSID and ad hoc). The parties eventually settled their dispute with a substantive US$3.2 billion being paid to Anadarko, Maersk and Eni in damages on top of an increase of their shares in the oil fields and an extension of the duration of the production-sharing contract.[16]

Looking further back in time, one cannot fail to mention the case of AGIP against the Republic of the Congo. In this case, despite the Congolese government having agreed in stabilisation provisions not to pass any laws altering the corporate form of AGIP's subsidiary, a law was enacted ordering that AGIP subsidiary's rights and assets be transferred to Hydro-Congo, without compensation. The ICSID tribunal gave effect to the stabilisation provisions and ordered the state to compensate AGIP, noting that stabilisation provisions that have been liberally signed by a government do not affect the sovereign power of a state to legislate or regulate as the state retains this power with regard to other investors that do not benefit from the same commitments.[17]

International Sanctions Provisions

There has been considerable debate in recent years as to whether an international sanction constitutes a force majeure event. In practice, the multiplicity and diversity of new international sanctions enacted each year makes it very difficult to state with certainty whether the enactment of new sanctions prohibiting a foreign investor from conducting all or part of an energy project in an African country would constitute an event of force majeure or fait du prince.

Contractual clauses on sanctions, which have rarely been reviewed until a few years ago, have thus become hotly debated points in contractual negotiations for long-term energy projects – all the more so as sanctions programmes frequently target the energy sector.

As a result, new sanctions provisions now need flexibility to adapt to divergent regimes and changing circumstances. Moreover, sanctions clauses must now be designed to operate jointly and consistently with dispute resolution clauses and clauses allowing for the revision of a contract's terms, its suspension or termination.

ADDITIONAL TRENDING ISSUES

Among the many subjects usually put forward as a source of future conflicts in the energy sector in Africa, we wanted to highlight two themes. The first is little known and yet is the source of heavy conflict between investors and states: the implementation of foreign exchange regulations. The second has been hotly discussed, with particular acuteness when talking about the African continent: energy transition and disputes related to the environment and climate change.

Foreign Exchange Control

African states generally impose various forms of control over the purchase or sale of foreign currencies by residents, the purchase or sale of local currency by non-residents, or the transfer of any currency across national borders.

The purpose is to allow better management of a country's economy through the control of inflow and outflow of currency, and accordingly limit the risk of speculation against the local currency. As such, foreign exchange control can be used to either limit or encourage foreign investment, depending upon the political and commercial agenda defined by the state.

Foreign exchange control essentially consists of:

- control over the use of foreign currency within the country;
- control over the possession by locals of foreign currency;
- control over the opening of local and foreign accounts in foreign currency by locals;
- control over currency exchanges; and
- control over imports and exports of foreign currency.

Foreign exchange control has recently become a very hot topic in the context of the project financing of energy projects and the foreign distribution of proceeds generated by local operations. The applicable regime can indeed have major impacts upon, for instance, the structuring of financing, as restrictions on the flow of money, the conditions of reimbursement, the opening of accounts and the currency used can have direct consequences on the bankability of an energy project.

In addition to being complex and sometimes ambiguously drafted, foreign exchange control regulations are in some cases not only based upon national laws, but also upon regional laws (eg, the rules of the Central African Economic and Monetary Community, usually referred to as 'CEMAC'). Due to the complexity of the rules and their intertwining, it is not uncommon for divergent interpretations to coexist for the same provisions.

Since they have instant effects upon the proceeds generated by an investment, any new or more stringent interpretation of exchange control rules is likely to immediately raise new challenges for foreign investments in the energy sector, and may also run the risk of being in contradiction with stabilisation provisions or individual authorisations that may have been given by a state to a project at the outset (eg, authorisations to open foreign accounts, repatriation limitations, etc).

This recent discussion in relation to CEMAC's foreign exchange regulation perfectly illustrates this trend.

CEMAC is an economic community comprised of Cameroon, the Central African Republic, the Republic of the Congo, Gabon, Equatorial Guinea and Chad. It was founded in 1994 by a treaty signed in N'Djamena, which entered into force in 1999. CEMAC aims to coordinate and monitor national economic policies and sectoral policies, and to gradually create a single market.

