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ARBITRATION IN NIGERIA

A CLOSER LOOK

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In this paper we will highlight some challenges posed to the recognition of arbitration as a viable and faster alternative means of dispute resolution in Nigeria. The importance of this paper is premised on the fact that it has now become common place for the losing party in an arbitration to try to avoid complying with the terms of an award by resorting to the local courts of the States where such award is to be enforced and deploying all manners of court process to frustrate its enforcement. This paper will also discuss how to validly challenge an award and the difficulty in the enforcement of arbitral awards in Nigeria.

Introduction

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. The process of arbitration is consent-based, in that participation must be voluntary or based on an underlying agreement.

Some of the features of arbitration include but are not limited to; the powers of the parties to appoint arbitrators with the relevant expertise for the resolution of the disputes between them, power to choose which procedure to adopt for the arbitration, powers of the parties to choose the venue of arbitration, power to appoint any person with the relevant knowledge and expertise to represent each party at the arbitration and when an award is delivered it can only appealed or set aside on very limited grounds.[1]

It is also in important to state that although parties are at liberty to agree on the laws and rules of procedure for an arbitration, there are established laws and rules of procedure that can be adopted in arbitration locally and internationally. Nigeria for instance has in place the Arbitration and Conciliation Act Chapter A18, Laws of the Federation of Nigeria 2004 (ACA) and the procedural rules made pursuant to it, which is operational in the federation except for states which have their own laws such as Lagos State having The Lagos State Arbitration Law, 2009 (LSAL). International legislations which govern arbitration and have the force of law in Nigeria and other countries are: United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 as amended in 2006, UNCITRAL arbitration rules as revised in 2010, The New York Convention among others.

[1] Dr Emilia Onyema FCIArb et al - Workbook: Introduction to International Arbitration; Chartered Institute of Arbitrators 2014.

How does arbitration work?

It has been settled beyond any form of contention that, for a party to be involved in an arbitration there must be an arbitration agreement or an arbitration clause in the agreement of the parties which will essentially subject any dispute between the parties to resolution by arbitration and is treated as an independent agreement on its own. This is the purport of Section 12(2) of the ACA which provides thus;

> *"an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".*

In **NNPC v. Clifco Nigeria Limited**[2], the Supreme Court, relying on the English case *Heyman v. Darwin Ltd. [1942] AC 356 at 373*, acknowledged that an arbitration clause survives the novation of an agreement when the apex court held as follows;

> **"Generally, in arbitration agreements, where the arbitration clause is a part, the arbitration clause is regarded as separate. So where there is novation, purpose of contract may fail but the arbitration clause survives. See: Heyman v. Darwin Ltd. (1942) AC 356 at 373. The purpose of arbitration might have failed, but the arbitration clause which is not one of the purposes of the contract survives. The two courts below were correct when they found that modification of the terms of the obligation in the original contract with new terms on 27-9-99 did not extinguish the arbitration clause in the original contract".**

Such is the importance of an arbitration agreement that the Supreme Court in the earlier case of **Commerce Assurance Ltd v. Alli**[3] held as follows: -

> **"... it is the law that to constitute a proper arbitration which the courts can enforce there must be an agreement to submit the matter to arbitration, and any award by an arbitrator so appointed shall be binding on both parties thereto."**

This decision underscores the voluntary nature of arbitration such that where there is no agreement in place for the submission of a dispute between the parties to arbitration, the parties can not purport to arbitrate. This is an essential legal requirement as stipulated in Section 12(2) of the ACA and in

[2] (2011) LPELR-2022(SC)
[3] LPELR-883(SC)

order to ensure that an arbitral tribunal has been duly constituted, Section 12(1) of the ACA empowers an arbitral tribunal to rule on questions regarding its own jurisdiction and on objections that concern the existence or the validity of an arbitration agreement. However, Section 1(c) of the ACA is to the effect that the existence of an arbitration agreement can be determined in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

Benefits of Arbitration as a dispute resolution mechanism

The parties to the dispute usually agree on the arbitrator, so the arbitrator will be someone that both sides trust to be impartial and fair.[4] More importantly, in the appointment of an arbitrator the parties can consider the competence and expertise of any such arbitrator regarding the subject matter of the dispute.

