

ARBITRATION IN AFRICA - THE STATE OF ARBITRATION IN NIGERIA

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INTRODUCTION

First, I would like to thank the organizers of this International Colloquium for the choice of the theme – “Current State of Arbitration in Africa” and secondly for the choice of the title of this paper - The State of Arbitration In Nigeria.

This paper will focus mainly on domestic and international commercial arbitration, investment arbitration, construction arbitration and maritime arbitration in Nigeria in an order of popularity of usage.

Nigeria is no doubt the most populous country in Africa (140 Million People) richly blessed in natural resources, the most important of all is the black gold (petrol). The projected national revenue for 2008 is N1.986 trillion while the projected expenditure is N1.8 trillion which translate approximately to 16.9 billion USD and 15.4 billion USD respectively.

The economy of Nigeria is twice the economy of many African countries put together. In the West African sub Region, the Nigerian economy is about the size of all other member States put together.

The size of the economy, coupled with commercial, business and investments activities (domestic and international) in the various sectors of the economy including, Oil and Gas, Energy, Banking and Finance, Development Projects, Construction, Transportation -Reconstruction of the Railways, Port and Airport Concessions, Aviation and International Trade dictate the level and size of economic activities in Nigeria.

All these active sectors of the Nigerian Economy are usually involved in International Trade and Commercial transactions in one form or the other resulting in negotiations, drafting and interpretation of international contracts and commercial agreements and dispute resolution.

Operators of these sectors are competing for prime relevance in the Nigerian economy and are often faced with many obstacles in the conduct of their business. These obstacles include unforeseen change in Government policies, delay in the execution of contracts, inevitable variation of terms of commercial agreements occasioned by inflation and other factors, lack of performance by the parties etc. From time to time, business and commercial decisions are made which often result in breach of the terms of commercial agreements between parties. The breach in turn leads to dispute between the parties and consequent invocation of Arbitration Clauses.

Domestic and International Commercial contracts, of necessity, contain Arbitration Clauses. Arbitration Clauses are therefore a sine qua non and an integral part of most contracts entered into by parties in Nigeria, either domestic or international. It must however be noted that small time businessmen do not

bother about the inclusion of Arbitration Clauses in contract or commercial agreements, if one is executed at all.

It is the Arbitration Clauses that stipulate what steps to be taken, how it is taken and by whom, in the event of a dispute arising in the course of executing the contracts or commercial agreements between parties. Arbitration Clauses come in different ways, depending mostly, on the Arbitration Rules to be applied. It can be under the UNCITRAL Arbitration Rules, International Chamber of Commerce (ICC Rules), London Court of Arbitration Rules (LCIA) rules, American Arbitration Rules, The International Centre for the Settlement of Investment Dispute Rules (ICSID) rules.

Forms of Arbitration in Nigeria

Commercial arbitration (domestic, international, ad hoc or institutional) is the most popular means of Alternative Dispute Resolution in Nigeria. Construction Arbitration ranks next followed by Investment Arbitration and lastly, the relatively young maritime arbitration.

1. Commercial Arbitration

As observed by the Learned Authors of "Law and Practice of Arbitration and Conciliation In Nigeria" Honourable Justice J. Olakunle Orojo and Professor M. Ayodele Ajomo on page vi of the book:-

"The resolution of commercial disputes is obviously a very crucial aspect of the operation of the national economy and of the judicial system."

The relevant law which forms the legal basis of modern commercial arbitration and alternative dispute resolution mechanism in Nigeria, is the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria (2004) - (ACA 2004).

Arbitration and other alternative dispute resolution methods; mediation, conciliation, etc, in Nigeria, are not without historical antecedents. In the traditional setting - villages, hamlets, settlements and town - dispute resolution is almost as old as the tradition and customs of the people. Alternative Dispute resolution is therefore an age-long cultural phenomenon in Nigeria as it is in most African Countries.

Economic and political developments, (including colonialism), have brought about the modern methods of alternative dispute resolution - Arbitration, Mediation and Conciliation. This has not obliterated the traditional methods of settling disputes in the traditional setting.

The Historical Antecedents of Commercial Arbitration In Nigeria

The Arbitration Ordinance 1914, which was predicated on the English Arbitration Act 1889, is the first formal statute on Arbitration in Nigeria and dates back to the colonial times. Nigeria had its first set of Laws of the Federation in 1958, two years before independence in 1960. The Arbitration Ordinance 1914 was re-enacted as the Arbitration Ordinance Act Cap 13, Laws of the Federation of Nigeria and Lagos, 1958.

