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Africa Law Today

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A publication of the ABA Section of International Law Africa Committee

A Message from the Chair

Victor S. Mroczka

OUR NEW YEAR COMMITMENT!

Happy new year to everyone and welcome to another excellent edition of the ABA's Africa Committee newsletter. While President-elect Obama continues to reveal the agenda of his new administration, we eagerly await his policy decisions related to Africa. In this newsletter, several authors have contributed fascinating articles covering a variety of important issues. First and foremost, we have three articles discussing the situation in Zimbabwe. At the moment the world's eyes are intently focused on Zimbabwe and on what "Uncle Bob" has in store regarding the ongoing political negotiations as well as the ongoing crises that are impacting the country. Both Editor-in-Chief Roland Abeng and Ad Hoc Working Group leader Laura Young offer their thoughts on the ongoing situation and what we can anticipate in the coming year. In order to refresh our memory on the ABA's efforts, we also include, as addendums to this newsletter, the two rule-of-law letters ABA leadership sent to the Zimbabwean authorities last year. Also, our colleagues in Paris took time off to write an excellent article on the OHADA Pan-African court of Arbitration for this newsletter. We can also find a summary from Leigh Middleditch regarding the Commercial Law Training Program, something which all of us could participate in. Then, there is an article from Edna Udobong, former Africa Committee Chair, about Section Chair Aaron Schildhaus' recent visit to Nigeria. In the last article, yours truly tries to dispel the rumors floating around Washington, DC about United States Trade Representative-designate Tom Kirk and how his office will address trade issues related to Africa.

I would be remiss as Chair if I failed to mention all the other exciting initiatives currently being undertaken by the Africa Committee in 2009. Members, supporters, and friends of the Africa Committee should expect, in the near term, separate programs on private equity and Middle East investment in Africa, best practices in the African oil and gas industries (our second program in 12 months on the continent!), as well as an informed discussion comparing democratic and non-democratic transitions on the continent. We, led by vice-chair Ibrahim Bah, have just completed the always top-notch Africa contribution to the ABA's Year in Review and you can look forward to that publication being released this summer (section members automatically received this publication as part of their annual

publication being released this summer (Section members automatically receive this publication as part of their annual membership, so if you're not a member, this is reason alone to sign up now). Our working groups are also actively involved in a number of areas to bring you the latest developments in their respective areas. Whether it be working with local stakeholders in Kenya and Zimbabwe or recently setting up a blog discussing developments in Liberia, you can always find something new and exciting going on in these groups and, if you haven't already, I encourage you to visit our website and see what they have to offer.

As you can see, 2009 has started off as quite a busy year for the Africa Committee and we hope to bring you many new and interesting initiatives throughout this year. However, as always, this can only be done with your initiatives and ideas. Criticism is welcome as well. If there is something we are not doing that you feel needs to be addressed, please let us know. We are here to serve you. So, if you have something in mind that you think would be of interest to the Africa Committee, please do not hesitate to contact someone in the leadership and we'll see what we can do.

Once again, happy new year to everyone and here's to a prosperous 2009 to all those interested in Africa.

COMMITTEE LEADERSHIP

Chair:	Victor S. Mroczka
Vice Chairs:	Hdeel Abdelhady Roland D. Abeng Robert H. Alsdorf Nene Amegatcher Ibrahim Sajalieu Bah Gretchen C. Bellamy Babatunde Irukera Jacob A. Saah
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Article Contributors:	Laura Young Otto Saki Roselyn Hanzi Roland Abeng Marie-Christine Cimadevilla Amadou Dieng Leigh Middleditch Edna Udobong Victor S. Mroczka

Solicitation of Contribution

Contributions to this newsletter by committee members are always welcome. In fact, we are officially requesting at least one article from all members (we are ambitious aren't we?!). Please send your articles or other news to:
roland@theabenglawfirm.com

Thank you in advance!

CALENDAR OF EVENTS

MID-YEAR MEETING

BOSTON, MA

FEBRUARY 13-15, 2009

SPRING 2009 NEWSLETTER

MARCH 2009

SMALL STATES AND THE WTO

NEW YORK, NY

MARCH 25, 2008

A STAND ALONE PROGRAM CO-SPONSORED BY THE ABA AFRICA COMMITTEE, KING & SPALDING, AND THE AMERICAN SOCIETY OF INTERNATIONAL LAW

PRIVATE EQUITY INVESTMENTS IN AFRICA

NEW YORK, NY

MARCH 26, 2008

A stand alone program sponsored by the ABA Africa Committee, New York City Bar Association African Affairs Committee, and NYU Business School Africa Program

SECTION SPRING MEETING

WASHINGTON, D.C.

APRIL 14-18, 2009

MIDDLE EAST INVESTMENT IN AFRICA

WASHINGTON, DC

SPRING 2009

DEVELOPMENTS IN THE OIL & GAS INDUSTRY

GHANA

MAY, 2009

On Track

*Roland Abeng**

On November 4, 2008, we published our first newsletter for the 2008/2009 year in which I reminded our readership and members of the Africa Committee that we have the capacity to bring you a publication every three months.

We are here again with yet another edition of our newsletter thanks to the efforts of the entire Africa Committee and particularly those who took off time to write articles for this edition.

The encouragement of our Division and Section Leadership has gone a long way in making us want to do better. We appreciate their directives and counselling and urge them not to spare any efforts geared towards keeping us on track.

It is our wish that this Newsletter becomes a veritable tool and source of information concerning our working groups and current political and economic friends in Africa. We can only achieve this goal if every member gets his or her hands on deck to provide news feeds and various articles to the editors of our newsletter. We are gradually winning the challenge of periodicity and we are striving to continuously improve our product!

Three months ago we agreed to have a special edition on legal integration in Africa drawing inspiration from OHADA and other regional bodies working towards that end. We will be doing just that in our next newsletter by examining the successes, challenges and failures of attempts at legal integration on the continent. We change you to write an article!