The procedure adopted before national courts is laid down in rules applicable before such courts. These rules are not necessarily tailored to individual cases.[5] Parties involved in an arbitration can tailor their procedural rules to suit their dispute, even where the arbitration is conducted under specified arbitration rules.

Arbitration proceedings occur at an expeditious rate as compared to litigation; therefore, it saves time for both parties.

Unlike a trial which is open to the public, arbitration is essentially a private procedure, so that if the parties desire privacy, then the dispute and its resolution can be kept confidential.

When an arbitral award is delivered, there are very limited opportunities/grounds for either side to appeal, so the arbitration award is intended to be the end of the dispute. This is meant to give finality to the arbitral award; unlike court decisions such as judgments and orders. A court judgment is generally subject to appeal on the merits and usually becomes final only when it is no longer appealable.

Without disregarding any of the disadvantages of arbitration as a dispute resolution mechanism it is against the backdrop of the above advantages that parties tend to explore arbitration as a means of dispute resolution.

[4] https://www.allenandallen.com/arbitration-advantages-and-disadvantages/
[5] For example: see the Lagos State High Court (Civil Procedure) Rules 2019

Arbitral Awards

When an arbitral hearing is concluded the arbitral tribunal usually delivers its decision which is commonly referred to as an arbitral award. An arbitral award can be described as "a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders.[6] The Supreme Court has held on the effect of arbitral award that "It is very clear and without any iota of doubt, that an arbitral award made by an arbitrator to whom a voluntary submission was made by the parties to the arbitration, is binding between the parties".[7]

The case of **Taylor Woodrow (Nig) Ltd v. Suddeutsche Etna-Werk Gmbh**[8] is apt on the binding effect of an arbitral award when the Supreme Court held thus: -

> **"The law was firmly laid down by Williams J. in Hodgkinson v. Fernie 3 CB (NS) 189, 202 140; ER 712, 717 when he said: the law has for many years been settled, and remains so at this day, that, where a cause or matter in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, 'You have constituted your own tribunal; you are bound by its decision'. The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."**

It is important to determine what law governs the validity of the award to ensure that the final award complies with its requirements. The formal and procedural requirements of the arbitral award may stem either from the applicable arbitration law (*lex arbitri*), the parties' arbitration agreement or the

[6] Dr Wong Fook Kong, The Arbitration Award (Myiem.org.my, 2020), Retrieved from (http://www.myiem.org.my/assets/download/PMTD_Talk_TheArbitrationAward_121206.pdf) accessed 13 September 2021.
[7] Ras Pal Gazi Construction Co. Ltd v F.C.D.A (2001) LPELR-SC.45/96
[8] (1993) LPELR-3139(SC)

institutional arbitration rules that parties choose to be applicable.[9] If the award does not meet such procedural requirements, it may be subject to annulment.[10]

Under the ACA[11] an award will be valid if it is in writing, signed by the arbitrators, where there is more than one arbitrator signed by a simple majority of the arbitrators with the reason for absence of the signature of any of the arbitrators stated. There is also the requirement that an award must state the reasons upon which it was delivered, the date of the award and the place which the award was made. These requirements are also the same under the UNCITRAL Model law.[12]

Grounds for challenging an Arbitral Award

A preliminary point to note here is that arbitral awards by their very nature are unappealable and there is no legal framework for an appeal against an award. However, sections 29 and 30 of the ACA provide three grounds for setting aside an award.

Section 29 (1) & (2) provides that a party who is aggrieved by an arbitral award may within three (3) months apply to the court to set aside an arbitral award by an application (on notice to the other party) with proof that the award contains decisions on matters that are beyond the scope of the dispute submitted to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award that contains decisions on matters not submitted may be set aside.

