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# ARBITRATION IN NIGERIA: AN EFFECTIVE CHANNEL FOR DISPUTE RESOLUTION OR ANOTHER STEP IN THE LITIGATION LADDER?

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***Abstract***

*When commercial disputes arise, parties may opt to settle these disputes through litigation or by Alternative Dispute Resolution methods, one of which is Arbitration. Arbitration as a mode of dispute resolution is designed to be an alternative to the traditional means of resolving disputes (litigation) and became globally accepted due to its array of benefits. In recent times, however, some of the key features that set arbitration apart from litigation have gradually waned. Specifically, it appears that after arbitration, as a matter of practice, parties now resort to traditional courts, to challenge arbitral awards, thereby leading to protracted legal tussles on issues already resolved in arbitration. Accordingly, this work examines recent trends in arbitration and how parties, Counsel, and the legal framework may have somehow inserted arbitration into the litigation ladder in Nigeria. The article evaluates the impact of the above on the desired finality of arbitral proceedings, whilst also proffering solutions.*

## 1.0 INTRODUCTION

Disputes can arise in almost any situation where businesses or people interact, especially where interests conflict and cannot be met to the satisfaction of all parties involved. Dispute resolution can therefore be referred to as the systematic process of resolving disagreements between parties, typically through a third party and often based on terms or laws which bind the parties in question.[1]

Dispute resolution has existed for as long as humans have. It can come in different forms ranging from traditional resolution of disputes through courts of law to Alternative Dispute Resolution

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[1] Y. Shamir and R. Kutner, "Alternative Dispute Resolution Approaches and their Application" (UNESCO Digital Library) available at Alternative dispute resolution approaches and their application - UNESCO Digital Library> (accessed 14 December 2021).

(ADR) mechanisms, which have gained prominence in recent times. By their nature and in simple terms, ADR mechanisms are a wide range of approaches characterised by little or no adversarial elements by which parties come to either a mutually accepted resolution or a verdict by appointed third parties.[2] Arbitration stands as a primary and potentially the most organized ADR mechanism chosen by parties, particularly due to its resemblance to litigation.[3] The influence of arbitration stems from many of the deficiencies of the traditional courts, some of which are:[4] frustrating delays which have bedevilled the judicial process; relatively greater financial cost of the litigation process; lack of confidentiality of litigation and attendant adverse publicity; rigid formality that typifies court trials.

By its very nature, Arbitration is "the reference of a dispute or difference between not less than two parties, for the determination, after hearing both parties in a judicial manner by a person or persons other than a Court of competent jurisdiction."[5] Once the Notice of Arbitration is issued and the arbitral tribunal is set up, the proceedings commence and end with the delivery of an Award by the Arbitrator(s). Unlike most forms of ADR, the Award given at the end of an arbitral process is enforceable (as a court judgment) and binding on the parties in the Arbitration. The beauty of arbitration is its efficiency, flexibility, cost-effectiveness, and party autonomy. As a matter of fact, these proceedings are not structured to protract or give rise to needless delays. It is envisaged that the award would be delivered in good time and therefore parties avoid spending needless time, human and financial resources in dealing with a dispute. As a result of this, investors and businesses generally turn to arbitration as a means of resolving commercial disputes. As observed by the Court of Appeal, resorting to arbitration shields parties from the rigid formality which characterises court trials. Arbitral proceedings are treated with a broad, liberal, and open mindset leaning on the

[2] *Ibid.*
[3] *Ibid.*
[4] G. Ezejiofor, *The Law of Arbitration in Nigeria,* Longman Nigeria PLC 1997, vi.
[5] *Kano State Urban Development Board* v *Fanz Construction Co Ltd* (1990) 4 N.W.L.R (Pt. 142) 1.

side of commercial dynamism, commercial sense, latitude, and common sense.[6]

A contract or agreement between parties that does not include a clause stating that all future/existing disputes arising from their legal relationship should be referred to an arbitral tribunal is perceived to have been poorly drafted. This is because present realities call for avoiding (as much as possible) any resort to litigation. It is in the context of these excellent considerations of arbitral proceedings that one must examine the extremely antithetical implications that undue delay of any sort has on the essence of arbitration. Simply put, without prejudice to the importance of justice, arbitral proceedings that do not underscore the speed that arbitration should offer are an anomaly.