* Roland Abeng is Vice Chair of the AC, Cameroonian Attorney and Managing Partner of the Abeng Law Firm in Douala.

ZIMBABWE SPOTLIGHT ARTICLE I**Zimbabwe: A Pre-Occupation of the ABA**

Laura Young*

As part of the Section of International Law's Spring 2009 Meeting in Washington, DC, the Africa Committee will sponsor a program focused on rule of law issues in Zimbabwe. This is the culmination of, but hopefully not the final word on, the American Bar Association's commitment to supporting the Zimbabwean lawyers who are striving for the end of the deplorable human rights situation in the country. In April 2004 and again in June 2008, the ABA issued rule of law letters to the government of Zimbabwe both of which urged President Robert Mugabe to reign in his security forces and restore the rule of law.

The June 2008 letter specifically decried the targeting of lawyers and the judiciary by state operatives and demanded that the government establish conditions for free and fair elections. The ABA was spurred to action by reports of threats, abduction, arrests, and assaults on lawyers. Senior Zimbabwean lawyer Tino Bere described the situation: *"We have approached the courts for urgent relief. We can only wait. This persecution of lawyers is reaching levels where we will not be surprised if lawyers start getting killed or made to disappear."*

Indeed, in June 2008, two high profile opposition lawyers were forced to flee after they received credible threats against their lives, others were abducted, and still others were forced to cease their representation of clients from the political opposition. After disputed elections and months of power sharing negotiations, Robert Mugabe is still desperately holding onto power despite economic collapse, a cholera epidemic, and international calls for his resignation. How will Zimbabwe emerge from years of tyranny? How will the legal profession and the judiciary recover after the pillars of the rule of law were systematically dismantled by the state?

The Zimbabwe Rule of Law Forum will educate members of the American Bar Association about the roots and results of the undermining of the rule of law in Zimbabwe, highlight best practices employed by Zimbabwean colleagues for using legal advocacy to fight tyranny, and generate discussion and follow-up activities through which the ABA can continue to support restoration of democracy and the rule of law to Zimbabwe. The program will include discussion with senior Zimbabwean lawyers and civil society activists.

One of the panelists will be Andrew Makoni. Andrew is a founding partner of Mbidzo, Muchadehama & Makoni legal practitioners, a Harare based law firm that has taken the lead in offering legal services to human rights defenders and activists fighting for the restoration of democracy and the rule of law in Zimbabwe. Andrew has represented hundreds of Zimbabweans who have been persecuted by the state for their political views. In recognition of his contribution, the Open Society Initiative for Southern Africa (OSISA) honored Andrew on Human Rights Day 2007. Andrew has been continuously harassed for his work as a lawyer in Zimbabwe. In May 2008, he had to flee to neighboring South Africa after uncovering a plot hatched by suspected state security agents to assassinate him for his work. He returned to Zimbabwe after the signing of a memorandum of understanding for a possible political settlement in Zimbabwe hoping that a new culture of tolerance would emerge which would enable him to continue his law practice.

Another panelist is Arnold Tsunga, who has been director of the International Commission of Jurists Africa Regional Programme since February 2008. Arnold is world-renowned as a human rights defender in the struggle for rule of law and human rights in Zimbabwe as well as a prominent lawyer on the African continent. He has received

international recognition for his work, including the Martin Ennals Award for human rights defenders (2006-07) and the Human Rights Watch Human Rights Defender Award (2006). Arnold was an attorney in private practice in Zimbabwe for 14 years. One day his car was stopped on the road by state security forces and he was publicly flogged because of his representation of an opposition politician, propelling him into a career of activism. In 2006 Arnold's name, along with several other prominent human rights defenders in Zimbabwe, was found on a leaked "death list" published by the Zimbabwean security forces.

This program is co-sponsored by the International Human Rights Committee and the NGO Committee. If you are interested in helping to coordinate this program or if you have ideas for publicity or fundraising, please contact Laura Young at lyoung@advrights.org.

* Laura Young is a staff attorney in the Special Projects program at The Advocates for Human Rights. Laura's work at The Advocates currently focuses on transitional justice in Africa, specifically how transitional processes interact with and impact diaspora groups as well as other marginalized communities. Laura holds a J.D. from the University of Minnesota Law School and a Master of Public Health from Emory University.

ZIMBABWE SPOTLIGHT ARTICLE II

Attacking the Last Line of Defence?

*Otto Saki & Roselyn Hanzi**

The erosion of the rule of law to unprecedented levels persists and the phenomenon of gross human rights violations threatens to overshadow the contribution of lawyers in the restoration of a democratic Zimbabwe. A viable and independent judicial system is one of the most important institutions that contribute towards the achievement of a democratic state with the overall unfettered objective of nurturing, enforcing, and maintaining the rule of law. Such a judicial system cannot be whole, particularly in instances where executive excesses and non-state functionaries continue to undermine the work of judicial officers. The practice of human rights law in Zimbabwe is under threat. The concept of separation of powers remains hazy with the executive continuously meddling in the affairs of the judiciary.

An enabling environment where principles of separation of powers are observed is trite to facilitate an effective interaction between lawyers, the judiciary, and prosecuting authorities to further the administration of justice. In their capacity as human rights defenders, lawyers are regarded as the last line of defence with the potential capacity of assisting victims of human rights violations to access justice and vindicate their rights in courts of law. Over the years, lawyers have been greatly undermined in the course and scope of their duties. The practice of human rights law has faced various threats which manifest in the continued harassment, arrest, incarceration, assault, and intimidation of several members of the Law Society, with cases of threats of and actual abduction and torture of targeted lawyers having been actually experienced in recent times.

