Treatise in International Arbitration

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Arbitral Award Setting Aside – *3 Months from When?*

Background

The first part of the Article 34.(3) of UNCITRAL[28] Model Arbitration Law (MAL) reads as follows:

> "An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had **received** the arbitral award..." (Emphases added.)

It is reproduced word for word in s. 35.(3) of Kenya Arbitration Act 1995 and in many MAL jurisdictions worldwide. Unsurprisingly, it has attracted little or passing attention in international case law and scholarly works, most of which address the possibility of extension of the 3-month statutory period by courts, as the rest of the text is as clear as can be. However Kenyans have peculiar habits.

The recent High Court of Kenya judgment in *UoN v. Multiscope*[29] brings up, once more, Kenyan courts' divergent interpretations of when the 3-month period

28 United Nations Commission on International Trade Law.

29 University of Nairobi (Applicant) v. Multiscope Consultancy Engineers Ltd (Defendant). High Court Milimani (Commercial & Tax Division) Miscellaneous Cause No. E 083 of 2019 available at http://kenyalaw.org/caselaw/cases/view/195710/ last accessed on 14th June 2020

for setting aside an arbitral award starts running. The court ruled that the time starts running when the tribunal notifies the parties that the award is available for collection upon the payment of the outstanding fees and not when a party receives the award physically.

The case is now in the Court of Appeal and could easily end up in the Supreme Court of Kenya. Decisions by the higher courts one way or another are matters of national jurisprudence. However, one must search elsewhere for the true meaning of Art. 34.(3) of MAL. Could the mainstream view of the High Court of Kenya be fatally flawed in law and logic? Could it be that this view is the minority view elsewhere or completely unheard of and incomprehensible outside Kenya? Is there any chance of the minority view being the widely held view worldwide?

Fortunately, the interpretation or misinterpretation of the subject text by Kenyan courts can be benchmarked against other jurisdictions. Indeed, Article 2A, which was introduced to MAL in 2006, states that,

> "in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith".

According to notes attached to MAL, UNCITRAL has, as one of its primary objectives, the harmonization and improvement of national arbitration laws. It acknowledges that,

> "unexpected and restrictions found in national laws may prevent parties, for example, from submitting future disputes to arbitration." The notes also believe that MAL has "clear period of time within which recourse against an arbitral award may be made".

The Letter

The context is that many (my guess is over 90%) of domestic arbitrations which are seated in Kenya are *ad hoc*. Without an administering institution, the tribunal is responsible for demanding fees from the parties. The business culture in Kenya is that people and institutions, including the national government, rarely perform their financial obligations in domestic arbirtration on time.

The subject notification letter in the arbitration between *UoN v. Multiscope* is dated 24th November 2017. It is from the tribunal to the parties and it states as follows:

> "We have now published our Final Award in this arbitration which may be taken up upon payment of the balance of Ksh.....
>
> Upon receipt of the sum from either Party, we will deliver the Award to that party together with our formal receipt.
>
> If our final costs as contained in this notification are not paid in full within fourteen (14) days from the date of this notification, any such outstanding sum shall attract compound interest at Commercial Bank lending rates as shall be determined by us".

That letter informed the parties that the award was complete and ready for dispatch upon payment of the outstanding fees. It is worth noting that the letter is conditional.

Both parties defaulted in the payment and so the tribunal withheld the award for a considerable period of time. The Respondent eventually paid. The Applicant's advocates received the award on 5th March 2019 and filed an application to set aside the award in court within a month from 3rd April 2019.

Apparently, the Applicant obtained a copy of the award barely a month after the Respondent. The date when the Respondent received the award and the face of the award were not relevant in the case. The Applicant filed its set-aside application well within 3 months from the date of physical receipt of the award but over 15 months after receiving the letter.

Firstly, the question which arises is, what did the Tribunal mean when it says it has "now published" the award? The concept of publishing arbitral awards is alien to both the Kenyan and MAL laws. It is a relic of the English arbitration law, which is, of course, not applicable either in arbitral or court proceedings. The difference between a tribunal publishing an award and a party receiving an award is very well explained in the Irish case of *Moohan v. S.&R. Motors [Donegal] Ltd*.[30]

30 Neutral Citation: [2009] IEHC 391 High Court of Ireland Record Number:2009 139 MCA Date of Delivery:31 July 2009 Court: High Court Composition of Court, accessible at http://www.uncitral.org/docs/clout/IRL/IRL_310709_FT-1.pdf#

The Judgment – High Court's "Mainstream View"

UoN v. Multiscope, at paragraph 25 makes it clear that once an arbitral tribunal notifies the parties that the award is ready for collection upon payment of the fees and expense,

> "Delivery will have happened as it is up to the parties to pay the fees and expenses... because any delay in actual collection can only be blamed on the parties".

The Mainstream View's Unintended Consequences

The mainstream view is primarily on set-aside applications. However, it has considerable and probably unconsidered knock-on effects on other aspects of arbitration and of arbitral awards.

The mainstream view encourages parties to pay the arbitrator on demand. Timely payment of arbitration fees and other costs is one of the parties' implied obligations or statutory requirements to "do all things necessary for the proper and expeditious conduct of the arbitral proceedings" for example under s. 19A of the Arbitration Act of Kenya.

It is quite clear, from the Kenyan court rulings involving MAL Article 34.3, of MAL that the judges have not considered how their elastic definition of the word "received" in s. 35.(3) of the Kenyan Act affects the same word as used elsewhere in the same Act.

The first casualty is the parties' statutory right to apply to the tribunal for the correction of *"computation errors,*

any clerical or typographical errors or any other errors of a similar nature" under s. 34 of the Act. A party must apply to the tribunal for such corrections "(W)ithin 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties". To err is human. One finds typographical errors even in professionally peer-reviewed articles. To deny parties the sole opportunity to have errors in the award corrected is draconian.

