Is Arbitration Contributing to the Revolution? 5th Edition of Casablanca Arbitration Days

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Since 2014, the Casablanca Arbitration Days (CAD) have no doubt become one of the most attended arbitration-related events in Africa. Organized on 5-6 December 2019 at Kenzi Tower Hotel Casablanca by the Casablanca International Mediation and Arbitration Centre (CIMAC), this year marked the fifth edition of CAD under the topic 'Investing and Doing Business in Africa: Is Arbitration Contributing to the Revolution?' The CAD took off on an excellent note, on 4 December 2019 with three interesting side-events hosted by the Association of Young Arbitrators (AYA) for young arbitration practitioners in Morocco, Chartered Institute of Arbitrators and Accuracy. Some of the key points addressed during the Conference are discussed below.

Mapping Investment on the Continent: Actors and Sectors

The first panel was chaired by Dr Jalal El Ahdab (Partner, Bird & Bird) with Pascal Agboyibor (Founding Partner, Asafo & Co), Khaled Houda (Managing Partner, Houda Law Firm) and David Marty (Principal Legal Counsel, African Development Bank) as speakers. The session focused on the potentials in mining, agriculture and infrastructure in Africa and how the sectors can attract interests of foreign

investors. This is due, in part, to the privatization drive by many African States that have adopted significant reforms which ultimately resulted in a better ranking in the World Bank's Doing Business Report.

As far as the regulatory framework is concerned, bilateral and regional agreements are in force between countries in order to facilitate cross-border investment. According to the speakers, the emphasis is now on sustainable investment. Doing business in Africa is not a risk-free venture, so inevitably the question of dispute resolution arose in this panel. Mr Agboyibor and Mr Houda based on their experiences as legal counsels, regularly advise their clients to insert an arbitration clause in their agreements.

Providing insight from a development finance institution perspective, Mr Marty revealed that in many projects funded by the institution, arbitration has helped to mitigate or avoid risks. However, in his opinion, the threat of suspending any funding to countries for failure to observe their commitments was on many occasions a deterrent.

How to Protect Investment in Africa?

The second panel was moderated by Professor Mohamed Abdel Wahab (Founding Partner, Zulficar & Partners) with Professor Denis Mouralis (Aix-Marseille University), Eric Teynier (Founding Partner, Teynier Pic) and Benjamin Garel (Legal Counsel, ICSID) respectively as speakers.

Taking the floor, Professor Mouralis addressed the recent innovations observed in bilateral investment treaties drafting. Reflecting the ongoing debate about the ISDS reform, they introduced a balanced relationship between investors and State, in particular the Nigeria-Morocco BIT.

Whilst BITs remain one of the key instruments of investment protection, Benjamin Garel argued that in the specific African context, domestic investment law and State contracts are very often relied upon for investment protection purposes. Notably in 1984, the first ICSID arbitration case by virtue of domestic investment law involved an African State (Egypt) (the *SPP case*).

Based on his experience as both counsel and arbitrator, Mr Teynier touched upon

the issue of investment protection in time of armed conflict -a relevant topic given the ongoing civil crises in some countries within the continent and is at the intersection of both international investment law and international humanitarian law. According to Mr Teynier, an important issue to determine is “responsibility”. Who is responsible when civilian turned themselves into belligerent and commit severe violations to investors’ rights? What happens when the central State is unable to control a significant portion of its territory? Relying on the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, Mr Teynier advanced different scenarios and typical solutions based on his case experience. In one of those cases for example, the State suggested the reinstatement of the investor’s right for the project to be completed.

Although the focus was on arbitration during the conference, the author suggests parties will resort frequently to mediation and other less adjudicative dispute resolution mechanisms in the upcoming years. The recent adoption of the Singapore Convention thus provides a momentum for the development of mediation.

Chinese Investment in Africa

With massive investment in Africa, China has challenged the traditional former colonial powers in their investment strategy. The third panel, chaired by Nicolas Bourdon (Founding Partner, Accuracy), Jingzhou Tao (Partner, Dechert Beijing), retraced the origin of the Belt and Road Initiative (BRI) and the policy underlining it. Responding to the question whether there was any Chinese particularity when it comes to investment disputes, Mr Tao suggested three reasons differentiating Chinese investment disputes: First, the first-generation BITs whose wording only allows investors to sue States for compensation. Second, Chinese investors are often reluctant to have recourse to investment arbitration for purely domestic political constraints. Indeed, when dispute arises, diplomatic channel mechanism will be preferred over arbitration. As an example, for a Chinese state-owned entity to file a request for arbitration against a foreign State, a double level of authorization is required (Ministry of Commerce and Ministry of Foreign Affairs).Third, the context has evolved. We witnessed more investment arbitration brought by Chinese investors.

