# AN ANALYSIS OF THE ROLE OF COMMERCIAL DISPUTE ARBITRATION IN NIGERIA'S ECONOMIC DEVELOPMENT

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## Abstract

The term Arbitration has been used frequently in both legal and non-legal parlance. It is a method of settling a dispute(s) outside the conventional court process known generally as litigation. Arbitration has been increasingly significant in both commercial and non-commercial transactions especially now that cross-border commercial transaction is increasingly becoming the new norm. It is cheaper, faster, more confidential, efficient, and flexible, and gives the parties the liberty to choose who their arbitrator is. Most importantly, it carries the same weight as a judgement delivered by the court of competent jurisdiction. This essay is aimed at briefly discussing, among other things, the wider view against the old narrow view in which arbitration was viewed, especially, in developing countries like Nigeria. The essay also evaluates the indisputable reality that not everything is "arbitrable" i.e not every dispute can be referred to arbitration for settlement. The 'exclusive jurisdiction' and the 'public policy' concerning arbitral awards are also analysed. Some observations are made and recommendations are proffered. The scope of the essay is Nigeria, and to some extent, the Croatian and English laws and other relevant international jurisdictions would be considered, where necessary.

**Keywords:** Nigeria, UNICITRAL, Commercial, Arbitration, Award, Enforcement, Dispute

## Introduction: Evolution of Commercial Dispute Arbitration in Nigeria

In Nigeria just like in most countries around the world, arbitration is increasingly becoming the fastest, confidential, effective, cheapest, and most flexible method of resolving disputes in commercial transactions[78]. It is a private and not too formal

[78] Wuraola O Durosaro The Role of Arbitration in International Commercial Disputes (2014) International Journal of Humanities Social Science and Education 3, pp. 1-8

system of dispute settlement without involving the court's formal dispute settling mechanism. Arbitration has a long history in Nigeria and around the world, for it was used by tribal leaders to settle disputes among themselves or others.[79] Most nations have transformed their domestic arbitration laws or simply adopted those considered universally acceptable. These include Britain, China, Russia, Turkey, the USA, among others.[80] Nigeria depends heavily on international trade as it imports virtually everything and export only oil, is not left behind since the lack of contemporary laws on arbitration can slow its much-needed development. Therefore, embracing the UNCITRAL Model Law by the Commonwealth countries has to a great extent brought some significant changes to arbitration in Nigeria.[81]

Nigeria under colonial rule enacted the Arbitration Ordinance of 1914.[82] The Arbitration Ordinance was akin to the English Arbitration Act 1889. Later, the said Act was repelled and became the Arbitration Ordinance Act 1919, and later 1954. The Act covered the arbitration process at the national and global levels. Presently, the 1990 Arbitration and Conciliation Act, which was revised in 2004 (known as and referred to hereinafter as 'the ACA') is the main law on arbitration law in Nigeria.[83] The act provides a comprehensive legal framework for expeditious resolution of trade disputes by way of arbitration and conciliation. It adopted and domesticated wholly the New York Convention in 1970.[84]

The ACA is founded on the UNCITRAL Model Law and it applies to the arbitration process/sitting in Nigeria except for the ICSID.[85] Although the ACA applies arbitration at both national and international levels, it is to a large extent a UNICITRAL Model Law prototype with few deviations. For instance, while ACA covers both arbitration and conciliation, the Model Law restricted itself to arbitration only. Also, there is somewhat a discernible deviation between Articles 8 (1) and 13 (3) of the UNCITRAL Model Law and sections 4 and 5 of the ACA. The rules cover arbitral agreement and the substantive claim as well as the courts' power to stay proceedings whenever the issue of arbitration is successfully raised. Although ACA

[79] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, Redfern & Hunter on International Arbitration (5th edn, OUP 2009) p 2.
[80] Eric Robin, 'The evolution of international commercial arbitration over these past years'' (1996) International Business Law Journal p 1.
[81] Eric Robin, 'The evolution of international commercial arbitration over these past years'' (1996) International Business Law Journal p 1.
[82] 1914 Nigeria Ordinance, Orders and Regulation, 199. Issued as Chapter 9 of the 1923 edition of the Laws of the Federation of Nigeria.
[83] Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria 2004.
[84] This means that the Nigerian courts will only enforce awards made in states which is a party to the New York Convention.
[85] Asouzu, A. (2001). International Commercial Arbitration and the African States: Practice, Participation and Intuitional Development (p. 120). Cambridge: Cambridge University Press

is a federal law, some States, however, enacted their separate laws to govern the arbitration proceeding in their various States. Lagos State, for instance, enacted its Arbitration Law known as the Lagos State Arbitration Law in 2009 (LSAL 2009),[86] it adopted the UNCITRAL Model Law,[87] this led to the establishment of the Lagos Court of Arbitration (LCA).[88]