By virtue of paragraph 2 of Section 1 of the Arbitration Ordinance Act 1958, the Act was applicable to the Northern, Western and Eastern Regions, Federal Territory of Lagos; and interestingly or coincidentally, the then Southern Cameroons. It is interesting that this conference is taking place on the Cameroonian soil. It will equally be interesting to find out if the Law is still applicable today in an adopted or assimilated form. In any event, delving into this, will certainly be "hors sujet".

The provisions of the 1958 Act was limited to domestic arbitration only as no reference was made to international commercial arbitration. One is not certain if there was any international commercial arbitration involving Nigerian parties or foreign parties either in Nigeria or abroad, prior to Independence in 1960. If there was, Nigeria then a colony of Britain would probably have been covered by the 1958 New York Convention. It is not clear whether Britain, being a signatory to the Convention, in the exercise of its sovereignty over the former colonies, could rightly have made the Convention applicable to Nigeria. It will be a subject of further research for one to reach a conclusion that Recognition and Enforcement of Foreign Arbitral Awards (The York Convention) was ever put into practice in Nigeria prior to Nigeria becoming a signatory to the Convention in 1988.

The first indigenous Statute on Arbitration and Conciliation was enacted in 1988, by a military Decree. It was known as the Arbitration and Conciliation Decree 1988 (ACA1988) and came into effect on 13th March, 1988.

The Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria (2004) ACA 2004

The ACA 1988 was reenacted as the ACA2004. A cursory look at the ACA 2004 and examination of some important sections will be sufficient for this paper, in view of the constraint of time. The Act is described in its recital as:-

“An Act to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration”

The ACA which consists mainly of the provisions of the UNCITRAL Model Law, is divided into four parts.

Part I – Arbitration

Part I which comprises of Sections 1 – 36 deals with Arbitration in general, including Arbitration Agreement, Composition and Jurisdiction of Arbitral Tribunals, Challenge to the Appointment of Arbitrator(s), Conduct of Arbitral Proceedings, Recourse Against Awards and Recognition and Enforcement of Awards

Part II – Conciliation

Part II comprises of Sections 37 – 42 and deals with Conciliation as a means of Alternative Dispute Resolution. It is important to note that if the parties do not agree to the terms of settlement submitted by the conciliation body, the parties may submit dispute to arbitration or litigate.

Section 42(3) which states:-

“If the parties do not agree to the terms of settlement submitted by the conciliation body they may:-

1. *submit the dispute to arbitration in accordance with any agreement between them; or*

2. *take any action in court as they may deem fit."*

It is also important to note the provision of Section 42(4), affecting the legal rights of the parties states:-

"Nothing done in connection with the conciliation proceedings shall, affect the legal rights of the parties ;in any submission to arbitration or any action taken under sub-section 3 of this section"

Part III,- International Commercial Arbitration and Conciliation

Part III comprising of Sections 43 – 55, deals solely with International Commercial Arbitration and Conciliation in addition to the other provisions of the ACA. It includes Appointment and Challenge of Arbitrators, Rules applicable to the substance of dispute, lex arbitri, setting aside of arbitral award, costs, recognition and enforcement of awards.

Part IV – Miscellaneous

Part IV which comprises Sections 56 – 58 deals with miscellaneous provisions such as Receipt of Written Communication, Interpretation, Short Title and Application.

By virtue of Section 58 of the ACA, the Act is applicable through out the Federation of Nigeria.

2. Construction Industry Arbitration

Construction Arbitration is promoted by the Construction Industry Arbitration Association of Nigeria (that will be briefly discussed later). Participation in Construction Arbitration is, however, not the exclusive preserve of the members of the Association, their professional expertise notwithstanding. Most Arbitrators in Nigeria are actively involved in construction arbitration as this ranks next to commercial arbitration. Where the an arbitrator requires the expertise of a construction industry professional, the services of such a professional are hired as an expert giving advice, or as an expert witness.

3. Investment Arbitration

Investment arbitration is essentially statute derived, as it involves, in almost all cases, the State or Government agencies and an investor unlike commercial arbitration which essentially involves private parties. The relevant statute on investment arbitration is the Nigerian Investment Promotion Commission Act, (NIPCA) Cap N 117 Laws of the Federation of Nigeria, 2004 which was first enacted in 1995. While the ACA deals with arbitration in general without any specific provision for investment arbitration, the NIPCA deals extensively with the promotion of investments in Nigeria with a specific provision for the resolution of disputes arising between an investor (Nigerian or foreign) and any Government of the Federation of Nigeria in respect of an enterprise.