The most pertinent and glaring cases of intimidation of lawyers have occurred since 11 March 2007 in Zimbabwe. The major sources of threats have been from law enforcement agents, state officials, and security agents. Also, there are threats from the executive and what appear to be verbal threats from members' judiciary or unruly members of the public aligned to the ruling party. Lawyers that defend legitimate political activists or human rights defenders have been targeted. It is extremely risky for lawyers to conduct their duties without fear or favour as evidenced by the increase in incidents of reprisals from the police, security personnel, other state actors, and supporters of political parties. Law enforcement agents appear to be more of an appendage of a political arm than a national institution in which all citizens take pride. It has become a mammoth task for lawyers to access their clients

who are regarded as political renegades or politically incorrect. Clients are detained and shuttled from one police station to another and in some cases lawyers have simply been denied the right to access their clients. In recent cases, the police have 'arrested' citizens and later released them into the hands of state security agents where they disappear for long periods of time - often in excess of fifty-five days - thereby perpetuating the denial of access to lawyers.

Human rights lawyers have also received death threats from unknown people. To reinforce the seriousness of these threats, central intelligence officers have paid numerous unannounced visits to certain law firms and put a number of lawyers under surveillance. On 4 May 2007, two lawyers were arrested outside the High Court of Zimbabwe after they had just filed several bail applications on behalf of their clients. This was not an isolated incident as more lawyers were arrested in 2008. One lawyer was arrested and charged with attempting to cause disaffection in the police force after an altercation ensued with some police officers. A human rights lawyer was arrested and accused of insulting the President and bringing his office into disrepute after he had commented on the misrule by the President.

Defiance of court orders has grossly affected the rule of law with little or no action from the judiciary, which appears to be compromised individually, institutional, and administratively. In order for the rule of law to prevail, court orders simply have to be observed by the law enforcement authorities, the public and even the executive. Failure to observe and enforce pronouncements of courts of law can lead to a state of anarchy, rule of lawlessness, and a total collapse of the state.

Another factor that continues to negatively impact the duties of lawyers has been the compromised administration of the lower magistrate's courts. The high staff turnover and the continued partial operation of the courts due to a lack of court officials, such as presiding officers and other support staff, has negatively impacted the justice delivery system and is exposing litigants to inefficient courts. This turnover can be attributed to poor conditions of service and the current economic woes. Due to poor conditions of service, judicial officers have become susceptible to corrupt practices to survive which further erodes any confidence citizens might have in the administration of justice and the social fabric of the country. The adage "justice delayed is justice denied" rings true in Zimbabwe. Administrative and individual judicial officers' incapacities have resulted in excessive delays in the handing down of judgments. Civil claims for monetary remedies are meaningless in the hyper-inflationary environment where the highest denomination is a 100 trillion dollar note (less 13 zeros lopped off by the Reserve Bank in the past year). In addition to the denial of justice, this is another effective remedy being denied.

Lack of resources, including basic stationary such as pens, paper, and computers, has greatly hampered the progress at the courts resulting in excessive delays. A recent example is the High Court having to close due to shortages of water. Collective job actions by court officials, especially the magistrates and prosecutors, have continued to rock the country. To "cushion" judicial officers, luxurious gifts have been offered by certain state departments outside the constitutionally provided means of remunerating judicial officers, raising perceptions of a compromised justice system.

While the situation remains bleak for the administration of justice and the work of lawyers, there still remains hope that Zimbabwe will come right and that the work to reform the institutions that have been corrupted, politicized, and tarnished by political patronage will soon begin. This is our priority.

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ZIMBABWE SPOTLIGHT ARTICLE III

Zimbabwe: Is Anyone Ripe Enough to Throw the First Stone?

*Roland Abeng**

The situation in Zimbabwe today has been condemned worldwide and it is difficult to imagine how those who live within the borders of this country survive. Yes, the word is “survive” because no one can thrive in a country plagued by inflation, epidemics, summary arrests, and killings.

Western countries and their leaders have not only deplored the situation in Zimbabwe, but have taken various steps to see to it that Robert Mugabe and his supporters in Zimbabwe change their policies or even relinquish power. Individual and corporate bank accounts belonging to Zimbabwean officials have been frozen in various European countries and in the United States, travel bans have been imposed on certain Zimbabwean officials, and Western corporations conducting business in Zimbabwe have been asked to stop such operations. Without highlighting specific successes and failures of United States and EU countries’ efforts to effectuate change in the situation in Zimbabwe, one can recognize that these countries have and continue to take actions in this situation. In the past, such actions have yielded positive results in many countries with many recalcitrant dictators. One starts to imagine how long it will take for Mugabe to crack. Perhaps the question should be asked differently: why is it taking this long for Mugabe to crack? Without boasting of having the answer to this question, it will be interesting to see if other leaders on the continent look at Mugabe with the same scorn and disdain as some Western leaders.

Africa has over 52 countries and almost all of these countries are members of the African Union. The leaders of these countries are either actively or passively helping Robert Mugabe to stay in power. These African leaders, collectively under the Africa Union, are still not ready to condemn Robert Mugabe. The African Union sent an election observation team to Zimbabwe, which only helped to consolidate Mugabe’s position.

The situation is the same at the sub-regional level where the SADC is notorious for its inaction. Regional leaders cannot stand by while these unlawful detentions continue in Zimbabwe and still ask the rest of the international community to wait on them to solve the crisis. A key term of the power-sharing deal was that rights violations would stop, said Justice Richard Goldstone of the IBA, but this has not been the case.

Individually, some of the leaders have made it a duty to ensure that Mugabe and his inner-circle lack nothing. Citizens of Zimbabwe do not have potable water, the stalls in the supermarkets are empty, but Mugabe, his close officials, and their families receive basic necessities as well as other luxurious goods flown-in from Malabo and other African capitals.