The second casualty is the tribunal's right to make the corrections or give clarifications "on its own initiative within 30 days after the date of the arbitral award" under s. 34.(3) of the Act. The "date of the arbitral award" is not expressly addressed in the mainstream view but it is inconceivable that courts which have adopted the mainstream view would consider the date when a party physically received the award as the date of the award.

The above judicial extinguishing of the parties' and tribunals' statutory rights is amplified by the finality of awards. In addition, MAL and national arbitration statutes do not, otherwise, allow arbitral tribunals to review their awards the way courts have under the civil procedure rules.

The third casualty of the mainstream view is a party's right to an additional award under s. 34.(4), (5) and (6) of the Arbitration Act of Kenya. They are worth reciting in full:

> "(4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award,

request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award…" (emphasis added)

The default in fees is usually for an extended period of time, beyond 30-day period for a party to apply to the tribunal and the 30 or 60 days for the tribunal to take the required action. Therefore, whether the tribunal can lawfully receive the application and/or act on it acquires obvious jurisdictional trajectory.

Tribunals might be able to cure the anomaly by extending the time for correction and making of additional awards by invoking s. 34.(6) of the arbitration Act above. This is nevertheless speculative as the clause is probably meant to allow the parties and the tribunal more time to deal with applications which have been filed within 30 days of the award and not for applications filed months or years past what the mainstream view has determined to be the receipt date.

The fourth and most unfortunate casualty of the mainstream view is the consent award, which is stipulated under s. 31 of the Act in the following terms:

> "31.(1) If, **during arbitral proceedings**, **the parties settle the dispute**, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, **record the settlement in the form of an arbitral award on agreed terms.**
>
> (2) An arbitral award on agreed terms shall be made in accordance with section 32 and shall state that it is an arbitral award.
>
> (3) An **arbitral award on agreed terms has the same status and effect as any other arbitral award** on the substance of the dispute." (Emphases added.)

The long and short of it is that the parties' right to enter a consent award subsists throughout the arbitral proceedings, which according to s. 33.(1) of the Arbitration Act of Kenya "shall be terminated by the final arbitral award". Given the mainstream view, the implication is that the proceedings are terminated by the conditional notification letter and as such the parties cannot enter consent after the receipt of this letter even though they may not have seen the award and might not see it for years depending on when they pay the tribunal's outstanding fees.

The fifth consequence is, of course, the enforcement of the award could be time-barred if the parties do not pay up and collect the award within the limitations of actions period after receiving the notification letter. It is not unheard of for arbitrators to hold awards for 10 years pending settlement of their fees.

The sixth consequence is that the mainstream view reduces Article 34.(4) of MAL to a bargaining chip for the timely payment of arbitrators' fees. This was not it's intended purpose of this statutory provision.

The seventh consequence is that the mainstream view, in my view, vilifies Kenya as a seat of arbitration.

Kenyan Arbitrators' Views

If this view is mainstream in the High Court, it has attracted near unanimity among Kenyan arbitrators. A colleague, who is a respected lawyer and Chartered Arbitrator, responded as follows when I sought his comment: "Interesting…I think the judge got it right. Even when filing an appeal, time starts running from the date the registry confirms that, the proceedings are ready for collection. Inaction on the part of parties who are aware an award is ready for collection cannot stop time running… and I agree to decide would rob arbitration of finality."

The Chartered Institute of Arbitrators Kenya Branch (CIArb.) is considering preparing a position paper on the court interpretation of s. 35.(3) of the Act, i.e. Article 34.4 of MAL. I have reason to expect that the position will be aligned to the court's mainstream view. The most I can hope for is acknowledgement that the CIArb position, whatever it will be, is not unanimous among the membership. That is important not only for the arbitrators who hold a contrary view but also because some judges, whatever their views on this subject, are members of CIArb.

Tribunal's Duty to "Deliver" An Award

I have, as a former member of the Public Procurement Administrative Review Board (PPARB), where I was a member for 6 years up to October 2019, encountered the statutory duty to notify a party the outcome of a process. The Public Procurement and Asset Disposal Act 2015 s. 87.(1) requires a procuring entity (PE) to notify the successful bidder the outcome of the tender.

Some PEs, to frustrate certain bidders and stop them either from accepting the notification letter or to stop them from filing a complaint at PPARB within the stipulated period, sat on the notification letters. PPARB held on numerous occasions that the effective date of the notification letter for the purpose of reckoning of the period within which a party must approach PPARB starts running from the date the party received the notification letter. The rationale is simple: a party cannot act on a document it has not received. Since there is a statutory duty on a PE to notify, calling or writing to a bidder informing it that it's notification letter is available for collection does not discharge this statutory obligation.

A PE's mischief is evident in *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018]*[31]. The PPARB panel, in which I did not seat, declined jurisdiction on the basis that Lordship Africa had filed the complaint out of time and that in any case the contract had been signed, which ousted the jurisdiction of PPARB under the Act. The High Court judgement quashing the

31 http://kenyalaw.org/caselaw/cases/view/149362

Board's decision was upheld by the Court of Appeal in *Ederman v. Lordship*[32].

s. 32.(5) of The Arbitration Act of Kenya stipulates that "… after the arbitral award is made, a signed copy shall be delivered to each party." What is contemplated here is a physical delivery of the award and not reading of the award. In other words, even if a tribunal called the parties and read the award to them, it would still not, in my humble view, have met its obligation to deliver the award to the parties. Incidentally, arbitration under Order 46 of the Civil Procedure Rules of Kenya has an elaborate mechanism under which the tribunal files the award in court, and then the Registrar of the A.C reads the award to the parties. That is not the case for arbitration under the Arbitration Act of Kenya.

