2018 In Review: A Tug of War for International Arbitration in Africa

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The year of 2018 has seen arbitration as a dispute resolution forum in the resource rich continent of Africa pendulum between boosting countries in the region as a seat of arbitration and reinforcing court sovereignty in disputes.

The year began with optimism in the wake of the OHADA reforms. In late 2017, the Organization for the Harmonization of Business Law in Africa (OHADA) (a group of 17 African countries geared towards unifying business laws to boost investment) enacted the Uniform Mediation Act, the Uniform Arbitration Act (UAA) and Arbitration Rules for the CCJA, all of which were introduced with the intention of attracting investors and boosting confidence in OHADA seated arbitrations. These reforms made important changes to the arbitration landscape. For example, the UAA, expanded the scope of the Act such that,

- in addition to States, public establishments and local governments any local entity governed by public law can be a party to arbitration; and
- arbitration can be initiated on the basis of an arbitration agreement or an investment related instrument including an investment code or a bilateral or multilateral investment treaty.

Moreover, under the UAA, parties may expressly waive the right to file an application to set aside an award (except where this may be counter to international public policy as defined in the Act). Alongside French law, this makes it one of the rare texts that allows such waiver. Further the new CCJA Rules addressed concerns that arose in the infamous *Getma v Guinea case* where the award was set aside on the premise that the fee agreed between the tribunal and the parties was in violation of the CCJA Rules. The Rules now clarify that any fixing of fees without the CCJA's approval is null and void but is not a ground to set aside an award.

Following the 'Belt and Road Initiative' other positive developments in the region have been the establishment of the China Africa Joint Arbitration Centre (CAJAC). The CAJAC is set up to provide a neutral and cost-effective mechanism for resolving commercial disputes that involve Chinese and African parties. As Deline Beukes, the CEO of the CAJAC Johannesburg comments "*The purpose of the creation of CAJAC is to address China-Africa disputes as an integral part of the Belt and Road interaction. This implies the harmonization of China and Africa business practice, centralized norms and arbitral systems and requires a cadre of arbitrators familiar with the cultural norms and practices of China and Africa who will build together a shared jurisprudence. This is a unique purpose and it is anticipated that African and Chinese investors will benefit from the use of such an institution*."

Other positive developments include Nigeria's Arbitration and Conciliation Act (Repeal and Re-enactment) Bill (the Bill) which is yet to come into force. Some key provisions of the Bill include:

- an arbitration agreement can be concluded by electronic communication;
- an implied provision on the recognition of third party funding in arbitration; and,
- a guarantee of the power of arbitrators to grant interim measures of protection.

Whilst on the one hand the above developments encourage the use of African countries as a seat of arbitration and development of their reputation as "arbitration friendly" jurisdictions, on the other hand some African countries have taken a step in the opposite direction.

In May 2018, the Supreme Court of Ethiopia in the *National Minerals case* ruled that notwithstanding the parties' agreement to waive their right of appeal on the final award, the Supreme Court has jurisdiction to review the arbitral award on fundamental errors of law. This was in direct contrast to the Supreme Court's ruling in *National Motors Corp. v. General Business Development case* where the Court recognized and upheld the parties' final intention to be bound by an arbitration award and ruled that such an arbitral award would not be subject to review by courts, including the cassation bench. Shortly after the National Minerals case, the Supreme Court annulled a Euro 20 million award issued in favour of Italian contractor Consta JV in an arbitration case against CDE (a joint enterprise between the Ethiopian and Djibouti government).

Another key development which changed the shape of international arbitration in East Africa is Tanzania's Public Private Partnership (Amendment) Act which came into force in September this year. Under Section 22 of the Act any dispute arising during the course of the PPP agreement *shall in case of mediation or arbitration be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with its laws.*International arbitration is no longer permitted in PPP Agreements particularly those projects relating to natural resources.

There appears to be a disharmony in the pattern of international arbitration in the Africa region and whilst some developments have caused positive excitement in the international arbitration community others have given a cause for concern and will likely deter investors from entering into arbitration agreements or even from investing in the particular country in the first place. It remains to be seen how the above developments will fair with the passage of time.