From North to South, not more than three African heads of state have condemned Mugabe and the Zimbabwean situation. However, it is understandable. How can Paul Biya of Cameroon condemn Mugabe for wanting to stay in power at all costs when, within the last ten months, he [Biya] implemented measures to modify his country’s constitution so that he could remain president for life, with all possible immunities? The situation is more or less the same with the presidents of Chad, Gabon, Central African Republic, Togo, Guinea, Congo-Brazzaville, Algeria, and Niger. Like Robert Mugabe, most of the African leaders have only their own interests at heart and have no real desire to work for the good and betterment of their citizens. The few available democratic leaders have been overshadowed by the omnipresent dictators and enlightened despots. The bitter truth is that despite the efforts of the United States and Europe, African leaders are not ready to see Mugabe out. They have similar negative attributes and are not prepared to relinquish their power, so they have collectively created an association of country leaders for the purpose of protecting each other in times of dictatorial difficulties and democratic attack. This looks, sounds, and smells like syndicalism and yet the band plays on. It is left to see how much longer this type of behaviour will be tolerated or whether someone will finally gather up some political stones and throw the first one.

* Roland Abeng is Vice Chair of the AC, Cameroonian Attorney and Managing Partner of the ABENG Law Firm in Douala.

REGIONAL

The OHADA Common Court of Justice and Arbitration

*Marie-Christine Cimadevilla & Amadou Dieng**

Introduction

The Organization for the Harmonization of Business Law in Africa (“OHADA”) is an international organization created by fourteen African states that signed a treaty in Port-Louis, Mauritius on 17 October 1993. Presently, OHADA has sixteen members.¹

OHADA is achieving integration by law. In fact, OHADA is considered a “legal tool for economic integration and development.”² The simplification and harmonization of the applicable law, on the legislative level, through court decisions, and the security that it engenders, are deemed factors that will stimulate growth by encouraging economic operators to invest in Africa.

The goal of the OHADA Treaty is the harmonization of business laws in the Member States, which is accomplished by elaborating and adopting modern rules, by setting up appropriate judicial procedures, and by promoting arbitration for the settlement of contractual disputes.³

OHADA has created two different sets of legislation applicable to arbitration. First, there is the OHADA Treaty, which provides for institutional arbitration under the auspices of the Common Court of Justice and Arbitration (“CCJA”), in accordance with the CCJA’s Rules of Arbitration. Second, there is the Uniform Act, which sets forth basic rules that are applicable to any arbitration where the seat of the arbitral tribunal is in one of the Member States.⁴

For the purposes of this article, the focus will be on the CCJA arbitration system, the scope of application of CCJA arbitration (I), CCJA as an arbitration center (II), and CCJA as a state court after the award is rendered (III). The specificity of CCJA arbitration appears in two levels with very important consequences.

First, it is unusual that a Treaty establishing an international organization contains a separate chapter devoted to arbitration, not between Member States in connection with the Treaty itself, but rather by laying down a procedural framework for the arbitration of private contractual disputes under the auspices of CCJA.⁵

Second, CCJA operates as an institution in charge of the administration of the arbitration process and, at the same time, has a judicial function in matters relating to the appointment of arbitrators, appeals, and enforcement procedures. This double function makes CCJA arbitration very specific because the entire arbitration process, from the first request of arbitration to the final decision of Court on the award, is controlled by a unique institution.⁶

I. Scope of Application of the CCJA Arbitration System

Article 21 of the Treaty states the principle that, in application of an arbitration agreement, a contractual dispute may be submitted to CCJA arbitration if:

- one of the parties is domiciled or has its usual place of residence in one of the Member States; or
- the contract has been or is to be performed, in whole or on part, on the territory of one or more Member States.

Contractual disputes are handled by CCJA's arbitration regardless of whether the dispute is related to commercial or civil matters. Article 21 of the Treaty allows any party to a contract to refer to CCJA's arbitration. That means that States, other territorial public bodies, and public establishments may be parties to CCJA arbitration.

However, CCJA arbitration is possible only if there is a certain connection to one or more member States. The territorial limit for CCJA arbitration is the OHADA area. There may be a problem if non-OHADA member parties conclude a CCJA's arbitration agreement. Shall CCJA accept the arbitration or not? CCJA has not yet answered that important question.

II. CCJA as an Arbitration Center

The CCJA is comprised of seven judges elected by secret ballot by the Council of Ministers for a term of seven years which is renewable only once. They enjoy diplomatic privileges and immunities for the duration of their term of office.⁷

CCJA performs the functions of administering arbitration. Like other arbitration institutions, CCJA does not itself perform judicial functions as an arbitral tribunal. It does not settle disputes itself. In its role as an arbitration center, the CCJA appoints arbitrators or confirms their appointments, addresses challenges presented to the arbitrators, stays informed of the progress of the arbitral proceedings, and reviews draft awards before they are issued. The decisions taken by the CCJA in this role are administrative, not judicial. They are subject to appeal, and the rationale behind the decisions is not shared with the parties.

In accordance with the Treaty and CCJA's Arbitration Rules, the Plenary Assembly of the Court established internal arbitration rules which allow the delegation to a restrained formation of its members to make decisions subject to the Court to the next hearing of the Plenary Assembly. [Roland, please make sense of this.]

In urgent cases, the President of the Court may take steps necessary to ensure the proper functioning of arbitral proceedings. The President of the Court has the responsibility of informing the Court of actions in the Plenary Assembly's next meeting following the said action and directing issues requiring exclusively an order of the Court to it. Also important to the smooth running of the CCJA is the Chief Registrar who is in charge of the General Secretariat of the CCJA arbitration center. The Chief Registrar ensures that all relevant notifications are made and plays an important role in the arbitration process.

Arbitral proceedings commence upon receipt of the request by the Secretariat, which notifies such receipt to all parties. That date of receipt is the date the arbitration commences. The respondent must file a statement of defense within 45 days of receiving notification from the Secretary-General. The respondent may file a counter-claim, to which the claimant must respond within 30 days.

