Kluwer Arbitration Blog

A Step Back for OHADA Arbitrations?

Maguelonne de Brugiere (Herbert Smith Freehills) · Wednesday, February 10th, 2016 · Herbert Smith Freehills

In a highly unusual arbitral decision, the Cour Commune de Justice et d'Arbitrage (CCJA), the court created by the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (the Organisation for the Harmonisation of Commercial Law in Africa) (OHADA) Treaty, signed by 17 African States, has ruled that an award should be set aside on the grounds that the arbitrators had exceeded their mandate by entering into a separate fee agreement with the parties to the arbitration.

In response to the CCJA's decision, the three arbitrators in question have taken the equally unusual step of writing an open letter to the arbitration community and the CCJA, publicly criticising the decision and calling for their colleagues' support. The CCJA's decision has the potential to have important and far-reaching consequences for arbitration in the OHADA region and the willingness of international arbitrators to sit as arbitrators in arbitrations governed by the CCJA Rules in future.

The CCJA

The CCJA, based in Abidjan (Côte d'Ivoire), is the leading arbitral institution in francophone Western and Central Africa. It is a supranational court, consisting of seven judges of OHADA nationality. It administers appeals of a commercial nature from national courts of OHADA Member States, and dispute resolution proceedings under OHADA's own arbitration rules. The CCJA does not arbitrate disputes, however it can confirm and appoint arbitrators and supervise the arbitral proceedings. The CCJA reviews awards before they are handed down, and similarly to the ICC, can amend the form of the award, but not its substance. Unlike any other arbitral institution, the CCJA also acts as a Supreme Court which rules on appeals against arbitral decisions, requests for enforcement of or opposition to foreign decisions and third party proceedings.

Arbitration under the CCJA is available for contractual disputes where any contractual party is domiciled or habitually resides in an OHADA Member State, or where the contract is to be executed in the OHADA territory.

The CCJA, since its formation, has been one of the African arbitral institutions which has shown the most promise. Its structure and operations made it an attractive option for parties seeking to regulate their disputes on the continent, particularly as initial judgments issued by the CCJA were suggested that the CCJA was supportive of arbitration. The CCJA has recently published a number of its decisions.

Indeed, given its dual role – both supervising arbitrations but also sitting in judgment on the

awards generated by those proceedings – the CCJA could be subject to the theoretical criticism that it has a vested interest in upholding awards. However, the recent annulment decision in the case of *Getma International v. Guinea* however, and the strong condemnation of the judgment by the tribunal in the case, may dampen enthusiasm for the CCJA.

Background to the Getma Annulment

In 2011, French company Getma International commenced arbitration proceedings against the Guinean State for wrongful termination of a port and railway concession contract. The proceedings were held under the arbitral rules of the CCJA with a Tribunal comprised of three arbitrators: Professor Ibrahim Fadlallah, Eric Teynier Esq and Juan Antonio Cremades Esq.

In April 2014, the Tribunal ruled in favour of Getma, ordering Guinea to pay over €38 million in damages plus interest. Getma commenced proceedings to enforce the award in the US courts.

During this time, Guinea applied to set-aside the award before the CCJA on the grounds, amongst others, that the tribunal had not fulfilled its mandate and had breached CCJA provisions by entering into the private fee agreement with the parties. In a judgment on 19 November 2015, the CCJA ruled that the award should be set aside on the grounds that the arbitrators had indeed breached their mandate by negotiating directly with the parties over their fees, in breach of a 2011 court order issued by the CCJA which limited their fees to 40 million CFA francs (approximately €60,000).

The CCJA found that, in entering into this separate fee agreement, the Tribunal had exceeded its mandate and deliberately excluded the mandatory provisions of OHADA arbitration rules providing that the parties are bound by the fees set by the CCJA. Article 23.2 of the OHADA rules on the resolution of CCJA arbitrations grants the CCJA the authority to fix the tribunal fees, in accordance with a schedule established by the CCJA Assembly and approved by the OHADA Council of Ministers. The schedule is intended to provide parties with a degree of foreseeability as to arbitrator costs, and to ensure that the costs are proportional to the sums in dispute. However, it is worth noting that Article 24.3 of the OHADA Rules also grants the CCJA the authority to set arbitrator fees at a higher or lower rate than those set out in the schedule in ‘exceptional’ and ‘necessary’ circumstances.

