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The Arbitrator

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CHARTERED INSTITUTE OF ARBITRATORS (NIGERIA BRANCH)

LEADING THROUGH THE PANDEMIC

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EDITORIAL

I bring you warm felicitation from the editorial board. I hope that our members are staying safe in the light of our current realities. We are grateful to God that we have not received any bad news concerning any member. We urge members to continue to stay safe and comply with all the extant regulations.

This is the maiden edition of our journal. Even though this has been in the works and we had hinted members of the desire to make "The Arbitrator" an e-journal, two factors have made it necessary to begin now. The first is that the journal published from 12 Bloomsbury Square has been migrated to an e-version and all branches have been encouraged to adopt the same approach.

The second factor is the reality of the Covid-19 pandemic, which has rendered all engagements virtual. We have migrated to an e-journal to ensure that we keep our members and the reading public up to date as we have done through the journal in the past. Thus, "physical distancing" is no barrier to the "The Arbitrator" reaching our members.

This edition is special for a number of reasons. Apart from being our maiden attempt at an e-journal (we have an e-newsletter), it features articles that discuss the current realities and propose ways to deal with the situation at hand. Our traditional staples such as the Chairman's remark, the report from the secretariat as well as the editorial have been maintained.

The articles in this edition are contemporary as well as timely. The first article titled "ODR in Africa: The Emergent Face of Dispute Resolution Post Covid-19" is apt and very engaging. The need for online dispute resolution cannot be overemphasized especially at this time. The second article titled "The need for Persuasive Precedents in Arbitration and Dispute Resolution Practice" discusses the propriety or otherwise of precedents and their applicability. The third article discusses the incorporation of arbitration clauses in contracts of employment and the applicability thereof.

The fourth article is focused on the "Judicialization" of the arbitral process in Nigeria, and undertakes an analysis of the role of the courts. The fifth article titled "Hints on Arbitration in the Construction Industry in Nigeria" draws our attention to the benefits of arbitration to the construction industry. The last article is an expose on data protection and confidentiality in remote proceedings. It underscores the collective responsibility that tribunals and parties bear in the course of proceedings.

Our picture gallery as usual showcases the sights and scenes from the branch activities.

We thank the executive committee of the branch and our esteemed members for the opportunity of continued service to the institute.

Happy Reading!

Agada Elachi Ph.D.

EDITORIAL BOARD

Agada John Elachi Ph.D.

Okey Akobundu FCIArb

Taiye Oniyide FCIArb

Oluwakemi Eweje FCIArb

Racheal Osibu MCIArb

CHARTERED INSTITUTE OF ARBITRATORS
(NIGERIA BRANCH)

OBJECTIVE

To promote and facilitate the determination of dispute by arbitration and alternative means of dispute resolution, other resolution by the court

VISION

To be a world leader in the promotions and education of professionals, involved with arbitration mediation and other forms of dispute resolution outside the court.

NOTE FROM THE SECRETARIAT

Dear Members,

I welcome you to the maiden edition E-Journal of the CIArb Nigeria Branch. I hope we are all staying well and keeping safe during these trying times. I would like to thank you all for your support to the Branch. Your contribution to the growth of Branch and the CIArb Network and your support during this COVI-19 pandemic is extremely important to us and is appreciated.

We had hitherto published paper copies of our Branch Journal "The Arbitrator" but in view of the COVI-19 pandemic we have now migrated to an E-Journal to continue to keep our members informed about our activities and developments in the arbitral community.

In the first quarter of the year, Branch activities had to be suspended and the Branch Secretariat closed following lockdown and restrictions on movement as a result of the pandemic. During the lockdown, the Branch held election into the Branch Committee. This was done via e-voting on the 8th of April 2020.

Election was held electronically on 8th April, 2020 to fill the existing vacancies and the following were successful in the election.

- Mr. Akin Omisade
- Mrs. Josephine Akinwunmi
- Dr. Adeyemi Agbelusi
- Dr. Tayo Bello
- Mr. Ibifubara Berenibara

Also during the lockdown, the Institute released the CIArb Guidance Note on Remote Dispute Resolution Proceedings. On 23rd April, 2020, the Branch organized a webinar on "Remote Dispute Resolution where the CIArb Guidance Note on Remote Dispute Resolution Proceedings was discussed. The faculty at the webinar included Chief Bayo Ojo SAN, C.Arb, Immediate Past Trustee for Africa, CIArb. Other faculty members included Mrs. Adedoyin Rhodes-Vivour SAN, C.Arb, Immediate Past Chair, CIArb Nigeria Branch and Mr. Omololu Bajulaiye, Digital Expert, University Lecturer, PhD Candidate at Tilburg University.

