Kluwer Arbitration Blog

Finality of Arbitral Awards in Nigeria- Separating Harm from Hubris (Part 1)

Adebayo Adenipekun (Afe Babalola & Co.) · Thursday, January 18th, 2018

A feature of arbitration that makes it appealing to the user is the finality of arbitral awards. Parties are encouraged, upon the advice of counsel to submit to the arbitral process because the end result is final and not subject to appeal. However, the reality as users come to find, is that an award is not always the last piece of the dispute jigsaw. Sometimes, the award is itself a source of dispute which results in applications to annul the award, to wholly or partly set the award aside, to remit portions of it for reconsideration, etc. There is a reasonable fear (and risk) that if parties are increasingly and repeatedly confronted with this harsh reality, arbitration will lose its appeal and users will more readily apply the same suspicions they have of litigation to arbitration. There is even a growing clamour for a return to traditional litigation anchored by specialised commercial courts so that parties skip the illusion of arbitration and litigate straightaway.

However, we must be aware that there are a number of disputes in which a rendered arbitral award is fully accepted by the parties which voluntarily abide by it. A number of awards are challenged in part with the unchallenged portions still available for benefit of the award creditor. Furthermore, Nigerian courts have (if at all lately) usually leaned toward arbitrators when an award is challenged on the basis of arbitrator misconduct. The implication of this is the undeniable position that firstly, not all awards get challenged; secondly, not all impugned awards are wholly challenged; thirdly and quite obviously, not all challenged awards result in nullification.

As a result, the persistent and loud criticisms about the finality of awards in Nigeria are sometimes more anecdotal than factual (or legal). No doubt, the Nigerian legal framework needs legislative and judicial intervention to clearly delineate the sphere of the courts' interference with awards and to give firm legal flooring to the principle of finality of awards in a manner that is both assuring to the arbitration stakeholder and reflective of best, current arbitration trends. However, to exclude oversight altogether (which I concede is not the goal of many critics) will do more harm than good to the practice of arbitration. The need for some oversight is perhaps best underscored by the fact that even in the current arbitration bill pending before the Nigerian federal legislature (which the pro-finality critic hails as a major step forward), an award review committee is to be constituted to entertain award review applications.

Arbitral institutions nullify awards: It is often an immediate and automatic reaction to ascribe reviews of awards to courts. It is usually within the context of subjecting an arbitrable and arbitrated dispute to the same litigation which parties sought to avoid by signing arbitration clauses. However, that criticism is scarcely fair and if fair, it is incomplete. This is because arbitral

institutions operated by some of the best, brightest and oldest hands in the practice of arbitration, permit, entertain and resolve challenge applications and sometimes nullify awards.

While all the above may be easily understandable even amongst arbitrators, the OHADA case of Getma v. Guinea is quite interesting, if not disappointing. In *Getma*, the award of the arbitrators was set aside by the Common Court for Justice and Arbitration (CCJA) on the basis solely that against the rules of OHADA, the arbitrators had negotiated an upward review of their fees! It is thus on record today that an arbitral award has been set aside not because the arbitrators misconducted themselves (within the context of the traditional UNCITRAL interpretations), but because the parties agreed to pay the arbitrators what they thought was fair to the arbitrators. Interestingly, the award that was set aside did not itself include a demand for the reviewed fees (as the CCJA Secretary-General had warned) and the United States' Court of Appeals for the District of Columbia Circuit did find that the "decision to set aside Getma's entire award might seem to be a harsh penalty" (although despite that finding, the Court stood by the annulment for reasons I find agreeable and reasonable).

The takeaway, therefore, is that not only arbitral institutions entertain post-award applications that may undermine the finality of an award, they sometimes uphold those applications even for the most controversial reasons. Annulment is not peculiar to the CCJA too – ICSID wholly annulled the Fraport v. Philippines' award and partly annulled Venezuela v. Tidewater, to name a few.

Model law and laws of perceived arbitration hubs allow for challenge of award – often, the post-award interventions of Nigerian courts are vilified and denounced straight off the bat by arbitrators and arbitration practitioners as an overreach. While that may indeed be so in individual cases, a crucial point that gets lost in the mix is that the option to review/nullify an award is not in itself a vice to arbitration. Otherwise, the renowned hubs of arbitration around the world would not be so. London, home to the LCIA and the Chartered Institute of Arbitration is a favourite arbitration venue. Still, the English Arbitration Act 1996 provides that awards may be challenged in court. The Act further provides that in determining such a challenge under certain sections, the court may confirm the award, set aside in whole or in part or vary the award (the last being a license unavailable in Nigerian law). The Act also allows appeals from arbitral references on points of law by agreement or with leave.