Section 30(1) provides two additional grounds for setting aside an arbitral award. The first ground is if an arbitrator has misconducted himself or herself. The instances of misconduct have been stated by the Court of Appeal in the recent case of **Polaris Bank v. Magic Support (Nig) Ltd**[13] when the court held as follows: -

> **"Parties are in consensus with respect to the fact that there is nowhere in the Act where what amounts to misconduct is defined. Resort will therefore be had to case laws on what amounts to misconduct. In Taylor Woodrow (Nig) Ltd vs. Suddeutsche Etna-Werk GBMH (1993) LPELR-3139 (SC), the apex Court held: "Paragraph 622 of**

[9] Redfern, A. and Hunter, M. (eds.), Law and Practice of International Commercial Arbitration, 2004, sec. 8-53.
[10] Born, G.B., International Arbitration: Law and Practice, 2012, p. 285.
[11] Section 26 of the Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria 2004.
[12] Article 31 UNCITRAL Model law
[13] (2020) LPELR-53106(CA)

> **Halsbury's Laws of England 4th Edn. Vol. 2 at pages 330 - 331 sets out what constitutes misconduct and lists examples of acts that have been held to amount to misconduct. "622. WHAT CONSTITUTES MISCONDUCT, it is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire. The expression is of wide import, for an arbitrator's award, unless set aside, entitles the beneficiary to call on the executive power of the state to enforce it, and it is the Court's function to ensure that the executive power of the Court is not abused. It is accordingly misconduct for an arbitrator to fail to comply with the terms, express or implied, of the arbitration agreement. But even if the arbitrator fully complies with those terms, he will be guilty of misconduct if he makes an award which on grounds of public policy ought not to be enforced. Much confusion has been caused by the fact that the expression 'misconduct' is used to describe both these quite separate grounds for setting aside an award, and it is not wholly clear in some of the decided cases on which of these two grounds the award has been set aside. However, on one or other of these grounds the expression includes on the one hand that which is misconduct by any standard, such as being bribed or corrupted, and on the other hand mere "technical" misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference."**

The second ground in this provision, entitles a court to set aside an award if it was improperly procured or tainted by fraud. This is usually a question of fact, the sufficient materials of which are to be placed before a court by an aggrieved party. See **Araka v. Ejeagwu**[14].

With respect to international awards, section 48 of the ACA (which is *impari materia* with the provisions of article V of the New York Convention 1958) provides two broad grounds for setting aside the award:

(a) if a party making the application furnishes proof – (i) that a party to the arbitration agreement was under some incapacitation; (ii) that the arbitration agreement is not valid under the law that the parties have indicated should be applicable; (iii) that he or she was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was otherwise not able to present his case; (iv) that the award deals with a dispute not

[14] (2000) LPELR-533(SC)

contemplated by, or falling within the terms of the submission to arbitration; (v) that the award contains decisions on matters that are beyond the scope of the arbitration; (vi) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; (vii) where there was no agreement within the parties under paragraph vi, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act [the ACA]; or

(b) if the court finds that – (i) that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or (ii) that the award is against the public policy of Nigeria.

Another factor pivotal to the challenge of arbitral awards in Nigeria is the limitation period within which to do so. The Nigerian courts have delivered several decisions in this regard. In **FCMB v. Garba Usman Nagogo**[15] the Court of Appeal held that:

> ***"The provision of Section 29 (1) (a) of the Act is to the effect that a party to an arbitration who is aggrieved by an arbitral award has a period of three months from the date of the award to apply to the Court for the award to be set aside. It is a limitation provision, the essence of which is that the legal right to apply to set aside an arbitral award is not a perpetual right but is limited to the period of time given therein. Where the time given expires, legal proceedings cannot be validly instituted to set aside the award. The aggrieved party is left with a bare and impotent cause of action which he cannot enforce by judicial process. See Egbe v. Adefarasin (1987) 1 NWLR Pt. 471; Ajayi v. Adebiyi (2012) 11 NWLR Pt.1310 Pg. 169."***

The Supreme Court in **Nitel v. Okeke**[16] also held as follows: -

> ***"The 3 months period stipulated in Section 29 of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria 2004 for filing an application to set aside the award started to run from the date the award was published. It is my view that the Respondent cannot by passive means try to set aside the award while ignoring the provisions of Section 29 of the Arbitration and Conciliation Act. The failure to challenge the legality***

[15] (2016) LPELR-40211 (CA)
[16] (2017) 1-2 SC Pt.1 Pg. 39 at 48

or merit of the award within 3 months as provided by the Act prevents the Respondent from doing so by the time it did."