As in arbitration, I will frame the controversy into a list of issues for determination and invite the reader to consider the various arguments and contentions.

First and foremost: Is there any ambiguity in the statute?

At the risk of being repetitive, I will recite the subject text below for ease of reference. Article 34.(3) of MAL and s. 35.(3) of Kenya Arbitration Act provide that:

> "An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application

32 http://kenyalaw.org/caselaw/cases/view/175507

had **received the arbitral award**…" (Emphases added.)

The text is simple and clear. There is absolutely no ambiguity, real or imagined, in what it says. In addition, what it says in not impractical, absurd or insensible. There is no justifiable reason to consider any other interpretation of the text.

Second: What is the plain meaning of the word "received"?

Words have no meaning other than the one ascribed to them. It is the "agreed meaning" of a word which matters. So, what is the agreed meaning of the word "received"?

According to the Cambridge English Dictionary[33], "receive "means "to get or be given something", for example, "Did you receive my letter?" "She died after receiving a blow to the head." "Members of Parliament received a 4.2 percent pay increase this year." Other dictionaries say to receive is "to come into possession of"[34] or to "take delivery of (something sent or communicated), as in 'he received fifty enquiries after advertising the job'"[35] Take your pick from Cambridge, Webster or Oxford. The meaning is even clearer when one considers that receipt is "the action of receiving something or the fact of its being received."[36]

33 https://dictionary.cambridge.org/dictionary/English/receive accessed on 7th October 2020.

34 https://www.merriam-webster.com/dictionary/receive accessed on 7th October 2020.

35 https://www.lexico.com/definition/receive

36 https://www.google.com/search?client=firefox-b-d&q=receipt+meaning

None of the dictionaries suggest that you have received something just because you know where to buy it from and the price you have to pay to get possession of the said item.

Any attempt to give a new meaning to words whose meaning are not in doubt must be treated with suspicion. A person proposing a new meaning to words has the burden of proof, which is an uphill task in this case.

Third: Does the word "received" have a special meaning in law or in arbitration law?

Non-lawyers get sicknesses and illnesses. Not lawyers and judges get "indisposed". Therefore, it is necessary to enquire if the word "received" has a special meaning in law generally or in arbitration law particularly.

The court and the proponents of the mainstream view have not suggested that the word "received" as used in Article 34.(3) of MAL has a special or different legal meaning in law or in arbitration. The word is widely used in law and always with the simple universal meaning. For example, the Constitution of Kenya 2010 stipulates at Article 145.(3)(a) that:

> "Within seven days after receiving notice of a resolution from the Speaker of the National Assembly the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the President…" (Emphasis added.)

The Senate Speaker is required to take certain action within seven days "after receiving" the notice of resolution.

The Speaker must first receive the notice. The Speaker of the National Assembly (SNA) must make sure that the Senate Speaker has received the notice. Supposing the SNA sent a letter telling the Senate Speaker that the notice is ready for collection, even without any conditions being attached? Would the date the Senate Speaker received that letter serve, in your wildest imagination, as the date when the Senate Speaker received the notice? Would it not be preposterous to require the Senate Speaker to act within 7 days of receiving such a letter even though he has not received the notice itself?

The University of Missaouri and the National Academy of Arbitrators published a glossary of arbitration terms, "Glossary (Complete Listing)"[37], to assist the reader understand arbitration practice, which "involves the use of some specialized vocabulary". The glossary is in the context of labour dispute arbitrations, where the claimants are generally lay people and appearance in person is common as opposed to legal representation. The words explained in this glossary include the most obvious like advocate, pay back, grievance and shop steward. You guessed it: the words "receive" and "received" are not there. Neither are they in the index of *Russell on Arbitration*[38], which has been the guide and monitor of arbitration law in England for over 150 years according to the foreword by Julian Lew, QC.

37 https://law.missouri.edu/arbitrationinfo/2016/01/27/2030/

38 Sweet & Maxwell, 22nd Edition 2003

The word "received" does not have a special meaning in law or in arbitration law. Therefore, the courts would require an overwhelming reason not to adopt the ordinary meaning of the word.

Fourth: What was the intention of the drafters of the original text in MAL?

The drafters of Article 34.(3) MAL are, of course, not the Kenyan legislature, which merely and wisely copied and pasted the MAL article *verbatim*. I have perused the *travaux preparatoires*[39] and there is nothing on record to imply that the drafters applied their minds to the meaning of the word "receive" or "received". They did not need to, since the meaning of the word was clear.

They did, however, consider three things, whether the period should be 90 days, whether the parties should be allowed to extend the period by consent and whether the courts should have the power to extend the period in some circumstances. This is recorded in the proceedings of Meeting No. 318[40], which was chaired by Mr Loewe of Austria on 11th June 1985. The contributions of Mr. Nemoto from the Asian-African Legal Consultative Committee, Mr Mtango of Tanzania and the chair are on record. Mr Mathanjuhi of Kenya did not comment on this particular article but his contribution on a different article is on

39 Record of the preliminary or preparatory documents of the negotiations and deliberations in the preparation of legal text.

40 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/318meeting-e.pdf last accessed on 9th October 2020

record. He contributed in what appears to be a robust negotiation on whether or not to include "public policy" as one of the grounds in article 34.(2)(b)(ii) MAL.

The MAL drafters applied their minds to important legal issues and did not address semantics like the meaning of the word "receive" or "received". The mischief of the High Court of Kenya's mainstream view was not conceivable or reasonably foreseeable.

Fifth: Did the Court Apply the *Lowe* Case Correctly?