## 2.0 A BRIEF CONSIDERATION OF THE LEGAL MECHANISM FOR CHALLENGING AWARDS IN NIGERIA

Arbitration is envisaged to be the dispute resolution mechanism with a reasonable and considerably stable timeline for resolving disputes. However, in recent times, there has been a distressing rate of almost automatic applications seeking to set aside arbitral proceedings at the instance of award debtors/the losing parties in arbitral proceedings. The expression "challenging arbitral awards" refers to forms of judicial recourse that parties to arbitral proceedings may make in respect of the decision of an arbitral tribunal. In other words, an aggrieved party can actively seek a declaration that the award be set aside under certain limited circumstances.

Prior to the enactment of the Arbitration and Mediation Act, 2023 ("the AMA"), which is currently the legislation that primarily governs arbitration in Nigeria, the previously applicable Arbitration and Conciliation Act,[7] "appeared" to serve as the basis for seemingly

[6] *Stabilini Visinoni Ltd* v *Mallinson & Partners Ltd* (2014) 12 NWLR (Pt 1420) 134 (CA) 197-205.
[7] CAP A18, LFN 2004.

indiscriminate challenge of arbitral awards, owing to the inclusion of "Misconduct by arbitrators" as a ground upon which an award could be challenged.[8]

Specifically, the provisions of s. 29 (2) and 30 (1) of the (now defunct) Arbitration and Conciliation Act ("the ACA") CAP A18, LFN 2004 provided the instances where an aggrieved party could apply to set aside an arbitral award. The sections listed three instances where an application to set aside an arbitral award could be brought.[9] These instances were:

a. *The arbitral award contains decisions on matters which are beyond the scope of the submission to arbitration;*
b. *Where an arbitrator has misconducted himself; or*
c. *Where the arbitral proceedings or award has been improperly procured.*

In many instances, the above-limited grounds have been the subject of ingenious and nearly limitless legal suppositions, usually where parties are dissatisfied with the outcome of arbitration. A good example is the ground of "misconduct" under the repealed law. Although the ACA did not define what amounted to misconduct, the Supreme Court, in a plethora of judicial authorities,[10] listed instances that may be construed as misconduct by arbitrators. Notably, these instances were not particularly constant, with occasional additions to what may constitute misconduct. For example, in certain instances, it was suggested that errors of law by Arbitrators amount to misconduct, and as such, the award thereby delivered ought to be set aside.[11]

The authors posit that this argument is a stretch, as errors of law ought not to qualify as misconduct by arbitrators. In ***Taylor***

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[8] See s. 29 (2), 30 (1), and 48 of the defunct Arbitration and Conciliation Act.
[9] *Nitel* v *Okeke* (2017) LPELR-46284(SC).
[10] *Ibid*.
[11] Suit No. FHC/L/CS/925/2019 – *Atlantic Energy Drilling Concepts Ltd. & Anor.* v *Nigerian Petroleum Development Company Limited* (Unreported) available at https://guardian.ng/features/court-upholds-landmark-us1-7-billion-arbitral-award-in-favour-of-npdc-on-brass-and-forcados-assets/ (accessed June 14, 2023).

***Woodrow (Nig) Ltd* v *S. E. GMBH***[12] it was held that a Court considering an application to set aside an arbitral award is expected to look at the award and determine whether as understood by the Arbitrator and as reflected on the face of the award, the Arbitrator complied with the Law as he perceived it, rightly or wrongly. The Court further held that the fact that a decision is erroneous does not make the award bad *prima facie* to permit it to be set aside, and that an arbitrator's decision cannot be set aside only because the Court itself would have come to a different conclusion.[13]

In fact, assuming that there is indeed an error of law on the face of an arbitral award, Nigerian law is settled that the duty of the Court before which an application to set aside is brought would be to examine the correctness of the procedure by which the Tribunal arrived at a decision and not the correctness (in law) of the decision itself.[14] The reasoning and findings of the courts in the above-referenced matters are indicative of the underlying philosophy behind arbitration and the need for decisions reached by arbitrators to be sparingly set aside.

## 3.0 CHANGES TO THE REGIME FOR CHALLENGE OF ARBITRAL AWARDS UNDER THE ARBITRATION AND MEDIATION ACT, 2023

Notably, the Arbitration and Mediation Act 2023, the extant law primarily governing arbitration in Nigeria, provides a unified legal framework for settling disputes through arbitration and mediation. The Act improves the provisions of the repealed ACA. Regarding the challenge of arbitral awards, the AMA arguably provides a more detailed and explanatory list of instances and grounds for an application to set aside an arbitral award. In addition, the AMA

[12] *Taylor Woodrow (Nig) Ltd* v *S. E. GMBH* (1993) 4 NWLR (Pt. 286) 127 p. 133.
[13] See also: *MTN (Nig) Comm Ltd* v *Hanson* (2017) 18 NWLR (pt. 1598) 394 p 410.
[14] *Optimum Construction and Property Development Company* v *Provast Limited* (2019) LPELR -43689 (CA).

dispenses with misconduct by arbitrators as grounds for challenging an arbitral award. This removal eliminates one of the issues under the ACA: the vagueness surrounding the issue of misconduct by arbitrators.