Once the initial written pleadings have been exchanged, the CCJA determines the amount of the advance to be paid by the parties to cover the anticipated costs of arbitration. These costs include the arbitrators' fees and expenses, the CCJA's administrative costs, the costs incurred in the functioning of the tribunal, and the fees and expenses of any experts.⁸

The arbitrators may be chosen from a list of arbitrators established by the CCJA and updated yearly.⁹ Article 49 of the OHADA Treaty, which deals with the status and the immunities and privileges of the organization, contains an unusual provision according to which any arbitrators who have been designated by the CCJA enjoy diplomatic privileges and immunities in the exercise of their functions.¹⁰

The applicable procedural rules are those contained in the CCJA Rules.¹¹ In the event that the Rules are silent on a particular point, the applicable rules are those agreed by the parties and if they fail to make such agreement, then the rules are selected by the arbitral tribunal. The tribunal must apply the substantive law chosen by the parties. If the parties have made no such choice, the tribunal must apply the law designated by the conflict of laws rule deemed most appropriate in the circumstance, taking into account any relevant customs of international trade. Also important to these issues is the fact that the tribunal may appoint one or several experts, define their assignments, receive their reports, and hear them in the presence of the parties or their legal advisers.

Unless otherwise agreed by the parties, the tribunal may order any provisional or interim measures of protection during the course of an arbitral proceeding. If an enforcement order is necessary in relation to the implementation of such measures, it may be applied for immediately, in proceedings before the President of the CCJA or the specially delegated judge.

If the need arises at a time when the case is not yet before the tribunal, or in exceptional situations of urgency thereafter, the parties may apply to the national courts for provisional or conservatory measures. In such an event, the parties must inform the CCJA of the application and of any measures that are ordered by the national court, and the CCJA must in turn inform the arbitral tribunal.¹²

Before they are signed by the tribunal, drafts of all awards on jurisdiction, partial awards which put an end to the proceedings, and final awards are to be submitted to the CCJA for review. Other awards are not subject to review, but are nonetheless sent to the CCJA for informational purposes. Except otherwise agreed upon by the parties, and subject to such agreement allowed by the applicable law, reasons shall be given for all awards.

When it reviews a draft award, the CCJA may only propose purely formal modifications. If the award is a final award, the CCJA advises the tribunal of the final amount of the costs of arbitration and determines the amount of the arbitrators' fees. The final award must indicate the costs of arbitration and determine in what proportion they are to be borne by each of the parties.

If there are three arbitrators, the award may be given by majority vote. If there is no majority, the award is given by the President of the tribunal alone. Any separate or dissenting opinion may be attached to the award at the request of the arbitrator concerned. The award must be signed by the arbitrators.

Once the costs of arbitration have been paid in full, the Secretary-General delivers the signed award to the parties. Supplementary copies certified as true by the Secretary-General shall, at any time, be delivered to the parties who request such; copies requested for parties outside the particular arbitration will not be honored.

III. The CCJA's Role After the Award is Rendered

Arbitral awards rendered under the CCJA Rules are deemed to be final and binding and have *res judicata* effect in the territory of all the Member States, with the same authority as judgments rendered by the national courts, and they may be enforced in the territory of any Member State.

Usually, the post arbitral process is not organised by institutional arbitration rules since it mostly concerns national courts. However, with regard to the double function of the CCJA, the Treaty and the CCJA Rules contain provisions related to recourses against the award and enforcement of the award. The Court shall perform these jurisdictional functions in its ordinary contentious composition and in accordance with the procedure provided for this purpose.

A. Recourses against the award

Three means of recourse are recognized against a CCJA award. These are challenges of validity, recourse to revision, and opposition by a third party. Ordinary appeals are not available against CCJA arbitral awards. Instead, if a party intends to challenge the recognition of the award and its *res judicata*, it does so in proceedings before the CCJA. These appeals may be filed within sixty days after issuance of the award and its delivery to the parties.

The only grounds upon which a challenge of validity proceedings may be based are the following:

- if the arbitral tribunal ruled without an arbitration agreement or on an agreement which is void or has expired;
- if the arbitral tribunal ruled without conforming with its term of reference;
- failure to comply with due process; or
- if the award is contrary to international public policy.¹³

These grounds are more limited than those listed under the Arbitration Uniform Act, which allows setting aside proceedings on all of these grounds as well as if the award does not contain reasoning or if the tribunal has been improperly constituted.¹⁴

If the CCJA finds that the challenge to the validity of the award is well-founded, it will declare the award null and void. It may then evoke and rule on the substance if the parties have allowed it to do so. Otherwise, either party may request a resumption of the arbitral proceedings.

In addition to the challenge of validity, a party may request that the award or judgment of the CCJA be re-examined on its merits following the setting aside of the award. Such a request is admissible only in the event of discovery of a fact which may have had substantial influence on the decision in question and which was unknown to the tribunal or the CCJA and to the party making the request at the time of issuance of the decision.¹⁵

Third party opposition of awards and CCJA judgments (where the Court has ruled upon the merits following the setting aside of the award) is also possible in the event that a third party who has not been joined to the proceedings considers that the award or judgment is prejudicial to its own rights.¹⁶ It is to be noted that recourse to revision and third party opposition are filed before the CCJA and not before the arbitral tribunal as under the Arbitration Uniform Act.¹⁷

B. Enforcement

In conformity with the Treaty, CCJA arbitral awards shall have final and conclusive authority in the territory of each Member State. Such awards may be enforced and executed by an order of exequatur. Only the CCJA has jurisdiction to pronounce an order of exequatur.¹⁸

The exequatur is requested by petition addressed to the Court. Enforcement orders are issued by the President of the CCJA or a specially delegated judge. This procedure is not after full arguments on both sides (it is *ex parte*). Where the exequatur is refused, the petitioner may seize the Court of its claim and notify the other party so that it may participate in the proceedings.

If the enforcement order is granted, the applicant shall notify the adverse party of this order. The adverse party may, within fifteen days of notification, file an opposition with one of the jurisdictional ordinary sessions of the Court, which shall hear full arguments from both sides in conformity with its rules of procedure.