Section 26 of NIPCA provides as follows:-

- (1) *"Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.*
- (2) *"Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies is not amicably settled through mutual*

discussions, may be submitted at the option of the aggrieved party to arbitration as follows:-

- (a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act or*
 - (b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or*
 - (c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.*
- (3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for the Settlement of Investment Dispute shall apply"*

Nigeria ratified the ICSID Convention as far back as back as 23rd August, 1965. I believe some investment disputes have been referred to ICSID for arbitration.

It must be said that, in view of the continuous construction developments going on since the creation of the Federal Capital Territory, Abuja and some other States of Nigeria, disputes arising from construction contracts are very common. This has in fact led to a boom in construction arbitration.

4. Maritime Arbitration

Maritime arbitration has not been as common as the other forms of arbitration. The reason for this is that most arbitration clauses in maritime contracts (e.g. Bill of Lading) exclude the jurisdiction of the Nigerian Court. However since the enactment of the AJA (to be discussed later) maritime arbitration is stepping up. The emergence of the Maritime Arbitration Association of Nigeria in 2005 has given impetus to the promotion of maritime arbitration in Nigeria.

Arbitration Rules Under the ACA

The applicable Arbitration Rules is flexible under ACA. Parties are at liberty to agree in writing on the applicable rules. The UNCITRAL Rules are contained in the First Schedule.

Section 53 of the ACA states:-

"Notwithstanding the provisions of this Act, the parties to an international commercial agreement may, agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties."

Composition of Arbitral Tribunal

a. Number of Arbitrators

Section 6 of the ACA provides:-

"The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three"

b. Appointment of Arbitrators – Domestic Arbitration

Section 7 of the ACA deals with the appointment of Arbitrators for domestic arbitration. The parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator. Where no procedure is specified in the agreement, in the case of three arbitrators, each party shall appoint one arbitrator and the two arbitrators shall appoint the third. In the case of a sole arbitrator, where the parties do not agree on the choice of an arbitrator either of them may apply to the High Court for the appointment of a sole arbitrator.

If the parties do not agree on the choice of arbitrator(s), as the case may be within thirty days, then either of the parties may apply to a High Court for the appointment of an arbitrator in the case of a sole arbitrator or a third arbitrator in the case of three arbitrators. The decision of the Court in the appointment of an arbitrator is final and is not subject to appeal.

c. Appointment of Arbitrators - International Commercial Arbitration

Section 44 deals ACA with the appointment of Arbitrator(s) or Conciliator in an international commercial arbitration. Section 44(1) – In the case of a sole arbitrator, either of the parties may propose the name of one or more persons, one of whom would serve as the sole arbitrator. Section 44(5) – In the case of three arbitrators each party shall appoint one arbitrator and the two arbitrators shall choose a third arbitrator who shall act as the presiding arbitrator.

Section 44(2) and (6) - If within thirty days after the receipt of the proposal for the appointment of a sole arbitrator or a third arbitrator, where each party has nominated an arbitrator in the case of three arbitrators, the parties to an International Commercial Arbitration or Conciliation do not agree on the choice of a Sole Arbitrator or a third arbitrator, it shall be referred to an appointing authority who shall apply the list-procedure. Section 54(2) defines the appointing authority as the Secretary-General of the Permanent Court of Arbitration at The Hague.

Jurisdiction of An Arbitral Tribunal

Section 12 of ACA states:-

- (1) *"An Arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement."*
- (2) *"For the purpose of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause."*

Challenge To The Jurisdiction of An Arbitral Tribunal Under the ACA

The jurisdiction of an arbitral tribunal or its scope of authority may be challenged pursuant to the provisions of Section 12(3) which states:-

In any arbitral proceedings, a plea that the arbitral tribunal –

- a. Does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator.*
- b. is exceeding the scope of its authority may, be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings.*

And the arbitral tribunal may, in either case admit a later plea if it considers that the delay was justified.

Pursuant to the provisions of Section 12(4), the arbitral tribunal may, rule on any plea referred to it under subsection (3) either as a preliminary question or in an award on the merits; and such ruling shall be final and binding.