In view of the above decisions the right of an award debtor or losing party to apply to set aside an award on any of the statutory grounds stated above will not enure for the benefit of the award debtor after a period of three (3) months. However, under the Arbitration Law Cap. 7 of the Laws of Kano State[17] it does appear that, provided an arbitral award has not been enforced by the award creditor, an award debtor can still bring an application to extend the time within which to set aside the award. Although this law does not provide a time limit within which an aggrieved party may apply to set aside an award, this was the purport of the Court of Appeal's decision in **Alhaji Albishir & Sons Ltd v. Bayero University Kano**[18].

Challenges in the enforcement of Arbitral Awards in Nigeria

When an arbitral award is delivered, the losing party may decide to voluntarily comply with the terms of the award. Where this is the case the issue of recognition and enforcement does not arise. However, where the losing party fails to comply with the terms of an award the winning party will need to seek the assistance of a national court to recognise and enforce the arbitral award.

Unfortunately, one of the major disadvantages of arbitration as a dispute resolution mechanism is that arbitral awards in and of themselves do not have the force of a judgment of court. Thus, where there is no voluntary compliance with the award by the losing party, the winning party is miles away from reaping the benefits of the award.

However, Nigerian courts are generally disposed to strict compliance with the relevant laws when it comes to the enforcement or setting aside of an award. The courts have in a plethora of cases noted that an arbitral award is the decision of an arbitrator or arbitrators to whom parties in dispute refer their misunderstanding or disputes for resolution. It is an alternative means of dispute resolution. The significant element of it is that parties voluntarily or mutually agree to be bound by the decision or award of an arbitrator or arbitrators appointed by them. Once the award is made it may be voluntarily complied with by the losing party or enforced through the courts. . Where the award is made and it is

[17] section 12 (2)
[18] (1996) LPELR-13928(CA)

final, the award enjoys the same efficacy as a judgment of a Court. Unless it is set aside by due process under the applicable laws the decision or on award constitutes *res judicata* between the parties to it.[19]

i. Limitation Periods

The question as to when time begins to run for the purpose of commencement of enforcement proceedings in respect of arbitral awards remains a controversial issue. This is on the premise that ACA and the New York Convention do not specify any time frame for the enforcement of awards. It is in view of the *lacunae* in the New York Convention and the ACA on the limitation period for the enforcement of arbitral awards in Nigeria that the Limitation Act 1966 and the Limitation Laws of the various States of Nigeria have become pivotal in the determination of this point.

In Nigeria, the limitation law applicable in any enforcement proceedings would depend on the limitation law of the State in which the award is being enforced.

The Foreign Judgment (Reciprocal Enforcement) Act has stipulated a period of six years within which to enforce a foreign award. The question which is of concern is, when does the six years start to run? In **Murmansk State Steamship Line v. Kano Oil Millers Ltd**[20]., the plaintiff brought an action on an award more than six years from the date the defendant breached the charter party. On appeal, the plaintiff argued that time ran from the date of the award in 1966 but the defendant argued that time ran from the date of the breach of the charter party in 1964. The Supreme Court decided that the period of limitation runs from the date on which the cause of arbitration occurred i.e. from the date of breach of the charter party.

In the words of learned Justice Elias CJN (as he then was);

> **"The present case is one of a simple reference of any dispute to arbitration and contains no clause making an arbitration award a condition precedent to the bringing of an action[21]; a plaintiff can always bring an action at common law as soon as the cause of action arose. The action may then be stayed until the arbitration is disposed**

[19] Enl Consortium Ltd v. Shambilat Shelter Nig. Ltd (2020) LPELR-50465(CA)
[20] (1974) 12 S.C. 1
[21] Thompson v. Charnock (1799) 8 Term Rep. 139

of[22]. Even in the Case of Board of Trade v. Cayzer Irvine & Co[23], Lord Atkinson made it clear that Thompson v. Charnock is still good law when he said at p. 625:

"Therefore, without overturning the case of Thompson v. Charnock, and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration."