If the applicant does not file a timely opposition against the order granting exequatur, it is unable to challenge the validity of the award even if the two months have not expired. The reason is that the grounds for refusal of exequatur and those for challenging the validity of the award are the same.

When an enforcement order is granted, the award is enforceable in all Member States, although it will be necessary to have the award stamped as enforceable by the national authorities of the State where enforcement is sought.

In fact, the Secretary General of the Court shall deliver to the party who requests a copy of the award certified as true to the original deposited, on which shall figure the exequatur attestation. The attestation shall state that the exequatur has been granted to the award, depending on the case, either by an order of the President of the Court and which has become final in the absence of opposition made within fifteen days, by a Court judgment rejecting such an opposition, or by a Court judgment invalidating a refusing exequatur.

The national authority appointed by the State where enforcement is sought, based on a certified true copy of the award annexed to an attestation of the Secretary General of the Court, attach an executory clause such as is in force in the said State. This is, however, a mere formality which cannot be refused.

Conclusion

Until 1999, very few of the OHADA Member States had legislation specifically relating to arbitration, and not all of those that did had modern legislation on the subject. OHADA has completely changed the situation and it is now possible for parties to a contract to include an arbitral clause providing for arbitration proceedings to take place in any one of the Member States, with the knowledge that a modern law will apply.¹⁹

The basic principles of CCJA arbitration are set forth in the Treaty.²⁰ The CCJA Arbitration Rules, the rules of procedure of the CCJA, and the internal rules of the CCJA in arbitration proceedings complete the substantive and procedural law of CCJA arbitration.

As we have seen, CCJA arbitration is unique because of the double function of the Common Court which acts like an arbitration Center and like a state court. This originality has procedural consequences, but the principal advantage is that the system can give more security since the entire process is controlled by one institution which can make decisions enforceable in all Member States.

Summary

The OHADA Treaty provides that the CCJA has two types of functions: judicial and arbitral. In its judicial capacity, the CCJA is the sole supranational court. Its purpose is to avoid the risk of conflicting interpretations of the Uniform Acts by the supreme courts of the various Member States, and to achieve a uniform judicial interpretation of the Treaty, any regulations applying the Treaty, and Uniforms Acts.

CCJA arbitration is one of the legal reforms being taken by sixteen African States to enjoy legal and judicial security. The achievements of OHADA are a result of strong political will of the Member States to create and update an African system of law.

With these considerations, CCJA arbitration appears as a unique institution which combines the advantages of arbitration and corrects its weakness by providing effective enforcement in all Member States. The system is original and useful for promoting arbitration on the regional level.

* Marie-Christine CIMADEVILLA & Amadou DIENG are Members of the Africa Committee and Paris-based lawyers of the CIMADEVILLA law firm

1 Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Federal Islamic Republic of the Comoros, Congo, Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, and Togo.

2 Judge Kéba MBAYE. President of UNIDA (Association for a Unified System of Business Laws), Honorary Vice –President of the International Court of Justice, Former President of the Steering Committee responsible for the implementation of the OHADA Project.

3 Article 1 of the Treaty

4 The Uniform Act of Arbitration Law and CCJA Arbitration Rules were both signed on 11 March 1999.

5 In this way the CCJA arbitration system looks like ICSID arbitration.

6 This particularity can be considered as an advantage or a disadvantage.

7 Candidates for election must be either judges, professors of law or practising lawyers from any Member State, with a minimum of fifteen years of professional experience. No State may nominate more than two candidates, and the CCJA may not have more than one judge from a particular Member State at any one time. The judges are elected by absolute majority of votes in the Council of Ministers.

8 The arbitrators' fees and the CCJA's administrative cost are determined on the basis of the amounts in dispute, in accordance with a scale drawn up by the CCJA in General Assembly and approved by the Council of Ministers by Decision No 004/99 of 12 March 1999.

9 In drawing up this list, the Court may consult with experts in the field of international commercial arbitration. The current list contains some 70 arbitrators both African and other nationalities. This list is not imperative.

10 These privileges are granted to all arbitrators, those who are designated by the parties or/and by the Court.

11 The CCJA Rules are in many ways very similar to the ICC Rules, although there are some differences.

12 This is a very important issue because the decision of the competent national court is at least to be challenged before CCJA

13 These grounds are the same for the refusal or the grant of exequatur. When a challenge of validity is filed, exequatur cannot be granted for the same award. In such case, the two petitions shall be consolidated.

14 As regards absence of reasoning, it is logical that this should not be a ground for challenging the validity of a CCJA award, since CCJA Rules do not necessarily require a reasoned award. But if the agreement of the parties or the applicable law requires reasoning, any absence of reasoning could be considered as a failure by the tribunal to comply with its term of reference.

15 Article 49 of the CCJA Rules of Procedure.

16 Article 47 of the CCJA Rules of Procedure.

17 With these recourses the arbitration proceedings is cancelled into a judicial one.

18 Article 25 of the OHADA Treaty.

19 All types of arbitration can be done in OHADA area. Ad Hoc arbitration under the Arbitration Uniform Act or Institutional arbitration under the national arbitration centers which exist in some Member States or under the regional Center – CCJA-

20 Title IV; Article 21 to Article 26 OHADA Treaty

REGIONAL

Commercial Law Training Celebrates 5 Years

Leigh Middleditch

This is the fifth anniversary of one of ISLP's most successful programs - the Commercial Law Training Program for historically-disadvantaged African attorneys. In late 2003, at the request of the South Africa Black Lawyers Association and the Senior Lawyers Division of the American Bar Association, ISLP together with the South African firm Brink Cohen LeRoux, developed a Commercial Law Training Program (CLTP) for South African attorneys from historically-disadvantaged communities. The program's immediate objective was to enhance these attorneys' practical, real-world skills in areas where they have had little opportunity to practice. The overall goal of the program was to expand the opportunities for attorneys and their client-entrepreneurs in disadvantaged communities to participate more fully in their country's commercial and civic life.