Other webinars which have been held include

- 5th May, 2020, Ibadan Chapter webinar on "Remote ADR: Feasibility, Challenges and Opportunities for Young ADR Enthusiasts".
- 21st May 2020, Abuja Chapter webinar on Drafting a Valid & Enforceable Award"
- 12th June 2020, Port Harcourt Chapters webinar on "Arbitration: Navigating the Current Pandemic through Technology" on respectively.
- 25th June 2020, Ibadan Chapter webinar on "Challenges and Opportunities for Women in ADR During These Disputed Times"

The Branch office re-opened on 11th May 2020 and it is observing the safety protocol laid down by WHO. We however advise our members to continue to make use of our phone lines and email addresses in the interest of public health and safety.

In line with the restrictions on gathering and the social distancing policies in place, our courses are being delivered remotely. We have the following activities lined up; Accelerated Route to Membership Programme, International Arbitration on 10th, 13th & 14th July, 2020, Introduction to Domestic Arbitration on 14th & 15th July, 2020 and Arbitration Advocacy for Lawyers on 30th July, 2020. Other courses include Arbitral Secretaries Training on 11th August, 2020, Introduction to International Arbitration on 13th & 14th August, 2020, Accelerated Route to Fellowship, International Arbitration on 14th & 17th -20th August, 2020 and Introduction to Domestic Arbitration on 17th & 18th September, 2020.

We have created a souvenir corner at the Branch Secretariat with items such as wooden membership plaques, lapel pins and branded facemasks. We

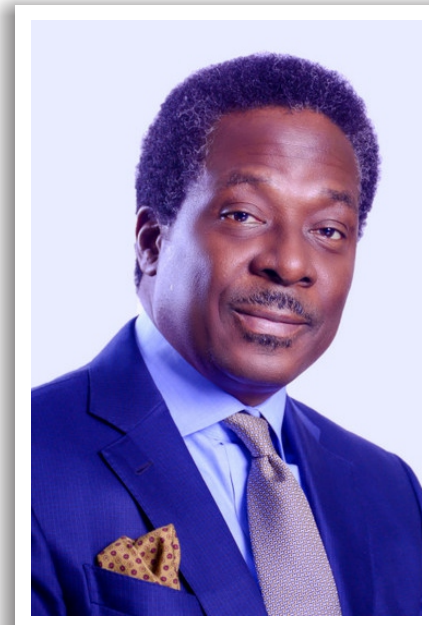
intend to increase the number of available items to include ties and scarfs, cuff links in due course. Please call our office lines to +234 803 464 4337, +234 803 464 4338 or you can email us on ciarbnigeria@gmail.com to order for your wooden plaques, lapel pins or branded facemasks.

Preparations are ongoing for 2020 Annual Conference of the Branch, which is scheduled to hold on the 26th & 27th of November, 2020. The YMG Conference will precede the conference on the 25th of November, 2020. In view of the pandemic, we will be organizing a virtual conference this year. Details about the conference will follow shortly.

Finally, I also encourage you to renew your membership with the Institute and work with us to promote a harmonious society.

Kindly visit the Branch website https://www.ciarbnigeria.org/ for information on the programmes for 2019 and for prospective members, information on how to become a member of the Institute.

Chinelo Agbala
General Manager



CHAIRMAN'S REMARK

ON THE MAIDEN EDITION OF THE E-JOURNAL OF THE CHARTERED INSTITUTE OF ARBITRATORS (CIArb), NIGERIA BRANCH

Dear Members,

I am happy to welcome you to the maiden edition of the CIArb E-Journal. I hope you are all keeping safe during this COVID-19 pandemic. The E-Journal is a glorious compliment to the conventional hard copies of the CIArb News Journal, "*The Arbitrator*". It has been an era of inter-state and intra-city "lock-down" and so, in keeping with current realities, we have decided to add an E-Journal to our array of publications.

Since December 2019, the world has been grappling with the COVID-19 pandemic and this has negatively affected businesses. Sales and revenue have fallen and companies are facing the reality of downsizing or outright closure. The arbitral community has not been left out as arbitral proceedings have been postponed and activities delayed, suspended or temporarily cancelled. This has affected the usual efficiency associated with alternative disputes resolution.

In the Nigeria Branch, even before the Federal Government of Nigeria and State Governments imposed the lockdown and restrictions on interstate travels, we had suspended our courses and activities and had also temporarily closed the Branch Secretariat on 24th March 2020 in anticipation of the social distancing policy. This closure was to last for a period of 7 (seven) weeks leading to a spell of inactivity and loss of revenue for the Branch as we were unable to physically hold training and arbitral activities during this period.

It is not all gloomy as the pandemic created a unique opportunity for the CIArb to publish the **"Guidance Note on Remote Dispute Resolution Proceedings"**. This laid the foundation for the Arbitral Community to adapt to new and innovative ways of conducting remote and virtual hearings through the use of technology. It also brought awareness to new ways of carrying out daily activities in line with social distancing policies.