The Application of the New York Convention – Recognition and Enforcement

The New York Convention was incorporated and domesticated into Nigerian Laws by virtue of Section 54(1) of the ACA. It constitutes the Second Schedule of the Act and has been applicable in Nigeria since 14th March, 1988. Section 54 is important within the context of International Commercial Arbitration and the theme of this conference and it states:-

- 1. Without prejudice to sections 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought the Convention on the Recognition and Enforcement of Foreign Awards (hereinafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any in any contracting State –*
 - a. provided that, such contracting State has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention.*
 - b. That the Convention shall apply only to difference arising out of a legal relationship which is contractual ."*

One highly respected former Justice of the Nigerian Supreme Court, late Justice Ephraim Akpata, (a veritable latter day convert into the world of Arbitration), commented on page three of his book "The

Nigerian Arbitration Law in Focus" as follows:-

"It is also relevant to state that even though the Convention was not adopted before 1988 and the country enacted no law relating to international commercial arbitration, a foreign arbitral award in an international commercial arbitration made outside the

country could be enforced in Nigeria by the combined effect of sections 2(1) and 4(2) of the Foreign Judgment (Reciprocal Enforcement) Act, Laws of the Federation of Nigeria 1960, provide amongst other things, it was registered in the High Court in this country"

However, the views expressed by the respected author on the application of sections 2(1) and 4(2) of the Foreign Judgment (Reciprocal Enforcement) Act, Laws of the Federation of Nigeria 1960, relating to the recognition and enforcement of foreign arbitral award made outside Nigeria need to be reexamined critically. In this pursuit, one must first admit that the view may be right on one hand and in some circumstances. Such circumstances include instances where the award or decision is by law, in the country where it was made, a judgment of a court.

On the other hand, the views can be faulted on the ground that the Foreign Judgment (Reciprocal Enforcement) Act relates to **judgment of a foreign court and not arbitral award or decision made outside Nigeria**. If **arbitral award** was intended to be covered by the provisions of the Act, it would have been expressly stated. The non-mention of an arbitral award or decision in the Act, clearly excludes the recognition and enforcement of an arbitral award or decision in a Nigeria Court. The inevitable conclusion one can therefore reach, is that, prior to ACA 1988, an arbitral award or decision made outside Nigeria is neither registerable nor enforceable in Nigeria, except in the circumstance admitted above as being rightly expressed by the author.

The point must also be made, in my view, that the door was not totally shut against the registration and enforcement of a foreign award or decision in Nigeria. One sure way of registering and enforcing such awards in countries where such award or decision is not by law, a judgment of a court, would have been, first registering the award as a judgment of a court in that country, and having been clothed with judicial cloak of a judgment of a court, it becomes registerable under the Foreign Judgment (Reciprocal Enforcement) Act, provided the judgment is from a country covered by the Act, id est, countries which have reciprocal agreements or treaties with Nigeria.

It is note worthy that the obstacle to the recognition and enforcement of an award arising from an international commercial arbitration prior to 1988, credited to Justice Akpata and earlier referred to, has been cleared by the provisions of Section 54(1) of ACA which accords with the provisions of Article X of the New York Convention which states:-

"Any State may at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible".

Arbitration and the Exercise of Jurisdiction By Nigerian Courts.

The penchant, by natural instincts, of the Nigerian Courts to protect and preserve its jurisdiction has been demonstrated now and again, and more particularly, when parties in an agreement (arbitration agreement or others) seek to exclude the courts from exercising their constitutional and or inherent jurisdictions. The Courts have never failed to jealously guard and protect their jurisdiction as this is often perceived as a challenge or an affront to the dignity of the courts. This, one must admit, is done within the ambit of the law. A court has, at least, the jurisdiction to decide whether or not it has jurisdiction to determine a matter or cause before it.

Some judicial pronouncements in this regard speak volume. In *Attorney-General of Lagos State vs. The Honourable Justice L. J. Dosunmu*, (1989) 3 N.W. L.R. Part 111 SC 552, the Supreme Court held at page 580 paragraphs C-D as follows:-

"Courts should guard their jurisdiction zealously and jealously but if in any given case that jurisdiction has been ousted by the provisions of the Constitution or a Decree or Act, then the path of constitutionalism dictates a willing compliance with the ouster clause"

It is important to note that the decision of the Supreme Court cited above does not refer to ouster clauses in arbitration agreements. The question that then readily comes to mind is that can ouster clauses in arbitration agreement effectively oust the jurisdiction of the Nigeria courts? The Admiralty Jurisdiction Act (AJA) 1991 comes in aid and provides an answer. It clearly prohibits such ouster clauses.