Dubai is another oft-praised venue for arbitral proceedings. Article 216 of the UAE Civil Procedure Code permits parties to apply to court for the nullification of an award upon the occurrence of a limited number of events. And while Article 217 prohibits an appeal from an award, it provides that judgements "*approving the arbitrators' award may be contested in any of the appropriate manners of appeal*" – as is the position in Nigeria. Section 48 of the Singapore Arbitration Act also allows the court to set an award aside for 9 different reasons ranging from party incapacity to inarbitrability, while Section 24 of the Singapore International Arbitration Act allows the court to set an award aside for all the reasons provided in Article 34 of the UNCITRAL Model Law, for fraud and breach of any of the rules of natural justice.

Experience tells us the arbitrator is not always right: The Judge (or arbitrator) is not always right. An arbitrator, being human, can err, can be conflicted, can be mischievous and may even with the best of intentions, be wrong. The experience is the same all over the world and in Nigeria, court interventions in the past, though slow and painful, have sometimes been justified. In the Nigerian case of **T.E.S.T v. Chevron [2017] 11 NWLR (Pt. 1576) 187**, the arbitrator of his own accord raised an issue and on that note, refused a part of the Claimant's claim which the

Respondent had not denied – without hearing the parties on the point. The Claimant successfully applied to have that portion of the award set aside – all the way to the Supreme Court. In **Statoil v. FIRS & anor (2014) LPELR-23144(CA)**, the Court of Appeal concluded that the claims in the reference touched on Federal taxes and were not to be arbitrated and accordingly permitted a third party (the federal tax agency) to take out Summons in Court against the reference.
While most arbitral awards are not disturbed by courts and a good number are not challenged anyway, those that have been set aside or references that have been interfered with by courts demonstrate the point that sometimes, even if not often, the arbitrator may get it wrong and the duty to correct the error may fall to the courts. And these rare instances may be all too important – the Court of Appeal in Statoil observed that the allegation of unremitted sums ran up to a figure well over ?20 billion!

In sum, post-award interventions are not at all strange to arbitration neither are they an innovation of the Nigerian courts. And insofar as the fear is that arbitration is being converted to litigation by set-aside proceedings or that challenge applications diminish the status of arbitration in Nigeria or even worse, the status of Nigeria as an arbitration destination, the criticism is more frenzied than fact-based.

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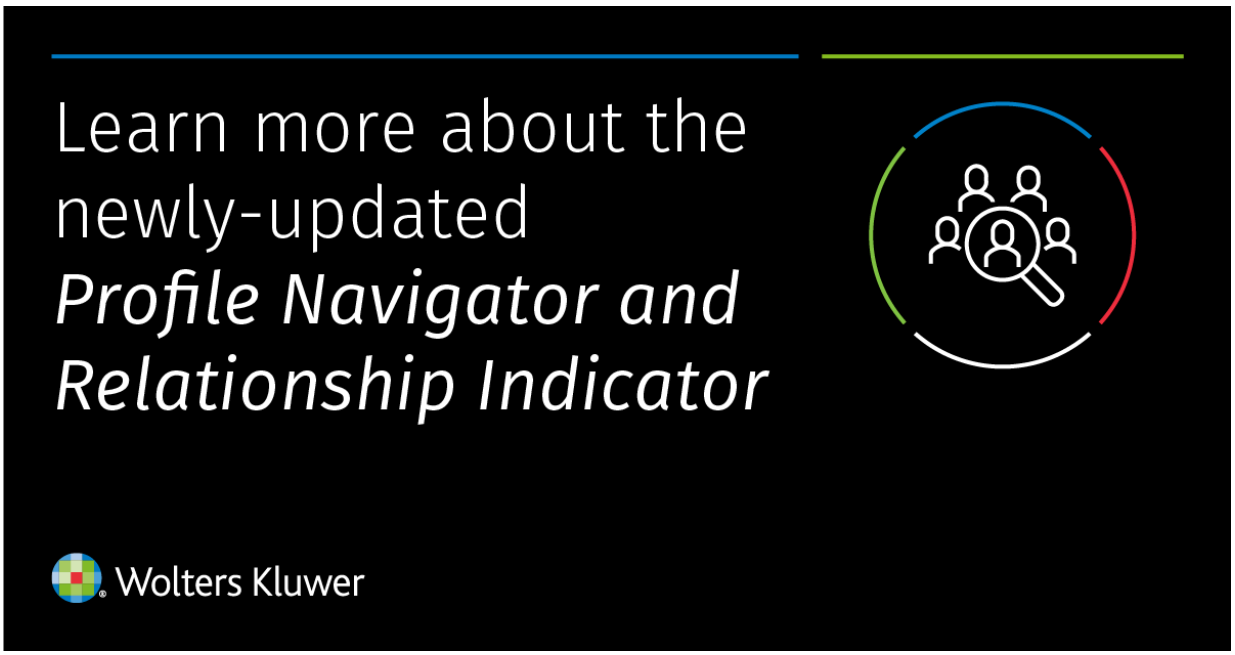

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