

Energy Sector | Insights Series



WEBBER WENTZEL

in alliance with > Linklaters

In partnership with



**AFRICA
LEGAL**

Contents



01

Choose a seat in Africa



02

ESG - The Game-Changer



03

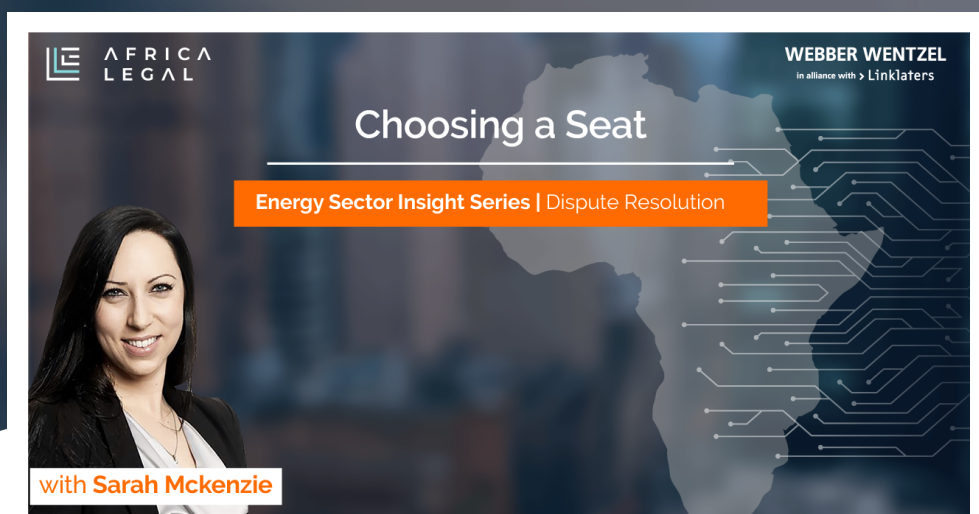
Energy Transition is Happening



04

ESG | The BIG Question

Choose a Seat in Africa



Parties to energy projects in Africa should give serious consideration to choosing a venue and seat of arbitration within the continent rather than relying on historically popular arbitral seats in the northern hemisphere, said Webber Wentzel partner Sarah McKenzie.

“In Africa there are a number of very strong arbitral seats where disputes can be safely resolved with support from the courts and without interference,” commented McKenzie, a commercial dispute resolution expert. “South Africa, for instance, recently adopted an International Arbitration Act in line with best practice globally, has a court system that’s very supportive of arbitration, and provides an excellent platform for arbitrations to take place.”

The energy sector – vital to the development of many African nations – has historically produced the highest value awards in international arbitration, noted McKenzie. Arbitration is becoming a stronger and better method for resolving disputes in general, for many reasons.

“There are lots of benefits to clients from using arbitration as their chosen dispute resolution method, including confidentiality of the proceedings, easy enforcement in cross-border disputes, and a flexible process tailored to the particular dispute.”

Covid has created a lot of disruption for the energy sector, noted McKenzie, with all projects that were underway when the pandemic hit affected in one way or another. The pandemic caused further strain on relationships among various players in the sector, with financiers concerned about insolvency risks, and the ability of sub-contractors as well as project companies to perform.

“I think the whole system was a little on edge over the last 18 or so months,” said McKenzie. “There’s also been an increased focus flowing from the pandemic on

force majeure clauses – whether they’re in place, how they can be relied upon, and whether they cover these particular events. We’ve seen a number of disputes relating to force majeure rights and whether they apply to key energy sector projects. We’re likely to see more.”

During the pandemic there was also a move to virtual hearings for arbitrations, something that began out of necessity, but which McKenzie believes will continue in future.

“The global arbitration community has adapted quite well to virtual hearings,” she said. “It’s actually been a relatively good transition and we’re finding it can be a more efficient way to resolve disputes for clients, depending on the type of dispute and procedural requirements.”

While McKenzie expects some arbitrations will go back to physical hearings in future, particularly for bigger disputes or where there may be concerns around security of witness testimony, she believes that a large number of smaller hearings will continue to proceed virtually.

Whatever the case, McKenzie would like to see businesses involved with African energy projects, and other matters on the continent, look beyond traditional arbitral seats such as London, Paris and Singapore when drafting dispute resolution clauses in their contracts.

“I think it’s important in all sectors to think about whether there is an alternative African seat available that they could consider and potentially gain a lot of efficiencies from,” she said. “Pa

<https://www.africa-legal.com/news-detail/choose-a-seat-in-africa/>

ESG - The Game-Changer



The combination of advanced laws relating to sustainable development and growing shareholder pressure has seen environmental, social, and governance (ESG) reporting become a vital issue for African businesses, says environmental law expert Garyn Rapson.

“In the last three or four years we’ve seen a strong shift in terms of ESG reporting being a tick box compliance issue where your sustainability manager quickly produces a report at the end of the year, to boards and companies taking ESG standards and performance targets seriously,” adds Rapson, a partner at leading African firm Webber Wentzel. This shift is also marked by the UN driving the Decade of Action, with less than nine years left to realise the Sustainable Development Goals and business now acknowledging that it is not only governments who are responsible for furthering the sustainable development agenda.