With the gradual lift of the lockdown and restrictions, many organizations and ADR Institutions now work remotely from home while others work in shifts. Consequently, arbitration proceedings and meetings are now largely conducted remotely as that is the only meaningful way of ensuring that we discharge our roles as disputes resolvers.

In order to keep hope alive, I will highlight those activities that we have introduced and/or conducted as a Branch, designed to encourage and enhance the activities of our members in spite of the pandemic.

Live cast on Remote Dispute Resolution proceedings on 23rd April, 2020:

The Branch hosted a Live cast on Remote Dispute Resolution proceedings on 23rd April, 2020 to share insights on the newly released **"Guidance Note on Remote Dispute Resolution Proceedings"** including how parties and arbitral tribunals should handle these unprecedented circumstances as well as the IT and AI skills required to conduct remote dispute resolution.

The Facilitators of the Live cast included Chief Bayo Ojo SAN, C.Arb (the Immediate Past Trustee for Africa, CIArb), Mrs. Adedoyin Rhodes-Vivour SAN, C.Arb (Immediate Past Chair, CIArb Nigeria Branch) and Mr. Omololu Bajulaiye (Digital Expert, University Lecturer, PhD Candidate at Tilburg University). The Live cast was moderated by Mr. Greg Nwakogo.

The BigBlueButton Virtual Education Platform

The BigBlueButton Virtual Education Platform (BBB) was introduced to enable the remote delivery of courses. This compliments the introduction of the "*CIArb Guidance note on Remote Dispute Resolution Proceedings*" as our members are

assured of continued virtual courses and on-line institutional and administrative support for the administration of disputes resolution. I am happy to announce that the Branch has resumed remote training on Zoom and the BigBlueButton Virtual Education Platform. The Branch has also successfully held a virtual Award Writing on 27th & 28th May, 2020 via Zoom with 7 (seven) participants and an Introduction to International Arbitration Course on 18 & 19 June 2020 via the BigBlueButton Virtual Education Platform with 30 (thirty) participants.

We intend to use the BigBlueButton Platform for all our courses until the restriction on gatherings is lifted. In the meantime, the Institute has begun the training and certification of faculty members on the use of the BBB Platform.

Chairman's Quarterly Reports

The Nigeria Branch continues to conduct our normal trainings and other activities in conjunction with notable Arbitration and ADR Bodies, Institutions and Professional bodies and firms such as the Lagos Court of Arbitration (LCA), the International Chamber of Commerce (Young Arbitrators) Forum, Maritime Arbitrators Association of Nigeria, Nigeria Bar Association, Babcock University etc. We also collaborated with the Firm of Steptoe & Johnson UK LP to organize a roundtable discussion on Arbitration on the 19th February, 2020 at the Radisson Blu Anchorage Hotel, Victoria Island, Lagos.

Details of these activities are contained in the regular Chairman's Quarterly Reports.

Lagos Pre-Vis Moot

The Branch has been very supportive of the teams representing Nigeria at the Willem C. Vis Moot scheduled to hold in April, 2020 in Vienna Austria. The maiden edition of the Lagos Pre-Moot competition took place on 27th February 2020 at the Regional Centre for International Commercial Arbitration Lagos (RCICAL). The aim of the Pre-Vis Moot competition was to test the readiness of the students and the Universities to represent the country at the vis-moot.

Nigeria was to be represented at the Vis-Moot by the University of Lagos, Obafemi Awolowo University and Lagos State University. However, due to concerns over the COVID-19 pandemic, the organizers of the Willem C. Vis Moot announced the cancellation of the oral hearings in favour of online submissions.

2020 Annual Conference and Gala/Induction Nite

With the Abuja Chapter of the CIArb winning the hosting rights for the 2020 CIArb Conference and Gala/Induction Nite, a 32 (thirty-two) member 2020 CIArb Conference Planning Committee (CPC) was inaugurated with Mr. Y. C. Maikyau, SAN, FCIArb as Chairman to organise the events scheduled for November 2020 in Abuja.

However, in view of the current COVID-19 pandemic and the possible continuation of the social distancing policy even after restrictions are lifted, the CPC is exploring the possibility of organizing a hybrid conference, which will have the elements of both a physical and virtual conference.

Branch Elections

In line with the Branch Model Rules, Elections were held electronically on 8th April, 2020 to fill the existing vacancies on the Ececutive Committee of the Nigeria Branch (Exco) and the following members were elected; (1) Mrs. Josephine Akinwunmi (2) Dr. Adeyemi Agbelusi (3) Dr. Tayo

Bello (4) Mr. Ibifubara Berenibara and (5) Mr. Akin Omisade. At the inaugural meeting of the 2020-2021 Executive Committee of the Branch held on 16th April, 2020, Mrs. Yejide Osunkeye, FCIArb was elected as the Hon. Branch Secretary, Mr. Akinwunmi Omisade, FCIArb was elected as Hon. Treasurer, Dr. Adeyemi Agbelusi FCIArb was elected as Branch P.R.O and Mrs. Josephine Akinwunmi FCIArb was elected as Asst. Secretary.