Paragraph 24 of the high court judgment in *UoN v. Multiscope* states as follows:

> "This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties" (Emphases added).

The paragraph is very revealing. Firstly, it says that the Kenyan law does not require the tribunal to dispatch or send a signed copy to each party. Notably s.32.(5) of the Arbitration Act of Kenya 1995 reads as follows

> "... after the arbitral award is made, a signed copy shall be delivered to each party." (Emphases added.)

Secondly, the High Court itself cites that section of the Act in Paragraph. 8 of the same judgment. Why then does the court say the opposite in paragraph 24 of the judgement?

Thirdly, the High Court was alluding to the Matter of Lowe (Erie insurance Co.)[41], a New York appeal court case reversing the decision of a lower court, which had decided that the statutory 90-day period started running from the date the arbitrator posted the award. The New York Appeal court had no difficulty holding that the period started running from the date when the award was received.

The subject legal text is found in the Civil Practice Laws and Rules (CPLR) at Article 7511[a], which provides that an application to vacate or modify an arbitration award "may be made by a party within ninety days after its delivery to him…". CPLR 7507 provides that the arbitrator "shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested." An Insurance Department regulation concerning master arbitration procedures provides that "[t]he parties shall accept as delivery of the award the placing of the award or a true copy thereof in the mail, addressed to the parties or their designated representatives at their last known addresses, or by any other form of service permitted by law" (11 NYCRR 65-4.10 [e] [3]).

The New York bench of five, having considered numerous judicial authorities, unanimously ruled that delivery

41 Matter of Lowe (Erie Ins. Co.) 2008 NY Slip Op 07735 [56 AD3d 130] October 10, 2008 Centra, J. Appellate Division, Fourth Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. As corrected through Wednesday, December 24, 2008 accessible at https://law.justia.com/cases/new-york/appellate-division-fourth-department/2008/2008-07735.html

must be interpreted as the date on which the award was received. It is really strange that the Kenyan court cited this particular case and then reached the opposite conclusion.

This authority is merely about the arbitrator's obligation to deliver the award. In other words, even without considering the requirement that the period should start running from the date of "receipt" as per the MAL, the period should still run from the date of receipt and not the date of postage. Of course, in UoN case the award was not even posted.

How can an award which is still being held by the Tribunal be said to have been both "delivered" by the Tribunal to the parties and also "received" by the aggrieved party? Only in Kenya!

The reason why this is wrong is simple. Firstly, the tribunal has a statutory obligation to deliver the award. Secondly, the applicant's date of receipt is the critical because the applicant cannot make a decision on whether to comply with the award or to apply for setting aside before it is aware of the decision of the tribunal.

Sixth: Was it necessary for the Court to rely on English authorities when interpreting manifestly different MAL text in UoN v. Multiscope?

The Kenyan court relied on Ransley J's and Nyamu J's decisions by quoting Parker J in *Bulk Transport Corporation v Sissy Steamship Co. Ltd* Lloyd's Law Report 1979 Vol. 2 p. 289, which states:-

> "The submission that item should be calculated from the date of receipt of the copies of the award would be rejected in that it had been accepted as good law for 140 years that time ran from the date upon which the award was made and published to the parties and publications to the parties was completed by notice'.

This case is premised on an earlier version of arbitration law. S. 55 of the English Arbitration Act 1996 states that parties are free to agree on the requirements as to notification of the award to the parties but in default the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made. This means that the tribunal is required to "serve" the award on the parties. This unnecessary and misleading reliance on outdated English arbitration legislation is most unfortunate.

Seventh: Supposing the notification letter had come from a tribunal secretary or from an administering institution, would the court still have considered receipt of that letter as the date the parties received the award?

I have no idea. Tribunal secretaries are rare in Kenya, where most arbitrations are *ad hoc*, not administered.

Eighth: Did the Tribunal Intend for the date on the Notification Letter to be the date of the receipt of the arbitral Award?

No.

The tribunal stated clearly in the letter that it would deliver the award to the parties upon receipt of the outstanding payments.

Was it the intention of the Tribunal that the date of the letter would serve as the date of the delivery of the award? Definitely not. The Tribunal itself did not consider that its letter amounted to delivery of the award. Its letter states clearly that it will deliver the award upon payment of the outstanding fees. Why would the court then deem the parties to have received the award when they received that letter?

Nineth: Does it Matter that the Notification Letter was Conditional?

No.

The letter is conditional. It is not simply a letter to pick the award. It requires one party to pay its share and the other party's share in default in order to pick the award. It is not the same as a court telling the parties, without any condition attached, come on such and such a date for the reading of their judgement.

Tenth: Is the Kenya High Court's ostensibly good intentions to expedite arbitral proceedings through it's mainstream view lawful?

No. The law is made by national legislature, which in this case merely, and rightfully, copied and pasted an internationally negotiated text. The international and national legislators built into the text the devices they considered necessary to expedite arbitral proceedings.

It is not only unlawful but also patronising for the High Court to create new ones.

Parties, tribunals and courts have an obligation to expedite arbitral proceedings. However, the highest obligation to do so falls on the parties because of the party autonomy. Each party is at liberty to expedite the release of the award by paying its own and the defaulting party's share of the fees. When the parties delay the release of the award or any stage of the proceedings by consent or conduct, the Tribunal has options like resignation, termination of proceedings or suing the parties for payment.

Whatever the case, courts should not be seen to be more eager than the parties to expedite arbitral proceedings. Otherwise, they could be viewed as crying louder than the bereaved.

Lest we forget, the full name of courts is " courts of law", *atrium autem legi*s. They are the courts in which the law or the rule of law reign supreme.

