2020 in Review: Sub-Saharan Africa in Focus

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We initiate our traditional Year in review series of 2020 with a retrospective view of the reported developments in the Sub-Saharan Africa. In this post, we aim at giving you a quick look back to some of our most impactful publications in 2020 from this geographical area, with a focus on the commercial arbitration developments and interesting developments with national law or institutional rules. Africa has responded swiftly to the challenges brought by the pandemic, including with the release of the Africa Arbitration Academy Protocol on Virtual Hearings as reported by our contributors, and as it will be further developed in a separate end year post.

Developments in commercial arbitration

In 2020, the Blog covered interesting developments in commercial arbitrations involving African parties. The latest developments of the Garoubé saga have been brought to our attention, as the Paris Court of Appeals rejected a request by the State of Cameroon for the annulment of arbitral awards that had applied OHADA law over Cameroonian law. The dispute between SPRL Projet Pilote Garouble v Cameroon involved a lease agreement over two areas for game ranching and game farming, which was governed by OHADA law and provided for ICC

arbitration.

The decision by the Paris Court of Appeal is important as it confirmed that the OHADA Treaty and its Uniform Acts take precedence over Cameroonian regulations regarding wildlife. As our contributor suggests, while confirming the primacy of international treaty provisions over municipal law is not a specificity of or a novelty brought by OHADA law, the decision is important as it reinforces the organisation's goals of ensuring a harmonious system of business law amongst its state members.

Moreover, one of our contributors reported that on 25 February 2020, the High Court of Lagos State (the "Lagos Court") in Nigeria set aside an award in the ICC arbitration involving Global Gas and Refinery Limited and Shell Petroleum Development Company. The Lagos Court found that the presiding arbitrator's non-disclosure of the fact that the arbitrator had prepared an expert opinion in a previous case that involved Shell amounted to misconduct. This was decided despite the ICC Court dismissing this challenge when raised by Global Gas during the arbitration proceedings. The Lagos Court considered that where an arbitrator is challenged the arbitrator should resign. This approach is not in unison with the approach taken to such situations in international arbitration, as we can see also from recent developments in Europe in the much discussed *Halliburton v Chubb* case where a decision was recently issued by the UK Supreme Court. The general practice in international arbitration is to consider the legitimacy of a challenge to an arbitrator by applying non- binding principles such as the IBA Guidelines. If the IBA Guidelines are applied, this challenge may fall under the Orange List. Even if this fact should have been disclosed as an Orange List item, nondisclosure in itself cannot be evidence of the arbitrator's bias.

The Lagos Court was not persuaded by the IBA Guidelines and the Court's ruling only referred to Section 8 of the Nigerian Arbitration and Conciliation Act, which states that an arbitrator has an ongoing obligation to disclose any circumstances that may give rise to any justifiable doubts as to his/her impartiality or independence. This ruling raises serious concerns on Lagos' attitude towards arbitration and the Court's approach is a step back for the region.

New developments in national laws or rules

2020 started with positive news, as the Republic of Seychelles became the 162nd Contracting State of the New York Convention on 3 February 2020. Our contributors reported that this step brings a journey of more than forty years to an end. While looking back on important developments that took place up until joining the New York Convention framework, the authors identified three Seychelles court decisions that illustrate and explain the controversy surrounding the applicability of the New York Convention in that country. Two other Sub-Saharan African countries joined the New York Convention this year as well, and while Ethiopia's accession already entered into force on 22 November 2020, Sierra Leone's accession will shortly enter into force on 26 January 2021.

Another positive news this year was that, on 1 July 2020, the Arbitration Foundation of Southern Africa ("AFSA"), a leading arbitral institution in South Africa, launched its new draft International Arbitration Rules for public comment. The aim of the new rules was to meet the needs of international users. In the wake of South Africa's 2017 International Arbitration Act ("IAA") which is based on the UNCITRAL Model Law AFSA experienced a surge in its case law. Keeping with this increase and the needs of users of arbitration, the new AFSA rules consider the use of administrative secretaries, multi-party arbitrations, the availability of fast-track procedures, the flexibility to have fully electronic arbitration filings and remote hearings, and provisions striking a balance between confidentiality and transparency. Examples of key features introduced in the AFSA Rules include enabling fully electronic submissions (without the need for paper filings) and permitting hearings in any form the arbitral tribunal considers appropriate, including remote hearings conducted entirely by video or telephone conference and a new expedited procedure for cases where the amount of dispute does not exceed US$500,000 or where the parties agree. South Africa is definitely leading the way for international arbitration in the African continent.

Whilst the new AFSA Arbitration Rules introduce many progressive approaches to arbitrations the rules show that the drafting committee had to tackle with difficult issues such as confidentiality and disclosure of third-party funding. The new AFSA Arbitration Rules consider the issue of third-party funding; an increasingly topical issue particularly in view of bringing arbitrations during the pandemic which has had a significant impact on the cash flow of many entities. AFSA has taken a minimalist approach, requiring only the disclosure of the existence of an arrangement and the identity of the funder (Art 27(2)). This will unlikely please

everyone as many would prefer some insight into the funder's terms. However, it appears on balance the drafting committee may have seen this as potentially problematic, since the terms on which funding is offered necessarily reflect the funder's assessment of a claim's chances of success.

Interestingly, the AFSA Rules allow AFSA to publish all arbitral awards in an anonymised or pseudonymised form, provided the parties do not object. This is a key point and parties should be alert to submit their objections, if any, within 30 days from notification of the award (Article 36). The AFSA Rules take a similar approach to the ICC Rules. In January 2019, the ICC updated its Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration. While the default position remains that arbitral awards are publishable, the updated note provides parties with an opt out mechanism from publishing their arbitral award. Interestingly, the LCIA which revamped its arbitration rules this year did not follow suite. That is, awards issued under the LCIA Rules are not published in any form.

Moreover, one of our contributors has reported on aspects regarding the recognition and enforcement of foreign arbitral awards in the Kingdom of eSwatini ('eSwatini'), one of the few jurisdictions worldwide who has not yet ratified the New York Convention. While the country's 1904 Arbitration Act sets forth that an arbitral award that has been recognised ('[a]n award which has been made an order of Court') may be enforced like a national judgment or order, it does not identify the requirements for enforcing arbitral awards, nor clarify whether this provision applies to domestic and/or foreign arbitral awards.

The author understands that three national court decisions on the recognition and enforcement of foreign court judgments could shed light on this matter. In particular, the decision in Improchem (Pty) Limited v USA Distillers (Pty) Limited may provide useful guidance. From it, the author extracted aspects that could be applicable to the enforcement of foreign arbitral awards in eSwatini, namely that (i) foreign arbitral awards can be recognized and enforced either directly in eSwatini or after having been recognized and declared enforceable in their country of origin, and (ii) eSwatini's courts should not review the merits of the foreign arbitral award, nor subject the foreign arbitral award to a broad review of public policy violations.

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