The CLTP was first presented in July 2004 as an eight-week program in Johannesburg. It consisted of 35 hours of practical training provided by four experienced commercial law practitioners from the United States serving on a *pro bono* basis. About 40 South African attorneys enrolled in this initial "pilot" program.

Following this initial success, the CLTP has since been presented each year and to date has trained over 300 South African attorneys in Johannesburg, Durban, and Cape Town. The South Africa program has grown to 50 hours of training over a 12-week period with instruction and interactive workshops in topics such as commercial contract drafting, commercial transaction negotiations, forms of business organization and governance, business start-up and capital-raising techniques, business acquisitions, and commercial law firm management.

Over the course of the program, ISLP has utilized 15 experienced practitioners from the United States, Canada, and the United Kingdom as volunteer instructors - with many enjoying the experience so much that they have returned multiple times. The ISLP attorneys are joined by South African commercial law attorneys as co-instructors, also on a *pro bono* basis. Instructors also provide ongoing counseling and mentoring to interested participants. Keith Watson, an attorney with the U.S. firm Wiley Rein manages the program in cooperation with several Johannesburg attorneys and the Black Lawyers Association's legal education center. In 2007, ISLP presented similar commercial law training programs in Tanzania and Botswana, co-sponsored by their country's law society (akin to a bar association in the United States). The program was repeated in Botswana in 2008.

The CLTP continues to receive high marks from the attorneys participating in the trainings, as well as the local co-instructors and law societies. ISLP is now considering an expansion of the program to other African countries as well as additional initiatives to enhance commercial law opportunities for historically-disadvantaged African attorneys.

THANK YOU - ISLP would like to recognize these fantastic volunteers who have blazed the CLTP trail - teaching in Africa all 5 years since the project started: Perry Irvine – CA; Kevin Salisbury – NJ; Steve Spronz – CA; and Jim St. Clair – WV

Thank you to all, and to our amazing CLTP coordinator, Keith Watson.

NIGERIA

Section Chair, Aaron Schildhaus, in Lagos Nigeria: Building Relations with the Nigerian Bar Association

Edna Udobong*

The Nigerian Bar Association (NBA) held a successful and impressive 2008 Bar Dinner event on December 19th in Lagos, Nigeria. The annual dinner took place at the Lagoon Restaurant, Ozumba Mbadiwe, Victoria Island, Lagos, with a theme *Law and Society in the Face of the Global Economic Recession*.

Here is a summary report, from the NBA, on Aaron's visit:

"The occasion attracted distinguished members of the legal community worldwide and from various professions. It was originally planned for just 250 participants, but had well over 350 eminent guests in attendance—all of whom were efficiently and duly catered for.

Of the major highlights of the occasion was the presence of the world-renowned American Bar Association Section of International Law Chair, Mr. Aaron Schildhaus, who was the guest speaker at the event. Mr. Schildhaus, a highly reputable international law practitioner (with practices in Washington D.C., Europe, Russia, and Asia,) currently oversees thirteen divisions and sixty committees of the American Bar Association (ABA). He is known for having a great interest in Africa and has advanced numerous initiatives in the ABA for the development of the Rule of Law and economic growth initiatives. Mr. Schildhaus insightfully addressed the topics of 'Law and Society in the Face of the Global Economic Recession' introduced inter-alia and the concept of 'Just Rule of Law' as an antidote to the economic recession in emerging economies, both of which justifiably earned him a standing ovation. The full text of his speech was reproduced in the 2008 Yuletide edition of the Premier Bar Briefs—which is, as usual, being distributed free—courtesy of TRILPLAW—and with our best compliments.

Mr. Schildhaus was in Nigeria on our invitation, from the 17th to the 21st of December 2008. During this period, he held fruitful deliberations with the NBA President, Mr. Olurotimi Akeredolu, SAN., the Lagos State Attorney-General/Commissioner for Justice, Mr. Supo Shasore SAN., alongside the Solicitor-General, Mr. Femi Pedro and various others. He also held a number of interviews with the press. Mr. Schildhaus' schedule was on the whole a purposeful, multi-impact one.

Beyond the gaiety, pomp, and pageantry of the event, the 2008 Lagos Bar Dinner was (with Mr. Schildhaus' invaluable input) an exceptional one with a memorable, historic difference. For the first time in the history of the Premier Branch, an enduring legacy was bequeathed which would impact not just those of us gathered as members of the Lagos Branch today, but would for generations hereafter; continue to positively shape the course of events within the Lagos Bar and beyond. The 2008 NBA Lagos Bar Dinner culminated in a significant, mutually-rewarding alliance between the American Bar Association Section of International Law on the one hand, and both the National Body and the Lagos Branch of the Nigerian Bar Association on the other. Details of this alliance are contained in a Memorandum of Cooperation between the said parties.

Basically, the Memorandum establishes various spheres of collaboration including inter alia, production of joint programmes in Africa and the United States, promotional support for ABA Conferences by the NBA and vice versa, attendance incentives and special recognition of NBA leaders and/or their designees at such Conferences and vice versa, and associate membership of the ABA with all the advantage associated therewith.

On the whole, the 2008 NBA Lagos Bar Dinner was a resounding success, leaving in its wake an enduring legacy which would long live after us all.

For the opportunity to serve and positively impact the course of events within the NBA through this epoch-making event, our profound gratitude goes to Mr. Bola Baderinwa, our amiable Chairman of Chairmen—who stood solidly behind us to ensure we gave nothing

short of our best. In the same vein, we are most grateful to Mrs. Edna Udobong (ABA's genial Africa/Eurasia Division Chair), NBA President Olurotimi Akeredolu SAN., Chief Wole Olanipekun SAN, Chief Obi Okusoga SAN., Mrs. Dorothy Ufot and the many others –too numerous to mention -whose participation in no small measure, ensured an overwhelmingly successful event. And moreover, to you –distinguished members of the Premier Branch of the NBA, we say a big thank you. Thank you all –very much!"