On 1 March 2019, CEMAC foreign exchange Regulation No. 02/18/CEMAC/UMAC/CM entered into force after several years of debate. It cancelled and fully replaced former Regulation No. 02/00/CEMAC/UMAC/CM dated 29 April 2000. The entry into force of more stringent rules imposed by this new Regulation has led to major concerns among hydrocarbon and mining companies. After several years of discussion and a moratorium on the enforcement of the new Regulation, CMEAC issued two new Regulations, applicable to the extractive sector:

- CEMAC Regulation No. 01/21/CEMAC/UMAC/CM dated 23 December 2021 relating to the enforcement of certain provisions of the 2018 CEMAC Regulation to resident extractive companies; and
- CEMAC Regulation No. 02/CEMAC/UMAC/CM dated 23 December 2021 relating to the protection against seizure of foreign currency accounts opened by entities operating in the extractive sector.

CEMAC adopted and issued three Instructions on 4 February 2022:

- Instruction No. 001/GR/2021 relating to the declaration, domiciliation, payment and clearance of imports by extractive companies;
- Instruction No. 002/GR/2021 relating to the declaration, domiciliation, repatriation and clearance of exports by extractive companies; and
- Instruction No. 003/GR/2021 setting out the rules for the opening and operating foreign currency accounts by extractive companies.

In addition, CEMAC adopted and issued Instruction No. 005/GR/2022 on 20 July 2022 relating to the repatriation and domiciliation of decommissioning funds with the Bank of Central African States.

As CEMAC regulations have prevalence over any local legislation of the CEMAC member states, these new Regulations have created new challenges for companies in the energy sector. The long-term consequences and potential disputes in relation to this matter still need to be assessed.

Energy Transition, Environmental Protection And Climate Change

Climate change represents a major threat to economic development in Africa. Indeed, according to the African Development Bank and the Environment Programme of the United Nations, despite having contributed the least to global warming and having the lowest emissions,Africa has been the most vulnerable continent to the effects of climate change.[18]

In Europe and the US, the energy transition has aimed to decarbonise the economy, reduce dependence upon fossil fuels and achieve energy sobriety. The African states' needs have proved to be very different, however, insofar as their carbon emissions are proportionately rather low but their energy needs rather significant, bearing in mind that a large proportion of the population does not have access to electricity and the networks are not stable, which hinders their development.[19]

African governments will thus have to find a difficult balance between their development needs and the growing importance of environmental protection measures.

Access to water resources is an obvious example. The construction of Africa's largest dam in Ethiopia on the Blue Nile fulfils a compelling need for the country's development, but will necessarily have consequences for the millions of people downstream in Sudan and Egypt whose lives depend upon the Nile's waters. This project, like others on the Nile and other major African rivers, is creating tensions between countries, affecting populations and investors, and may lead to disputes.

In response to climate change, African states will progressively adopt more protective environmental laws that may affect some energy projects and lead to commercial or investment treaty-based arbitrations. The Netherlands provides an example: the country banned the use of coal in electricity generation to comply with the 2015 Paris Agreement. The ban led to the introduction of two ICSID arbitration proceedings against it under the Energy Charter Treaty (ECT) by German energy suppliers RWE and UNIPER.[20] Although no African country is a signatory to the ECT, similar causes could produce similar effects. The enactment of environmental protection legislations by the African states could lead to the commencement of arbitration proceedings by foreign investors, which may find a legal basis for their actions in the protections offered by bilateral treaties that were often concluded at a time when environmental concerns were not at the forefront.

In recent years, African states have also increasingly (and successfully) raised environmental issues as a defence to investors' claims in the framework of arbitration proceedings and this trend is expected to increase in the coming years.

For example, in 2018, an ICSID tribunal declined jurisdiction over a claim filed by subsidiaries of a Canadian mining company against Kenya on the basis of violations by the Kenyan authorities of environmental local laws in the attribution of the mining licence.[21] The tribunal ruled that the ICSID Convention and the UK–Kenya bilateral investment treaty both imply that investments should be lawful to ensure protection. The tribunal concluded that, in light of the violation of Kenyan environmental laws, the licence was void ab initio and that it had no jurisdiction.[22]

CONCLUSION

While the challenges facing energy projects in Africa are numerous, everything indicates that the coming years will be fertile in new developments. In this context, energy will undoubtedly remain one of the main industries subject to international arbitration proceedings in the years to come.