The Admiralty Jurisdiction Act (AJA) 1991

This Act, without any doubt clearly, sets out to protect the admiralty jurisdiction of the Federal High Court in Nigeria no matter the ouster clause in any arbitration clause and in deed no matter how very well drafted. The reason is not far fetched. For years, many a foreign drafted and executed shipping documents, have deliberately ousted the jurisdiction of the Nigerian courts in admiralty claims notwithstanding whether the subject matter of the Claim or either of the party is within the jurisdiction of the Nigerian courts.

Section 20 of the AJA states:-

"Any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the Court shall be null and void, if it relates to any admiralty matter falling under this Act and if –

- a. the place of performance, execution, delivery, act or default is or takes place in Nigeria; or any of the parties resides or has resided in Nigeria; or*
- c. – f.*
- g. under any convention, for the time being in force to which Nigeria is a party, the national court of a contracting State is either mandated or has a discretion to assume jurisdiction; or*
- h. in the opinion of the Court, the cause, matter or action should be adjudicated upon in Nigeria.*

This Act has been given judicial backing in many cases. In *M.V. PANORMOS Bay v. Olam (Nig.) Plc* 2004 5 N.W.L.R. Part 865, C.A.1, where Clause 7 of a Bill of Lading had ousted the jurisdiction of the Nigerian courts. The clause read as follows:-

"Any dispute arising under this bill of lading shall be referred to arbitration in London. The unamended centrum arbitration clause will apply."

The Court of Appeal held that by virtue of Section 20 of the Admiralty Jurisdiction Decree, 1991 any agreement by any person or party to any cause or matter or action which seeks to oust the jurisdiction

of the court shall be null and void, if it relates to any admiralty matter falling under the Decree. In the instant case, the said section is a statutory limitation to the enforcement of the purported arbitration agreement

In an earlier decision in the case of Sonnar (Nig.) Ltd. & Another vs. Partenreedri M.S. Norwind & Another, 1987 A.N.L.R. 548, the Supreme held that a similar arbitration clause ousting the jurisdiction of Nigerian court is null and void. The Clause stated:-

"Any dispute arising under his Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein"

The Use of the Judicial Proceedings To Defeat Arbitration

Judicial proceedings have always been resorted to by litigation Lawyers to create obstacles to Arbitral Proceedings. It has worked immensely in defeating the goal and essence of arbitration – speedy, informal and less expensive means of resolving commercial disputes. The strategy is simple and well-mastered. Once there is the likelihood or real situation to evoke an arbitral clause, the party in breach or the party who perceives that the outcome of an arbitration will not be in his favour rushes to court to seeking an order of injunction prohibiting or staying arbitral proceedings.

This obstacle to justice is usually at the instance of Counsel. The point must, however, be made and emphasized that Counsel involved in this practice have little or no knowledge of arbitral proceedings and in most cases feel threatened and often express the fear that arbitration will take away their fees whereas the contrary is the case. Arbitration in its nature, ensures speedy resolution of disputes and an early payment of fees to Counsel. I must confess, I was once a part of this group of Advocates and the majority of Nigerian Advocates still belong to it and are not willingly to change.

The courts too have not fared better and this is better expressed by the dictum of the Late Justice Ibukun Ephraim Akpata whom I have earlier described as a veritable latter day convert into the world of arbitration. In the case of Kano State Urban Development Board (K.S.U.D.B) vs. FANZ Limited (1986) 5 N.W.L.R. Part 39 74 CA, the late Justice, then sitting at the Court of Appeal in expressing some disgust against arbitration and arbitrator said thus:-

"Foolhardy references to arbitration and rough and ready decisions by arbitrators"

By sharp contrast and a complete detour of his earlier gratuitous conclusions, the late Justice (like many justices of the Appellate Courts and High Courts in Nigeria), upon retirement from the Supreme Court at the age of seventy in 1992, got seriously involved in domestic and international commercial arbitration. In his book published in 1997 "The Nigerian Arbitration Law in Focus", he stated in the introduction thus:-

