

### ► The rule of law

Since 1981, Zimbabwe has maintained a fused profession – a small de facto Bar remains, and is supported by bodies such as the UK's Advocacy Training Council in its work, although firms mainly carry out their own advocacy work.

The Law Society of Zimbabwe has faced tough challenges, over its support for the maintenance of the rule of law, especially in support of its members – it has been steadfastly supported in seeking judicial reform by fellow Commonwealth jurisdictions and the International Bar Association, in particular the IBA's Human Rights Institute which is co-chaired by Moyo.

A new constitution was promulgated in 2013, which allowed for the independence of the judiciary including a new Constitutional Court. In 2010, a high-profile Bar Council of England & Wales report criticised the level of patronage shown by the government to the senior judiciary and perceived impacts on judicial integrity, although there were subsequently gradual signs of a more independent approach by some judges in 2013. However, unlike neighbouring Botswana, Zimbabwe was ranked at the bottom of the World Justice Project's Rule of Law Index in 2015, alongside Afghanistan and Venezuela.

### Investment, indigenisation, industry

In common with other Southern African states, there is a growing interest in arbitration. Bigger commercial entities place a strong emphasis on confidentiality of disputes, making arbitration a favourable form of dispute resolution. Mutasa points out however, that other ADR mechanisms, such as conciliation, mediation, or expert determination, are less common in commercial dispute resolution in Zimbabwe.



Moyo indicates that there has been a rise in investment disputes as a result of the implementation of an indigenisation law. The controversial law requires non-indigenous investors to sell 51% of their interest in their Zimbabwean businesses to indigenous investors in a market characterised by a lack of liquidity, thus preventing parties from recovering the true value of the assets sold. "When

pushed, I can see some investors relying on bilateral investment protection agreements, or seeking international arbitration. Already, a number of such arbitrations have either commenced or been threatened," he adds.

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**Miranda Khumalo**  
Atherstone & Cook

In respect to foreign investment, the main sectors are mining, oil and gas. Khumalo says that "for foreign investment most of the legal work involves due diligence, reviewing and drafting transaction documents and assisting with regulatory approvals. At the initial stage, the delays are mainly due to regulatory approvals. Negotiations on the investment agreement between government and the foreign company, can take months sometimes years – there are many factors that come into play".

Moyo states that "compared to other jurisdictions, Zimbabwean courts have a much smaller backlog. This is largely because in 2009 the Zimbabwean dollar was abandoned... Consequently, all litigation which was pending before the courts became irrelevant. The courts were able to start from a clean slate".

"Obviously there are concerns over the reintroduction of the Zimbabwean dollar," says Khumalo. "The Zimbabwean government has assured us that this will not happen soon – but the courts do honour the essence of the contract; even if there is a change in currency they can recover their amounts in the stated currency."

In June, the Reserve Bank said that it would 'demonetise' the valueless currency, following plans drawn up in 2014, which process should complete by September 2015.

### Confidentiality is key

Despite rumours of the establishment of a commercial court, Moyo notes that in commercial matters, there is definitely a tendency by investors to prefer arbitration over litigation. "This is driven largely by a desire to maintain confidentiality, to ensure speedy resolution of disputes and to ensure that the persons adjudicating over disputes are persons with real expertise in the areas covered by the disputes," he says.

Khumalo agrees, pointing out that while many investment agreements contain arbitration clauses, "this does not inhibit the parties from approaching the courts".

Mutasa states that specialist commercial knowledge available in arbitration proceedings as opposed to litigation is also a key draw for investors. Khumalo indicates that many parties enjoy greater involvement in the process, which allows them to determine the pace of the matter, stating that "for many commercial clients, time is of the essence. They normally want the quickest and best solution. Arbitration proceedings are usually quick and judgment is obtained in a shorter period than with litigation". She adds that, of course "confidentiality is also a plus". ■

# FILLING the VOID

Litigation is not getting the job done for Africa's biggest Portuguese-speaking nations. As investors seek a cheaper and quicker alternative, the pieces are in place for arbitration to step up and meet the demand,  
**Andrew Mizner reports**



Although not often placed among sub-Saharan Africa's growing economic powerhouses, such as South Africa and Ghana, the continent's two largest Portuguese-speaking (Lusophone) nations, Mozambique and Angola, are significant locations for overseas investment, particularly in the natural resources and energy sectors.

Angola, Africa's second largest oil producer, had a GDP of USD 130 billion in 2014, while gold discoveries have combined with Mozambique's growing natural gas industry, making it increasingly interesting to overseas investors.

While both countries are closed to foreign law firms, they are open to international arbitration, and with ever-increasing levels of foreign investment coming into slow civil justice systems, the push towards arbitration is well underway.

Civil disputes in Angola and Mozambique have much in common. Litigation in both is slow and expensive. Many Angolan cases are subject to a 10% judicial tax on the value of the dispute, and the World Bank estimates that legal costs account for 44% of the value of its cases. Meanwhile a 2014 **Clifford Chance** report estimated that a breach of contract dispute in Mozambique would take two years to reach a judgment.

Álvaro Telles da Sylva Pinto Basto, a litigation partner with **Couto, Graça e Associados** in Maputo, Mozambique tells *CDR* that there is a busy domestic disputes market, mainly civil and commercial matters, many of which relate to debt collection, but also criminal cases, including insurance fraud.

Pinto Basto says litigation is still the preferred method of dispute resolution, and that "for Africa, it works quite well", but "arbitration is now rising in selected markets, mainly for the big projects and big companies".

"Demand has been raised in the last five years, as the government, and especially industry, have encouraged arbitration clauses to be included in their contracts."

**Antonio Justice Moreira**, senior arbitration associate with Portuguese firm **PLMJ**, agrees that in Mozambique, "the market for commercial disputes is a very active one", adding: "Most commercial disputes are resolved through the judicial courts, only a small part is submitted to arbitration. However, the number of arbitration agreements in commercial contracts is growing."

Moreira says the most popular disputes for **PLMJ** relate to "the breach of loan agreements, real estate purchase agreements and works contracts", while shareholders' disputes and breach of contract disputes are on the rise.

Conversely in Angola, despite having a bigger economy, the legal sector has not been able to cope with demand, meaning that the litigation sector remains quiet.

**Pedro Metello de Nápoles**, arbitration partner and head of the Angola desk at **PLMJ**, says: "One cannot say the market is very busy. State courts have a structure partially inherited from colonial times and a procedural law that is outdated; on the top of that the number of disputes has been increasing and the courts are not able to keep the pace."

As a result, despite an ongoing court restructuring, "commercial disputes tend to be solved by other means, notably negotiation, courts being seen as a last recourse".

This includes arbitration: "Government entities and, in particular, the Ministry of Justice have been paying much attention to arbitration, either by sponsoring arbitral institutions or by convincing public institutions to include arbitral clauses in their contracts."

De Nápoles adds that, as in Mozambique, debt and credit collection are the major source of disputes. ►