Some disputes are not arbitrable. For example, Kenyan presidential election petitions cannot be resolved by an arbitral tribunal. It would be ridiculous, bordering legal fiction, for a court of law to refer such a dispute to arbitration under the guise of "promotion" of arbitration.

It is not like courts are short of opportunities to "promote" arbitration lawfully - for example when faced with pathological arbitration clauses, which are capable of being cured by purposeful interpretation.

Eleventh: What of the Rule of Law?

In *Breen v Williams*[42], Gaudron and McHugh JJ said,

> "(A)dvances in the common law must begin from a baseline of accepted principles and proceed by conventional methods of legal reasoning Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles."

According to Murray Gleeson[43], then Chief Justice of Australia, judgments in the High Court of Australia contain numerous assertions of practical conclusions said to be required by the principle of the rule of law. They include

> "that judicial decisions are to be made according to legal standards rather than undirected considerations of fairness"[44]

The requirement for courts to comply with the rule of law is greater than the rather amorphous requirement to "promote" arbitration and other ADR procedures.

Twelfth: Is the Penalty Imposed on a Party by the Mainstream View Lawful?

Penalising a party by curtailing its right to set aside puts pressure on it to settle the tribunals fees sooner than

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42 (1996) 186 CLR 71 at 115

43 Courts and the Rule of Law, The Rule of Law Series, Melbourne University, 7 November, 2001 available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm#_edn14 last accessed on 7th October 2020.

44 Federal Commissioner of Taxation v Westraders Pty Ltd (1980) 144 CLR 55 at 60 per Barwick CJ

later. However, this is an extraneous consideration. The statute is not meant to assist the tribunal's debt collection initiatives. Remedies are found elsewhere – lien, adequate deposits, etc.

Admittedly, parties have an obligation to facilitate the early payment and release of fees. This notwithstanding, penalties must be prescribed in the law and not created by judges.

Thirteenth: Consider Party Autonomy

Party autonomy is parties' right to decide how their dispute ought to be resolved. Public policy favours expeditious resolution of disputes generally and particularly so in arbitration. However, party autonomy allows parties to decide the pace of proceedings.

Parties may take 10 years if they so wish. It is their dispute. An arbitrator who does not like the pace adopted by the parties through consent or conduct should alight the bus at the next stop. Courts should certainly not get involved except as expressly stipulated in statute.

Fourteen: What of the Court's Constitutional Obligation to "promote" arbitration?

Article 159.2.(c) of The Constitution of 2010 of Kenya follows:

> "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities...

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law." (Emphases added.)

While clause 3 speaks to traditional dispute resolution, it is inconceivable that courts could interpret a statute in a matter which is inconsistent with the same statute.

To me, the duty on courts to promote arbitration means that they should be predisposed towards arbitration in the lawful exercise of their discretion and in all borderline cases. It does not allow courts to get out of their way into the alleys and byways of illegality or to break the law to promote arbitration.

Kenyan courts are clogged with cases some of which are decades old. This is delayed justice, which courts must deal with in compliance with the law and not by breaking the law. Similarly expedition in arbitration must be achieved by complying with, not by breaching, the law.

Incidentally, Order 65 of CPR permits court of law to refer disputes in court to arbitration. It is rarely invoked either to unclog their system or to "promote" arbitration.

The constitutional obligation imposed on Kenyan courts to "promote" arbitration and the public interest considerations to expedite arbitral proceedings must be exercised within the confines of what is lawful. That is what the rule of law requires.

There is no greater prejudice than the breach of a statutory provision. My humble but considered view is that the mainstream view is an example of legal fiction and judicial overreach at their worst.

Fifteenth: Does delay in paying the tribunal's fees mean that parties are not interested in the award?

No.

This is proven in the following ways. Firstly, some parties still eventually pay the fees in order to get the award. It is acknowledged that arbitration is expensive and that it usually costs more than what the parties contemplated when they initally consented to or commenced the arbitration. Therefore, it should not surprise anyone if the parties delay payment.

Secondly, there is another aspect which is usually ignored. When the proceedings take very long either due to the conduct of the parties or to poor case management, one or both parties lose confidence in the process and direct their funds elsewhere until further notice. The bottomline is that they are still interested – if in doubt, just ask them!

Sixteenth: Are Court Procedures for delivery of judgments applicable to Arbitration carried out under the Arbitration Act of Kenya?

Of course not.

The court relied, in the UoN and similar cases, on the analogy about courts informing parties that the judgment of a court of law is equivalent to a tribunal's conditional notification letter. This approach is not convincing.

The delivery of court judgments is prescribed in the Civil Procedure Rules, which obviously does not apply in arbitration. A court delivers its judgement by reading it out. The production of a signed copy to the parties may be subject to payment of court fees but this notwithstanding the court has "delivered" the judgment whether the parties obtain the signed copy or not. This is how courts operate. Furthermore, the receipt of a court judgment is a non-issue. Any wonder why some people prefer arbitration? One of the complaints about arbitration is that it has become increasingly court-like contrary to the intention of the parties. The mainstream view entrenches the conversion of arbirtration to "litigation without wigs" by imposing court procedures on arbitration.

Even in arbitrations carried out under Order 46 of the Civil Procedure Rules a mode of delivery is prescribed which differs from that prescribed under the Arbitration Act of Kenya but which is still decent. Once the award is complete, the arbitral tribunal is required by Rule 10 to file the award in court of law within fourteen days. The Registrar then notifies the parties, within 14 days of filing,

that the award has been filed and notifies the parties of the date, within 30 days, when the Registrar will read the award "to such of the parties as are present".

In courts systems, delivery is deemed to occur at reading of the judgment. A party's appeal are safeguarded through various mechanisms until the signed judgment and court proceedings are ready. You cannot be denied the right of appeal when you do not have a copy of the signed document even if it takes years.