The period of limitation is deemed to run after the date of the award only when a party has by his own contract expressly waived his right to sue as soon as the cause of action has occurred. If there is no such Scott v. Avery clause, the limitation period begins to run immediately. A party is, however, precluded from setting up such an agreement as a defence if he had waived his right to insist on arbitration as a condition precedent."[24]

The Supreme Court's decision in Murmansk has been followed and applied in subsequent cases such as **City Engineering Nigeria Limited v Federal Housing Authority**[25] and **Tulip (Nig.) Ltd. V Noleggioe Transport Maritime S.A.S**[26] where the Supreme Court held that it is six years from the date of accrual of cause of action. However, it is apparent from all the decisions above that whether the enforcement of an award has been caught by the limitation period is largely predicated on the facts and circumstances of each case, the limitation law in question and the nature of the clause referring the dispute to arbitration.

ii. Jurisdiction of the Enforcing Court

The competent authority in Nigeria to enforce or recognize an arbitral award would depend on the statute under which the enforcement and recognition application is sought[27]. For example, Nigeria ratified the ICSID Convention on 23 August 1965. In pursuance of its commitment to domesticate the ICSID Convention, the convention was re-enacted as a local legislation vide the International

[22] Graham v. Seagoe (1964) 2 Lloyd's Report 564 (Sup. Ct., N.S.W.).
[23] (1927) 43 TL.R. 625 HL
[24] See also;Toronto Railway v. National etc. Insurance Co. (1914) 20 Com. Cas. 1 As Lord Wright has rightly observed in Heyman v. Darwins Ltd. (1942) A.C. 336, at p. 377:
[25] (1997) 9 NWLR (520) 244
[26] (2011) 4 NWLR (Pt1237)254
[27] Akinola, Chief J. Akingbola. ENFORCEMENT OF ARBITRAL AWARD. Lagos Nigeria, December 2015. http://www.gosodipo.com/wp-content/uploads/2015/12/Enforcement-of-Arbitral-Award.docx.

Centre for Settlement of Investment Dispute (Enforcement of Awards) Act, Cap 19 Laws of the Federation of Nigeria 1990 now 2004. The Act[28] provides that an ICSID award shall be enforced in Nigeria as if it were an award contained in a final judgment of the Supreme Court if a copy of such an award, duly certified by the Secretary General of the Centre is filed in the Supreme Court by the party seeking its recognition and enforcement.

Under the ACA[29], the competent authorities are the Federal High Court and the State High Court. The major issue in this area has been whether both courts have concurrent jurisdiction over the same matter. Can matters that come up for arbitration whose subject matter falls within the exclusive jurisdiction of the Federal High Court be enforced or recognized by the State High Court? Does arbitration give rise to a separate cause of action that can be distinguished from the subject matter of the contract that led to arbitration? These are the questions placed before the Supreme Court in the case of **Mr. Adeoye Magbagbeola v Temitope Sanni,**[30] when the court was called upon to address the issue raised as follows: whether the exclusive jurisdiction of the Federal High Court under section 251 of the 1999 Constitution (Nigeria) includes matters on the list which become the subject matter of arbitration.

The Court held that the definition of "high court" under the Arbitration and Conciliation Act is applicable to arbitral proceedings. They referred to Section 57(1) which defines "court" as the High Court of a State, the Federal Capital Territory or the Federal High Court and a "judge" as any judge of such courts. Furthermore, the Court noted that the issue before it was not such that, it could invoke the provisions of Section 251 of the 1999 constitution to trigger the exclusive jurisdiction of the Federal High Court over the subject matter dispute between the parties. The implication of the above decision is that parties to an arbitration would do well to consider, the subject matter in dispute in order for them to ensure that the relevant court has the requisite jurisdiction to entertain an application for the enforcement of an arbitral award.