Specifically, s. 55 of the AMA 2023 states the instances where an aggrieved party can apply to set aside an arbitral award as follows:

a. *Where a party to the arbitration is believed to be under a legal incapacity;*
b. *Where the arbitration agreement is not valid under the law under which it is to be executed;*
c. *Where the applying party was not given timeous notice on tribunal appointments;*
d. *Where the award deals with a dispute outside the scope of the arbitration agreement;*
e. *Where the jurisdiction and composition of the tribunal raises questions; and*
f. *The arbitral award contains decisions on matters which are beyond the scope of the submission to arbitration.*

Additionally, the Act also introduces the Award Review Tribunal[15] as an alternative to challenging the Award in court, provided this is included in the arbitration agreement. The inclusion of this clause does not, however, oust the jurisdiction of the Court to hear an application challenging the award. It only restricts the grounds on which the Court can disagree with the findings of the Award Review Tribunal. Interestingly, the Act provides that the same arbitrators that gave the award may constitute the Award Review Tribunal.

In the event that the Award Review Tribunal sets aside the award in whole or in part, the Court can reinstate such an award if it disagrees with the ground on which it was set aside.[16] On the

[15] Arbitration and Mediation Act 2023, s. 56.
[16] Arbitration and Mediation Act 2023, s. 56(8).

other hand, if the Tribunal affirms the award in whole or in part, an application to the Court to set aside the award can only be granted where the Court finds that the subject matter of the dispute is not capable of being settled by arbitration under the laws of Nigeria or it is against the public policy of Nigeria.[17]

## 4.0 THE POSSIBLY ANTITHETICAL EFFECT OF THE LEGAL MECHANISM FOR CHALLENGING AWARDS IN NIGERIA ON THE ARBITRAL PROCESS

Although the AMA is definitely an improvement on the ACA, it may plausibly be argued that the new law does not totally extinguish the prevalent non-finality of arbitration. For instance, while the AMA provides more clarity on the instances and grounds upon which an arbitral award may be challenged and set aside (thus allowing for little to no ambiguities), the establishment of the Award Review Tribunal may be perceived as another extension of the dispute resolution timeline.

Admittedly, although proceedings before the Award Review Tribunal are likely to be less expeditious, the AMA's provisions streamlining grounds for recourse to the Court (after the decision of an Award Review Tribunal) are commendable. Notwithstanding the above, and without prejudice to the rights of parties to a fair determination of their disputes, challenge of arbitral proceedings are likely to remain a recurring decimal, owing to the litigious nature of parties and the fact that decisions on suits challenging arbitral awards can be challenged to the apex court.

Interestingly, in some instances, parties that commence arbitration turn around (at the conclusion of arbitration) to challenge the validity of the arbitral proceedings (which they commenced) on jurisdictional grounds. In other words, there have been instances where a party who commenced arbitration sought to set aside the

[17] Arbitration and Mediation Act 2023, s. 56(9).

arbitral award on the ground that the tribunal lacks jurisdiction to determine certain aspects of the dispute, *ab initio*. The decision of the Federal High Court of Nigeria in the landmark case of *Atlantic Energy Drilling Concepts Nigeria Limited and Anor* v *Nigerian Petroleum Development Company Limited* [18] was one of such instances.

It may be inferred from the foregoing that it has become commonplace for aggrieved parties to automatically challenge an arbitral award once the decision reached by arbitrators is unfavourable to them. It is almost as though arbitral proceedings are the first recourse before the inevitable resort to litigation. This ought not to be the status quo and is not in tandem with the established principle that a Court, in protecting the integrity of arbitral awards, should not be used as a machinery for the exercise of appellate jurisdiction over the decisions of an Arbitral Tribunal.

