When Arbitrators and Institutions Clash, or The Strange Case of Getma v. Guinea

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The facts in *Getma v. Guinea* case seem familiar enough, but the facts leading to annulment of the award involve a wholly unexpected plot twist—a showdown between an African arbitral institution and the arbitral tribunal over the tribunal's fees.

When the annulment decision in *Getma v. Guinea* first came out, it received considerable attention, including in this **blog** and two letters authored by the tribunal. Most reports were critical of the *Cour Commune de Justice et d'Arbitrage* ("CCJA") of *l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA"), and raised questions about the legitimacy of its annulment decision.

Those reports, however, did not examine the extent to which the tribunal's conduct was contrary to CCJA rules and express rulings. Taking this tension as a starting point, the thesis of this post is that, even faced with a terrible, horrible, no-good, very-bad decision on an issue that is within an arbitral institution's exclusive competence and discretion, a tribunal has only two choices: comply or resign.

Instead, in *Getma v. Guinea*, the tribunal substituted its own preferences for the institution's unambiguous rulings despite the institution's forewarning of the possibility of annulment.

The CCJA and Its Powers

For those who are unfamiliar, the CCJA operates as a traditional arbitral institution (drafting arbitral rules and administering arbitrations), as a multi-national court that is the final expositor of OHADA law, and as the authority competent to annul arbitral awards rendered pursuant to CCJA rules.

Among its powers, the CCJA sets arbitrator fees according to a fee schedule. In a 1999 decision by the CCJA, it affirmed that arbitrators' fees and expenses are set exclusively by the Court, in accordance with the provisions of the Rules of Arbitration, and that "Any separate arrangement between the parties and the arbitrators concerning their fees is null and void."

Low Fees and Efforts to Augment

Back in our case between Getma and Guinea, in accordance with its published fee schedule, the CCJA set the arbitrator fees exceptionally low, some might even say breathtakingly low—just €60,000 for an entire tribunal in a case with approximately $50,000,000 in dispute and in which the tribunal reportedly spent a combined total of nearly 1000 hours.

During the appointment process or soon thereafter, the arbitrators apparently realized that the €60,000 amount in the CCJA fee schedule was inordinately low and the President had several communications with the case manager at the CCJA to that effect. The exact nature of these communications is not entirely clear from the record that was available in drafting this post. Among other reassurances in these communications, however, the CCJA eventually consented to the tribunal raising the issue of fees with the parties.

To that end, nearly two years after commencement of the case and shortly before the first evidentiary hearing, in April 2013 the tribunal proposed to the parties that €450,000 was a

more reasonable fee for the arbitrators, and it requested that the parties both agree to the increased fees.

When the parties' formal assent was not forthcoming, the President of the tribunal commenced the May 2013 evidentiary hearing with a request for specific assent by the parties. In making this request, the President stated specifically, "*Of course, if the Parties were not to agree, the Tribunal would be forced to reconsider its involvement in this matter[.]*" In that statement, however, the President also asserted that party assent was required for "OHADA to make a fully informed decision" and to "enable OHADA to make its decision." Under its rules, the CCJA retains the power to adjust fees from its schedule "where the circumstances of the case make it exceptionally necessary."

Getma agreed to the tribunal's proposal almost immediately. Guinea, apparently with some reluctance, also agreed to the increase, though later stepped away from that agreement.

Notwithstanding the parties' apparent agreement, and repeated efforts by the tribunal, the CCJA eventually decided in writing on August 2013, and confirmed again on October of 2013, that the tribunal's fees would remain €60,000. The last confirmation came after Getma, at the behest of the tribunal, directly lobbied the CCJA to increase the fees in September 2013.

The Award and Fee Augmentation

Fast forward several months. Notwithstanding the CCJA's decision, and another confirmation of that decision by the CCJA on April 14, 2014, the tribunal proceeded to hear the dispute. The arbitral proceedings were completed and tribunal signed the award on April 29, 2014.

The day after signing the award, the tribunal President wrote the parties indicating that the award had been signed. In the letter, however, he stated that "for the sake of good order, the arbitrators – who ... are to be paid by the Parties – should receive their emoluments [totaling €450,000] before the award is sent." The letter also stated that "If one of the Parties pays more than its share, the award will reserve that Party's right to claim the surplus from the other Party."

The parties did not immediately pay the €450,000, but counsel for Getma wrote to the CCJA on May 14 indicating its intention to pay the additional fees.

On May 19, the CCJA wrote to the tribunal confirming that the tribunal's requests for fee augmentation had been "rejected by the Court, by means of several administrative decisions of which [the tribunal was] properly notified." In this letter, the Court cited the 1999 decision referenced at the beginning of this post and concluded that "Any separate arrangement between the parties and the arbitrators concerning their fees is null and void."