However, it is recommended that a party seeking to enforce an arbitral award in Nigeria should approach the Federal High Court because it has federal jurisdiction which means that an execution order against assets of the award debtor can be enforced in any State in the federation.[31] The territorial

[28] Section 1
[29] Section 57
[30] [2002] 4 NWLR (Pt 756) 193.
[31] Note 18

limitations that affect State High Courts do not affect the Federal High Court making the process of execution less procedural or cumbersome.

iii. Procedural Delays

Another major challenge in the enforcement of arbitral awards in Nigeria is the ability of any of the parties to employ delay tactics in the enforcement proceedings, usually with no effort on the part of the relevant court to discourage or disallow such antics. Every application to enforce an arbitral award, with or without a parallel application to set aside the award, is potentially open to appeal from the court of first instance through the Court of Appeal and all the way to the Supreme Court, many times in relation to interlocutory matters.[32] Apart from the delaying tactics of parties, the enforcement proceedings are also vulnerable to potential delay attributable to the local courts and judges and court rules themselves.

An extremely vivid example of how the sort of delay referred to above plays out in practice was on display in the multi-jurisdictional case of **IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation**[33]. This case involved a contract between the claimant, IPCO, and the defendant, NNPC, to construct a petroleum export terminal. In October 2004, IPCO obtained an award for US$ 150 million plus interest in an arbitration seated in Nigeria. Since then, there have been many efforts to enforce and to challenge the award, in both Nigeria and the UK. NNPC challenged the award in the Nigerian courts soon after it was rendered, alleging that it was wrong in law and lacked adequate reasoning.

In late 2008, NNPC also raised allegations that the award had been procured by fraud. By April 2008, the English court had ordered part payment of the award but adjourned the decision to enforce the award until NNPC's challenge to it in Nigeria had been determined. In June 2009, the parties agreed by consent that enforcement of the court's order for part payment should be set aside, and that enforcement of the award should be adjourned pending the outcome of NNPC's challenge. At this point, the parties had expected the challenge to be resolved in good time. However, by 2012, no substantial progress had been made in respect of NNPC's challenge to the award in Nigeria.

[32] Adewale Atake et al Beating The System: Enforcement of Arbitral Awards Against State-Owned Entities http://www.templars-law.com/413-2/. Visited 23 September 2021.
[33] (No. 3) [2015] EWCA Civ 1144 and 1145

Accordingly, IPCO applied to the English court under S. 103 of the Arbitration Act 1996 to further enforce part of the award (for US$ 100 million). The Court of Appeal overturned Field J's (High Court) decision and held that IPCO would be permitted to further enforce part of the award provided the Commercial Court was satisfied that it was not contrary to public policy. In doing so, the court considered the competing arguments that:

a. the on-going delay in determining the challenge in Nigeria (which showed no prospect of being resolved any time soon) was causing IPCO prejudice; and

b. If it enforced part of the award, it might be permitting IPCO to benefit from an award which it may have procured by fraud (the court accepted this was a bona fide allegation).

The Court of Appeal concluded that whilst it faced a *"stark choice"* between the two, if it declined to order enforcement of the award, IPCO was unlikely to receive the *"fruits of it for a generation"*. It decided that this was, *"in commercial terms … absurd"* and would be *"inconsistent with the principles that underpin the New York Convention, which was intended to foster international trade by ensuring a relatively swift enforcement of awards and a degree of insulation from the vagaries of local legal systems"*.

While the court considered the need *"for comity between the Courts of friend foreign states, especially when the Court in question is the Court of the seat of the arbitration to which the parties have agreed", it concluded that the* ***"judicial system in Nigeria has not kept pace with the need to give effect to the principles underlying the New York Convention".*** In circumstances where the proceedings in Nigeria had become *"sclerotic"* and *"a Gordian Knot"*, the court held it had no option but to intervene and permit IPCO to further enforce part of the award.[34]

However, NNPC being dissatisfied with the above decision appealed to the United Kingdom's Supreme Court[35] which in its decision delivered on 1 March 2017 unanimously set aside the Court of Appeal's order, allowing NNPC to advance its defense in the English Commercial Court without settling any part of the award.