"Although slow in coming, arbitration is beginning to receive some attention in commercial and legal circles in Nigeria. Retired judges who in the past would have been tire of adjudicating are developing interest in arbitration and are being used as arbitrators. Some practicing lawyers are combining litigation with arbitration. More than anything else, the formation in Nigeria of the Nigerian Group of the Chartered Institute of Arbitrators, has brought added impetus to promoting arbitration in the country"

The observation of the Late Justice sums up the State of Arbitration as at 1997. The story is different today. Over the decade, there has been immense interest shown in Arbitration by lawyers and non-lawyers alike. This is clearly evident in the relative upsurge of the number of Nigerian Arbitrators who have attained the Status of Chartered Arbitrator, Fellows, Members and Associates of the Chartered Institute of Arbitrators (UK). There are countless others who are involved in arbitration but have not bothered to follow the path of the Chartered Institute.

Incidentally, the K.S.U.D.B. (Supra), is a classical example of the use of judicial proceedings to delay arbitral proceedings. The Plaintiff sued the Defendant for the sum of N6,922,742.00 being damages for a breach of an agreement dated 16th July, 1975 to build 840 units of dwelling house. On 8/10/79, the parties appeared through their Counsel in Court and pleadings were ordered to be filed. On 22/01/80 the Court was informed of the Plaintiff decision to arbitrate. The court ordered that the matter be referred to Arbitration and the court was informed on 11/2/81 (two years after the matter was first brought to court), that arbitration proceedings had commenced. The matter was stayed and proceedings adjourned sine die pending arbitration.

The award was subsequently made in favour of the Plaintiff, who by an application, sought to enforce the award. The Defendant then sought to set aside the award. On 25/11/82 (three years after the commencement of judicial proceedings), the Court upheld the award. The matter went on appeal to the Court of Appeal and ended up at the Supreme Court which delivered its judgment on 15/06/90. Eleven good years after the High Court was first approached. There are cases which have lasted longer than this in which arbitral proceedings have been stayed or the award challenged.

Judicial Review of Arbitral Awards

Apart from the powers of the Nigerian Courts to grant stay of proceedings pending arbitration and power to appoint arbitrators as stipulated in the provisions of Sections 5 and 7 of ACA respectively, the Courts are also empowered by the provisions of Sections 29 and 30 of the ACA to carry out judicial review of arbitral awards.

Recourse Against Arbitral Awards

By the provisions of Section 29 ACA, an aggrieved party may, by way of an application to a high court, apply to set aside an arbitral award within three months from the date of the award or in the case of an additional award from the day the request for the additional award is disposed of by the arbitral tribunal.

The power of Court to Set Aside Arbitral Award

The Supreme Court in K.S.U.D.B vs. FANZ Limited (1990) 4 N.W.L.R. Part 142 SC1), said this much on the powers of court to set aside an award.

"Parties take their arbitrator for better or worse both as to decision of fact and decision of law. However, by virtue of the provisions of section 12(2) of the Arbitration Law, where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court has the power to set the award aside."

Grounds For Setting Aside An Arbitral Award

By the provisions of Section 30 of ACA, the Court may set aside an arbitral award on the ground of misconduct of the arbitrator. It states:-

1. *Where an arbitrator has misconducted himself, or where the arbitral proceedings or award, has been improperly procured, the Court may on the application of a party set aside the award.*
2. *An arbitrator who has misconducted himself may, on the application of any party be removed by the Court.*

The grounds for setting aside an arbitral award were reiterated by the Supreme Court in K.S.U.D.B vs. FANZ Limited (supra) as follows:-

- a. *that the arbitration or award has been improperly procured, as, for example, where the arbitrator has been deceived, or material evidence has been fraudulently concealed and*
- b. *that the arbitrator or umpire has misconducted himself or the proceedings.*
- c. *That there is an error of law on the face of the award.*

One good thing about (K.S.U.D.B) vs. FANZ Limited is that it went as far as the Supreme Court of Nigeria and afforded the court opportunity to make some far-reaching judicial pronouncements, on Judicial Review of Arbitral Proceedings, including:-

On the meaning of arbitration –

“An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in judicial manner, by a person or persons other than a court of competent jurisdiction. Although an arbitration agreement may relate to present or future differences, an arbitration is the reference of actual matters in controversy.”

On the Basis of validity of arbitration and arbitrator’s authority

“In deciding whether disputes have been submitted to arbitration, two preliminary questions arise in all cases, namely:-

- a. *whether there has been any valid agreement to submit any disputes to arbitration, and*
- b. *whether the dispute that has in fact arisen is one within the scope of any agreement to refer”*

On the power of court to stay proceedings for arbitration

“The exercise of the power to stay proceedings does not in any way affect the validity of the exercise of the power to refuse an application to set aside the arbitration award or to grant leave for its enforcement.”

