

The Democratic Republic of Congo to ratify the New York Convention 1958

The Democratic Republic of Congo ("DRC") continues to improve its regulatory regime by passing a law authorising the State to ratify the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention"). It will become the 150th state and the 33rd African country to adhere to the NY Convention.

1. First the OHADA Revolution

On 12 September 2012, the DRC acceded to OHADA, an organisation comprising 17 African states which seeks to provide a harmonised legal framework for the conduct of business in Africa by operating a uniform business law regime (based on modern French laws). It was a revolutionary change as overnight the DRC upgraded its 19th century legal system to a modern set of business laws. The OHADA Uniform Acts only cover the core business areas of law such as the formation of companies, the creation and enforcement of security interests, the insolvency regime and local and international arbitration. Indeed, pursuant to the OHADA legislation, international arbitral awards will be recognised and enforced in OHADA states. This was a huge improvement for the DRC. However, as the OHADA regime is less well known outside the OHADA states and may therefore have a limited effect on investor confidence, this is where the NY Convention will help.

2. Then the adhesion to the New York Convention 1958

As soon as the DRC becomes a party to the NY Convention (90 days after the deposition of the ratified act, which hopefully should take place at the start of 2014), Article 5 of the NY Convention will apply. This brings with it international recognition that the DRC will recognise and enforce foreign arbitral awards. It is another improvement demonstrating the dedication of the government to improve the DRC regime and make it more appealing to foreign investors. The DRC follows other reforming countries in Africa, like Rwanda which adhered to the NY Convention in 2008. However, the NY Convention is not a panacea, it also has some limits, particularly in relation to the DRC whose ratification law has set down various reservations.

3. Limits

The NY Convention allows signatories to make certain specified reservations upon ratification, and very few countries have signed up without any. Two of these reservations are quite common: (i) non-retro activity (ie the NY Convention will only apply to arbitral awards granted after it is in force in the DRC) and (ii) reciprocity (the NY Convention will only apply to arbitral awards granted in jurisdictions that are also parties to the NY Convention - this reservation is quite usual, applicable for instance in both France and the UK). The third reservation states that the NY Convention will only apply to commercial matters. This is a little more unusual (and for example the OHADA arbitration legislation applies to both private and public matters) but it is not uncommon. Perhaps the most significant reservation is the final one, which excludes real estate matters, particularly as it would appear that mining rights would fall within that category in accordance with DRC law.

Only two other countries amongst the 149 already party to the NY Convention have a similar reservation: Norway and Tajikistan. For all these excluded matters, foreign arbitral awards will not be enforceable in the DRC under the NY Convention, and the party seeking enforcement will have to revert to the OHADA regime.

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