The Principle Of Limited Court Intervention Survives In Nigeria … But How Far Will The Courts Go?

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In the course of 2012, a number of injunctions have been issued by Nigerian courts to stop arbitrations commenced by international oil companies against the Nigerian National Petroleum Corporation (NNPC). One of such orders was made *ex parte* by the Nigerian Federal High Court on 4 October 2012 in FHC/L/CS/1043/2012: *Nigerian National Petroleum Corporation v. Statoil (Nigeria) Limited and Others*.

Section 34 of the Nigerian Arbitration and Conciliation Act 2004 ("the ACA") is based on Article V of the UNCITRAL Model Law on International Commercial Arbitration, and it provides that *"a Court shall not intervene in any matter governed by this Act except where so provided in this Act."* There is no provision in the ACA which permits a court to restrain arbitration. In the commentary on the draft text of the *Model Law* provided by the Secretary-General of UNCITRAL, it is stated that the effect of Article V would be "to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law".

In an earlier case decided on 29 February 2012 (FHC/ABJ/CS/774/2011: *Federal*

Inland Revenue Service v. Nigerian National Petroleum Corporation and Others), the Nigerian Federal High Court had held that section 34 of the ACA (Article V of the Model Law) will not preclude a court from restraining arbitration where the allegation is that the matter submitted to the arbitrators is inarbitrable. The Federal Inland Revenue Service had contended that the matters submitted to arbitration raised questions about taxation and were therefore inarbitrable. The Federal High Court agreed, and made orders restraining the arbitration.

Subsequently, in FHC/L/CS/1043/2012: *Nigerian National Petroleum Corporation v. Statoil (Nigeria) Limited and Others*, the Nigerian Federal High Court issued an *ex parte* injunction restraining another arbitration. In this case, the NNPC, Texaco Nigeria Outer Shelf and Statoil (Nigeria) Limited were parties to a Production Sharing Contract. That contract provided that disputes would be resolved through arbitration. When a dispute arose a notice of arbitration was issued by Texaco and Statoil. NNPC subsequently sought an *ex parte* injunction to prevent the proceedings from continuing. It argued that it was in an invidious position because the subject matter of the claims in the arbitration involved taxation, over which the Tax Appeal Tribunal had exclusive jurisdiction, and that the claim was therefore inarbitrable. The FHC accepted the argument and made an *ex parte* order to restrain the arbitration. Texaco and Statoil challenged the *ex parte* order on appeal.

Although section 34 of the ACA (Article V of the Model Law) is clear in its wording, the Nigerian Constitution and other statutory provisions vest the courts with judicial and inherent powers. It has been argued that such powers include the right to grant injunctions. For example, section 13 (1) of the Federal High Court Act 2004 provides that a Federal High Court is statutorily empowered to grant an injunction in cases where it appears to be just and convenient, and the 1999 Constitution vests the superior courts of records with inherent powers, which are considered to include supervisory powers over inferior courts. NNPC argued before the Court of Appeal that an arbitral tribunal is equivalent to an inferior court so that a superior court must have supervisory powers over it. NNPC also argued that the provisions in the ACA cannot always be paramount and that there are instances when the ACA must give way to the inherent powers of the courts and/or other statutory powers.

The Nigerian Court of Appeal did not see any force in these arguments. It held that the legislative intent in the promulgation of section 34 of the ACA is to ensure that

arbitral proceedings are not subject to undue interference by regular courts, and that this is important in order to achieve the purpose of alternative dispute resolution. It held that NNPC could not propound the superiority of the court's jurisdiction over that of the arbitral tribunal in the face of the express wordings of section 34 of the ACA. Section 34 of the ACA is to be interpreted as strictly prohibiting the intervention of the courts in arbitration proceedings except in the limited instances permitted in the ACA itself, and there is nowhere in the ACA where a court is empowered to halt arbitral proceedings through the issuance of an injunction.

This decision will be celebrated by the Nigerian and international arbitration communities. It remains to be seen however if the Nigerian courts will take the next bold step, i.e. overturn a long line of judicial decisions which allow virtually full merits review of an arbitral award on the basis that the arbitrator committed an "error of law on the face of the award". Under the ACA this supposed jurisdiction has been applied to review both domestic awards and international awards where the arbitration is seated in Nigeria.

There is no provision in the ACA which allows an award to be set aside for "error of law on the face of the award". Section 30 of the ACA allows the court to set aside an award on grounds of "misconduct", but it has been held that it is not misconduct on the part of an arbitrator to come to an erroneous decision whether the error is one of fact or law (*Baker Marine vs. Danos & Curole Marina Contractors Inc.* (2001) 7 NWLR (Part 712) 337 at 354 to 355 (Nigerian Court of Appeal) and *Gillepsie Bros & Co v. Thompson Bros* (1922) 13 Lloyds L.R. 519 at 524 (English Court of Appeal)). Nigerian courts appear to have generally assumed that the common law power to review an award on grounds of "error of law" is equally applicable in Nigeria. However, the absence of any provision in the ACA which permits such review, and the effect of section 34 of the ACA, must be that there is no power in Nigerian courts to review an award on grounds of error of law.