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Arbitrators' duty of independence and impartiality: an analysis of the Nigerian Trial Court's decision in Global Gas & Refinery Limited v Shell Petroleum Development Company

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One of the cardinal pillars of arbitration is the independence and impartiality of the arbitral tribunal. It is for this reason that an arbitral award may be subject to challenge if there is evidence to show that any member of the arbitral tribunal was one way or another linked to one of the parties to the dispute in a manner that questions this fundamental expectation.

Quite recently, the High Court of Lagos State (the "Court") delivered its judgment in the case of *Global Gas & Refinery Limited ("Global Gas") v Shell Petroleum Development Company ("Shell")*, where it set aside an award on the ground that the presiding arbitrator misconducted himself, having failed to recuse himself from the proceedings upon being challenged by Global Gas.

In this note, we will consider the pertinent issues dealt with by the Court – the duty of disclosure owed by the arbitral tribunal; challenging an arbitrator's appointment on the grounds of bias and the arbitrator's response; the effect, if any, which an arbitral institution's decision should have on the decision reached by the court. We will also assess the implication of the decision on Nigeria as a destination for international arbitration.

Brief summary of the case

Further to the dispute resolution clause in the Gas Processing Agreement (GPA) executed between Global Gas and Shell, Global Gas commenced arbitration against Shell when a dispute arose under the GPA. Shell counterclaimed. The arbitration was administered by the International Chamber of Commerce ("ICC") and governed by the Arbitration Rules of the ICC.

During the arbitration proceedings, Global Gas challenged the appointment of the presiding arbitrator and communicated its challenge to the ICC which was dismissed after considering the merits of the challenge. The tribunal then delivered its final award. Global Gas subsequently filed the suit at the Court seeking to, *inter alia*, set aside the final award, alleging misconduct under Section 30 of the Arbitration and Conciliation Act ("ACA"). The Court set aside the award on the ground that the arbitrator's non-disclosure amounted to misconduct under the ACA[1] and specifically held that *"…it does not lie in the Arbitrators to raise a defence or put the process in ridicule. What it is* [sic] *expected was to have simply recluse* [sic] *himself, even when the system absolved him. This is the standard and nothing more is required."*

Analysis of the court's judgment

In what is to follow, we will discuss some of the pertinent issues that were considered by the Court.

a. Duty of disclosure owed by the Arbitrator and the effect of non-disclosure

The Court held that the facts presented a case which required the presiding arbitrator to disclose his relationship with Shell, to the parties and that by failing to make the disclosure, the presiding arbitrator fell *"… short of the required standard and [this was] therefore a solid ground to set aside* [the] *award."*

Indeed, the ACA, the principal law that governs arbitration in Nigeria, imposes a continuing duty of disclosure on arbitrators.[2] The ACA, however, makes no clarification on what relationships or situations will require disclosure in any given circumstance. It is, therefore, clear that whether or not there is a situation requiring disclosure will be left to the discretion of the supervising court upon the consideration of the facts and circumstances of the particular case.

The above notwithstanding, the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") have been widely accepted as a resourceful guide for determining situations that will require disclosure in arbitration proceedings. The 2015 International Arbitration Survey[3] noted that most arbitration users perceive the IBA Guidelines as effective and have been generally accepted within the arbitration community.[4] As such, the Court ought to have had recourse to it in the judgement but, regrettably, did not.

We consider it baffling that while Shell's counsel relied upon the IBA Guidelines in presenting its arguments before the Court, the Court did not, at the very least, mention the IBA Guidelines in its judgment but went on to determine that there were situations of conflict which the presiding arbitrator ought to have disclosed. While the IBA Guidelines are not binding on the Nigerian courts, it is indeed a persuasive authority that guides decision-makers (including local courts) in the determination of conflicts of interests in other jurisdictions.[5] As is the position under Nigerian law, where our laws are silent, foreign law principles can be resorted to especially in transactions that are peculiar to that system and alien to the Nigerian system or way of life, for example, arbitration, as in this case.[6] More so, Nigerian courts are obliged to consider all issues placed before them, and in the clearest cases.[7] Failure to do so could be said to be tantamount to a denial of justice or fair hearing.[8] It was therefore expected that the Court should have considered the IBA Guidelines in its judgment.