Appointment of Chairman and Vice Chairman of the Port Harcourt Chapter

Following the resignation of Mrs. Florence Fiberesima, MCIArb (now Honourable Justice Florence Fiberesima, MCIArb of the Rivers State Judiciary) as the Chair of the Port Harcourt Chapter, Mr. Tonye Krukrubo the then Vice Chairman has been appointed by the Branch as the Chairman of the Port Harcourt Chapter and Mr. Emeka Onyeka as the Vice Chairman of the Chapter.

Relationship with Other African Countries

Further to the mandate given to the Nigeria Branch Regional Representative to establish the presence of the CIArb in other African countries, the Branch Regional Representative, Mrs. Folashade Alli, FCIArb has opened dialogue with contacts in Ghana and Tanzania. The Branch has submitted proposals to our contacts for training of interested candidates in both countries.

The Souvenir Corner

I am happy to invite our members to the Souvenir Corner at the Secretariat for the purchase of membership items such as membership wooden plaques (for your office walls), membership pins, face masks etc, all at reasonable prices. We intend to expand the variety of available items to include lapel pins, ties and scarfs in due course.

Webinars

To keep our members educated and up to date with current developments during this COVID-19 pandemic a number of webinars on Arbitration have been held by the Branch and Chapters. They include

- "Remote ADR: Feasibility, Challenges and Opportunities for Young ADR Enthusiasts" webinar organized by the CIArb Ibadan Chapter on 11th May 2020. Featured speakers at the webinar include Mr. Ben Giaretta, *Chair, CIArb London Branch*, Mr. Aled Davies, *MediationAcademy.com*, Mrs. Funmi Roberts, *Funmi Roberts & Co.* and Prince Lateef Fagbemi, SAN, *Chair, CIArb Ibadan Chapter*. It was moderated by Mr. Lateef Yusuff.
- "A Guide to Virtual Arbitration" webinar held on 16th May, 2020. The webinar was organized by J-K Gadzama and Co. It featured speakers such as Prof. Paul Idornigie, SAN, *Nigerian Institute of Advanced Legal Studies*, Mr. Isaiah Bozimo, *Broderick Bozimo & Co.* Mr. Abayomi Okubote, *African Arbitration Academy*. It was moderated by Lamar Joe-Kyari-Gadzama.
- *Delos Dispute Resolution* organized a TagTime webinar with Funke Adekoya SAN, *Aelex*, on "Damages and Costs: Can Fair Compensation Be Too Much?" which took place on 27th May, 2020. It was co-hosted by Dr. Kabir Duggal and Amanda Lee.
- Port Harcourt Chapter webinar on "Arbitration: Navigating the Current Pandemic through Technology" held on 12th June 2020. It featured speakers such as Mr. Adrian Cole, *King & Spalding, UAE*, Mrs. Miannanya Essien SAN, *Principles Law Partnership, Nigeria*, Prof. Oba Nsugbe, QC, SAN, *Pump Court Chambers, UK*, Mr. Richard Mugisha, *Trust Law Chambers, Rwanda* and Mr. Brian Speers *President of the Commonwealth Lawyers Association*. The webinar was moderated by Mr. Tonye Krukrubo, the Chair of the Port Harcourt Chapter.

Upcoming webinars include:

- "KIAC Knowledge Sharing Session" webinar on Virtual Arbitration Proceedings: Positioning Africa to the Post COVID-19 World. The speakers at the webinar will include Mr. Duncan Bagshaw, *Howard Kennedy, London*, Mr. Isaiah Bozimo, *Broderick Bozimo & Co. Nigeria*, Dr. Fidele Masengo, *Secretary General KIAC*, Mrs. Rose Rameau.
- Ibadan Chapter webinar on "The Great Gender Debate :Challenges and opportunities for women in ADR during this disrupted times". It will be moderated by Mr. Lateef Yusuff and Ms. Bukola Haastrup-Ashagidigbi and will feature speakers such as Lucy Greenwood, *Greenwood Arbitration, UK*, Mrs. Olajumoke Ojo, 2nd Vice Chair, CIArb Ibadan Chapter, Amanda Lee, *Seymours Solicitors, UK* and Mercy Okiro, *Chair, YMG Kenya*

Financial Members:

As at today, we have an active membership of 1,350 (one thousand, three hundred and fifty) out of a total trained membership of 3,282 (three thousand, two hundred and eighty two). Of the 1,350 (one thousand, three hundred and fifty) active members, only 535 (five hundred and thirty five) members have paid their membership subscription for 2020.