The reading of court judgments is not conditional on any payment or action by a party. A judgment can even be read in the absence of one, or both or all parties. It is a different ball game. The singular reading of a court judgment and the statutory triple requirement (signed copy/delivery/ receipt) are like chalk and cheese.

Seventeenth: Is a notification letter (whether conditional or not) that the award is available for collection an "award"?

No. It is not possible for such a letter to be deemed as an arbitration award by any stretch of imagination. The letter belongs to the same class of administrative documents or procedural directions etc which are commonly used in arbitration but which are not necessary to legislate about.

Eighteenth: Is the Notification Letter what is prescribed or contemplated by MAL and the Kenyan Arbitration Act for the tribunal to "deliver" and what should be "received" by the parties?

The law does not leave it to our imagination what should

be both delivered by the tribunal and received by the parties at the end of arbitral proceedings.

Date of delivery is of no legal significance. Only the date of receipt and the setting aside by the applicant matters in the reckoning of the 90-day period in Art. 34.(3) of MAL.

From the above, it is clear that a notification letter is not compliant with the statutory requirements of the document required to be delivered by the tribunal and received by the parties.

The letter is not an arbitral award and does not claim to be. It does not determine the merits of the case or state the seat of arbitration. It does not, or in the case of *UoN v. Multiscope,* bear the signatures of the entire tribunal.

Lastly, anyone who does not see the absurdity of recognising receipt of the notification letter instead of the award should try to enforce that letter as an arbitral award!

Nineteenth: What, then, is the legal status of a letter notifying parties that the award is ready for collection upon payment of the outstanding tribunal's fees?

With profound respect, I humbly suggest that the subject letter is, at best, a debt collection letter complete with notification of the interest which would accrue in default of payment.

It is not even a "demand letter", since there is no threat of litigation if the demand is not complied with within a stated date after which legal proceedings would be

commenced without further notice. Please re-read the notification letter above and decide for yourself.

Twentieth: Is a party's delay or failure to pay its share of the Tribunal's fees relevant in the consideration of when the period started running or at all in Article 34.(3) of MAL?

No.

Twenty first: Can the Kenya's Court of Appeal and Supreme Court possibly help?

I hope so: that they will give regard to the text's international nature and treatment in other MAL jurisdictions.

High Court views can potentially be corrected or harmonised by higher courts. However, I am not optimistic here, given that the higher courts get their judges from the High Court and from the bar both of which are unsettled on this issue.

Twenty second: How, then would the Timely Payment of Arbitrators' Fees be Assured?

All the same, arbitration is primarily about parties, not about arbitrators. Arbitrators have powers to demand sufficient initial and subsequent deposits for their fees and disbursements and to withhold the award pending the payment of any outstanding balance. They typically also charge interest. A party has the liberty to pay the defaulting party's share. An arbitrator can also either recuse himself or herself or terminate the proceedings if the parties do not pay the deposits. If a tribunal elects to

proceed, it should not impose or benefit from unlawful penalty to the parties.

MAL Jurisdictions within the Commonwealth

Given the international nature of arbitration law, I now turn to jurisprudence in other jurisdictions.

Uganda

S. 34.(3) of the Arbitration and Conciliation Act (Uganda Act) follows the MAL wording except that the period is not three but one month, while s. 36 of the Uganda Act, stipulates that "*where the time for making an application to set aside the arbitral award under S. 34 has expired, or that application having been made it has been refused, the award shall be enforced in the same manner as if it were a decree of Court.*"

However, Rule 7.(1) of the Arbitration Rules (First Schedule) under that Act states, "Any party who objects to an award filed or registered in the court may, within ninety days after the notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested."[45]

This inconsistency has been addressed in numerous cases and referred to as "cutting and pasting the provisions of the old rules on the new rules without ensuring that there

45 Kilembe Mines Ltd v. B.M. Steel Ltd. Accessible at file:///C:/Users/Paul/OneDrive/Documents/Arbitration.Cases.Uganda/Kilembe.BMSteel.htm

was no conflict between them... *has therefore led to this confusion and in the absence of any ambiguity in the Act, the Act prevails over the rules..."*[46]. The Supreme Court of Uganda ruled that Rule 7(1) was inconsistent with the Act[47].

In *Fountain v. Nantamu & Another*[48] where the award was read by the arbitrator on the 7th of September 2009 and filed with Centre for Alternative Dispute Resolution (CADER) on the same day but was not physically given to the parties because of an outstanding payment. This was not resolved until on or about the 3rd of March 2011 when the award was also filed in court.

> "To my mind receiving an award like receiving a Judgment is on the day the Judgment is read and signed. I respectfully do not agree that it is on the day that the award is physically given or is available to a party. That in this case would have been the 7th September 2009. The Arbitration was filed in Court on the 3rd March 2011 which is provided for under Rule 2 of the Arbitration Rule (first schedule to the ACA).
>
> However, since the *Roko Construction Ltd Appeal* (Supra) decision it is clear that the time line of 30 days in Uganda is mandatory and there is no way round it. If that period is regarded as too tight for the parties then the law will have to be amended.... Until

46 Uganda Lottery Ltd. V. Attorney General, High Court (Commercial Division) M?C 627 of 2008

47 Mohammed v Roko Construction Ltd (CIVIL APPEAL NO. 014 OF 2015) [2017] UGSC 13 (5 May 2017) https://ulii.org/ug/judgment/supreme-court/2017/13

48 https://ulii.org/ug/judgment/commercial-court/2013/87

then it is up to the parties on receipt of the award to ensure that they pay the arbitrators fees promptly in order to meet the 30 day rule. Any dispute on fees can be handled subsequently." (Emphases added.)

