ICSID award no replacement for annulled OHADA award (Getma v Guinea)

Dr Rémy Gerbay, of counsel at Enyo Law LLP and lecturer at Queen Mary, University of London, considers what lessons can be learnt from the complex parallel commercial and investment arbitrations in Getma v Guinea. The following interview was first published by Lexis Nexis PSL on 20 August 2016 and can be found here.

Original news

ICSID tribunal issues its final award in Getma v Guinea, LNB News 02/09/2016 289:

In an investment arbitration which ran parallel to a separate commercial arbitration, an International Centre for Settlement of Investment Disputes (ICSID) tribunal has decided that its jurisdiction is limited to certain investment law aspects of the claims submitted to it. Accordingly, it has awarded the claimants only a small fraction of their total claims, €448,834 plus interest and costs as against claims in excess of €100m.

What was the background to the dispute between Getman v Guinea?

In 2011, Getma International, a French company, commenced arbitration proceedings under the rules of the Organisation for the Harmonisation of Commercial Law in Africa's (OHADA) Common Court of Justice and Arbitration (CCJA) against the Republic of Guinea for wrongful termination of a 25-year concession agreement to develop and operate a container port in Conakry, the capital of Guinea.

It also commenced parallel arbitral proceedings at ICSID against Guinea alleging that the termination of the concession agreement amounted to an unlawful expropriation, breaching the 1987 Guinean Foreign Investment Law.

What happened in the commercial arbitration under the OHADA Rules?

The background of this case is complex and, therefore, the summary below focuses on some of the key facts only.

In accordance with the concession agreement, the parties agreed to resolve their dispute before a three-member arbitral tribunal constituted under the CCJA Rules. Juan Antonio Cremades (selected by Getma), Eric Teynier (selected by Guinea) and Professor Ibrahim Fadlallah (chairman) were appointed to the tribunal.

The schedule of arbitrators' costs annexed to the CCJA Rules provides for an ad valorem system, meaning that the fees payable to a CCJA arbitrator are calculated by reference to the amount in dispute. Many arbitral institutions operate on an ad valorem basis, including most notably the International Chamber of Commerce (ICC). What is unusual however is the very modest level of the fees which the CCJA schedule of costs contemplates for high-value disputes. In this case the quantum of the claims was said to exceed $50,000,000, and the CCJA Rules contemplated fees of just over €60,000 for the entire tribunal. By way of comparison, the ICC's costs calculator indicates that the average fees for three arbitrators would be $517,450. Using the cost calculator of another Africa-based institution, namely the Cairo Regional Centre for International Commercial Arbitration, the average fees would be $364,203.

Shortly after it was constituted, the tribunal sought permission from the Secretary General of the CCJA (as permitted by the rules) to contact the parties with a view to increasing their fees. This permission was granted, and the tribunal contacted the parties to negotiate increasing their fees. Ultimately, about two years after commencement of the proceedings and shortly before the first evidentiary hearing, the tribunal suggested that €450,000 was a more reasonable sum in this case. Despite initial reluctance, the parties eventually assented to this substantial fee increase (although Guinea retracted its assent later on).

The increased fees were rejected by the CCJA which decided, in August and October 2013, to maintain the arbitrators' fees at the level set forth in the schedule of costs, i.e. approx. €60,000. The CCJA ordered the arbitral tribunal on multiple occasions to abandon its efforts to solicit increased arbitrators' fees from the parties. Despite this, the tribunal continued to hear the case, and eventually issued an award on 29 April 2014.

Before issuing the award, the tribunal requested the parties to pay the remainder of the amount of €450,000. At that stage the CCJA reminded the tribunal that the fee increase had not been approved by the CCJA as required under the applicable rules, and that it had been rejected by several administrative decisions of the court. The court relied on a 1999 CCJA precedent which, among other things, stated that:

'[...] any separate arrangement between the parties and the arbitrators concerning their fees is null and void.'

The CCJA also warned the tribunal that, if it included the increased fees, the final award would 'potentially be subject to invalidation by the...community's high court.'

The CCJA is the competent court for all appeals on set aside decisions made against OHADA awards.

Getma ultimately paid its share of the increased fees (€225,000), while Guinea did not. There are reports that the tribunal eventually sued Getma for Guinea's share of the unpaid fees.

The tribunal ultimately communicated the award directly to the parties. In the award, the tribunal unanimously found in favour of Getma, ordering Guinea to pay approximately €39,000,000 in damages plus interest. Following this, Getma commenced proceedings in the US courts to enforce the award, and Guinea sought to set-aside the award before the CCJA on various grounds, which included, that the tribunal had breached CCJA provisions by entering into the private fee agreement with the parties.

On what grounds did the CCJA annul the award in that arbitration?

In November 2015, the CCJA unanimously annulled the award on the grounds that the tribunal directly contravened CCJA rules and rulings regarding its fees, and had exceeded its mandate by entering into an unauthorised agreement with the parties to increase their fees.

OHADA Rules, art 24.2 grants to the CCJA exclusive authority to determine the arbitrators' fees, which must be set in accordance with the ad valorem schedule of costs established by the CCJA Assembly and approved by the OHADA Council of Ministers. This schedule of costs forms part of the parties' arbitration agreement. OHADA Rules, art 24.3 gives to the CCJA the power to depart from the fees prescribed by the schedule of costs (and fix higher or lower fees) in 'exceptional' and 'necessary' circumstances. But in this case the CCJA had not done so.