I encourage our members being members of an international organization to pay their annual subscription fees. With this bloc membership, we will acquire the votes required to elect a Nigerian President of the CIArb in the very near future.

Appointment of New Director General:

In December 2019, we received the news that Anthony Abrahams was retiring as the Director General of CIArb after 8 (eight) years of service to the Institute. The Institute has now announced the appointment of Catherine Dixon as Director General to succeed Anthony Abrahams MCIArb with effect from 1st May, 2020.

Before her appointment, Catherine Dixon spent time in chief executive roles at the Law Society of England and Wales, Askham Bryan College and NHS Resolution. Catherine also held senior leadership roles at the NSPCC and BUPA. She also served as Trustee and Non-Executive Director on a number of boards, including the Centre for Effective Dispute Resolution and she is currently a Trustee of Stonewall.

Catherine is a non-practicing solicitor and accredited mediator.

Achievements by Members

Our members continue to make strides in their respective fields. On Monday, 16th December, 2019, the 2nd Edition of the book "Nigerian Arbitration Law in Focus"co-authored by 2 (two) members of our Executive Committee, Mrs .Obosa Akpata, C.Arb and Mrs. Sola Adegbonmire, C.Arb was launched at the Agip Hall, Muson Center, Onikan, Lagos. The book was originally authored by the Late Hon. Justice Ephraim Akpata (JSC) Rtd and the event was attended by many of our members.

In addition, one of our own, Dr. Adewale Olawoyin SAN, FCIArb was appointed as the President of the Lagos Court of Arbitration (LCA). We believe that his tenure will grow the existing relationship and coperation between the CIArb Nigeria and the LCA. We wish him all the best in his appointment.

As reported earlier, the Chair of the Port Harcourt Chapter, Mrs. Florence Fiberesima, MCIArb (now Honourable Justice Florence Fiberesima, MCIArb) was sworn in as a Judge of the River State High Court on 7th January, 2020. We wish her a very successful tenure as a Judge.

Passing of Members

We lost a prominent member of the Branch **Chief Richard Akinjide, SAN FCIArb.** The sad event occurred on 21st April, 2020. He was an active and strong supporter of the Nigeria Branch and served as a member of its Training Faculty. May his gentle soul continue to rest in the bosom of the Lord. Amen

Conclusion:

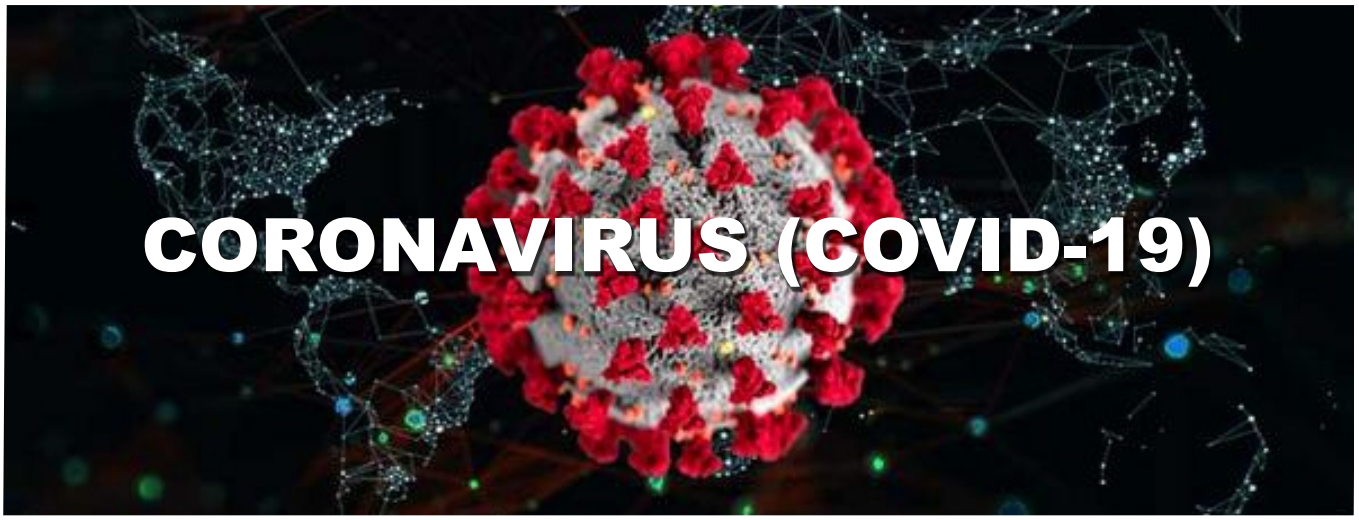
I thank the Editor-in-Chief of this Journal, Dr. Agada Elachi and his team for this initiative of migrating to an E-Journal. I also thank the Executive Committee of the Branch, Sub-Committees, members and the Administrative Staff for their support towards the growth and development of the Branch.

