Kluwer Arbitration Blog

2019 In Review: A View From North Africa

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Here at Kluwer Arbitration Blog, we are pleased to reflect on a number of significant and exciting developments in international arbitration, with impact on the North African region. In this post, we recap these developments and their implications; and, of course, also thank our esteemed authors who have enabled us to bring coverage of events in this emerging region to the wider international arbitration community.

1. Developments in Investment Arbitration: Framework and Experience

This past decade has been important for regional developments in investment arbitration. Not only have Arab states gained more experience with the resolution of investment disputes during the 2010's, but they have also actively worked toward revising the available framework through the Organisation of Islamic Cooperation (OIC).

A. Impact of Arab Spring on International Investment Arbitration

The uprisings of the Arab Spring and political changes resulting therefrom have had a quantifiable and significant impact on the international investment arbitration landscape, with a surge of new investment cases against Arab states. The number of newly filed ICSID cases from the Arab World indeed rose sharply in the period from 2011 to 2019.

While Arab respondent states have become increasingly diverse, Egypt has remained the most frequent respondent state with 22 new cases filed against it between 2011 and 2019. Behind Egypt, Algeria was confronted with 5 new cases in the 2011-2019 period. Morocco was confronted with 4 cases and Tunisia was confronted with 2 cases.

Despite the increasing number of new cases filed against Arab respondent states, the outcomes have not always been favorable for investors. A number of cases brought by investors have been dismissed on jurisdictional grounds (*e.g.* National Gas) or resulted in liability decisions in favor of the respondent state (*e.g.* Veolia). An even larger number of cases have settled (at least 12 since 2011, *e.g.* Bawabet Al Kuwait, Sajwani, Indorama, and LP Egypt), which leads one to question whether investment arbitration may have been increasingly employed during this period as a

tactical mechanism for obtaining amicable settlement. In the years to come, it will be interesting to see how the legacy of these experiences will influence the approach taken by Arab respondent states in future investment arbitrations.

B. Organisation of Islamic Cooperation (OIC) Developments

Egypt, Libya, Tunisia and Morocco are the North African countries that have ratified the OIC Agreement, which provides for investment protections such as prohibition of unlawful expropriation and most favored nation treatment. It also includes an ad hoc investor-state arbitration provision (Article 17), which will operate "[u]ntil an Organ for the settlement of disputes arising under the Agreement is established."

As explained by our contributors in 2019, the OIC Agreement provides that if a party to the dispute does not appoint an arbitrator, the OIC Secretary General will make the appointment on the party's behalf. However, the Secretary General has refused to make such appointments due to political pressure from some OIC member States. In a recent case, the Secretary-General of the Permanent Court of Arbitration (PCA) designated an appointing authority in an OIC arbitration by applying the UNCITRAL Arbitration Rules. This was despite the absence of any reference to these Rules in the OIC Agreement, and the fact that placing the constitution of tribunals in the hands of the PCA is contrary to the spirit and the objectives of the OIC.

This led to the question as to whether the OIC would establish a permanent "organ" for the settlement of disputes to resolve the issue of potential interventions in OIC arbitrations. In a recent post, our contributors reported on developments shared by Dr. Mouhamadou Kane, Project Lead and Manager for the OIC at a program hosted by Columbia Law School. During the program, Dr. Kane confirmed that a draft (which is not yet publicly available) investment protocol for the OIC Investment Dispute Settlement Organ is likely to be adopted by ministers of OIC member States in March 2020. This development has importance regionally and globally, and it will be interesting to see if the final protocol adopted by the OIC draws on the current global reform efforts concerning investor-state dispute settlement, including topics addressed through the ICSID rule revision process and the work of UNCITRAL Working Group III.

2. North African Arbitral Institutions

One of the highlights of our coverage of the North African region on the Kluwer Arbitration Blog in 2019 was our interview with Dr Ismail Selim, Director at the Cairo Regional Centre for International Commercial Arbitration (CRCICA). In his interview, Dr Ismail kindly gave our readers a guided tour of the institution he describes as the "Godfather" of arbitration in the MENA region and Africa. In explaining the advantages to users of administering an arbitration via CRCICA, Dr Ismail pointed to the Centre's highly experienced counsels, cost effectiveness and neutrality *vis a vis* the host state in investment arbitrations, and through guaranteeing party autonomy in appointing tribunals.

Our 2019 coverage of North Africa shone a spotlight on a number of up and coming arbitral institutions, which are developing as regional alternatives to some of the more well-established global players. Two such institutions, both of which are located in Morocco, are:

- The Casablanca International Mediation and Arbitration Center (CIMAC), which was instituted in late 2014. With an internationally composed, diverse panel of arbitrators, facility with proximity to major economic hubs, clear flexible rules, cooperation Agreement with the Vienna International Arbitration Center (meaning that cases can be managed by either center), it is well placed to serve North Africa and beyond.
- The International Court of Maritime and Air Arbitration (CIAMA), established in September 2016 as a specialist maritime and air arbitration centre for the MENA region. CIAMA was designed to be a reliable and secure choice for parties engaged in maritime, shipping and aviation disputes in the MENA region.