On the Scope of Reference To Arbitration

"An arbitrator has jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority, and consequently the whole of the arbitration proceeding including the award of the arbitrator will be null and void and of no effect."

On the Binding Effect of An Arbitral Award

"The effect of an award by an arbitrator on the parties concerned is such as the agreement of reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be final and binding on the parties and any persons claiming under them respectively. The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement."

Arbitral Bodies In Nigeria

The practice of Arbitration in Nigeria and Arbitration Rules, unlike some other jurisdictions, are not derived from the need to settle commercial disputes among members of a particular chamber of commerce and other parties. There is no institutional arbitration system, save for the Lagos Regional Centre for International Commercial Arbitration (LCICA) which is limited in scope to the settlement of disputes arising from economic and commercial matters, including trade, commerce and investment. In contrast, in Switzerland, the chambers of commerce in Basel, Berne, Geneva, Lausanne, Lugano and Zurich had its respective arbitration rules and mechanism for settling domestic and international commercial disputes. These rules were later harmonised and gave birth to a unified rules of arbitration known as Swiss Rules of International Arbitration (SRIA). The chambers operate an institutional arbitration system and apply the SRIA and the Swiss Law on International Arbitration 1990.

In Nigeria, the State or State Agencies do not fund arbitration or arbitral bodies, and in consequence the State does not have any direct control over their activities or administration of arbitral proceedings. I am aware that the Cameroonian Centre D'Arbitrage du GICAM. Gicam is funded by the State and the State appoints its Secretary General, even though GICAM is a "groupement" of private commercial interests.

The reality in Nigeria is that unlike the Swiss system, the various chambers of commerce and industry have little or nothing to do with practice of arbitration as a body and are not directly involved in the formulation of any rules of arbitration or the regulation of the practice of arbitration in Nigeria. The practice of arbitration in Nigeria is thus regulated by the ACA and International Arbitration Rules the parties may wish to apply.

There are four main Arbitral Bodies in Nigeria namely, The Chartered Institute of Arbitrators (UK) Nigeria Branch, The Chartered Institute of Arbitrators Nigeria, Construction Arbitrators of Nigeria and the Maritime Arbitrators of Nigeria.

1. The Chartered Institute of Arbitrators (UK), Nigeria Branch

The Nigeria Branch of Chartered Institute of Arbitrators (UK), (C.I.Arb UK) was granted a Branch status on 22nd December, 1997 and became functional in March, 1998. The Nigerian members of the CIArb (UK) numbering about fifty in 1990, started meeting as a group and has grown through the tireless efforts of its founding members for years. The status of a Branch was granted after all the conditions had been met.

The mandate of the Branch is to develop and promote the art and practice of arbitration in its region by way of lectures, seminars, promotional material for effective dissemination of dispute resolution.

The Nigeria Branch has not relented in its efforts in popularizing the practice of arbitration in Nigeria. In this regard, it organizes seminars and workshops regularly as well as training courses in accordance with the standards of C.I.Arb (UK). The Branch has attained such a high level that it conducts training programmes in Ghana on behalf of the C.I.Arb (UK).

The membership of the Branch is drawn from various professions, but one must admit that it is dominated by lawyers. The Branch can today boast of a total membership of 657 made up of 11 Chartered Arbitrators, 19 Fellows, 185 Members and 442 Associate Members.

The Branch has an Arbitration Centre which provides venues for arbitration proceedings on request. The Centre has a conference Hall, Hearing Rooms and Retiring Room and a Library. The Branch is arguably the most vibrant body of arbitrators in Nigeria.

2. “The Chartered Institute of Arbitrators Nigeria C.I.Arb (Nig)”

This body was recently founded by a group of seasoned Nigerian Arbitrators, very senior lawyers and retired judges, some of whom are fellows of the C.I.Arb (UK). The similarity in name of the two bodies is still in controversy and subject of litigation. Although The Corporate Affairs Commission has ordered this Institute to change its name, I am not sure it has fully complied.