As the restriction on movement is gradually lifted, the CIArb appreciates the sacrifice made by the frontline health workers all over the world, to secure our lives while risking theirs. I enjoin our members to please keep safe and adhere to the advisory on COVID-19 from health care professionals.

Olatunde Busari, SAN, C.Arb
(Chair, Nigeria Branch)
1st July 2020

ODR IN AFRICA: THE EMERGENT FACE OF DISPUTE RESOLUTION POST COVID - 19

By ***MORENIKE OBI-FARINDE FCIArb***



The COVID-19 pandemic has brought to the fore what most people in emerging economies particularly in some countries in sub-Africa have never really given a thought to - working from home. For a majority of Africans in the sub-Sahara, special dispensation is usually afforded to employees who work remotely on an exceptional basis. i.e. illness or circumstances that are extremely grave. There is no doubt that the ability to work from home has been mainly due to the widespread availability of constant electricity and the availability of consistent Internet service. Most employers and employees are however unable to access the tools to work remotely as they do not possess the economic resources to do so.

In the last couple of weeks, although sub-Sahara Africa seem to have avoided the worst impacts of the pandemic, our legal systems have effectively grounded to a halt. Most sub-Saharan Africans have been directed to stay in their homes by their various Governments. Sub-Saharan Africa is not alone in this fate but it appears that the impact on the administration of law and business in sub-Saharan Africa is disproportionately impacted as a result of these directions. Also most of the global workforce has been forced to adjust but we do not appear to have been able to benefit from the technological improvements made globally to ensure continuity in the Court systems and the business area.

In the last decade, the Internet and mobile technologies have become a part of everyday life for most in the world. Mobile technologies are almost omnipresent in many nations.

According to the Pew Research Center [1],"In a few short years, the proliferation of mobile phone networks has transformed communications in sub-Saharan Africa. It has also allowed Africans to skip the landline stage of development and jump right to the digital age....Today, cell phones are as common in South Africa and Nigeria as they are in the United States." The Nigerian Communication Commission ("**NCC**") has said the number of Internet users on the Global System for Mobile Communications (GSM) networks has increased from 105,066,589 in August 2018 to 128,723,188 in January 2020.[2]

Mobile technology is also changing economic life in parts of sub-Saharan Africa, now, many are using cell phones to search for information, make or receive payments as well as make purchases with native mobile payment applications such as Quickteller, Paga, Readycash, M-Pesa; Paystack. According to the Global system for Mobile Communications Association (GSMA), as of 2019, smartphones remained the primary access to the Internet despite the influx of other mobile and smart devices. In another report approximately 23% of the population in sub-Saharan Africa use the mobile Internet on a regular basis and it is projected that by 2025, almost half of the population would

have subscribed to a mobile service.[3]

The Internet in sub-Saharan Africa is largely used for communication purposes and is closely followed by online retail transactions as can be deduced from active social media usage. Among those who access the Internet on their mobile phone, 57% visit social networks, 39% use email, 38% listen to music or watch video, and 31% read news. Instant messaging is highly popular and used by 41% of consumers.[4] When it comes to social media platforms, Facebook continues to dominate. It remains the most used platform among both marketers and consumers; Instagram now has over 1 billion monthly active users–a 42.86% increase from 2017; As of Q1 of 2019, Twitter had about 330 million active users worldwide. LinkedIn has a completely different audience type compared to other social media platforms, and is the largest professional network.[5]

Nigeria has a current estimated population of over 190 million[6] people with approximately 84 million people (almost half the entire populace) under the age of 20 and with forecasts for this demography to account for at least 52 percent of the population, the demand for mobile phones, personal care products, electronics, fashion items and food is steadily on the rise. [7]

With those numbers in mind, it can be imagined the number of online conflicts that will also arise. Mobile Technologies have capacity to proffer solutions to the issues that could arise. but technology can also create disputes.

Online Dispute Resolution (ODR) has been defined as "the adaptation of technological tools and systems for the resolution of offline and online disputes.[8]

Even though ODR evolved from a necessity to resolve disputes that arose in the online community, we have seen the adaptation of technology to adjudication by the courts. ODR therefore is not only a tool to assist the neutral in Alternative Dispute Resolution (ADR).

Due to the Covid-19 Pandemic in Nigeria, the Chief Justice of Nigeria upon the Order of the Federal Government has directed a lockdown of our Courts as well as the various ADR centers in the last couple of weeks.[9] The circular of the Chief Justice of Nigeria Ref. No NJC/CR/HOC/11/656 dated 8th April 2020 further heightened this uncertainty in the administration of justice system by extending indefinitely the suspension of Court sittings upon the expiration of the earlier two weeks lock down that commenced on the 24th of March 2020.