Nigeria

The law on the setting aside of arbitral awards under Nigerian law is characterised by fragmentation. This is partly due to the fact that arbitration laws differ[49] between federal and state levels and between the states in terms of arbitration statutes and court rules. Then there is the fact that whether the 3-month period is extendable is answered differently depending on whether the arbitration is domestic or international. These differences give rise to endless permutations.

The multiplicity of time limitations is captured by Webber F.J., in *Efana Ekeng Ita v. Edet Zutere Idiok*[50]. There are numerous conflicts between the time limits given in statutes and those provided in court rules. The principle that the limitation period stipulated in an Act prevails[51] over the period given in rules holds but does not seem to be consistently applied.

Oyekunle and Ojo[52] states that it is mandatory that signed copies of such awards must be forwarded by the tribunal

49 The diversity is even greater considering that federal and within the states, setting aside periods vary for court-ordered arbitration – these are not within the scope of this article.

50 Nigeria Law Reports, Vol. IV, page 1000 as cited in Vitamalt Plc v. Ibrahim Abdullahi CA?L?181/04

51 Stabilini Visinoni Ltd v. Mallinson & Partners Ltd (2014) 12NWLR (Pt 1420) (CA) 134

52 Handbook of Arbitration and ADR Practice in Nigeria, LexisNexis 2018

to each party. S. 26(4) of the Arbitration and Conciliation Act provides that *"a copy of the award made and signed by the Arbitrators in accordance with subsections (1) and (2) of this Act shall be delivered*." The Lagos State Arbitration Law requires the award to be notified to the parties by service on them of written notice to that effect which must be done without delay after the award is made.

Perhaps it is the use of the word "forward" as opposed to the word "deliver" which saves Nigeria from the needless confusion on whether an award was delivered or received once a notification letter was sent to the parties.

S. 29.(1) of the Federal Arbitration Act of Nigeria stipulates that *"A party which is aggrieved by an arbitral award may within 3 months from the date of the award apply to court to set the award aside".*

Interestingly, the Draft Arbitration and Conciliation Bill 2017 will, if enacted into law, have Nigeria revert to the wording Article 34.(3) of MAL but with a slight innovation, as follows:

> "An application for setting aside shall not be made after three months have elapsed from the date on which the party making that application had received the award…" (Emphases added.)

By employing "shall" instead of "may" it removes any appearance of discretion even though "may not" in this context clearly means "must not" or "shall not". It is the concept of receipt of the award which could be problematic given the inconsistency in Kenyan courts.

State laws have varying provisions. For example, in Lagos State[53] a party which is aggrieved by an arbitral award "may within 3 months from the date of the award...(apply to court) to set aside the award...". In the absence of any Rule of Court relating to the time an award set-aside must be made in Oyo State[54], then the Rules of the Supreme Court of England are applicable by virtue of the relevant Civil Procedure Rule. The time allowed in Kaduna[55] is 15 days.

India

The Supreme Court of India has pronounced itself clearly on this issue in two cases, *Union of India v. Tesco Trichy Engineers* and *State of Maharashtra & Others v. M/s Ark Builders Ltd*, both of which are cited in Para 11 of *UoN v. Multiscope.* That court is categorical that the delivery of an arbitration award becomes effective when it is physically received by a party.

Ireland

In *Moohan v. S.&R. Motors [Donegal] Ltd*[56] Clarke J.says as follows:

> "3.4 ... It is also important to note that, in accordance with the terms of Article 34(3) of the UNCITRAL Model Law, time begins to run when the party seeking to set aside "has received the award".

53 Lagos State Arbitration Law 2009 s. 63.

54 Bioku investment and Property Co Ltd v. Nipol Ltd [1986] NWLR 767 (CA)

55 Kaduna State Civil Procedure Rules 1977.

56 Neutral Citation: [2009] IEHC 391 High Court of Ireland Record Number:2009 139 MCA Date of Delivery:31 July 2009 Court: High Court Composition of Court, accessible at http://www.uncitral.org/docs/clout/IRL/IRL_310709_FT-1.pdf#

> 3.9 … It seems to me that the wording of the UNCITRAL Model Law is clear. It speaks of time beginning to run when the person challenging the award has "received the award". It seems to me that the use of the term "received" in respect of an award means just that. The party has to physically receive the award. The language used in the UNCITRAL Model Law is in total distinction to the phrase used in the Rules of the Superior Courts which speaks of award being "published to the parties", which, for the reasons analysed by Kelly J., occurs when the parties are told by an arbitrator that his or her award is available.
>
> 3.10 It seems to me, therefore, that time does not begin to run in respect of the three month period specified in the UNCITRAL Model Law until the party concerned has actually received the relevant award. However, time begins to run in respect of the Rules of the Superior Courts (because of the different wording used in those Rules) when the parties are notified that the award concerned is available.
>
> 3.11 On that basis it is clear that, so far as the UNCITRAL Model Law (if it applies) is concerned, this challenge is within time as it is common case that this challenge was commenced within three months of the time when the arbitrator's award was actually received by the parties…" (Emphases added.)

Australia and New Zealand

The two jurisdictions are considered together only because Stewart J's judgment dated 20th February 2020

in S*harma v Military Ceramics Corporation [2020]*[57] does so as follows:

> "On 4 April 2018, Ms Rooney published her final award in the arbitration. The award reflects it as having been signed and dated in Sydney on that date. By letter dated 6 April 2018, Ms Deborah Tomkinson, the Secretary General of ACICA, wrote to the parties to the arbitration proceeding saying that ACICA had been asked by the arbitral tribunal to communicate the final award. The letter stated that the final award is "enclosed" and that hard copies of the award would follow by courier. At no stage did the applicant dispute that he had received the award as an attachment to the email from Ms Tomkinson on 6 April 2018.
>
> As indicated above, Art 34(3) of the Model Law requires an application for setting aside an award to be made within three months "from the date on which the party making that application had received the award". The applicant's application for relief against the arbitral award was issued on 29 November 2019, the question is whether the applicant "had received the award" on or before 29 August 2019, i.e. three months' earlier.
>
> In the circumstances, the court found that the applicant received a copy of the final arbitral award on or shortly after 6 August 2019."