## The Enforcement of Arbitration Agreement in Nigeria

The arbitration agreement is an essential contractual agreement between the parties to it.[89] By this, mutual consent is crucial to an arbitration agreement.[90] Under section 1 of the ACA,[91] the arbitration agreement shall be made by way of writing or documented in a written form and signed by all the parties or in exchange for a telex, telegram, letter, or another ,medium of communication evidencing the existence of the arbitration agreement. Section 2 of the ACA states that citing an arbitration section in a contractual agreement implies that an arbitration agreement is made in writing which implies that the clause is part of the main contractual agreement.[92] From the above, it suffices to state that when it comes to an agreement on arbitration it is consensual and can also be a separate not in the main contract therefore the parties can agree to refer to it when in dispute(s). As fascinating as it may seem, however, other national laws may render this provision less effective. For instance, according to the National Pension Commission (PENCOM) Act, the PENCOM has the power to refer a matter to the arbitration under the ACA provisions,[93] or to simply refer the same to the investments and Security Tribunals under the 2014 Pension Reforms Act. Again, section 26 of the Nigerian Investment Promotion Commission Act,[94] provides that an alien who is an investor(s) and who registered under the Act is entitled to bring an arbitration proceeding under the ICSID scheme[95]. Also, an arbitration agreement can only be binding if it conforms to the

[86] Lagos State Arbitration Law, No 10, 2009.
[87] Lagos Court of Arbitration Law No 8, 2009.
[88] Uchenna P. Emelonye; Uchenna Emelonye Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria Beijing Law Review Vol.12 No.1, March 2021
[89] Ar. Gör. ªeyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent' (2012) 1 Yalova Üniversitesi Hukuk Fakültesi Dergisi <file://lha-033/pers-G/00072E61/Downloads/5000136735-5000215407-1-PB%20 (2).pdf> accessed 25 April 2016.
[90] Sunday A Fagbemi, 'The Doctrine of Party Autonomy In International Commercial Arbitration: Myth or Reality?' (2015) 6 Afe Babalola University Journal of Sustainable Development Law & Policy p 226.
[91] ibid section 1 (n 8).
[92] ACA 2004, section 2.
[93] Pension Reform Act 2014, Part IX.
[94] Nigerian Investment Promotion Commission Act, Cap N117, Decree No 16 (Laws of the Federation of Nigeria) 1995.
[95] Uchenna P. Emelonye; Uchenna Emelonye Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria Beijing Law Review Vol.12 No.1, March 2021

provision of section 48 (b) (i) ACA, which is to the effect that the matter in contention must be arbitrable under the law of Nigerian. Moreover, in section 52 (b)(i) of the ACA, the arbitration agreement must be for a matter that can be settled arbitrably. This implies that the agreement must be on something that can be enforced against the parties.[96]

Even though the ACA did not not state what constitute arbitrable matters, however, commercial disputes originating from an arbitration agreement are by and large deemed arbitrable under Nigerian law. Whether or not a matter is arbitrable is mostly determined by the court as seen in the Court of Appeal decision in *Ogunwale v Syrian Arab Republic.*[97] Here, it was held that to determine arbitrability, the disagreement must arise from the arbitration part of the arbitration agreement.

## The Enforcement of Arbitration Agreement in Nigerian Courts

Courts in Nigeria have initially perceived arbitration as a rival that must not be welcomed into the country[98] However, since arbitration has grown to become the preferred means of settling commercial disputes around the world, coupled with globalisation where Commercial transactions have no barrier, the Nigerian businessmen prefer to settle their trade disputes by way of arbitration[99] hence the change of attitude from Nigerian courts.[100] Thus, Oguntade the the JCA, in *Okpuruwu v Okpokam,*[101] said:

> *"That the regular courts in the early stages of arbitration were reluctant to accord recognition to the decisions or awards of the arbitrators. This attitude showed substantially from reasoning that arbitration constitutes a rival body to the courts. But it was soon realized that arbitration may in fact prove the best way of settling some types of disputes. The attitude of the regular courts to arbitration therefore gradually changed.''*

This marked a turning point in the Nigerian courts toward arbitration as a means of dispute settlement.[102] Accordingly, resolving commercial disputes by way of