We also analysed the Rules of the Egyptian Sports Arbitration Center, which envisage that arbitral awards should be subject to (a) an appeal; and (b) an annulment action (internally within the same arbitral institution itself). The Rules further provide that the internal annulment regime applies to any arbitral award whether seated in Egypt or abroad. In other words, the Rules have an extraterritorial reach beyond the borders of Egypt whereby they apply to domestic and foreign arbitral awards alike. Egyptian courts' perspective on these provisions will be discussed in further detail later in this post.

3. National Level Developments

A. Morocco as a New Hub

We have witnessed a number of developments in Morocco in 2019, as it seeks to draw on its position as a cardinal point between the Middle East and North Africa. We explored the potential for Morocco to develop into a hub for international arbitration in the region, owing to its lead as a diplomatic power in Africa and its experience in investment and commercial arbitration. Morocco has been an Observer to the Economic Community of West African States (ECOWAS) since 2005, and recently filed an application to join the organization as a member. It is also in the process of joining OHADA and is an existing member of the OIC. Morocco is also one of the oldest players in the investment and commercial arbitration scene. It was the very first state to be part of an ICSID arbitration under the Washington Convention of 1965, as well as one of the early signatories of the ICSID Convention. The definition of an investment under the ICSID Convention (known as the "Salini test") was formulated in a prominent case to which Morocco was a party (Salini v. Morocco).

We will keep a watching eye on Morocco as it seeks to fulfill its potential as an emerging hub for international arbitration in the region.

B. Egyptian Courts' Perspectives on Contemporary Arbitration Controversies

There have been various contemporary controversies concerning arbitration that have triggered heated debates before the Egyptian courts:

- **Arbitrators' Conflict of Interest**: On 11 June 2019, the Egyptian Court of Cassation clarified that the presumption of knowledge of the challenging party of any arguably suspicious facts arises only when the arbitrator in question discloses such facts at the time of officially accepting

his appointment. Accordingly, if the challenged arbitrator fails to prove that the challenging party already knows these suspicious facts, then it cannot be said that the challenging party has waived its right concerning this ground. The Egyptian Court of Cassation has aligned its views with international arbitration practices as it defined the standard of arbitrators' independence and impartiality as the one constituting "a real danger of bias", or raising "justifiable doubts".

- **Enforceability of Arbitral Anti-Suit Injunctions**: The Egyptian Court of Cassation is currently reviewing the Cairo Court of Appeal's judgment concerning the enforcement of an arbitral interim measure ordering one party to arbitration to refrain from suing a third-party guarantor bank regarding the liquidation of a letter of guarantee issued in favor of the said party. The Cairo Court of Appeal held explicitly that interim orders are covered by the New York Convention, provided that (1) the interim order is final; (2) the interim order is issued based on a valid arbitration agreement; (3) both parties were offered the opportunity to present their case in the arbitration; and (4) the interim order does not violate the Egyptian public policy. Upon applying these criteria, the Cairo Court of Appeal determined that the order satisfied all of these requirements.
- **Judicial Nature of Arbitration**: Although the nature of arbitration is still a matter of debate in the Egyptian legal system, the arbitration-friendly jurisprudence of Egyptian courts now supports the idea that the arbitration process is indeed of a judicial nature. As discussed by our contributors, recently the Cairo Court of Appeal held that arbitration is a technical means with a judicial nature that aims to settle a dispute. To that effect, if arbitration is to be considered of judicial nature, the Egyptian Supreme Constitutional Court would have the final word in cases where the same dispute is filed before an arbitral tribunal and the other side files the same dispute before a domestic court. In this scenario, the Supreme Constitutional Court would have the final word on which proceedings would continue and which would be terminated.
- **Annulment of Sports Arbitration Awards**: In December 2018, the Cairo Court of Appeal ruled that annulment actions concerning arbitral awards issued by the Egyptian Sports Arbitration Center (as discussed earlier in this post) are *inadmissible*. The Court explained its position by stating that the annulment procedures under the Egyptian Arbitration Law No. 27 of 1994 do not apply to sports arbitration awards as the latter follow a special regime for annulment as provided for under the new amendments to the rules of the Egyptian Sports Arbitration Center. Nonetheless, on 24 December 2019, the Egyptian Court of Cassation decided to refer relevant provisions of the Rules of the Egyptian Sports Arbitration Center to the Supreme Constitutional Court to decide whether they conform with Egypt's Constitution. In its recitals, the Court of Cassation held that the Rules of the Egyptian Sports Arbitration Center contravene the Egyptian Constitution while excluding the review of its arbitral awards through annulment actions by any domestic courts, whether Egyptian or foreign-based.

Based on these recent developments, it is evident that the Egyptian courts are aligned with best international arbitration practices, seeking to drive legal developments in this direction.

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