Providing a perspective from a Chinese company operating in Africa, Michael Sun (Legal Counsel MENA, Huawei) mentioned that, for small claims, negotiation and sometimes litigation will be preferred over arbitration. However, where the issues at stake are much bigger, the contract features very often ICC arbitration seated in Paris, Geneva, etc. To reduce or avoid what may be termed as an 'offshoring' of Chinese African-related disputes, initiative such as China-Africa Joint Arbitration Centre (CAJAC) has been launched. In Mr Tao's opinion, CIMAC has a great role to play in particular for Chinese African-related disputes occurring in African francophone countries. In this regard, measures related to the facilitation of travel and visa should be implemented.

This author's view is that the very existence of those above mentioned Sino-African arbitration bodies clearly suggests the Chinese-African relations in terms of dispute resolution will not bring an innovative feature, despite their common cultural preferences for mediation and negotiation.

The Role of the Regional Economic Communities

The fourth panel was chaired by Aicha Brahma (Partner, Brahma Avocats) with Mohamed Oulkhouir (Partner, CWA), Mamadou Konaté (Founding Partner, Jurifis Consult) and Amne Suedi (Founding Partner, Shikana Law Group) as speakers. Regionalization is firmly rooted in African integration efforts. Applying the saying "think global, act local", the eight regional economic communities contribute to the concretization of African integration.

Aiming at unifying, facilitating trade and investment across Africa, AfCFTA finally entered into force despite nationalism resentment as indicated by Amne Suedi.

As far as OHADA is concerned, as recalled by Mr Konaté, its main function is the harmonization of business law, with the firm belief that it will bring legal certainty to potential investors. In terms of dispute resolution, the unified arbitration act (recently amended) has proven to be efficient 20 years after its adoption. The acting Secretary General of OHADA in a recent declaration called upon AfCFTA to fully integrate OHADA in the implementation of the agreement.

Touching upon ECOWAS, Mr Oulkhouir opined it was mainly tasked with facilitating cross border trade among western African countries. The project of including

arbitration among the jurisdiction of the ECOWAS Court was discussed recently in Nigeria, after many years of hesitation.

The panel was unanimous that these efforts are to be encouraged, but we should remain aware of the risks of overlapping competences.

The Debate

A debate about the proliferation of arbitral institutions in the African context was definitely the high point of CAD.

Defending the position against proliferation, Domitille Baizeau (Partner, Lalive) recognizes it was an unavoidable consequence. We count today more than 70 arbitration centres in Africa; however, only one or a few of them are truly international arbitration centre. They are generally not always known in the arbitration community for they do not regularly publish statistics, reports, etc.

She suggested instead the regionalization or concentration of arbitral institutions. As an example, CIMAC may be turned into North African dispute resolution centre.

Being in favour of proliferation, Jacob Grierson (Partner, Asafo & Co) suggests it is a reaction to what he called the "offshoring of African-related disputes to foreign or western arbitral institution". He referred to the recent call for more nationalism in terms of preferences of domestic arbitral institutions. In his opinion, arbitration is truly international where parties are able to resolve their disputes in an arbitration institution located on their continent. Encouraging such trend is Article 42(1) (d) of Pan African Investment Code.

In the same vein, the author would like to mention the approach adopted recently by Egypt and Cote-d'Ivoire in their domestic investment laws. Indeed, the new amendment of the 2018 Ivorian Investment Law designates the Court of Arbitration of Cote-d'Ivoire as the competent organ for the resolution of investment disputes. In Egypt, the Investment Law No. 72 of 2017 contemplates the establishment of '[An] Egyptian Arbitration and Mediation Centre' (Article 91).

Update of the Moroccan Arbitration Legislation

Morocco is currently adopting a new standalone arbitration and mediation act detached from the current code of civil procedure containing a chapter on arbitration.

The latest Marrakesh International Justice Conference in October 2019 was the occasion for the highest authorities in Morocco to reaffirm their willingness to provide the country with a modern arbitration act meeting international best standards.

The last panel, chaired by Hassan Arab (Partner, Al Tamimi & Co), consisted of leading Moroccan practitioners – Professors Mohamed El Mernissi (University Hassan II), Tarek Mossadek (Partner, Mossadek Law Firm) and Bensalem Oudija (Director of the Legislation, Ministry of Justice) provided the audience with some insights on the bill currently before the Parliament. Among the novelties, the bill recognizes the validity of electronic arbitration agreement, and contains provision summoning third parties to produce document necessary for the arbitral proceeding.

Pending its adoption, a debate about the impossibility to seize State assets is currently drawing the attention of arbitration practitioners due to a provision (Article 9) contained in the 2020 Budget Act.

Conclusion

Casablanca Arbitration Days 2019 was again very successful and engaging. It confirmed its ambition of being a forum of debate about topical issues pertaining to Africa. The continent remains the preferred destination for investments, despite the risks future investors may encounter. As far as African States are concerned, they are very supportive of arbitration, while at the same time contemplating other forms of disputes resolution.