1. *Section 30(1) of the ACA provides that where an arbitrator has misconducted himself, the court may, on application of a party, set aside the award.*
2. *See Section 8 of the ACA.*
3. *Conducted by White & Case and Queen Mary University.*
4. *Margaret Moses, The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges, accessible via <http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/?doing_wp_cron=1596127087.9430179595947265625000> accessed on 30 July 2020.*
5. *The IBA Arbitration Guidelines and Rules Subcommittee, Report on the reception of the IBA arbitration soft law products, September 2016.*
6. *B. J. Export & Chemical Company Limited v Kaduna Refining & Petro-Chemical Company Limited (2002) LPELR 12175(CA), Omega Bank Plc. v. Govt. Ekiti State (2007) 16 NWLR (Pt. 1061) 445 at 468.*
7. *A.G. Leventis Nig. Plc. v. Akpu (2007) 6 S.C. (Pt.1) 239 at 252 - 253 Lines. 30-10.*
8. *Odetayo v. Bamidele (2007) LPELR-2211(SC)*

Moreover, the Court failed to avert its mind to the fact that even though failure to disclose may be considered in assessing whether a challenge to an arbitrator's independence is well-founded, non-disclosure cannot, in itself, make an arbitrator partial or lacking in independence. Indeed, only the facts or circumstances that [s]he failed to disclose should do so.[9] The Court's approach that the mere non-disclosure of a situation of likely conflict, in and of itself, is a misconduct is therefore flawed and not supported by any statutory or judicial precedent.[10] In *Triana Ltd. v. U.T.B. Plc*[11] the Court of Appeal was called upon to set aside an arbitral award on the ground that one of the arbitrators failed to disclose a situation of conflict. After carefully considering the facts and circumstances before it, the Court of Appeal concluded that "*no matter how the definition of misconduct is over stretched, this situation cannot be accommodated.*"

b. Challenging an arbitrator's appointment on the grounds of bias and the arbitrator's response

9. Part II (5) of the IBA Guidelines.
10. Misconduct is not defined in the Act. But the Supreme Court has, in Taylor Woodrow (Nig.) Ltd. v. Suddentsche Etna-Werk GMBH (1993) 4 NWLR 127, spelt out some conduct that would amount to misconduct under Nigerian law, including where the arbitrator has been bribed or corrupted and where the arbitrator or umpire has breached the rules of natural justice.
11. (2009) 12 NWLR (Pt. 1155) 313 C.A.

Commensurate to the arbitrator's duty to disclose any circumstance likely to give rise to justifiable doubts, is the parties' right to challenge the appointment of an arbitrator.[12]

The Court in its reasoning rightly alluded to the fact that "*the soul of arbitration lies in its impartialities*", as an objection based on bias could have the unwanted effect of casting doubts on the entire proceedings. Quite strangely, however, the Court went ahead to hold that in the event of a challenge to an arbitrator's propensity for partiality, it does not lie with such arbitrator to put up a defence, but rather, [s]he must, as a matter of expediency, recuse himself from the entire proceedings. This decision, if unchallenged, would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by parties to contracts.[13] It simply means that any and every party can, in a bid to either delay or scuttle arbitral proceedings, bring up any objection as to the appointment of an arbitrator on the grounds of likelihood of bias and straightaway, without considering the merits of the challenge, such arbitrator must resign. This definitely could not have been the intention of the drafters of the ACA or international guidance materials in this respect (like the IBA Guidelines). The position taken by the court is also not in consonance with the provision of Section 9(3) of the ACA which provides that *"unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge".* The word "unless" therein connotes liberty as against the mandatory withdrawal view expressed by the Court.

12. Section 8(3) and 9 of the ACA.
13. See L.S.D.C. v. STAM (1994) 7 N.W.L.R. (Pt. 358) 545

c. The effect, if any, which the arbitral institution's decision should have on the decision reached by the Court

In its judgment, the Court did not also consider the decision of the ICC, which the parties freely chose as the administering authority for the arbitral proceedings, on the challenge of the presiding arbitrator. Whilst it is acknowledged that the position taken by the ICC is, in itself, not necessarily binding on the Court, the ICC remains the administering authority. As such, it is our view that the court should ideally have not only considered the decision of the ICC but should have also placed some weight on the decision reached by the ICC in line with parties' freedom of contract and the autonomy of arbitral proceedings.

The implication of the decision on Nigeria as a destination for international arbitration

There is fear among the arbitration community that the decision of the Court could affect the reputation of Nigeria as a jurisdiction that is pro-arbitration. This may be unwarranted. The Nigerian courts have continued to uphold arbitration clauses,[14] stay proceedings pending reference of the dispute to arbitration and more often than not, enforce arbitral awards.

Furthermore, it is also important to note that Global Gas made an application for a consequential order, for the determination of the dispute by resorting to litigation rather than arbitration. The Court, in refusing this application, held that *"the question of allowing the award to be set aside and a new panel in accordance with the agreement of the panel* [sic] *be set up and the parties agree on the persons of their chosen forthwith, the court at this stage cannot interfere in the agreement made and established by the parties to guide them."* It is therefore our view that this was an isolated case of an error in law and fact, and nothing more, which could be corrected on appeal.

Conclusion

Following a careful review of the judgment delivered in the suit, we believe that the decision of the Court was reached per incuriam and stands a strong chance of being overturned on appeal. The decision is not reflective of the general attitude of the Nigerian courts towards arbitration.

14. Sino-Afric Agriculture & Ind Company Ltd & Ors v. Ministry of Finance Incorporation Anor (2013) LPELR-22370(CA)