Kluwer Arbitration Blog

2019 in Review: Sub-Saharan Africa

Ana Carolina Dall'Agnol (Assistant Editor for Africa) (University of Oxford) · Sunday, December 15th, 2019

2019 has been a busy year for international arbitration in Sub-Saharan Africa. Indeed, the year has brought an interesting wave of precedents, new domestic statutes, modern international investment agreements, and arbitration events.

This post highlights and summarises some of the African developments covered in the Blog in 2019, with many thanks to the authors who have contributed to our coverage.

Conclusion of Multilateral Agreements

Perhaps the most significant African multilateral initiative of 2019 was the signing of the Agreement Establishing the African Continental Free Trade Area ("AfCFTA Agreement") on 30 May 2019 and the launch of its operational phase on 7 July 2019. The conclusion of the AfCFTA Agreement is one of the six steps in the process of creating an African Economic Community ("AEC"), which is set out in the Treaty Establishing the African Economic Community ("Abuja Treaty").

The Abuja Treaty, which was concluded in 1991, sets forth milestones for the thirty-four transitional period for the establishment of the AEC, including the establishment of:

- a Continental Customs Union, initially planned to be concluded by 2019;
- an African Common Market by 2023; and
- the Africa Economic Community by 2028.

As a means for settling disputes between its parties, the AfCFTA provides for state-state arbitration, which is set out in AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes. However, it is still unclear what will be the substantive protections and procedural remedies available to investors, as one author commented. These aspects will likely be governed by the Investment Protocol, whose terms remain to be determined. In the meantime, there are aspects that investors might be interested in considering in the near future.

In addition, Djibouti signed the ICSID Convention in April 2019, although it has not yet ratified the Convention. Djibouti, therefore, became the 163rd signatory state of the ICSID Convention.

Arbitration Disputes Involving African Parties

In regard to arbitration disputes involving African parties, the year started in the wake of a development that has shaken up the African arbitration community in 2019 – that of the $8.9 billion arbitral award against Nigeria in favour of Process and Industrial Development ("P&ID"). The case involves a gas supply and production agreement and has resulted in a $6.6 billion arbitral award, with $2.6 billion of interest at seven percent per annum effective from the outset of the arbitration proceedings. The development received great public attention, as some have noted that $9 billion represents one-fifth of the country's declared foreign reserves.

In another dispute involving Nigeria, the English High Court adjourned the decision to enforce the arbitral award in a dispute between AIC Limited ("AIC") and The Federal Airports Authority of Nigeria ("FAAN"). In *AIC Limited v The Federal Airports Authority of Nigeria* [2019] EWHC 2212, the English High Court exercised its discretion pursuant to section 103(5) of the Arbitration Act 1996 and decided to adjourn the decision to enforce the arbitral award as a claim for annulment of the arbitral awards was still pending before Nigerian courts. The arbitral award in question was rendered in 2010 and favoured AIC, awarding it the sum of $48,124,000 plus interest at 18% per annum from the date of the award until payment. The English High Court took a similar position in other two past cases (see here and here). A contributor understands that this decision highlights the balance to be struck between enforcing a New York Convention arbitral award on one hand, and avoiding conflicting judgments when set aside proceedings are pending before other jurisdictions on the other.

Moreover, recent disputes involving Tanzania and Zambia have also been covered on the Blog.

On 16 April 2019, Ayoub-Farid Michel Saab, a Dutch national, has filed an ICSID claim against Tanzania under the Agreement on Encouragement and Reciprocal Protection of Investments with the Netherlands ("Tanzania-The Netherlands BIT"), which was terminated in September 2018. The claim is probably related to FBME Bank, whose operations in Tanzania were shut down and liquidated by Tanzania's central bank.

The dispute between Vedanta Resources ("Vedanta") and the Zambian State Mining Company ZCCM-IH ("ZCCM") has come to public notice and has received much publicity (see here, here, and here). The dispute relates to an *ex parte* order sought by the Zambian government to initiate liquidation proceedings in respect of Konkola Copper Mines ("KCM") before the Zambian courts. Vedanta is a majority shareholder of KCM, whereas ZCCM holds a 20% shareholding in KCM.

While opposing to the filing of liquidation proceedings by ZCCM, Vendanta alleged that initiating liquidation proceedings before Zambian courts would be procedurally incorrect, as the KCM shareholders' agreement contained an arbitration clause. Accordingly, Vedanta initiated UNCITRAL arbitration proceedings seated in South Africa against ZCCM, while also filing for, and later successfully obtaining, an *ex parte* order of the South African High Court in Johannesburg against ZCCM. In July 2019, the South African High Court granted an anti-suit injunction in support of the arbitration agreement contained in the KCM shareholders' agreement, as well as ordering the blocking of KCM's wind up.

As the arbitration proceedings have proceeded, the outcome of the dispute remains to be seen. Likewise, Zambia's approach to welcoming and protecting foreign investments is still an open

issue.

Enactment of Domestic Laws Relating to Arbitration

Contributors have brought to our attention interesting developments that took place in Nigeria in 2019. These developments could be construed as indications that Nigeria may establish itself as the favorite arbitral seat in West Africa.

While Nigeria's Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2017 ("Bill") was still pending before the House of Representatives earlier this year, it was received with optimism by the international arbitration community – indeed, the Bill could provide grounds for securing Nigeria as a preferred seat for arbitrations in Africa. In particular, the fact that the Bill tacitly recognises third party funding ("TPF") in arbitration could be a commendable move, as it may be interpreted as enabling parties who would otherwise not have had the resources to participate in arbitration proceedings to access justice. On the other hand, contributors have discussed whether the Bill clearly authorizes TPF. While some commentators understand that it is sufficiently clear that TPF is allowed under the Bill, others believe that the matter demands further clarity. One author suggests that Nigeria should consider including substantive provisions expressly allowing TPF in its new Bill, following the examples of Singapore and Hong Kong. On the other hand, another author understands that although the Bill authorises TPF, Nigeria would benefit from establishing a comprehensive regulatory framework for this type of funding, he suggests.

In addition, the decision in Case No. SC/851/2014 between *Dr. Charles Mekwunye v. Christian Imoukhuede* before the Nigerian Supreme Court was also brought to our attention. In this case, the Nigerian Supreme Court upheld an arbitral award, confirming that any irregularity that one of the parties became aware of and failed to object to would not be grounds for setting aside the arbitral award. In this sense, the Nigerian Supreme Court relied on the concept of waiver, and affirmed that the will of the parties must be given effect to. In so doing, one author understands that the Nigerian Supreme Court set aside its much criticized past judgment in *Imoukhuede v Mekwunye* & 2 ORS. (2015) 1CLRN 30.

In a less commendable note for liberal arbitration enthusiasts, one author raised the concern that the Nigerian Arbitration Rules could be interpreted as preventing parties from relying on legal counsels who are not qualified to practice law in Nigeria. From the author's perspective, such restriction on the parties' selection of their preferred representatives could inhibit the selection of Nigeria as an attractive seat of arbitration – and therefore encourage Africa-related disputes to keep seeping through to Europe for resolution.

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All in all, these discussions will probably continue in 2020. The coming year is likely to prompt African states to further implement the next stages of the AfCFTA, and certainly, new interesting developments are on the way.

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