The marked difference between the Nigeria Branch of the C.I.Arb (UK) and the “C.I.Arb (Nig)” is that the former insists on membership by examination while the latter bases its membership on experience in the practice of law or arbitration. Thus you find some members joining as Fellows unlike the different levels you have to pass through in C.I.Arb (UK) Nigerian Branch. It is hoped that sooner or later, it will be stricter in its membership drive by organizing training courses and examination for its members at various levels and not merely awarding membership and fellowship. High standards are no doubt the hallmark of any professional association or body.

3. Association of Construction Arbitrators of Nigeria

This body is made up of mainly professionals in the construction industry in Nigeria, Architects, Builders, Civil Engineers, Structural Engineers, Quantity Surveyors. The Nigerian Institute of Architects and the Nigerian Institute of Quantity Surveyors have provisions for the appointment of arbitrators and the conduct of arbitration in their respective statutes.

Construction arbitration in Nigeria requires some specialist knowledge and experience in the construction and building industry. Very often only professional expertise and experience determine the choice of arbitrators in this area as a typical construction project involves several professionals and several works.

4. Maritime Arbitrators Association of Nigeria

The Maritime Arbitration Association of Nigeria is a specialized association which was incorporated in 2005. It is relatively young but very active. Its main objective is to enlighten the general public and stakeholders in the maritime industry about arbitration and ADR as a viable alternative to litigation, and to promote the choice of arbitrators.

Maritime Arbitration has been in practice in Nigeria for long without a formal association promoting the interests of maritime arbitration. Its membership is made up mainly of admiralty practitioners, lawyers, shipping agents, marine insurers and other professionals with similar interest.

It is however to be observed that Section 20 of the Admiralty Jurisdiction Act 1991 which protects the jurisdiction of Nigerian courts against ouster clauses in arbitration clauses in shipping matters will go a long way in encouraging the practice of maritime arbitration in Nigeria.

Lagos Centre For International Commercial Arbitration (LARCICA)

This Institutional Arbitration Centre was established by the Asian-African Legal Consultative Committee (AALCC) along with similar Centres in Cairo and Kuala Lumpur. It was inaugurated on March 28, 1989 for the settlement of disputes in economic and commercial matters and became functional in 1999. The Centre is today a beehive of activities providing venues for both domestic and international arbitration in economic and commercial matters in Africa South of the Sahara, particularly, the West African Sub-Region.

It provides facilities under its own rules and under UNCITRAL Arbitration Rules as modified by the AALCC

Future of Arbitration In Nigeria

The future of arbitration is very bright in Nigeria as many professionals are becoming more interested and the congestion in our courts is also discouraging parties from litigation in preference for alternative means of dispute resolution, particularly arbitration. The future of arbitration will again be hors sujet and so one cannot delve into it but the inevitable conclusion is that it is bright.

Ohada's Common Court of Justice and Arbitration (CCJA) -Court Commune de Justice et d'Arbitrage (CCJA)

It is a matter of regret that CCJA is little known in Nigeria as a major Institutional Arbitration Centre CCJA. It is desirable that the activities of CCJA should be known outside the francophone world as other major specialised international centres.

The scope of the jurisdiction of the CCJA must be expanded and extended to the Anglophone and Lusophone Africa in the near future, in the spirit of harmonization of laws in Africa. The APAA, in conjunction with Ohada, should be in the forefront of the realisation of this goal. While Abidjan could remain the centre of arbitration in Africa, the jurisdiction of Ecowas Court in Abuja could be expanded to cover disputes arising from cross-boarder commercial transactions within the region. Advantage must be taken of the limited jurisdiction of the Ecowas Court which does not cover cross boarder commercial transactions. The jurisdictions to be exercised by the CCJA and the Ecowas Court on

disputes arising from cross-boarder commercial transactions in future, have to be clearly defined to avoid conflict.

The process of achieving the opening up of CCJA may take time as this will involve amending the Ohada Treaty, The Uniform Act, Ecowas Treaty and respective relevant national laws., but it is worth the effort, if we must achieve economic integration through harmonized laws.

I hope an attempt has, at least, been made on the subject "The State of Arbitration in Nigeria". The attempt has been merely to demonstrate how arbitration has been a useful tool in the resolution of commercial disputes. It is also an attempt to elucidate on the law and practice of arbitration within the contexts of Nigerian Statutes, International Treaties and Conventions ratified by, and domesticated in, Nigeria.

In conclusion, one is certain that in a world of "open sky", the sky will not be the limit for the future of arbitration in Nigeria, nay Africa. The future is bright.

Je vous en remercie, Chers Confreres, Mesdames et Messieurs.

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