* *The authors wish to thank Yoann Lin, international trainee, for his assistance in the preparation of this article.*

Endnotes

1 To name only a few, similar definitions of force majeure can be found in articles 1104 of the Civil Code in Guinea, 129 of the Code of Civil and Commercial Obligations in Senegal, 120 of the General Regime of Obligations in Mali, 282–283 of the Code of Obligations and Contracts in Tunisia, 268–269 of the Code of Obligations and Contracts in Morocco, as well as in article 294 of the OHADA Uniform Act on General Commercial Law applicable in 17 African states. ^ Back to section

2 French Cour de cassation, Commercial Chamber, 8 March 1983, No. 81-11.075: the supplier had no effective means to curb the effects of the strike, nor did it have the power to requisition some of the employees. ^ Back to section

3 French Cour de cassation, 2ndCivil Chamber, 20 April 1983, No. 82-11.234. ^ Back to section

4 French Cour de cassation, Commercia Chamber, 9 June 2015, No. 14-15.074. ^ Back to section

5 French Cour de cassation, Commercial Chamber, 16 September 2014,No. 13-20.306. The Court refused to recognise insufficient financial resources from a debtor of a monetary obligation following its court-organised liquidation as an irresistible event that the debtor's guarantor could rely upon. ^ Back to section

6 *Buyer (Switzerland) v Seller (Kosovo)*, ICC Case No. 16369, in Collection of ICC Arbitral Awards 2012–2015, Kluwer Law International: a drop in the commodity's price did not qualify as a force majeure event under Swiss law, since it did not render the commodity's delivery impossible. ^ Back to section

7 *RSM Production Corporation v Central African Republic*, ICSID Case No. ARB/07/02. ^ Back to section

8 *National Oil Corporation v Sun Oil*, ICC Case No. 4462, in 'Collection of ICC Arbitral Awards 1991–95', Kluwer Law International. ^ Back to section

9 ICC Cases Nos. 3099 and 3100, in Collection of ICC Arbitral Awards 1974–85, Kluwer Law International. ^ Back to section

10 'Eskom's COVID-19 Force Majeure', Michael Ward, University of Pretoria Gordon Institute of Business Science, Johannesburg, South Africa, 2020. ^ Back to section

11 Botswana Power Corporation electricity tariff adjustment proposal for the 2021/22 financial year. ^ Back to section

12 https://globalarbitrationreview.com/article/drc-brings-icc-claim-against-gertler-companies. ^ Back to section

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14 ICC International Court of Arbitration Bulletin Vol. 25 No. 2. ^ Back to section

15 https://arbitration.qmul.ac.uk/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf. ^ Back to section

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18 https://www.afdb.org/en/cop25/climate-change-africa; https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change. ^ Back to section

19 https://carnegieendowment.org/2023/01/31/how-u.s.-can-better-support-africa-s-energy-transition-pub-88899. ^ Back to section

20 https://globalarbitrationreview.com/article/netherlands-faces-first-icsid-claim-over-coal-plant-ban; https://globalarbitrationreview.com/article/uniper-withdraw-ect-claim-part-of-german-bailout. The two ICSID arbitration proceedings are suspended, and on 1 September 2022 the higher regional court of Cologne ruled that both ICSID arbitration proceedings are inadmissible and that no intra-EU investment arbitration proceedings can be made on the basis of the ECT. https://jusmundi.com/en/document/decision/en-uniper-se-uniper-benelux-holding-b-v-and-uniper-benelux-n-v-v-kingdom-of-the-netherlands-decision-of-the-higher-regional-court-of-cologne-thursday-1st-september-2022#decision_28857; https://jusmundi.com/en/document/decision/en-rwe-ag-and-rwe-eemshaven-holding-ii-bv-v-kingdom-of-the-netherlands-decision-of-the-higher-regional-court-of-cologne-thursday-1st-september-2022#decision_28856. ^ Back to section

21 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018. See also 'Kenya defeats mining claim after local law violation', GAR, 23 October 2018. ^ Back to section

22 On 19 March 2021, an ICSID ad hoc committee upheld the award. https://jusmundi.com/en/document/decision/pdf/en-cortec-mining-kenya-limited-cortec-pty-limited-and-stirling-capital-limited-v-republic-of-kenya-decision-on-annulment-friday-19th-march-2021#lvl_200503. ^ Back to section https://www.nortonrosefulbright.com/en

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