It is important to note that over fifty (50) members of the legal profession in Nigeria expressed interest in joining the ABA Section of International Law during Aaron's visit to Nigeria. We expect that possibly ten (10) new members from Nigeria would attend the 2009 Spring Meeting in Washington this April. Membership issues are being coordinated with the Section through Ms. Angela Benson.

Aaron also toured the Rule of Law program of the Justice Research Institute led by Babatunde Irukera, Esq. and was briefed by Akin Akinbote, Esq. about the Young Lawyers Program at the Lagos Branch of the NBA. Akin and Babatunde are members of the ABA-SIL Africa Committee Steering Group and the Nigerian Bar Association, and provided support during the Section Chair's visit.

For Africa Committee members, the good news is that this event has opened the door for more collaborative initiatives between Bar Associations in Africa and the ABA Section of International Law.

My profound gratitude goes to NBA leadership, particularly, Mrs. Olufunmi Oluyede - Chairperson, Planning Committee, NBA Lagos Bar Dinner 2008 - for coordinating a successful event and for the warm welcome extended to our Section Chair in Nigeria.

My sincere thanks to Section Executive Director Leanne Pfautz for the generous support and cooperation that she provided from Washington to make Aaron's visit a success. Please note that Leanne is always available to help.

Links to newspaper reports of the visit will be sent to the Section as soon as they are published in Nigeria. I will not forget to add clips of photos where Aaron made some impressive steps of Africa traditional dance. That also earned him the title of "Chief" to be crowned shortly.

Please keep the lights shining on Africa!

* Chair, Africa and Eurasia Division

POLITICAL

Trade Policy Toward Africa: What Will the Obama Administration Bring to the Table?

Victor S. Mroczka

When President-elect Obama takes office as the 44th President of the United States, he will face enormous problems and challenges. There was much speculation in the legal, trade, and general media that when Rep. Xavier Becerra turned down (and former mayor Tom Kirk accepted) the nomination to become President-elect Obama's United States Trade Representative, that trade would not be a priority issue for the incoming administration. The popular thinking is that working with a possibly protectionist Congress and the challenges of addressing the current economic crisis, there would be no room for trade in the near future. If I may be so bold, to view this as an either-or situation (i.e., economy or trade), is too simplistic in this day and age.

While it is true that the challenges presented by the economic crisis will consume much of the early energy of the Obama Administration, this does not mean that trade, particularly Africa trade, will be left unaddressed. First of all, trade is one of the ways in which the Obama Administration will proceed in addressing the economic crisis. Put simply, without trade, the situation facing the United States and the rest of the world will be worse off. To neglect trade issues would be irresponsible for anyone trying to stimulate an economy and create jobs and the Obama Administration is certainly not going to forego opportunities that benefit the United States economy and its stakeholders.

However, in terms of new initiatives, African stakeholders will have to wait until the Obama Administration has its Africa-specific officials in place before consideration of anything new. This will most likely not occur until late 2009 at the earliest. In the meantime, there already exist mechanisms by which the Obama Administration could enhance its relationship with various African stakeholders. For example, bilateral forums such as the Trade, Investment and Development Cooperation Agreement (TIDCA) signed in July 2008 could be used to continue to build the U.S.-Southern Africa Customs Union (SACU) trade relationship. Regional forums, such as the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC), can continue to be utilized as effective communication forums to address multilateral African trade issues. For country-specific and rapid-response trade issues, the United States can utilize its proprietary communications channels in the form of diplomatic exchanges and the USAID trade hubs throughout Africa. Given the popularity of President-elect Obama in the region, the United States has some rare built-up goodwill in the region from the start and this should not be squandered.

Therefore, the future of African trade does not look as bleak as many would have us believe. Working hand-in-hand with African stakeholders, whether through existing or new initiatives, will definitely be pursued by both sides as part of striding efforts to not only widen, but deepen the U.S. – Africa trade paradigm.

OTHER NEWS AND USEFUL INFORMATION

SPRING 2009 MEETING UPDATE

April 14 –April 18, 2009

The Committee is sponsoring two programs addressing the following topics:

- Developments in Oil & Gas in Africa (Jacob Saah)
- Human Rights Situation in Zimbabwe (Laura Young)

Other Projects

- Outreach efforts to work with local human rights groups and law societies in Kenya and Zimbabwe in response to crises in each country
- Advice and consideration of the adoption of the Western Sahara report by the Committee

Committee Leadership Update

The Chair and Steering Committee of the ABA-SIL Africa Committee heartily welcome Babatunde Irukera of the Simmonscooper Partners Law Firm in Lagos, Nigeria as a new Vice Chair. Before his appointment, Babatunde had been an active member of the Nigeria Working Group and of the Africa Committee. Congratulations Tunde!

Join the Africa Committee:

https://www.abanet.org/ome/front/form/ome_main.cfm?JoinType=m&sc=RMM8ILEF

Committee Website: <http://www.abanet.org/dch/committee.cfm?com=IC805000>

Conference Calls: dial-in information is provided a few days prior to the conference call

February 2009 Call: Feb. 18 at 1pm

March 2009 Call: Mar. 18 at 1pm

Useful links

Ghana Working Group: <http://www.abanet.org/dch/committee.cfm?com=IC550555>

Liberia Working Group: <http://www.abanet.org/dch/committee.cfm?com=IC550553>

Sierra Leone Working Group: <http://www.abanet.org/dch/committee.cfm?com=IC550554>

The Liberia Working Group also works with the International Legal Resource Center in implementing its projects. If you have particular subject matter expertise, you can become a member of the ILRC database by registering at www.abanet.org/intlaw/intlproj/ilrc