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Global Gas and Refinery Limited and Shell Petroleum Development Company: Is Nigeria Pro or Anti-Arbitration? The Lagos High Court Says That When Challenged, an Arbitrator Should Just Resign

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The ruling given on 25 February 2020 ('Ruling') by the High Court of Lagos State in Nigeria ('Lagos High Court'), setting aside an award in the case of Global Gas and Refinery Limited ('Global Gas') and Shell Petroleum Development Company ('Shell') on the ground of arbitrator non-disclosure, raises concern to the arbitral community both in Nigeria and abroad. The award was in respect of a dispute arising from an agreement governed by Nigerian law. The proceedings were a domestic arbitration, since both parties were Nigerian entities, and the agreement contained an arbitration clause providing for any dispute to be administered by the International Chamber of Commerce ('ICC') under the ICC Arbitration Rules.

In the Ruling, the Lagos High Court held that the presiding arbitrator's non-disclosure amounted to misconduct, which led to the set aside of the arbitral award, even though a challenge on the same grounds had previously been submitted to the International Court of Arbitration of the ICC ('ICC Court'), which had dismissed the challenge.

Facts of the case

The brief facts of the case are discerned from the Ruling, which is not publicly available, but that the author had access to. This includes the facts retained by the Lagos High Court on the issue of the non-disclosure by the presiding arbitrator.

Global Gas commenced ICC arbitral proceedings alleging that Shell had failed to supply wet gas to it in accordance with the terms of a gas processing agreement dated 15 March 2002.

During the proceedings, Global Gas challenged the appointment of the presiding arbitrator on the grounds that he had failed to disclose information which led to doubts as to his independence and impartiality. This was argued because the presiding arbitrator allegedly[1)] prepared an expert opinion in a previous litigation matter involving Shell.

The ICC Court reviewed the challenge and dismissed it. The arbitration continued and was concluded with an award by the majority of the tribunal dismissing Global Gas's claims.

Global Gas then proceeded to the Lagos High Court seeking orders setting aside the final award dated 30 May 2017, refusing recognition and enforcement of the final award plus other consequential orders. The grounds for the application included a claim of misconduct of the majority of the arbitral tribunal in the award.

Global Gas alleged that the presiding arbitrator and the other member of the tribunal that constituted the majority in the arbitral tribunal were both members of the board of governors of an arbitration institution of which Shell's lead counsel was the chair, and that this body was formed while the arbitration was pending, with no notice or disclosure being made to any of the parties. Global Gas had challenged the appointment of these arbitrators for this reason in the arbitration, but the ICC Court did not uphold the challenge.

Global Gas argued that both the above situations amount to misconduct under Section 30 of the Nigerian Arbitration and Conciliation Act.

The Decisions of the Lagos High Court

The Lagos High Court in its Ruling was of the view that the main challenge to the award was the asserted bias of the president of the arbitral tribunal. The Lagos High Court noted that the president of the arbitral tribunal had a relationship with Shell, which he had failed to disclose both to the parties and to the ICC.

The Lagos High Court held that once an arbitrator had been challenged, his or her obligation is to resign and not resist the challenge. The Lagos High Court held that "*when an objection is raised on the basis of bias, it casts doubts on the process itself, notwithstanding whether the panel was constituted or not by ICC. This being so, the President of the* [arbitral tribunal] *must exercise a duty of care towards all the cases that are before them* [sic]. *Therefore, it does not lie in the Arbitrators to raise a defense or put the process in ridicule. What is expected was to have simply recluse* [sic] *himself* […]."

Why the decision of the Lagos High Court is not correct

This position is at odds with international practice standards, which are set out in the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines'). Even though the arbitration was domestic and the IBA Guidelines were not binding on the proceedings, Shell's counsel relied upon them during the set aside proceedings as a guidance on international best practices in disclosure requirements.

It appears that the Lagos High Court was not persuaded that the IBA Guidelines or international standards have any relevance to domestic proceedings, as the IBA Guidelines were not considered or otherwise referred to in the Ruling. Rather, the Ruling only referred to Section 8 of the Nigerian Arbitration and Conciliation Act, which states that an arbitrator has an going obligation to disclose any circumstances that may give rise to any justifiable doubts as to his/her impartiality or independence.

In determining whether non-disclosure constitutes a breach of an arbitrator's conflict of interest

obligations, as recently as 2018 in *Halliburton Company v Chubb Bermuda Insurance Ltd & Ors* [2018] EWCA Civ 817 (19 April 2018) ('Halliburton case'), the English Court of Appeal provided guidance as to how arbitrators' conflicts of interest are to be determined. The English Court of Appeal noted that the determination should follow a two-step process. First, one should determine whether disclosure ought to have been made at all; second, one should consider the significance of that non-disclosure. Although English decisions are not binding on Nigerian courts, they are of persuasive authority in instances such as this, where there is no direct Nigerian authority on the point. This is even more important where the bias is alleged in setting aside proceedings.

Unfortunately, the Lagos High Court neither considered whether the alleged relationships required disclosure, nor the effect of the non-disclosure on an impartial observer. Its view was that if challenged, in order to maintain the integrity of the arbitration process, an arbitrator should just resign rather than resist the challenge.

Apart from this not having any basis in legal jurisprudence, the '*if challenged, just resign*' solution advocated by the Lagos High Court also results in a very practical consideration. If the Ruling is to be followed, the failure of the challenged arbitrator to immediately withdraw will result in any consequent award being set aside. This may result in spurious challenges being submitted for the sole reason of changing an arbitrator with which a party is not happy. This surely cannot be the intention of the challenge procedure.