Nigerian Courts are closely connected to the ADR centers. Nigeria has been particularly forward looking and houses the first court, which is connected to an ADR center in Africa - the Lagos Multi-Door Courthouse. (LMDC). Of the 36 States in Nigeria, Sixteen States currently have established by Law, court connected ADR centers.

According to Ethan Katsh,[10] ODR may even turn out to be of value to the courts. If eBay can handle many millions of disputes and government agencies can take advantage of new tools to engage citizens, courts should be able to adapt to a new kind of alternative, one that is less an alternative to litigation and more an alternative to the physical structures in which courts are located and to the inefficient and expensive use of human labour that typifies even small claims courts.

The use of technology in dispute resolution and justice Administration in the developing economies has been ongoing for close to two decades but it maybe that the COVID-19 pandemic will bring ODR to the fore. Dr. Tom Clarke, National Center for State Courts (NCSC) an independent not for profit organization focused on improved judicial administration of courts worldwide said recently

"I find it immensely ironic that the coronavirus crisis will do more for virtual courts than decades of work by NCSC. I'm glad to see it come, even if this is not the way I would wish it to happen.[11]" -

The above statement is already been played out in Kenya. Upon the breakout of the COVID-19 Pandemic and the lock down of most countries, the Chief Justice of Kenya[12] proactively issued a practice direction providing for electronic case management. Kenyans are allowed despite the Pandemic to file and serve electronically court processes.

Justice Hannnah Okwengu of the Court of Appeal delivered 57 Rulings and Judgements of the court via video link with promise that the judgements/Rulings would be available for download 48 hours after. Also the High Courts in Kenya continue to hold sittings via video conferencing and Criminal Justice Administration is not halted as cases are conducted via video conference linked with remandees at Kapsabet GK Prison and Shimo La Tewa Prison.

On Friday March 20, 2020, the Chief Justice Brat Katureebe[13] in line with the executive order by President Museveni of Uganda, suspended all court hearings for a period of 32days.
The directions however made provisions for urgent proceedings via video link, judgement and rulings online via electronic mail.

So in Kenya and Uganda, even though a stay at home order is in force, law and order has not be suspended and ODR has adequately filled the vacuum and peculiar situation occasioned by the COVID-19 Pandemic.

This is a wake up call not only for Judiciaries in Sub- Sahara Africa but to the citizens who by the studies now have access to the Internet via their mobile telephones to embrace ODR for more efficient and cost effective alternatives to the Administration of Justice and Dispute Resolution.

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[11] https://www.ncsc.org
[12] https://www.judiciary.go.ke.kenya accessed 9-4-2020
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THE NEED FOR PERSUASIVE PRECEDENTS IN ARBITRATIONAND DISPUTE RESOLUTION PRACTICE.

By *Emelda Eko MCIArb.*

With the steady growth of Arbitration cases in Nigeria and the Awards resulting from them, Parties, their Lawyers, the Arbitrators and even inquisitive third parties have a growing interest to receive information on earlier cases.

This Article will focus on a few legal issues identified hereunder and discussed as follows:

1. The definition of Precedent, the concept of stare decisis and its sources;
2. The Implied Confidentiality in an Arbitration Clause;
3. The need for consistency in commercial Arbitration cases in Nigeria or not;
4. Conclusion.

The definition of "Precedent", the concept of "stare decisis" and its sources:

Precedent is defined as a decided case that provides a basis for determining later cases involving similar facts or issues.[1] While the availability of precedents has various advantages, this article will concentrate on two. The first is the ability of precedents to create study and research materials to be considered as a guide in subsequent similar circumstances, towards the understanding of a legal issue and the reasoning behind these decisions. The second aspect is the creation of legal principles that will serve to decide later cases in which similar or analogous issues arise.[2] The latter advantage is known as the rule of precedent or stare decisis, under which lower Courts as well as the Courts that rendered the decision must comply with these legal principles.[3]

In order to understand the definition of precedent from various perspectives especially the key players in arbitration, this Article will consider the meaning of Precedent from Counsel, Arbitrators and the Public's point of view.

Counsel's perspective:[4] A precedent is any decisional authority that is likely to affect the decision in the case at hand.[4] This is patently a results-oriented definition as Counsel tends to find authorities that are likely to affect the arbitrator's decision.[5]

Arbitrators' Perspective: A precedent is any decisional authority that is likely to justify the arbitrators' decision to the principal audience for that decision.[6] Going by this definition, it is clear that an Arbitrators' approach to precedents will be to find useful authorities that justify his reasoning on a decision to the principal audience.