[96] Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004, s 48(a)(ii) and 52(a)(ii).
[97] (2002) 9 NWLR (Part 771) 127.
[98] Percy L Ahiarammunnah, ''Relationship between the Courts and Arbitration in NIGERIA', (2013) <http://www.verbatimngr.com/Arbitration.html> accessed 27 April 2016.
23. Uchenna P. Emelonye; Uchenna Emelonye Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria Beijing Law Review Vol.12 No.1, March 2021
[100] ibid.
[101] (1988) 4NWLR (Pt 90) 544
26. Asouzu, A. (2001). International Commercial Arbitration and the African States: Practice, Participation and Intuitional Development (p. 120). Cambridge: Cambridge University Press.

arbitration Nigeria has continued to become popular. This can be linked to several factors I.e the parties to the arbitration, the country's courts, and the arbitrators who are relentless on the issues of arbitration.[103] The courts, to their credit, have a played an important role in this regard, especially on recognition and enforcement of arbitration awards as seen in *C N Onuselogu Ent Ltd v Afribank (Nig) Ltd,*[104] where it was held that:

> *''… arbitral proceedings are recognised means of settling disputes that should not be taken lightly either by the counsels or the parties. But the court went further to state that there must be an agreement to arbitrate, which is voluntary submission to arbitration.*

Also, the courts can stay proceeding if the issue of arbitration is raised under sections 4 and section 5 of the ACA. The courts in Nigerian tend to follow those provisions if the conditions thereto are met as seen in the Nigerian apex court , the Supreme Court (also known as the SCN) in the case of *Niger Progress Ltd v N E I Corp,*[105] where the court stayed proceedings due to the arbitration agreement. The same court equally applied the provisions of sections 4 and 5 in *Transnational Haulage Limited v Afribank Nigeria Plc & Anor,*[106] where the court granted a stay of proceedings pending arbitration. So also in the case of *Owners of the MV Lupex v Nigerian Overseas Chartering and Shipping Limited,*[107] *where* the Supreme Court of Nigeria granted an application for stay of proceedings and unanimously held that instituting an action on a matter that is pending in the arbitration process in London, amounts to the abuse of the court process. Arbitration is being supported by the courts in Nigeria unless when either of the parties is found wanting as in *Akpaji v Udemba*.[108] It is pertinent to mention that under sections 6 (3) and 21 (1) of the Lagos State Arbitration Law 2009, the court is empowered to grant interim reliefs to preserve the *res*. Section 13 of the ACA empowered the arbitration tribunal to make interim relief or preservation during or before proceedings.

## Jurisdiction agreements in Nigerian courts

[103]Olasupo Shasore 'Commercial arbitration in Nigeria' (8 August 2013) <http://www.kwm.com/en/uk/knowledge/insights/commercial-arbitration-in-nigeria-20130808> accessed 27 April 2016
[104] (2005) 1 NWLR Part 940 577.
[105] (1989) 3 NWLR (Part 107) 68.
[106] Unreported Suit No LD/1048/2008.
[107] (2003) 15 NWLR (Pt 844) 469.
[108] (2003) 6 NWLR (Part 815) 169.

Jurisdiction agreements are also known as the choice of court agreements. A Jurisdiction agreement is the liberty of the parties to choose a forum that will hear and determine their arbitral process.[109] While a contract, as said earlier, may be formed in country 'X' and country 'Y', the parties may want any commercial disputes thereof to be heard and settled in country 'Z'. While in theory, courts in Nigeria enforce jurisdiction agreements, in practice, they assume jurisdiction in some cases in contravention of the jurisdiction agreements. It is difficult to differentiate between exclusive and non-exclusive agreements. Records show that jurisdiction agreements were upheld in only a few cases such as *Nso v Seacor Marine (Bahamas) Inc (2008) LPELR-CA, Nika Fishing Co. Ltd v Lavina Corporation (2008) 16 NWLR (pt. 1114) 509, Damac Star Properties LLC v Profitel Limited (2020) LPELR-50699 (CA)*. A closer look at these cases indicates that the jurisdiction agreements are discarded by the Nigerian courts mainly on three reasons:[110] the non-characterisation of jurisdiction agreements as an outer clause; mandatory statutes that confer jurisdiction on some matters compulsorily on Nigerian courts; and the forum non-convenience.[111]

## The Public Policy Exceptions in Enforcement of Arbitral Award

While the New York Convention and other similar conventions governed recognition and enforcement of arbitral awards, in national laws the situation is not the same for enforcement of international arbitration awards has some exceptions and one of which is the public policy consideration. Public policy has no universally accepted definition, only a national court can determine what is and what is not 'public policy'.[112]

UNICITRAL Model Law also provides public policy as a ground for consideration when it comes to the enforcement of international arbitral award.[113] Same with the New York Convention which provides under Art. 34 that an award can be set aside by the national courts (the seat of arbitration) on "public policy".