In practice however, lately, an arbitration which ought to be final in most cases may end up being challenged at the High Court with appeals on the challenge of the proceedings lying to the Court of Appeal and then to the Supreme Court of Nigeria. For instance, appeals in respect of post-judgment applications, such as garnishee proceedings, may protract even to the Supreme Court of Nigeria. Interestingly, for a long time now, there have been calls from some quarters for the delimitation of the jurisdiction of the Supreme Court of Nigeria and for certain appeals to terminate at the Court of Appeal.

In recent times, certain constitutional alterations have precluded the Supreme Court from hearing appeals on the grounds of law and/ or mixed law and fact.[19] The underlying philosophy behind

[18] Suit No. FHC/L/CS/925/2019 (Unreported).
[19] Such as the 2nd Alteration, touching on s. 233 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

the above-referenced amendment to the constitution may not be unconnected to the clamours for the Supreme Court of Nigeria to play the role of a policy court more, as against being burdened by floodgates of appeals which, perhaps, need not go past the Court of Appeal. This was the subject of the controversial case of *Shittu* v *P.A.N. Ltd.*[20]

The inevitable implication of the multi-appellate framework is, sometimes, the inordinate delay of the award debtor from reaping the fruits of the award, thereby utterly negating the time effectiveness factor, which led parties to explore arbitration in the first place. A perfect example of inordinate delay in enforcing arbitral awards is the case of *NNPC v KLIFCO Nigeria Limited*,[21] where award recognition proceedings took eleven (11) years to get to the Supreme Court. Similarly, in *Mutual Life & General Insurance Ltd v. Iheme,* [22] the enforcement proceedings took thirteen (13) years to get to the Court of Appeal. All of these exclude the post-judgment procedure for enforcing the award (once it has been recognised as a judgment of the Court).

In light of the above, many now wonder if arbitration is really an alternative to litigation or merely another step in the litigation process, allowing dissatisfied parties repeated rolls of the dice; and whether the right of an aggrieved party to apply to set aside an arbitral award should not be redefined.

## 5.0 WHAT CAN BE DONE TO REDUCE THE INORDINATE DELAY IN THE ENFORCEMENT OF ARBITRAL AWARDS AND TO RESTORE THE ESSENCE OF ARBITRAL PROCEEDINGS IN NIGERIA?

In Nigeria, someplace between the latitude provided by the law and the very litigious nature of parties, arbitral proceedings have

[20] *Shittu* v *P.A.N. Ltd* (2018)15 NWLR (Pt. 1642) 195.
[21] *NNPC v KLIFCO Nigeria Limited* (2011) LPELR-SC 233/2013.
[22] *Mutual Life & General Insurance Ltd v. Iheme* (2010) LCN/3941(CA).

lost their essence. In the case of *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation,*[23] a retired Judge of the Supreme Court of Nigeria, as an expert witness in an English court, stated that:

> …the mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not geared towards arbitration in the manner which meets the international standards it agreed to.[24]

At this juncture, it is vital to note that the need for pure and swift arbitral proceedings is not mutually exclusive from the desire to ensure an avenue for redress when an erroneous award is given. Thus, without necessarily ruling out incidences of arbitral awards delivered in contravention of the rules and laws binding arbitral proceedings, a fine line can be drawn between affording a party the opportunity to seek redress against arbitral proceedings that have been improperly conducted and engendering pathways for appealing/ reviewing the decisions of arbitrators, thereby creating serious litigation.

Firstly, while we commend the streamlining of instances where a party may apply for setting aside an arbitral award to specific and defined instances, as against vague/ possibly equivocal grounds such as "error on the face of the award" or "misconduct"; it is essential that courts resist any attempts to expand or defeat the provisions of the AMA, the law must be definite as to the basis for challenging awards, and parties should not be given the latitude to extend statutorily recognised grounds to unreasonable extents.

Secondly, the provisions of the AMA introducing an Award Review Tribunal, though laudable in practice, add an extra step to

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[23] *IPCO (Nigeria) Ltd.* v *Nigerian National Petroleum Corporation* [2017] UKSC 16.
[24] F. Alli and Associates, "Arbitration in Nigeria: Overview and Challenges" available at https://www.faa-law.com/arbitration-in-nigeria-overview-and-challenges/ (accessed on August 2, 2022).

the already windy and lengthy path to justice. To ensure that the intention of the law is given life, decisions of Award Review Tribunals must be appealable only on the grounds contained in the AMA, without more.