The reaction of the arbitrators

The CCJA decision has yet to be published, but the arbitral members of the tribunal in the Getma arbitration, on 16 December 2015, published an open letter to the arbitral community publicly criticising the CCJA decision which it called a “judicial heresy”, and calling for their colleagues’ support.

The criticisms made included:

- • The CCJA’s decision does not reflect the agreement reached between the parties, and ignored the court’s own assurances made with regards to fees.
  After the 2011 CCJA ruling limiting the fees of the arbitrators, the Tribunal subsequently requested that the CCJA increase the amount of the arbitrator fees. These requests were denied on two occasions by the CCJA, in August and October 2013. According to the arbitrators, before accepting the role of presiding arbitrator, Professor Fadlallah wrote to Mr Acka, the CCJA case manager, stating that the fees set by the CCJA were inadequate, and that they would need to be

increased in order for the Tribunal to properly complete its mandate. The tribunal claim that Mr Acka gave Professor Fadlallah assurances that the fees would be readjusted at a later stage. The CCJA Secretariat also allegedly later encouraged the Tribunal, in April 2013, to raise the question of fees with the parties. The arbitrators maintain that, as a consequence of this discussion the arbitrators sought the parties' agreement to enter into a separate, private fee agreement to set the arbitrators' total fees at €450,000. The CCJA, however, did not properly take into account its own assurances made during the underlying proceedings, in deciding to annul the Getma award on this basis.

• The CCJA did not prevent Guinea from bringing the annulment proceedings, despite Guinea's agreement to the increase in fees. The open letter states that, because the parties agreed to increase the Tribunal fees, the CCJA should have estopped Guinea from bringing the set aside proceedings on this basis. The letter also highlights the difference between the question of arbitral mandate, which concerns the case which the tribunal is requested to adjudicate on, and the question of arbitrator remuneration, which is not in the remit of the award, and falls outside of the competence of the CCJA.

The open letter also heavily criticises the implications of the CCJA decision of the CCJA for arbitration in OHADA territories. The criticism focusses on two key points: the treatment of the arbitrators; and the treatment of the award.

The arbitrators describe the decision as demonstrating an "incomprehensible hostility towards arbitrators", noting that "[p]rofessional and organised arbitrators are the backbone of international arbitration across the world. When accepting a case, they decline others. By depriving arbitrators of a proper remuneration for the hundreds of hours they spend on a case, the Court undermines their financial situation, a fact which it cannot ignore."

In relation to this first point, the CCJA is not the only regional institution for which the question of arbitrator fees is significant. Newly established arbitral institutions in a number of regions have noted the need to get the balance right with regard to fee structures: if they are set too high and the institution will deter the local parties which it seeks to attract but pitched too low, the institution will not be able to attract the calibre of experienced arbitrators who take cases from well-established institutions. For example, the LCIA-MIAC has its hourly rate for arbitrators capped at a lesser sum than its London-based counterpart and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has factored local cost of living into its rates but also opted for arbitrator fees to be calculated on an ad valorem basis depending on the amount of dispute. By way of comparison, the arbitrator fees which would have been set for a KLRCA administered arbitration worth $54 million would have been in the region of $136,800 (a sum higher than the CCJA, but lower than the ICC).

Further, the arbitrators express concern that "the annulment will encourage the practices condemned by the award", with "dramatic" consequences for Africa. The CCJA is described as a "club of states, where companies are poorly represented", and the arbitrators claim that the CCJA acted in this case as both "judge and party", considering its own intervention during the proceedings regarding tribunal fees. They add that "one can legitimately question the ethical steps taken, or not taken, by the CCJA to prevent the interested State from partaking in decisions concerning them". This is a damning portrayal of the arbitral institution.

What does this decision mean for OHADA arbitrations?

