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The CCJA's Ruling in the Case Republic of Benin v SGS Société General de Surveillance SA: A Step Backwards?

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Since its creation, the Common Court of Justice and Arbitration (CCJA) has been at the forefront of promoting international arbitration in Africa, particularly with respect to creating a favourable setting for international and regional arbitration under the Uniform Act on Arbitration adopted by the seventeen OHADA Member States. This momentum continued with the recent adoption of the new Act which entered into force on 15 March 2018 (Uniform Act on Arbitration dated 23 November 2017).[1)]

Yet, these reforms are not always followed and implemented by the courts. A recent example is a judgment rendered by the CCJA on 27 February 2020 (Judgment n° 068/2020, *Republic of Benin v. SGS Société Générale de Surveillance SA*). Regrettably, the CCJA's review of the arbitral award is not only inconsistent with its own case law, but also represents a step back in the development of arbitration in the OHADA jurisdiction, by failing to enforce key principles in support of arbitration, such as *kompetenz-kompetenz*.

The Facts

The dispute arose out of a contract between the Republic of Benin and SGS Société General de Surveillance SA (SGS), whereby SGS was to provide training and consultation services in relation to a program for the certification of customs value (referred to as PCV). Issues arose with payment for the services and with the alleged conflict with another contract, for a similar program (referred to as PVI). This ultimately led to two parallel legal proceedings: one before the Cotonou Court of First Instance and one before an arbitral tribunal constituted under the ICC rules. As such, despite the arbitration agreement contained in the contract, the Republic of Benin hurried to initiate proceedings in December 2016 before its own administrative courts. In response, SGS brought an ICC arbitration claim a few weeks later, as provided by the arbitration agreement.

In a rather hasty judgment rendered on 13 February 2017, without both parties even having the opportunity to be heard, the Cotonou Court of First Instance annulled the contract between the Republic of Benin and SGS based on what the Court considered to be a conflict with the PVI contract entered into with a third party, as mentioned above. It was revealed that the President of Benin had a stake in this other entity.

Undeterred and unconvinced by the decision of the Beninese court and other procedural claims brought by the Republic of Benin, the arbitral tribunal rendered an award on 6 April 2018, finding that it had jurisdiction.

The seat of arbitration being Ouagadougou, Burkina Faso, the Republic of Benin attempted to set aside this award before the Court of Appeals of Ouagadougou. On 21 September 2018, the Court of Appeals dismissed the challenge, finding notably that the arbitration agreement was valid and that SGS had not waived its right to resort to arbitration. The Court of Appeals also ruled that the award did not contradict the decision of the Beninese judges, as the Cotonou Court of First Instance and the arbitral tribunal had ruled on different issues, the first having considered the validity of the contract and the latter having examined its performance and interpretation. Therefore, according to the Court of Appeals of Ouagadougou, there was no conflict with a decision having the effect of *res judicata* and no violation of international public policy.

The Republic of Benin appealed to the CCJA, which rendered a surprising decision in finding that the award was in contradiction with the Cotonou judgment.

The CCJA's disregard of principles of international arbitration and CCJA precedent

In its decision of 27 February 2020, the CCJA decided only on the issue of an alleged violation of international public policy. This issue was framed, before the Supreme Court, in the same terms as before the Court of Appeals of Ouagadougou. The CCJA first recalled that the principle of *res judicata* – which precludes arbitrators from considering the same claims or issues, opposing the same parties and having the same subject matter – formed part of OHADA international public policy. On that basis and without the nuance of the decision of the Court of Appeals of Ouagadougou, the CCJA held that the award contradicted the Cotonou judgment, as both ruled on an issue arising between the same parties and with respect to the same contract.

By doing so, the CCJA ignored the fact that the first instance decision was under appeal. This highly questionable decision therefore also contradicts CCJA precedent. Indeed, in a landmark decision of 31 January 2011, the CCJA found, having considered the effect of *res judicata*, that there is a violation of public policy only where an award contradicts a decision that has been finally settled by a state court. This decision implies that all remedies must be exhausted before there can be a violation of public policy, which did not reflect the case between the Republic of Benin and SGS.

In addition, by deciding only on the issue of a purported violation of public policy, the CCJA overlooked critical elements of the case and the positions of the parties.

First, it failed to address the violation of the *kompetenz-kompetenz* principle. This principle is established by Article 23 of the OHADA Treaty and by Articles 11 and 13 of the OHADA Uniform Act on Arbitration; it had also been reaffirmed in another decision handed down the same day (CCJA, 27 February 2020, judgment n° 064/2020). By failing to address this issue, the CCJA indirectly disregarded the fact that this principle had been violated by the Cotonou Court of First Instance. Though the Cotonou court had not denied the existence of the arbitration agreement, it still decided to retain jurisdiction in spite of it.

Second, and equally unexpectedly, the CCJA refused to address the issue of the alleged waiver by

SGS of the arbitration agreement. According to CCJA case law, the waiver of an arbitration agreement must be unequivocal (see CCJA, 23 July 2015, judgment n° 097/2015), though such waiver may also be tacit. A party may tacitly waive an arbitration agreement by failing to object, based on the existence of a valid arbitration agreement, to the jurisdiction of a state court. Invoking this precedent, the Republic of Benin had argued that the failure by SGS to object to the jurisdiction of the Cotonou Court of First Instance amounted to such a waiver. This failure, however, resulted from the fact that SGS was denied the opportunity to argue its case before the Cotonou court. This was expressly noted by the Court of Appeals of Ouagadougou, which stated that SGS was "*not placed, in the procedural circumstances described by it and confirmed by the exhibits, in a position to properly develop its own means*". In addition, SGS immediately claimed the benefit of the arbitration agreement by introducing arbitration proceedings in response to the Republic of Benin's claim, even before the hearing was held before the court in Cotonou.

The CCJA missed a clear opportunity to build upon persuasive and consistent case law on key issues relating to arbitration. Unfortunately, its decision of 27 February 2020 could have the effect of impairing efforts to construct a quality arbitration ecosystem. The hope is that this decision will not undermine the development of arbitration in the region.

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References

?1 For a commentary of this new Act, see N. Aka, A. Fénéon and J.-M. Tchakoua, Le nouveau droit de l'arbitrage et de la médiation en Afrique (Ohada), LGDJ, 2018.

This entry was posted on Wednesday, January 6th, 2021 at 7:11 am and is filed under Africa, Arbitral Award, Arbitration, CCJA Arbitration, Courts
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