AILA BLOG

Getma v Republic of Guinea: an African Legal Saga with International Implications, by Solomon Ebere, Esq.*

Posted on **July 5, 2017** by **AILA**

The protracted African legal saga *Getma v Republic of Guinea* has drawn much discussion and speculation in the arbitration community recently. For good reasons. This saga has highlighted various aspects of international arbitration, including party autonomy, remuneration of the arbitral tribunal and enforcement of annulled awards, that go way beyond the borders of the African continent.

The dispute arose out of a 25-year concession agreement between the Republic of Guinea and French corporation, Getma International, to develop and operate Guinea's main port in its capital, Conakry. The concession agreement provided that disputes would be resolved according to the arbitration rules of the Organization for the Harmonization of Commercial Law in Africa's ("OHADA") Common Court of Justice and Arbitration ("CCJA"). In March 2011, Guinea terminated the concession agreement and signed a new concession agreement with a different company. Shortly thereafter, Getma commenced CCJA arbitration proceedings against Guinea for wrongful termination of the concession agreement and a three-member tribunal (the "Tribunal") was constituted. Getma also commenced parallel arbitral proceedings at the International Centre for Settlement of Investment Disputes ("ICSID").

The schedule of arbitrators' fees annexed to the CCJA arbitration rules provides for an ad valorem system, meaning that the fees payable to an arbitrator are calculated by reference to the amount in dispute. In this case, the quantum of the claims was said to exceed US$50 million and the CCJA contemplated fees of just over EUR €60,000 for the entire Tribunal. It is worth noting at this point that under a CCJA arbitration, the CCJA functions both as an arbitral institution and as a supervising court, with authority to hear and rule on applications to annul a CCJA award.

In April 2013, with the arbitral proceedings well underway, the Tribunal sought permission from the CCJA's Secretary General to ask the parties for a very significant increase in fees, from €60,000 to €450,000. This permission was granted and, despite initial reluctance, the parties eventually consented to this substantial fee increase after the Tribunal repeated the request and indicated that if consent was not forthcoming it might reconsider its involvement.

In April 2014, the Tribunal ruled in favor of Getma, ordering Guinea to pay €38.5 million in damages plus interests. Following this, Getma commenced enforcement proceedings in the US courts. Simultaneously, Guinea petitioned the CCJA to annul the award on various grounds, including that the Tribunal had breached CCJA provisions by entering into a private fee agreement with the parties. In a judgment dated 19 November 2015, the CCJA annulled the award on that basis.

Matters took a further interesting turn when, in December 2015, the Tribunal issued an open letter, heavily criticizing the CCJA's annulment decision, describing it a "judicial heresy" and calling for their colleagues' support. (Full letter is available at http://www.jeuneafrique.com/285543/societe/affaire-getma-guinee-les-arbitres-repondent/).

Getma sought to enforce the annulled award in the US under the New York Convention. However, on 9 June 2016, the D.C. District Court recognized the CCJA annulment and refused to enforce the annulled award. It found that such annulment did not violate the most basic notions of morality and justice and adopted the view that "an arbitration award does not exist to be enforced . . . if it has been lawfully set aside by a competent authority in the State in which the award was made."

A week later, the ICSID tribunal rendered an award in which it granted Getma only a small fraction of its claims, €448,834 plus interests and costs as against claims in excess of €100 million. While it accepted that Guinea's conduct amounted to a breach of the Guinean Investment Law, it found that the bulk of the damages claimed by Getma in the ICSID proceedings arose from the concession agreement itself, and it therefore deemed these claims inadmissible.

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

The implications of this case for the principle of party autonomy have been the subject of much discussion. On the one hand, it might appear that the CCJA's annulment decision discarded the agreement between the parties and the Tribunal over the fee increase. Arbitration is a construct of contract, shaped by party agreement. Should parties not remain free to depart from, and amend, non-mandatory elements of a set of institutional rules, including the fee level of the Tribunal? On the other hand, where parties have specifically agreed in their arbitration agreement on a set of institutional rules with an administering body (such as the CCJA), which has the exclusive power to set the arbitrators' fees, and a supervising court with the authority to decide annulment applications (such as the CCJA), is that not in itself a key expression of party autonomy that should prevail over any subsequent agreement? Parties choose institutional arbitration for the predictability the rules offer and, in the case of fees, the predictability of costs, as well as a degree of protection from being forced to agree to fee increases for fear that to do otherwise could affect their prospects of success. After all, where a party is asked, mid-arbitration, to consent to a fee increase by a tribunal which has indicated that absent such consent it might be unable to continue, this necessarily puts at risk the time, effort, and legal fees committed up to that point.

With regard to fee levels, the implications of this case are that future parties to CCJA arbitrations will likely avoid increasing arbitrator fees without the CCJA consent. If this is the case, then the tribunal fees will remain as fixed by the CCJA. This poses a very real question

as to whether the CCJA will be able to attract high quality international arbitrators to hear its cases going forward. By way of comparison, the ICC cost calculator provides that the average fees for a three-member tribunal in a dispute of a similar value would be US$517,452. While this concern is justified, it also needs to be balanced against the important objectives of an institution such as OHADA of encouraging and facilitating the use of arbitration by local African parties, by providing more cost-effective centres than the ones in Paris, London or Washington, D.C. Moreover, the relatively low fee levels could have the benefit of clearing the way for a greater number of African and/or young arbitrators to gain appointments and therefore experience.

This case also speaks to the treatment of annulled awards by US courts. The D.C District Court's decision could be construed as endorsing the view that an award is necessarily anchored in a jurisdiction, in stark contrast with the approach taken by the French courts, which have considered an international arbitration award as untethered to any particular legal system. The DC Circuit will have the occasion to revisit this question when it considers the appeal in *Getma v Republic of Guinea*, which is pending. Should it confirm the decision rendered in the first instance, this will mean, as a practical matter, that parties attempting to enforce an annulled award in the US will need to demonstrate extraordinary factual circumstances sufficient to disregard the foreign annulment.

Finally, and irrespective of whether one agrees with the positions taken by the various fora involved in this saga, the outcome is very harsh for Getma. It has seen a sizeable award in its favor being annulled and rendered unenforceable for no fault of its own, and after having incurred millions of dollars in legal costs. Getma learned the hard way that success in arbitration is meaningless if the award constitutes nothing more than a paper tiger.

* International Arbitration Lawyer (New York Qualified), London, UK.

This entry was posted in **Africa**, **Dispute Resolution**, **International Arbitration**, **International Trade**, **Investment** by **AILA**. Bookmark the **permalink [http://blogaila.com/2017/07/05/getma-v-republic-of-guinea-an-african-legal-saga-with-international-implications-by-solomon-ebere-esq/]** .