Africa is in a unique position, says Rapson: large populations, developing economies, and a “very strong realisation” that, although “we weren’t the ones that caused the problem, we’ll be the ones that bear the brunt of the difficulties around climate change”.

While African businesses may be playing catch-up with some European and American counterparts, a clear understanding from many African governments of the importance of ESG, plus the ability to tap into a wealth of knowledge from an international shareholder base, allows Africa to escalate and elevate its ESG performance quickly and in a manner which addresses its nuanced, jurisdiction-specific challenges, says Rapson.

There’s also another factor that makes ESG an exciting space for Africa, generally.

“African people are entrepreneurial in their approach, so there’s a very clear understanding of the opportunities that ESG presents for Africa,” says Rapson. “We can learn from the mistakes of other jurisdictions and capitalise on the opportunities that ESG presents for Africa, for the betterment of our people and our economy.”

Lawyers can, and have, played an integral part across Africa with ESG understanding and the performance of companies, as well as advising governments on issues like decentralising power and a “key game-changer for Africa” of renewable energy procurement programmes.

While most state-owned energy providers have been slow to diversify out of coal, Africa could have a wealth of things like solar power, wind power, and wave technology, notes Rapson. “I think there was always an appreciation we could tap into that potential, but now governments have taken that head-on across Africa, which is exciting.”

Webber Wentzel has advised various clients on how to diversify their energy, “which has been the biggest driving force in terms of the change in mindset,” he says.

He gives the example of mining companies which would just focus on what they did best (extracting minerals from the ground) but are now thinking about where the power for their operations is coming from, and looking at their power mix and alternatives for power.

When it comes to ESG reporting, as there's currently no global standardised approach, Rapson and his colleagues advise companies in various sectors across a suite of reporting standards (eg those required by lenders, others by investors, others by supply chains and others which are entirely industry-specific).

Rapson also notes that, while there is great understanding of the E in ESG across Africa, it's vital that the social and governance aspects of ESG reporting aren't forgotten. For the S, companies need to consider who works in their operations, how they treat their people, and that they invest in them as well as projects. Companies also need to consider the impacts of their business on people externally (such as host communities and broader society).

"Then obviously G is particularly important," he says. "We have large-scale corruption, both in government as well as in companies across Africa. So G is going to become incredibly important going forward, and that's going to be the biggest stumbling block in terms of people taking ESG performance seriously."

<https://www.africa-legal.com/news-detail/esg-the-game-changer/>



Energy Transition is Happening



How is transitioning from hydrocarbons to green solutions going to be possible? What sort of legal considerations need to be made? Is it possible for African countries to shift from importing energy to exporting energy by adopting sustainable outputs? Can we create stronger economies without breaking laws and destroying the planet? These are some of the pertinent questions Jason van der Poel, partner and head of the Energy Sector Group at Webber Wentzel, discusses with the experts.

Van der Poel's guests are Axel Stritter (partner and corporate law, energy and mining expert at Engling, Stritter and Partners in Namibia), Andrew Hammond (senior process engineer at Nafasi Water) and Francesca Matthews (an energy and infrastructure partner at Linklaters based in London).

The panel exchanges views on the feasibility and reality of sustainable energy on the continent. It seems that governments, businesses and other relevant stakeholders are indeed pushing towards clean energy resources to abide by the Paris Agreement and ensure net zero carbon dioxide emissions by 2050.

"If you have a look at the annual reports of one of the big listed companies that are released these days, ten or 15 years ago the sustainability sections of those reports would probably be footnotes rather than actually main bodies of those reports, whereas now they are substantial and meaningful portions of those annual reports," Hammond comments.

"Is it possible for African countries to shift from importing to exporting energy?" asks Van der Poel. The answer is yes.

Stritter says the Namibian government is taking progressive steps of improving on its pledge of reducing emissions from 89% to 91% by 2030 to meet the Paris Agreement goal. At the moment a great deal of Namibia's energy source is imported. Stritter believes the energy transition would give the country "a good opportunity to actually realise the renewable energy opportunities". Discussions are also underway with the Netherlands and Germany to see how hydrogen can be exported from Namibia.

"Is there a disconnect between local government initiatives, international obligations, private sector engagement and shareholder expectations in this sphere?" asks Van der Poel.

Matthews says there has been a change in the urgency with which the global climate change crisis is viewed. "There has been a shift from asking how we reduce emissions to asking how we get to net zero within defined time scales. And that shift has come from a variety of sources. It's been led by scientists, non-governmental organisations and by citizens, and increasingly governments and regulators are responding with policy levers. Certainly, in Europe we are seeing a distinct narrowing of that disconnect. There has been a slew of policy announcements in Europe and the UK which are aimed at defining and compelling the steps needed to get to net zero, particularly as we get closer to COP26 in Glasgow."

COP26 takes place from 31 October to 12 November 2021.

<https://www.africa-legal.com/news-detail/energy-transition-is-happening/>

THE BIG QUESTION

Can African countries be expected to immediately bypass high-carbon energy generation in combating energy poverty and instead focus on green and renewable power generation?

RESULTS ARE IN!

