Inaugural World Arbitration Update: Africa and MENA Reasserting A Protagonist Role in the Arbitration Scene

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The World Arbitration Update gathered counsel, academics and governmental experts around the latest developments in Africa and the Middle East North Africa (MENA), arbitral hubs that have been proactive in their institutional growth, treaty making and as catalysts to major complex disputes in mining and infrastructure.

The Africa panel moderated by **Rose Rameau** (Rameau International) focused on the African Continental Free Trade Agreement (AfCFTA) potential ISDS inclusion in Phase II of negotiations concerning investment (Art. 7(b). The reform ongoing at the African Union (AU) echoes discussions in the UNCITRAL

realm as to the legitimacy of investor-state arbitration as means for resolving investment disputes.

Prof. John Nyanje (Africa Nazarene University) pointed out that intra-African BITs will be an impending issue within those discussions, providing an empirical view he indicated that African states have signed over 1000 BITs. Of those BITs, 319 are intra African BITs, and only 93 of these are enforced, mainly by Egypt Morocco and Mauritius.

Cautioning against a trilateral protection system, **Leyou Tameru** (I-Arb Africa) explained such a system would protect non-African investments more by proving ISDS, and then protect certain African investments via BITs but that would not protect investments coming through the AfCFTA. However, this fragmental landscape might make way for a more unified system with the AfCTA's implementation. Answering Prof John Nyanje's point, she suggested that analogously to the EU, the AU may seek to terminate intra-African BITs in order to harmonize the investment policy landscape in Africa. Whilst the AfCTA does not foresee a termination of BITs, the AU may opt for a policy based rather than hard law approach to implement this aim.

Roselyn N'geno (AfCFTA Secretariat) put the evolution of ISDS in Africa into perspective, highlighting three key advancements: (i) the position of African states in ISDS forums (i.e. UNCITRAL) , (ii) an Africanization of investment arbitration with the significant increase of foreign investment in the last 15 plus years, and (iii) conducting ISDS via regional judicial organs (i.e. the Economic Community of West African States Court of Justice). She suggested that in the Phase II ISDS negotiations, other African instruments may be used as referential points, such as the 2007 Common Market For Eastern and Southern Africa (COMESA) Treaty, and the Pan-African Investment Code adopted in 2015. **Jackwell Feris** (Cliffe Dekker Hofmeyr), added that a depoliticalized approach was warranted, to avoid results akin to the 2012 disbandment of the SADC Tribunal. However, he noted that while South Africa has not embraced ISDS, it still endorses a relative part of it considering that several treaties providing for ISDS have not been terminated and the SADC model BIT provides for an election by each member state to either include or omit ISDS in its respective BITs.

Recalling the ISDS moratorium rationale, **Professor Chrispas Nyombi** (Canterbury Christ Church University) concluded the panel by informing that the November 2020 14th meeting of the African Union Ministers of Trade (AMOT) lead to the adoption of the Draft Declaration on The Risk of Investor-State Dispute Settlement with Respect to Covid-19 Pandemic Related Measures . The Declaration (paras (i) to (vi)) urges States to explore options under international law to mitigate the risks of ISDS claims including mutual temporary suspension of investment provisions in treaties with respect to covid-19 measures.

Mega Disputes, Expansion of International Arbitration Centers, and a Renewed Interest in Shariah Law as a Foundation of Applicable Law in the MENA Region

The MENA region represents a unique and dynamic configuration in the dispute resolution sphere, particularly in view of major reforms of the arbitration landscape in Dubai, unifying arbitral centers under the DIAC. Moderator **Meagan T. Bachman** (Crowell & Moring) kickstarted the WAU MENA panel by pinpointing these particularities, ranging from: (i) business-related characteristics, with projects, most often construction, that trigger mega disputes; (ii) trade-related, as a link of the region between Asia, Africa and Europe, (iii) political, due to the shifts in regional regimes and alliances; and (iv) legal, as the legal framework of the region comprises civil law, common law and Shariah law.

