

## Comments on Sudanese Courts practice towards arbitration: 2021

### introduction

Sudan currently is facing great political and economic challenges. These challenges project itself on commercial operations where disputes and differences are common features. However, the Supreme Court did not follow a negative trajectory towards arbitration as it was expected after the famous *Tractors Co. case*<sup>1</sup> that created great mistrust within the arbitration community in Sudan.

The following two cases are significant positive development making the Sudanese legal system pro arbitration. On the other hand, *Musaab ALTYEB case* allows, with limitation, the Supreme Court review to the arbitration award. Therefore, it is expected to witness new development in future especially when the state is party. The pressing question is whether the Supreme Court is going to follow the same “pro arbitration” trajectory when the state is a party or not.

### The cases

In the case of *Concas International for Marketing vs Jumaa for Investment Co.*<sup>2</sup>, the parties had settled the case before the hearing, leaving the arbitral tribunal fees as debated matter. The Arbitration Act of 2016 did not organize such an issue while created a table of fees in Annex two as a guidance. The Supreme Court in this case defined the arbitration agreement “*the arbitration agreement is the stipulation prepared by the tribunal with the parties and includes the arbitration procedures, the duration of the process, the cost, location, the arbitration fees and any other issue agreed to be included*”<sup>3</sup>. It is clear that the Supreme Court followed an open mind interpretation to the arbitration agreement without any crippling limitation. This will assist the arbitration in general to avoid arbitrary recourses before the courts in future.

Meanwhile the Supreme Court ruled that in case of no agreement regarding the fees upon settlement, the first instance court will have the *discretionary* power to assess the efforts of the tribunal and estimate the fees. It is vital to acknowledge that the legal system in Sudan has not yet adopted any system of fees in the legal services which allows the court to dictate the

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<sup>1</sup> S.C/892/2015, The Finality or the Fees, Dr Hassan Alnor, Minister of Justice, in AL-Sudani Newspaper, 28 February 2016

<sup>2</sup> S C/C R/ 1797/2017, Sudan Law Journal 2018 67-71 pp

<sup>3</sup> Supra 67p

fees estimation for the tribunal. However, the same decision excluded the advocacy fees as the Advocacy Act of 1983 organizes the fees on settlement. But, in case of no agreement the court will do the same as this precedent dictated.

Generally, the Supreme Court have followed a positive approach in defining the arbitration agreement giving the parties the right to agree in all issues without any interference. On the other hand, it allows the court to decide a critical matter such as the arbitration fees. But only in case of lack of agreement where the court must fill the gap to make the arbitration operational.

In *Musaab ALTYEB vs Nimat OSMAN*<sup>4</sup> the Supreme Court made a victorious decision to arbitration, to some extent, which clarified article (42) of the 2016 Arbitration Act. To explain the significance of this precedent, a quick review to the Arbitration Act of 2005 is needed. In article (41-2) of the 2005 Act, the text was limiting the appeal process against the arbitral award. The practice and wording allowed the appellant to appeal against the award once and under the exception of “nullity claim”. The court decision on the nullity claim was final and not subject to any contest<sup>5</sup>. It was meant to limit the level of appeal allowing arbitration to be as fast and final as possible. In this model the appellant was able approach the competent court<sup>6</sup> under the nullity claim conditions and its decision was final. Where in the Act of 2016<sup>7</sup>, the wording avoided this model opening the doors for several appeal process while setting the jurisdiction for the nullity claim to the Appeal Court special circuit<sup>8</sup> only. For years, the debate

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<sup>4</sup> S C/ C R/ 504/2019, Sudan Law Journal 2019, 171-180pp

<sup>5</sup>“ 41.(1) The award debtor may request the dismissal of the Arbitration Tribunal award, for nullity , for the following reasons :

- (a) where the award has determined matters not included in the Arbitration Agreement or exceeds the limits of agreement;
- (b) corruption or misconduct of the arbitrators, or any one of them;
- (c) existence of serious neglect of a basic procedure of the arbitration proceedings;
- (d) failure of the Arbitration Tribunal to mention the reasons upon which it bases its award;
- (e) the award including what contravenes public order in the Sudan .

(2) The request referred to in sub-section (1), shall be presented before the competent court, whose decision shall be final .

(3) The competent court may adjudge the nullity of the award, of its own motion, or upon the reasons, set-out in sub-section (1)”

<sup>6</sup> The Khartoum Public Court

<sup>7</sup> Art:42

All not be raised”<sup>8</sup> Both parties may request the dismissal of the arbitration tribunal award, for nullity , from the Appeal Court to any of the following reasons :

- a. Where there is no arbitration agreement or is null, applicable to be a null, or ceased due to expiry.
- b. If one of the parties to the arbitration agreement, at the time of entering into the agreement, was under some incapacity according to the law that governs his capacity.
- c. If one of both parties was unable to present his case as a result of not given proper notice to appoint an arbitrator or of the arbitral proceedings or to any other reason out of his control.

about article (42) was open to interpretation as the wording affected the significance of the arbitral process as semi-independent resolution method in Sudan.

This precedent states clearly *“the nullity claim is different than the ordinary recourse as per the Civil Procedures Act 1983. The court in the nullity claim shall not consider the merit of the arbitral award issued by the tribunal. The only flaws that an appellant may raise in the nullity claim must be errors in the process. Or in other words, procedural flaws. However, any error in law or its interpretation regardless of its grossness shall not be raised at this stage”*. This a very decisive judgment and was not expected. The arbitration community now can breathe again as it gave the tribunal the ultimate right to adjudicate the case without interference or revision from the court.

On contrary, the judgment also clarifies the issue of finality of the nullity claim defined in art:42. It allowed the Supreme Court to accept the recourse against the Appeal Court under the nullity claim, but only to oversee the compliance of the appeal court to the same art:42 under the guidance given above.

The case also assisted the arbitration community to understand the limitation of the nullity claim. It is no longer a title for an ordinary appeal where the higher courts can engage into the substance of the dispute as in litigation.

To sum up, the two cases was to some extent supportive to arbitration. In *Concas International case*, the court interfered to fill the gap in the arbitration agreement regarding the fees. Where in *Musaab ALTYEB case*, and after a long wait, a guidance to art: 42 has arrived.

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- d. If the award set aside the applicable law that the parties agreed to apply on the merit of the dispute.
  - e. If the formation of the tribunal or the appointment of the arbitrators was not according the law or the parties agreement.
  - f. The award has determined issues not included in the Arbitration Agreement or exceeds the limits of agreement, nevertheless, if it is possible to separate the issues submitted to the arbitration from the issues not submitted to arbitration, the nullity shall fall into the latter issues only;
  - g. if the arbitration award is annulled or the arbitration procedures are annulled, which affected the award.
1. The request referred to in sub-article (1), shall be presented before the appeal court.
  2. The appeal court may adjudge the nullity of the award, of its own motion, if the award contravenes with public order in Sudan.

Nevertheless, the jurisdiction of the Supreme Court over arbitration cases is still intact. These developments show the changing lanes of the Supreme Court towards arbitration. From total denial in the *Tractors Co. case*<sup>9</sup> to semi-total recognition in *Musaab ALTYEB case*.

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<sup>9</sup> BANNAGA, Ahmed, Attitude of Sudanese Courts Towards, Arbitration Rethinking the Role of African National Courts in Arbitration, Kluwer Law International B.V., p219