[34] Notwithstanding the above, the Court of Appeal made clear that the English courts should not be used as a "reserve tribunal" for deciding questions on the validity of awards which should be determined at the court of the seat. However, given the principles of the New York Convention, which it considered were not being adhered to in this case, it was necessary to intervene. See,Davison, Mark. How long is too long? When will the courts permit enforcement of an award when a challenge to enforcement overseas is taking too long? 20 January, 2016. http://www.olswang.com/articles/2016/01/how-long-is-too-long-when-will-the-courts-permit-enforcement-of-an-award-when-a-challenge-to-enforcement-overseas-is-taking-too-long/.

[35] 2017 UKSC 16

With this decision, the NNPC could go on to fight against the enforcement of the arbitration without the $100 million part-payment. Indications also point to the fact that the NNPC has a good chance of voiding the whole arbitration as attested to by both the Commercial Court and the Appeal Court.[36]

The proprietary or otherwise of the above decisions are not what is to be considered at this point but, the inordinate delay occasioned in the determination of the validity of the arbitral award which had been delivered since 2004.

iv. Obsolete Arbitration Legislation

The ACA of Nigerian was enacted in 1988. There is no doubt that Nigeria's arbitration laws are long due for reform on account of various developments in the practice and procedure of arbitration in other jurisdictions. However, there is a silver lining presented by the Arbitration Law of Lagos State 2009 with its progressive provisions.

The Law has attempted to address some of the challenges encountered in the enforcement of foreign arbitral awards in Nigeria. For example, on the application of limitation laws to arbitral proceedings, the Law makes a departure from the Supreme Court decisions in Murmansk and City Engineering (supra) when it provides that in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded[37]. Nevertheless, as progressive, and innovative as this provision is, its application is only limited to Lagos State[38]. Both the Vice-President of NICArb, Prof. Fabian Ajogwu (SAN), and the Chairman, CIArb, Rhodes-Vivour JSC (as he then was) at the time, held the common view that the Nigerian arbitration law, the ACA 1988, has since become obsolete and was in urgent need of an amendment[39].

Ajogwu said, "The legal framework, our Arbitration and Conciliation Act, is long overdue for an amendment. The current Arbitration and Conciliation Act was passed in 1988 as a decree and we are

[36] https://nairametrics.com/2017/04/05/quick-rundown-of-the-nnpc-vs-ipco-case/ visited on 24 September 2021.
[37] Section 35 (5)
[38] Akolade, Olushola Abiloye and Jamiu. "Challenges in the Recognition and Enforcement of Foreign Arbitral Awards in Nigeria." ACAS-LAW (2016). Paper presented at the 1st International Chamber of Commerce (ICC) Africa Regional Arbitration Conference held in Lagos, Nigeria.
[39] Available online at http://www.kennapartners.com/index.php/10-news-events/241-principal-partner-advocates-amendment-of-legal-framework-and-adoption-of-nigeria-as-adr-venue

now in 2016. So much has happened in the world between 1988 and today we need to bring that legislation to be current."

Rhodes-Vivour said, "If Nigeria is to take its rightful place as not only a preferred seat of arbitration but an investor-friendly country, it is imperative that the legislative regime for arbitration be in line with the latest developments in the international arbitration framework."

v. Unrestricted Appeals Against Orders Enforcing Arbitral Awards

Another stumbling block in the enforcement of foreign arbitral awards is the proclivity for unsuccessful parties to appeal the orders of the enforcing court – sometimes up to the Supreme Court as stated earlier above. Undoubtedly the right of appeal against the decisions of a High Court is provided for under the Constitution[40]. Nevertheless, the arbitrary exercise of this right of appeal would appear to defeat the entire purpose and nature of an arbitral award as being final and binding on the parties and as an efficient means of resolving disputes. Invariably, arbitration has now merely become a first step towards litigation rather than an alternative to litigation.

An example of this unrestricted appeal can be seen in the case of **Sundersons Limited & Milan Nigeria Limited v. Cruiser shipping PTE Limited & Universal Navigation PTE Limited**[41]. In this case, the Respondents at the lower court (Applicants at the Federal High Court Lagos Division) by an Originating Motion dated 27 September 2010 sought an order of Court to recognize and leave to enforce the Final Arbitration Award delivered on 15 October 2009 as a judgment of the court. Attached to the Respondents' application were a duly certified copy of the arbitration award and a fax copy of the arbitration agreement. The Appellants (Respondents at the lower court) challenged the recognition and enforcement of the award on the ground that an original or duly certified copy of the arbitration agreement was not attached to the application for enforcement.