The CCJA annulment decision is, undoubtedly a controversial one, with potentially serious implications for the future of OHADA arbitrations.

Whilst arbitrator fees themselves have been the subject of intense scrutiny and debate in the past, the parties generally remain free to agree those fees once a dispute has arisen. It is arguable that this is a necessary constituent of party autonomy. In the present case, the CCJA ruled that the Tribunal had exceeded its mandate by negotiating increased fees – this despite the fact that both parties had agreed to the increased fees. Whether or not such party agreement is possible under the CCJA rules, the consequence of the CCJA's decision is harsh, with the award in favour of Getma being annulled, and both parties having already incurred €3 million in fighting the case. Even accepting that the fee agreement was impermissible, such breach of the rules would not be understood to affect the award under well accepted grounds on which arbitral awards can be impugned (for example, in the New York Convention 1958).

€60,000 for Tribunal fees would generally be considered extremely low across most of the main arbitral institutions. If the arbitrators jointly spent 1,000 hours on the case, this would have amounted to a remuneration of €60 per hour. By way of contrast, the ICC cost calculator provides that the average fees for 3 arbitrators in a dispute worth $54 million (approximately the value of the above case) would be $528,850, while the administrative expenses of the Secretariat would be $95,915 (not dissimilar to those of the CCJA in the above case).

In light of the present case, future parties to CCJA arbitrations will likely avoid increasing arbitrator fees without the CCJA consent. If this is the case, then the tribunal fees will remain as fixed by the CCJA. This poses a very real question as to whether the CCJA will be able to attract high quality international arbitrators to hear its cases going forward.

It will not come as a surprise that legal fees imposed in Western countries, by Western counsel, and arbitrators, are generally significantly higher than the legal fees charged by local African counsel. However, in this author's experience, even an hourly charge-out rate of €60 per hour for junior legal counsel in most African states is a rare occurrence. If the ambition of the CCJA, by fixing such low fees, was to promote the nomination of indigenous arbitrators, it remains to be seen whether such a strategy will pay off. Indeed this does appear to be one of the CCJA's objectives. The CCJA recently published its list of proposed arbitrators (see here). Out of 173 arbitrators on the list, 124 of these are of African nationality (predominantly from OHADA states).

The CCJA decision will also cause concern to investors in the OHADA member states, whose disputes are subject to the CCJA Rules. The potential impact this decision will have on the pool of arbitrators available, and on the parties' ability to nominate the arbitrators which they wish, will likely make the CCJA a less attractive arbitral institution and may raise questions about prospects for enforcement of arbitral awards in the OHADA region and beyond. The allegations of state bias made by the Tribunal in this case have not been substantiated, but the mere hint of it may provide commercial parties with sufficient incentive to provide for their disputes to be resolved under alternative arbitral institution rules than the CCJA in their contracts and even to avoid the OHADA region when choosing a seat of arbitration.

The African publication, Jeune Afrique, which first published the tribunal's open letter, sent the letter to the CCJA for its consideration. Current CCJA President, Marcel Serekoïsse-Samba, has stated that the letter will be studied at a CCJA plenary session. It remains to be seen whether the CCJA will respond to this letter, but any response would certainly now attract a great deal of

attention.

It is unclear how this decision will affect the enforcement proceedings in the US courts, which were stayed pending the CCJA annulment proceedings. It will be interesting to see whether Getma will continue to pursue enforcement proceedings in light of these recent developments and, if so, how the US courts will approach the CCJA's decision. The annulment of the Tribunal's award will give the US courts a discretion under Article V(1)(e) of the New York Convention to refuse the recognition and enforcement of the award (on the grounds that the award has been set aside by a competent authority of the country under the law of which the award was made). However, this will not necessarily prevent the US courts from recognising the award if they consider it appropriate.

This entry was posted on Wednesday, February 10th, 2016 at 12:05 am and is filed under Africa, Annulment, Arbitrator's Fees, arbitrators' conduct, Award Scrutiny, CCJA Arbitration, OHADA, Set aside an international arbitral award

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.