In addition, it is recommended that the legal framework for challenging awards be rejigged to reduce the levels of appeal which can emanate from the subject of the challenge of an arbitral award. Specifically, we propose that the Court of Appeal should be the final court for appeals arising from enforcement of arbitral awards and for appeals against decisions of the high courts to uphold or set aside an award to be with the leave of the court of appeal. Whilst an amendment of the ACA may reflect this alteration because the right of appeal is guaranteed constitutionally, this recommendation will be best achieved through an amendment of the constitution of the Federal Republic of Nigeria (1999). This position is further accentuated by the current realities of the court system in Nigeria and the caseload of our extremely busy courts.

A cursory examination of the frameworks in some other jurisdictions show that in several jurisdictions, there is some measure of commitment to limiting the extent to which arbitral awards can be challenged. In the United States of America, the extant framework appears to be similar to the Nigerian situation. By virtue of the Federal Arbitration Act, the Courts may set aside an award where it finds that it was obtained through fraud, corruption, undue means if there was misconduct by the arbitrator(s), etc. Likewise, the decision of the Court on the award can be further appealed, just like in Nigeria.

In India, however, the Indian Arbitration and Conciliation Act[25] provides for instances where an award from a domestic arbitration may be set aside; it further provides in s.37 that no

[25] The Arbitration and Conciliation Act 1996, s. 34(2).

second appeal shall lie from an order given on the appeal of an award; however, this does not affect or take away any right to appeal to the Supreme Court. The foregoing means that the law disallows second appeals on the issue of enforcement/ setting aside of awards, albeit without prejudice to the rights of parties to seek special leave to appeal to the Supreme Court under Article 136 of the Constitution of India 2022. This special leave is subject to the discretion of the Supreme Court. It helps filter the number of cases appealed at the Supreme Court, ultimately curbing the abuse of court proceedings.

In England also, by virtue of the Arbitration Act 1996, an Arbitral award may be challenged in Court on various grounds such as jurisdiction,[26] serious irregularity[27], or point of law.[28] However, leave of the Court must be sought before the decision of the Court can be further appealed. This requirement, although only applicable when the decision of the Court is sought to be further appealed, streamlines the amount of arbitral award that can be appealed after one Court has already decided on it.

Slightly similar to the above, in France, applications seeking to set aside arbitral awards are filed in the Court of Appeal, while an appeal against the decision of the Court of Appeal may lie (rarely) to the French Supreme Court.[29]

## 6.0 CONCLUSION

The litigation process in Nigeria is fraught with several issues, such as a significant backlog in cases due to the slow resolution of

[26] The Arbitration Act 1996, s. 67.
[27] The Arbitration Act 1996, s. 68.
[28] The Arbitration Act 1996, s. 69.
[29] Laurence Franc-Menget and Peter Archer for Herbert Smith Freehills LLP, "Cour de Cassation upholds decision to set aside an award following an arbitrator's non-disclosure", Lexology, Available at https://www.lexology.com/library/detail.aspx?g=506c081e-7edc-452d-8b85-de0d13eddcf2, (accessed August 2, 2022).

disputes by the courts. Arbitration, because of its efficiency, flexibility, cost-effectiveness, and party autonomy, has become a popular means of dispute resolution amongst businesses, companies, and organizations that seek faster and more effective ways of resolving disputes asides from litigation. These issues and the benefits of arbitration have made the litigation process in Nigeria an undesirable journey. As a result, investors, and businesses (national and multi-national), turn to arbitration as it proffers a swift alternative to litigation.

Nevertheless, it appears that Nigerian arbitration is slowly becoming a precursor to litigation instead of an alternative to it. This inevitably subjects the parties to the unfavourable conditions they attempted to avoid by choosing arbitration as their preferred dispute resolution mechanism. Without prejudice to the legal rights of aggrieved parties to Arbitration to seek redress before law courts, the mere fact that an Arbitral Award is resolved in a party's favour should not necessarily vest a right of challenge or resort to traditional courts. It is sensible to assume that if this goes on for too long, we will have a situation whereby parties boycott the arbitration process.

It is against the backdrop of the foregoing that the authors recommend a careful and deliberate structure to prevent inordinate challenges/ appeals of arbitral awards. While it may be unconstitutional to restrict the access of arbitral parties to the court to contest an arbitral award, it would be better to streamline the instances where a party can approach the court and possibly restrict further appeals in certain cases. This may be best achieved by a constitutional provision to the effect, given that the Constitution already outlines (to a considerable extent) rights of access to Court/ appeal. Furthermore, such a provision would help obviate a situation where statutory provisions are antithetical to constitutional provisions, thus possibly culminating in needless litigation regarding the law's true position on the subject.