In Nigeria, public policy exception is found in several legislations. Although neither the courts nor the ACA defined ''public policy'', it generally connotes illegality, breach of Nigerian laws, or State policy. Sections 48(2) (b)(ii) and 52(2)(b)(ii) of the

33. Adekoya, F. (2015). The Public Policy Defence to Engagement If Arbitral Awards: Rising Star or Setting Sun? BCDR International Arbitration Review, 2, 203-222.
34. Uchenna P. Emelonye; Uchenna Emelonye Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria Beijing Law Review Vol.12 No.1, March 2021

35. Adekoya, F. (2015). The Public Policy Defence to Engagement If Arbitral Awards: Rising Star or Setting Sun? BCDR International Arbitration Review, 2, 203-222.
36. Adekoya, F. (2015). The Public Policy Defence to Engagement If Arbitral Awards: Rising Staror Setting Sun? BCDR International Arbitration Review, 2, 203-222.

ACA provide that a court may set aside an arbitral award, refused to recognise or enforce the same if it is against or contrary to Nigerian public policy.[114]

## Recognition and enforcement of foreign arbitral award

When it comes to 'arbitrational universalism' nothing poses a threat to international commercial arbitration than the recognition and the enforcement of foreign arbitral award. For instance, the internationality of commercial transactions can sometimes become an issue especially when a court in a different country is approached to enforce the arbitral award passed by another country.

One can attempt to make a difference between a transfer of jurisdiction to a (foreign) arbitration tribunal and foreign juridical fora. But, candidly speaking, such an argument may only be validated by the 'uncritical fans of arbitration' or 'self-interested arbitration practitioners'.[115] Whichever way we look at it, both types of mutual agreements on the 'competent' venue of the arbitration panel affect the 'natural' rules on the jurisdiction by default and lead to the derogation of the otherwise competent legal system. Both types of agreements indicates the parties' autonomy over arbitration agreements, for instance, in the option of where they consider it appropriate to take their arbitration (the arbitration forum) in settling their disputes. If courts decide to follow the arbitral institutions by offering flexible dispute resolution methods, with all the liberties attached to them, the difference between private and public dispute resolution mechanisms would be very slim.[116]

## Conclusion and Recommendations

UNICITRAL Model Law and the New York Convention together with the national arbitration laws of every country, like Nigeria's ACA play an important role in international commercial arbitration. It is observed that commercial arbitration is being increasingly embraced all over the world over litigation due to its numerous advantages- faster, cheaper, confidential, choice of arbitrator(s), and the fact that it carries the same weight as judicial pronouncement (judgement) as pointed out earlier. Jurisdiction and public policy are however some hindrances to the arbitration process. While some countries have resorted to a 'protectionist' interpretation of public policy, others have opted for the 'expansionist' interpretation. This essay

[114] Onuselogu Ent. Ltd. Afribank (NIG) Ltd.
[115] Uchenna P. Emelonye; Uchenna Emelonye Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria Beijing Law Review Vol.12 No.1, March 2021
[116] Adekoya, F. (2015). The Public Policy Defence to Engagement If Arbitral Awards: Rising Star or Setting Sun? BCDR International Arbitration Review, 2, 203-222

recommends that enforcement of the international arbitral award should not be left solely at the discretion of the enforcing country. This is not to say that a country's genuine national concern which sometimes is seen as the national public policy (as seen in Soleimany v Soleimany) should not be taken into consideration. In Nigeria, for instance, what is public policy should not be left to the courts alone to define given that the arbitration process and award are a product of international treaties, international commerce, and a product of international arbitration tribunal. It is recommended that Nigeria should join other countries like India, South Africa, Kenya and other developing countries in utilising and appropriating the gains of arbitration and benefits of the enforcement of arbitration awards.

As popularly said, "nothing is good that can not be better" and "nothing is great that can not be greater", it is this essay's view that the New York Convention and the UNCITRAL Model Law should be amended to provide a strict interpretation of the public policy and exclusive jurisdiction. It is also recommended that there should be in place a model law legislation determining and harmonising what should and what should not be regarded as public policy in determining the enforcement of the international arbitral award in the contracting countries. This would help in serving the overall interest of the world as well as the individual interest of human beings.