57 FCA 216, Federal Court of Australia, File number: NSD 2003 of 2019 https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0216 accessed on 1st June 2020

ICSID

There are two relevant provisions:

Article 49 of the ICSID Convention requires the Secretary General to "promptly dispatch certified copies of the award to the parties" and stipulates that "the award shall be deemed to have been rendered on the date on which the certified copies were dispatched." This pre-empts questions about parties being required to collect the award and makes the date when a party received the award irrelevant. In addition, what ICSID should deliver to the parties is defined, as is the case under MAL. However, ICSID runs highly administered arbitrations in which the possibility of unpaid fees at the last stage of the proceedings is most unlikely.

Article 52 requires that an annulment application *"shall be made within 120 days after the date on which the award was rendered..."* According to Schrueur C. et al[58], the available information suggests that applications for annulment were generally submitted in a timely manner and but that there were arguments about whether the particular given were sufficient.

Bishop and Marchili[59] understand Article 52.(2) of ICSID convention to mean that an annulment application "must be m*ade within 120 days after the date on which the award was rendered"*. Incidentally, since ICSID is created

58 The ICSIS A Convention: A Commentary, 2nd Edition, Cambridge University Press pages 1024 -1026.

59 Annulment under the ICSID Convention, Oxford University Press 2012

by a treaty, then the interpretation of Article 52(2) of the Convention is subject to Article 31.(1) of Vienna Convention on the Law of Treaties (VCLT), which requires that,

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

This has been interpreted to mean that the plain or common sense meaning of a word prevails except where is clear that the word meant something else to the drafters or the meaning of the word has changed over time.

MAL is not, strictly speaking, a treaty. Its adoption by states creates national laws, not treaty obligations. However, plain reading is also the first port of call in the interpretation of national laws. I am not aware, but remain open to correction, of any jurisdiction where the literal or common-sense meaning of a word is not given the first and usually the last bite in the interpretation of every legal text.

Conclusion

Arbitration is not a self-service cafe where parties pick and pay. What is contemplated in *ad hoc* arbitrations under MAL is a different format or a more formal restaurants, so to speak. Parties sit, order and pay a deposit. When the meal is ready, the chef/arbitrator informs them of their final bill. Once that is settled, he or she delivers the food, ensuring that each party has received what it ordered, or, in his considered opinion, deserves!

Notification that the award is ready is a completely extraneous factor for consideration in set-aside applications under MAL. The recognition of the date of receipt of a "debt collection letter" as receipt of an arbitral award is a most absurd proposition. A tribunal must discharge the statutory obligation to deliver the award and to ensure that each party has received the award. Breaking the statute under which arbitration operates in order to ostensibly "promote" arbitration harms arbitration. Talk of throwing the baby away with the bath water!

The conclusion is that the Kenyan courts' mainstream view on the interpretation Article 34.(3) of MAL is manifestly incorrect, unlikely to be cured by the higher courts, different from what was intended by the drafters of MAL and inconsistent with the jurisprudence from other MAL jurisdictions. Given that in my view the subject legal text is free of ambiguity, this is also not a situation which requires legislative reform.

The divergence is deep rooted. The High Court in Kenya cannot redeem itself. It seems unconcerned with the divergence. The admission that the different interpretations have crystalised into schools of thought is, while great because it is honest, also quite unsettling.

On this particular issue, High Court could well mean "House of Confusion." Before you judge me harshly, read Justice Ochieng's decision in *UoN v. Multiscope*. His remarks about his decision in this case being based on the mainstream view is correct. This would not be the first time an even higher court has officially accepted

confusion among it's ranks. Reference is made to the comment made by Okwengu, M'Inoti and Shichale JJA in *Mumias Sugar Company Ltd* v. *Nalinkumar M Shah*[60]. The judges lament about the "chaotic" manner in which courts have treated interest claims. The chaos on interest in the courts of law continues to the detriment of judgement creditors.

Such conflicting interpretations are not restricted to law. The other area where interpretation of text is important is religion, where differences are either resolved through negotiations or allowed to coexist indefinitely through the creation of factions, sects and denominations.

Arbitration is a matter of choice. Parties go to arbitration because they choose to. They also choose the state in which to arbitrate even domestic arbitrations. I have seen contracts created in Kenya between Kenyan companies for matters to be performed in Kenya but with a different jurisdiction chosen as the seat of arbitration.

The proponents of the mainstream view claim that their position promotes arbitration and would attract international arbitration to Kenya. Given a choice between arbitrating in a seat which complies with an internationally accepted interpretation of a universal legal text and one which does not, I would personally choose and prescribe the former without hesitation.

60 Civil Appeal No. 21 of 2011, Kenya Court of Appeal at Mombasa.

Kenya has at least four options on the Article 34.(3) of MAL. First, *kukaa ngumu*, maintain the *status quo*. Second, persuade the other jurisdiction that they have strayed and correct them accordingly. Third, align it's jurisprudence with that of other MAL jurisdictions. Four, change s. 35.(3) of Arbtration Act of Kenya to read that the date when a party receives the tribunal's notification that the award is ready shall be deemed as the date of the notification of the arbitral award.