Citing Karim Yusef and expanding on the “quest for cosmopolitan law”, presenter **Munia El Harti Alonso** (Xtrategy) deepened the context surrounding the region by citing key decisions such as *Petroleum Development v. Sheikh of Abu Dhabi*, *Aminoil v. Kuwait*, *Salini v. Morocco*. Additionally, the following recent developments: (i) the Memorandum of Understanding between the ICC and the Union of Arab Banks, furthering the collaboration between 450 Arab banks and other financial institutions in arbitration and ADR; (ii) the opening of the ICC’s 5th case management office in Abu Dhabi, which integrates the existing activities of the ICC Middle East and North Africa (MENA) representative office, established in ADGM in 2017, into this new office; and (iii) the 2019 ICC Report on Financial Institutions and International Arbitration, which includes a section on Islamic finance disputes, displaying the relevance

of this region for international dispute resolution.

Another development is the Arab Spring, which generated a dramatic increase in arbitration cases filed against Arab States. **Cherine Foty** (Covington & Burling) discussed the trends associated with substantive claims and defenses arising out of these events and their potential relevance in light of the COVID-19 crisis, such as necessity (*Union Fenósa Gas v. Egypt*, *Strabag v. Libya*), breaking of the causal link defense (*Olin v. Libya*), force majeure (*Gujarat v. Yemen*, *General Dynamics v. Libya*), the state's right to improve workers' wages (*Veolia Propreté v. Egypt*) and corruption and fraud (*Nurol v. Libya*, Sorelec v. Libya).

Following the dissection of complex disputes, interim remedies and the powers of the Curial Courts in support of arbitration proceedings in MENA were presented by **Sara Koleilat-Aranjo** (Al Tamimi & Co.). A common procedural issue in the region which pertains to the utility and impact of interim measures in MENA-seated arbitrations. These interim or provisional measures are codified under various systems of law: the civil law, common law and Shariah law principles employed by jurisdictions in the region, including in the recent national legislation on arbitration in Bahrain, Saudi Arabia, the Dubai International Financial Center (DIFC) and in the United Arab Emirates. Of judicial relevance is the landmark 2016 DIFC Court judgment in *Multiplex Constructions LLC v. Elemec Electromechanical Contracting LLC* which notably granted the first ever anti-suit injunction in the DIFC Court context, and the 2018 judgment of the Cairo Court of Appeals in *Doosan v. Damietta Port and Kuwait Gulf Link Port* which affirmed the recognition of an interim order by an ICC arbitral tribunal. Those decisions show a fairly recent positive trend in safeguarding the practical utility of interim measures.

Latest "Arbitration Friendly" trends in the Recognition and Enforcement of Awards

The region has also made significant strides with regard to the recognition and enforcement of awards, as explained by **Prof. Dr. Mohamed S. Abdel Wahab** (Zulficar & Partners). More importantly, on 18 June 2021, the same court issued Resolution No. 1/2021through which it changed the applicable market rate of interest *from 9% to 5% per annum* in the absence of a

contractual rate.

In Egypt, recent decisions of the Court of Cassation addressed the issues of estoppel and virtual hearings (judgment of 27 October 2020), a saga regarding de novo review in *Al-Kharafi v. Libya* (judgment of 24 June 2021) and the first-ever ICC award set aside in Egypt in the *DIPCO v. Damietta Port Authority* case (judgment of 8 July 2021). Although not applicable to arbitral awards, the Supreme Egyptian Constitutional Law Court Amendment of 15 August 2021 brought along the non-enforceability of court judgments rendered against the Egyptian state abroad.

In Saudi Arabia, 25,000 enforcement applications were submitted with local courts between 2016 and 2021. Out of these, 8,964 applications took place in 2020 alone and involved a fair share of foreign arbitral awards, inviting a close look at the opening up of this jurisdiction in the future.

In 2021, Iraq, the only state in the Middle East that had not ratified the New York Convention, acceded to the Convention, whereas in the UAE, the Dubai Court of Cassation finally clarified the signature requirement for all pages of an award in a 14 June 2020 judgment, specifying that only one signature on the last page is sufficient for the award to be valid.

Conclusion

These recent procedural and substantive trends encompassed in the WAU conference demonstrate a renewed and welcomed interest for arbitration of mega disputes in the African continent and the MENA region, both international arbitration hubs that are gaining prominence. Whilst challenges remain, biases against arbitrating disputes in these regions are being debunked by the experience of Africa and MENA with dispute resolution, the advent of institutions and “arbitration friendly” jurisprudence.

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