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Does Judicial Intervention Aid or Undermine Arbitration in Nigeria?

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Introduction

Party autonomy is the underlining principle of arbitration. The courts ought to have it in mind whenever they are called upon to intervene in matters related to arbitration. The right of parties to resolve their dispute by arbitration must be upheld and given effect to. When the judiciary acts to give effect to this right, such intervention helps the arbitral process but where it does not, then judicial intervention undermines arbitration. There were legitimate concerns that judicial intervention could be the Achilles heel of arbitration in Nigeria, but that was before the landmark judgment delivered by the Supreme Court of Nigeria ("**Supreme Court**") on the 7 June 2019 in Suit No. SC/851/2014: Dr. Charles Mekwunye V Christian Imoukhuede.

In that case, the Supreme Court, in a unanimous decision, upheld an arbitral award ("**Award**") on the reasoning that parties were bound by the arbitration agreement they entered into, including mistakes contained in it which they condoned or waived. By so holding, the Supreme Court set aside the much-criticized judgment of the Court of Appeal that gave rise to this judgment (reported as Imoukhuede V Mekwunye & 2 ORS. (2015) 1CLRN 30) which was delivered on 14 November 2014. The Supreme Court, therefore, charted the path of what should be the judicial attitude when called upon to interpret and give effect to arbitration agreements, which is, to jettison technicalities and respect the medium chosen by parties to settle their disputes.

Background

Prior to this epoch-making decision, the Court of Appeal's decision in Imoukhuede V Mekwunye & 2 ORS. (2015) 1CLRN 30 had cast a very dark cloud over judicial intervention in arbitration in Nigeria and many commentators reached the conclusion that a Pandora's box of anti-arbitration judicial decisions had been opened. The Court of Appeal had in that case set aside the Award on the basis of a minor error made by parties wherein the arbitration institution was wrongly referred to as "Chartered Institute of Arbitrators, London, Nigeria Branch", instead of "Chartered Institute of Arbitrators, UK, Nigeria Branch". The Court of Appeal was emphatic that since there was no body in existence known as "Chattered Institute of Arbitrators, London, Nigeria Branch", the Award must be set aside. The Court of Appeal further upheld and affirmed all the other technical challenges brought against the Award to wit:

1. that the arbitrator misconducted herself when she wrote a letter of adjournment on a letter-head of a law firm, instead of writing it in her personal name. This, the Court of Appeal held to be a delegation of her duty and thus found that the arbitrator misconducted herself; and
2. that there was no valid appointment of an arbitrator because the appointing authority had in the letter of appointment used the word "recommended" instead of "appointed".

It was of no moment to the Court of Appeal that the Respondent participated in the arbitration conducted by an arbitrator appointed by the Chartered Institute of Arbitrators, UK, Nigeria Branch and did not raise any objection to the jurisdiction of the arbitrator until after the Award was made. It was this travesty that was remedied by the Supreme Court in Suit No. SC/851/2014: Dr. Charles Mekwunye V Christian Imoukhuede.

However, as reassuring as the Supreme Court's intervention in this case is, it must be noted that it took a period of twelve years between 14 May 2007, when the Award was made, and 7 June 2019 for the Supreme Court to uphold the Award and order the Respondent to pay the sum awarded. This is a great disservice to commercial arbitration in Nigeria. It defeats the very purpose of arbitration if any sort of judicial intervention could drag on for over a decade after the Award was made.

Generally in Nigeria, resolving disputes through the courts can be a protracted business. A litigated dispute from the High Court to the Supreme Court may take several years. This kind of delay is caused by several factors, including the busy dockets of the courts, the various technical objections which a clever defendant can conjure and generally, the lack of reforms and innovation in the administration of justice. It is in a bid to obviate this cumbersome and ineffective system that more parties are resorting to arbitration to resolve commercial disputes. Indeed, Nigeria now has a robust arbitration practice.

However, under the guise of challenging an award, protracted litigation may sometimes ensue after an award has been made in arbitration. The case under review is a clear example of how judicial intervention can deprive a successful claimant of the benefits of his award for several years. Indeed, a situation where a party can delay complying with an award and the courts can legitimately prevent enforcement for several years during the pendency of a challenge of the award in court, clearly undermines arbitration.

On the Need to Eschew Technicalities in Judicial Intervention in Arbitration

Generally, Nigerian Law is tailored after English Law and has not undergone as many reforms as the latter. The effect is that courts in Nigeria when construing the law sometimes lean towards form rather than substance. Thus, where an award comes before a court for enforcement or where a respondent applies to set aside an award and a Nigerian Judge wears a technical cap, it may be easier to find technical reasons to strike down the award. This attitude, if unchecked, may result in Nigeria not being an attractive destination for dispute resolution and high profile commercial transactions where time is of the essence, as it is often the case.

It is for this very reason that the Supreme Court's decision in Suit No. SC/851/2014: Dr. Charles Mekwunye V Christian Imoukhuede is indeed heartwarming. By its unanimous decision, the Supreme Court has set the tone on what the attitude of Nigerian Courts should be in judicial intervention in arbitration, going forward. Thus, courts that are lower in the judicial hierarchy are

bound under the principle of *stare decisis* to follow this precedent. The earlier judgment of the Court of Appeal in the same case now represents the old thinking which must be jettisoned.

Instructively, the technical objections raised against the Award in Suit No. SC/851/2014: Dr. Charles Mekwunye V Christian Imoukhuede are the sort that the Supreme Court might have upheld in a different scenario. They are summarized as follows:

1. by some drafting error, the appointing institution was not properly described;
2. the appointing institution also failed to categorically state that it was making an appointment but rather "recommended" a sole arbitrator; and
3. in the course of the reference, the sole arbitrator communicated with the parties using the letter-head of her law firm.

However, in this instance, the Supreme Court deftly defused all these objections and upheld the Award. It held that the intention of parties must be given effect to and that by section 33 of the Arbitration and Conciliation Act, LFN, 2004, any irregularity which the Respondent became aware of and failed to object to, was deemed to have been waived by him. Therefore, the Respondent, having participated in the reference up to Award could not be heard to complain about any non-compliance.

Recommendations

It is strongly recommended that a special regime be created for cases that arise from the enforcement or challenge of an arbitral award. Judicial intervention, even commendable ones like that of the Supreme Court in Suit No. SC/851/2014: Dr. Charles Mekwunye V Christian Imoukhuede, will nonetheless undermine arbitration unless a special regime that ensures the speedy dispensation of all such arbitration-related cases is created. It is also recommended that refresher courses be instituted for Judges and Justices of the High Court and the Appellate Courts on the fundamentals of arbitration and the need to understand that in arbitration the parties choose their judge and must therefore swim or sink with him/her.

Conclusion

In summation, we commend Suit No. SC/851/2014: Dr. Charles Mekwunye V Christian Imoukhuede for further reading on what the attitude of Nigerian Courts should be, going forward, when it comes to judicial intervention in the arbitration process. The era of technicalities in the interpretation of arbitration agreements is gone. Nigeria may yet attain its full potentials as the economic hub of West Africa and the most attractive business destination in Africa if judicial intervention aids the arbitral process.

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