Furthermore, the Lagos High Court also took the view that the challenged arbitrator had an obligation to disclose these particular facts. However, this position is not supported by reference to the IBA Guidelines. An analysis of Part II of the IBA Guidelines (Practical Application of the General Standards) reveals in its paragraph 4.3.1 that the non-disclosure that the majority of the members of the arbitral tribunal and Shell counsel were members of the board of governors of an arbitration institution should be considered a Green List item. As a result, this does not give rise to a conflict of interest.

The expert opinion given by the presiding arbitrator to the parent company of Shell in another litigation would at worst be an Orange List item as described in paragraph 3.1.1 of Part II of the IBA Guidelines, since depending on when the services were rendered, the relationship would amount to the presiding arbitrator having previously advised or been consulted by an affiliate of Shell in an unrelated matter. From the available data, it appears that the expert opinion was given in a previous litigation, and there was no evidence of an ongoing relationship. Even if this fact should have been disclosed as an Orange List item, nondisclosure in itself cannot be evidence of bias. As stated by the English Court of Appeal in the Halliburton case (paragraph 76), "[n]*on-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required …*" There is no evidence that the Lagos High Court analysed and/or determined that the non-disclosed relationship could and did give rise to doubts as to the impartiality of the majority of the tribunal.

Even where the arbitrator has failed to disclose a disclosable fact, this should not automatically result in the setting aside the award. The two-step approach advocated in the Halliburton case should result first in a determination that the facts of the undisclosed relationship would lead an objective bystander to harbour justifiable doubts as to the arbitrator's independence and impartiality before the award is set aside.

Many parties are negatively impacted when an award is set aside: the parties to the dispute who have expended time and money on putting their case before the arbitrators, and the arbitrators who have also expended their resources in providing a settlement to the dispute. In institutional arbitrations, the arbitral institution which initially reviewed the challenge and rejected it may suffer reputational damage. The confidence of users in the system of arbitration may also be negatively affected by an award that is eventually set aside.

It might have been advisable for the Lagos High Court to give weight to the fact that the institution agreed upon by the parties to administer the arbitration had reviewed the challenge and dismissed it. For as long as this decision stands unchallenged, Lagos cannot claim to be pro-arbitration.

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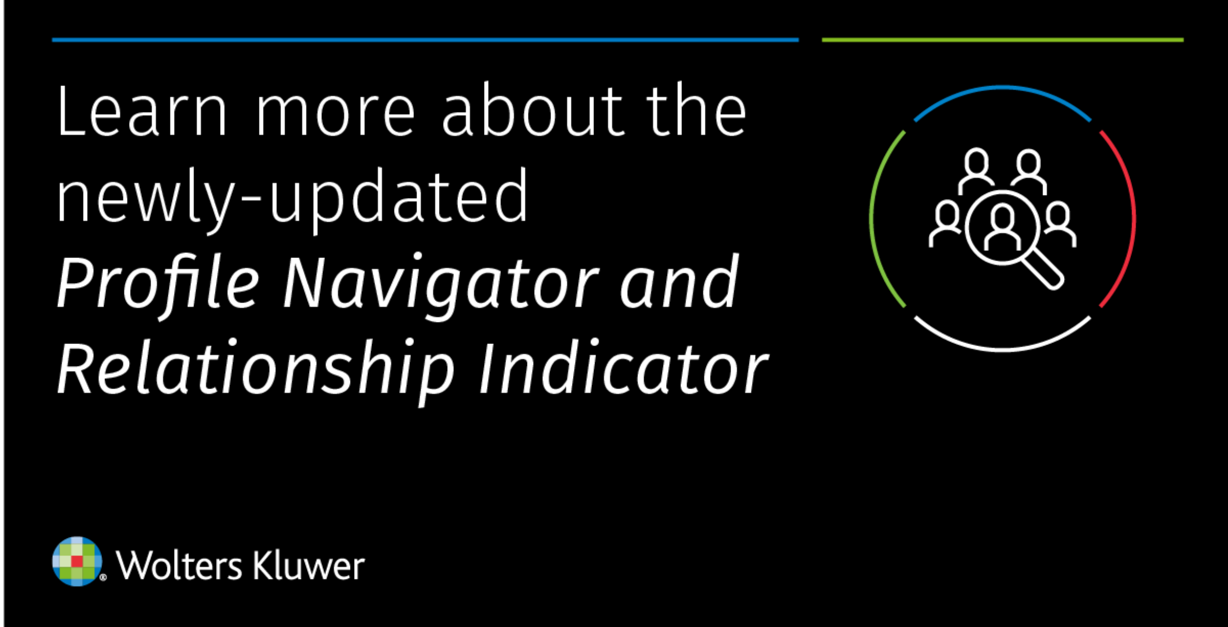

References

?1 As conveyed to the author by the presiding arbitrator, the Lagos High Court's understanding of the facts was "materialy inacurate", "as were the facts placed before the Judge", as the presiding arbitrator made clear that he "has never been instructed as an expert or Counsel by SPDC, Royal Dutch Shell or any Shell affiliate in any matter. At the time of the arbitration, (and since), [he] had no professional or other relationship with either of the parties, either subsisting or prior". The presiding arbitrator also clarified to the author that "this clarification has been sent in a subsequent letter to the ICC Secretariat by the UK lawyers that worked on the case, before the English Courts".

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