In an unprecedented move, on 16 December 2015, the chairman of the tribunal wrote an open letter to the arbitral community overtly criticising the CCJA's decision and requesting the support of the arbitral community.

Getma sought to enforce the award in the US under the New York Convention (District Court for the District of Columbia) and Guinea opposed the application for breach of public policy. On 9 June 2016, the court found that it could not confirm and enforce the annulled arbitral award, as it was unconvinced that '[…] the annulment decision under these circumstances - albeit somewhat unusual - violated the most basic notions of justice.'

What did the ICSID tribunal decide about its jurisdiction and whether it should be extended following the annulment of the award in the commercial arbitration?

The ICSID tribunal (ICSID Case No ARB/11/29), which comprised Vera Van Houtte (president), Pierre Tercier, and Bernardo Cremades (brother of the arbitrator in the CCJA arbitration), rendered an award on 16 August 2016 (having first rendered an award on jurisdiction in 2012).

It decided that its jurisdiction only extended to certain aspects of the claims submitted to it by Getma. It accepted that Guinea's conduct amounted to a breach of the investment law, however it noted that the majority of the damages claimed by Getma in the ICSID proceedings arose from the contract itself, and it therefore deemed those claims inadmissible.

The ICSID tribunal also rejected the characterisation by Getma that the annulment of the CCJA award amounted to a denial of justice, and that the tribunal should therefore assume jurisdiction to prevent this. It explained that its decision on jurisdiction was made before the CCJA annulment of the award, and was not affected by subsequent events.

What did the ICSID tribunal decide?

The tribunal dismissed the state's objection that the concession agreement was illegal, finding that allegations of fraud and corruption were not proven to a standard of reasonable certainty.

In relation to damages, the tribunal found that a claim for loss of cash flow did not fall within its jurisdiction, being a matter of contractual damages. The claimant was entitled to limited damages for certain acts of the state which followed termination of the agreement, including requisition of assets, but it must give credit for €200,000 of the amount awarded in the event that, despite the annulment of the other award, it recovered an equivalent sum awarded for the same requisition by the tribunal in the commercial arbitration. The total amount of damages awarded was €448,834 plus interest as against claims in excess of €100m.

The claimant's legal costs were some €1.7m but the tribunal decided that each side should bear its own costs. It also decided that the claimant should pay 60% of the arbitrators' fees and ICSID's charges with the respondent state bearing the balance of 40%. As the state had not yet paid any of those fees and charges and the claimant had paid them on its behalf, a reimbursement of $340,000 was due to the claimant.

What practical lessons can be drawn from both the commercial and investment arbitrations?

Arguably, the most interesting lessons can be drawn from the commercial arbitration aspect of this case.

The violation of the OHADA arbitration rules resulted in an annulment of a valuable commercial arbitration award and a failed attempt at enforcement of that award. The ICSID tribunal refused to enter commercial territory and its award was for a small fraction of the amount awarded in the commercial arbitration.

OHADA may, going forward, wish to be more flexible so as to allow parties and arbitrators to agree fees higher than those provided by the applicable schedule of costs when the value of the dispute warrants it. Otherwise, OHADA will face the risk of failing to attract arbitrators of the highest calibre. In this case, it has been claimed that the arbitrators worked collectively around 1,000 hours. If this were to be true, then fees of around €20,000 per arbitrator (as mandated by the OHADA schedule of costs) would be extremely low. Fees at that level make it particularly difficult for law-firm practitioners to accept appointments as arbitrators.

On the other hand, it is clear that the CCJA was entitled to fix the fees at the level at which it did. The arbitration rules are unambiguous. One may also argue that the arbitrators ought to have known when they accepted their mandates that there was a very real chance that their fees would not exceed around €60,000 because the CCJA's schedule of costs is widely available. In the circumstances, the manner in which the arbitrators attempted to obtain from the arbitral institution (and the parties) improved fees, and in particular the open letter to the arbitral community, might be considered regrettable. One may wonder whether the three arbitrators would have behaved in a similar way had it been an ICC or London Court of International Arbitration (LCIA)-administered case (but of course, the fees offered by these two institutions are higher).

At a more theoretical level, this case emphasises a very interesting legal question, which is that of the so-called 'mandatory' provisions (for lack of a better term) that may be found in institutional arbitration rules. Many arbitration institutions indeed take the view that some of the provisions of their arbitration rules are not capable of being waived by agreement of the parties. In the past, for example, the LCIA has considered (like the CCJA did in this case) that the provisions of its rules on arbitration costs (including its schedule of costs), are not capable of being waived by the parties. Likewise, the ICC would most likely not permit parties to disapply the provisions of its rules on the scrutiny of arbitral awards. While this practice is common among arbitral institutions, the legal grounds it relies on are arguably not well understood yet.

With a dual civil law/common law background, Dr Rémy Gerbay advises companies and individuals in respect of complex high value international disputes. In addition to his work at Enyo Law, he is a lecturer at the School of International Arbitration at Queen Mary University of London. Rémy also frequently sits as arbitrator (sole arbitrator, co-arbitrator and chairperson) in ad hoc and institutional arbitrations. He is co-chair of the LCIA's Young International Arbitration Group (YIAG). *Dr Gerbay would like to thank Badar Al Raisi at Enyo Law for his valuable input throughout the interview.*

Interviewed by Kate Beaumont. The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.