The letter went on to explain:

The CCJA system of arbitration categorically prohibits any arrangement between the parties and the arbitrators relating to fees, the determination of which falls within the discretionary power of the Court. The arbitrators may not ignore these mandatory rules of CCJA-OHADA arbitration.
As a result, you are formally prohibited from seeking payment of fees directly from the parties, who have already paid in full the amounts due.

The CCJA also wrote a response to Getma's May 14 letter, reiterating much of the content of its May 19 letter to the tribunal and warning that that if the final award "includes the payment of the amount of €450,000 to the arbitrators, ... the award will potentially be subject to invalidation by our the [sic] community's high court."

On May 22, 2014, over 3 weeks after signing the award, the Tribunal transmitted the Award directly to the parties. We do not know why the tribunal delayed transmitting the award, but it

might be reasonable to assume, in light of its April 30 letter, that the tribunal was waiting for payment of the €450,000, either from one or both parties. As previewed in the tribunal's April 30 letter, the award explicitly provided for a "right to claim the surplus from the other Party" of any unpaid fees to the tribunal.

In August 2014, Getma paid to the tribunal €225,000; Guinea did not. The tribunal wrote to Guinea and threatened legal action if it did not remit €225,000. Ultimately, the tribunal did not sue Guinea, but it apparently did sue Getma for Guinea's share of the unpaid fees.

Post-Award Proceedings

Meanwhile, back at the CCJA, Guinea challenged the award. At a public session on November 19, 2015, the CCJA announced its unanimous decision to annul the award. In a later published explanation of the ruling, the Court justified its decision primarily because of the tribunal's direct contravention of CCJA rules and rulings regarding its fees.

Enforcement proceedings on the annulled award are currently pending in Washington DC. Getma urges the US court to reject the CCJA's annulment decision and enforce the award because, it argues, the CCJA's decision on fees was "unfair and biased" and because the parties' agreement to pay additional fees should be honored as party autonomy.

Notably, among the exhibits in support of Getma's papers are two letters written by the tribunal, one an "open letter" to the arbitration community and another to *Jeuene Afrique*, a French publication that focuses on Africa. In the letters, the tribunal criticized the annulment decision as a "legal heresy," but based its analysis, in part, on somewhat puzzling assertions, like "arbitrators' compensation has nothing to do with their task" and "[t]he role of an international arbitration institution is to protect the arbitrators that work under its aegis[.]"

Arbitrators and Institutions

While the tale of Getma and Guinea raises many interesting issues, the focus of this post is on arbitrators' duties when they disagree with arbitral institutions' rules and rulings.

Arbitral institutions carefully calibrate the balance in their rules between party autonomy and mandatory provisions. Increasingly, institutions also serve as gatekeepers of arbitrator conduct. For example, institutions have increased arbitrator disclosure obligations, police arbitrator caseloads, monitor the time for rendering awards, and even limit arbitrator fees in light of sub-standard arbitrator conduct.

Some such institutional decisions have drawn strong criticisms from arbitrators and been reconsidered as a result.

In all this back-and-forth, however, in no other known case has a tribunal directly rejected an arbitral institution's express rulings. Indeed, one of the most fundamental features of arbitrators' mandate is an obligation to apply the arbitral rules agreed to by the parties, including those rules that allocate decisionmaking authority to the institution. If serious disagreement arises, arbitrators may avoid potential liability for resigning if done in a timely manner and on a well-founded basis. Substituting their personal preferences for the institution's decision, however, is simply not an option.

Moreover, arbitrator criticisms of arbitral institutions may perfectly valid, but those critiques are ordinarily proper only ***outside*** the context of individual, pending cases (unless sought through procedures in official enforcement proceedings that some jurisdictions permit in exceptional circumstances). The obvious reason is that arbitrators should not been seen as attempting to influence outcomes in cases in which they presided, especially not when the enforcement proceedings involve not only questions about the tribunal's conduct, but its conduct in obtaining its own compensation.

Conclusion

The international arbitration community has just finished the ICCA Congress in Mauritius, where the future of arbitration in Africa was discussed, including the need to build strong, legitimate African arbitral institutions that can attract parties and arbitrators. In this aim, Africa faces both real obstacles and unfair perceptions. Some of the issues in the *Getma v. Guinea* case, including some not discussed in this post, underscore those challenges ahead.

But one challenge that no African arbitral institution should face is arbitrators who deliberately reject that institution's mandatory rules and rulings, and then seek to blame the institution for the post-award consequences of their own actions.