The Lower Court held that the arbitral award was recognizable and enforceable as a judgment of the court. The court further held that it was not against public policy to recognize and enforce arbitral awards rendered in foreign venues agreed upon by the parties provided that it is just and proper to do

[40] See section 241 of the 1999 Constitution of the Federal Republic of Nigeria
[41] (2014) LPELR-22561(CA)

so in the circumstances. The court however decided that the award shall be enforced upon the filing of a duly authenticated original arbitration award by the Applicant.

The Appellants dissatisfied with the ruling, appealed to the Court of Appeal on the same ground. The Court of Appeal affirmed the decision of the lower court and held that failure to attach an original copy of the arbitration agreement [contained in the charter party] to the application for enforcement did not render the application incompetent. To it, a conditional enforcement was proper in the circumstances in the absence of any injustice or violation of the principles of fairness and equity. The court further held that the ground on which the Appellants sought for the refusal of recognition and enforcement of the arbitral award does not fall within the grounds provided in Section 52 of the Arbitration and Conciliation Act.

Although the above reasoning and decisions of the Courts are commendable in the circumstances of the case before them,the unfortunate fact remains that no matter how frivolous the appellant's ground of appeal may be, he retains a right of appeal up till Supreme Court.

This was noted by the Supreme Court in the case of **Metroline (Nig) Ltd & Ors v. Dikko**[42] per Rhodes-Vivour JSC (as he then was) noted as follows: -

> **"I intend to comment on the disturbing trend where all manner of appeals are filed against awards. It is time litigants fully understand, respect, and appreciate the nature of arbitration agreements they freely enter into. It is the duty of counsel to explain the nature of these agreements and not encourage their clients to disregard them when they get unfavourable awards. Arbitration agreements out to be respected and the resultant awards complied with. We should always bear in mind the importance of respecting arbitration agreements, more so those that have international connotations. Building up and sustaining a globally respected dispute resolution system are major steps for the growth of our Nation into a preferred investment destination. The Nigerian Legal System, following international standards, has legislated on the nature of arbitration awards to be final and binding and only to be interfered with by the courts in the exceptional circumstances enunciated in the relevant arbitration statutes. Arbitration is widely acknowledged as an alternative to litigation which enables expeditious dispute resolution. Commendably, the legal framework provides for court**

[42] (2021) 2 NWLR (Pt. 1761) 422 at 445

> **interference in specified circumstances only. However, the unfortunate trend in which litigants, with the assistance of counsel who fail to appreciate their duties as officers of the court, all in a bid to win their clients' case by all means, bring unsubstantiated and spurious challenges against otherwise good arbitration awards and the arbitration tribunal, ought to be frowned upon and discouraged. The courts should not allow itself to be used as a tool to set aside otherwise good awards or frustrate legitimate arbitration awards."**

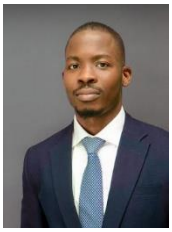
The learned justice summed it up perfectly in the above pronouncement when he highlighted the concept and nature of arbitration and the duty of counsel and litigants in the enforcement of arbitral awards.

Conclusion

Arbitration has become a part of the Nigerian legal system for some time now and a much bigger trend in other jurisdictions. However, there is a need to isolate arbitration and its process from the myriad of pitfalls in the Nigerian legal system to ensure that it remains a viable means of alternative dispute resolution within Nigeria. While the regime for the valid challenge of arbitral awards in Nigeria seems adequate as it is what is also obtainable internationally, the legislative framework for arbitration needs to be reviewed considering the challenges encountered in the enforcement of arbitral awards in Nigeria.

Practitioners and the courts have a significant role to play in ensuring that arbitration no longer becomes a pitstop for litigation as opposed to its true purpose of being an alternative means of final resolution of disputes between parties.

Author



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