Public's Perspective: A precedent is any decisional authority in which the factual and legal issues are sufficiently similar to the case at hand that the public reasonably expects the issues to be handled similarly.

Sources of Precedent:

1. Publications: Some Arbitral Institutions permit the publication of extracts from an award subject to the agreement of parties. When this occurs, the materials are made[7]

[1] Bryan A. Garner, Black's Law Dictionary, Third Pocket Edition, at P. 553.
[2] Nicolas Beguin, the Rule of Precedent in International Arbitration, Jusletter 5. Januar 2009, at P.2.
[3] Ibid
[4] Barton Legum, "Definition of Precedent" in International Arbitration, ed. Emmanuel Gillard, Yas Banifatemi"; IAI Seminar (Paris-December 14, 2007, Juris Publishing Inc.) P. 6
[5] Ibid; Pages 7 and 11
[6] Ibid P. 8

available to the public as non-binding precedent. Article 34 (5) of the UNCITRAL[7] allows for the publication of an award where the parties in that arbitration consent to same.

Similarly, Section 26(4) of the Arbitration and Conciliation Act[8] states that a copy of an award, made and signed by the arbitrators shall be delivered to each party. Although, the Arbitration and Conciliation Act does not expressly permit the publication of an award, in practice, the consent of the parties must be sought. The ICC publish extracts of arbitral awards giving insights into the reasoning of international arbitrators on the interpretation and application of contractual clauses, international conventions and the law of international trade.[9]

2. **Appeals and Enforcement:** Information about the arbitral process and awards become publicly available when awards are challenged in the Courts.[10] It is a prerequisite that any person relying on an arbitral award or applying for its enforcement must supply the duly authenticated original award or a duly certified copy;[11] the original arbitration agreement or the duly certified copy. In so doing, the award itself becomes a public record in the custody of the Court. Although, the Court is the appropriate mechanism to enforce an arbitral award, it is barred from delving into the award in its entirety.

3. Text Books, Write ups and Articles: Precedents can be found in text books, write ups or even articles written by some arbitration practitioners. These materials are developed based on the norms and practices of arbitration that have developed over time.[12] They are produced by those with experience in arbitration practice who understand 'how things are done' and in being published and adopted come to codify that practice to some extent.[13] In this way, they are a creature of precedent having been created based on 'what has gone before' and seeking to shape future practice.[14] Arbitration text books often report on how easy or difficult it is to persuade a tribunal to make a certain order.[15] The texts have no official authority but it shapes the way practitioners and tribunals behave.[16]

4. **Soft Laws:** In Arbitration, guidelines may be published and developed based on the norms and the practices of arbitration. These guidelines can be adopted by agreement to form part of the arbitral rules or as a means of persuading a tribunal to a point of view.[17] The best example is the International Bar Association (IBA) Guidelines on the Taking of Evidence in international arbitration (the IBA Guidelines) which was commonly adopted as a means of leveling the playing field for parties from different jurisdictions and setting out clearly for all involved, how the evidence in arbitration will be handled.[18]

5. Legal Press: The Legal Press, particularly specialized arbitration publications often provide insight into 'what has been done before' in arbitration across the globe.[19] These reports my not contain the level of detail on the tribunal's reasoning that would be available from, say the ICC, but often one can learn about tribunals, dissents and attitudes on key issues.[20] The legal press is also a key resource for learning about previous appointments of arbitrators and decisions they have made.[21]

The Implied Confidentiality in an Arbitration Clause:

The confidentiality of arbitral proceedings has traditionally been taken to be one of the important advantages of arbitration.[22] Unlike proceedings in Court, arbitration proceedings exclude third parties and the public generally. The confidentiality rule in arbitration was founded on the privacy of arbitral proceedings and the implied confidential terms of arbitration arises from the nature of the contract binding the parties. The arbitration contract itself is strictly between the parties to the exclusion of others and therefore, the resolution of the dispute has the potential of being a confidential process. It is important for parties in a contract to include confidentiality provisions in their agreement to arbitrate; however, the question that will arise is whether an implied confidentiality can be deduced.

The general principle of

[7] UNCITRAL Model Law on International Commercial Arbitration, 2010

[8] Arbitration and Conciliation Act, Cap A18, Law of the Federation of Nigeria, 2004

[9] Clyde & Co LLP, Precedents in Arbitration- a practical position (Part 1); www.lexology.com; (30/08/2019)

[10] Ibid

[11] Arbitration and Conciliation Act *op. cit.,* Section 31 (2) (a) and (b)

[12] Clyde & Co LLP, Ibid

[13] Ibid

[14] Ibid

confidentiality in arbitrations under English law, which might be said to represent the classical view, was spelt out by the English Court of Appeal in **Dolling-Baker vs. Merrett**.[23] Subsequently, in **Hassneh Insurance Co. of Israel vs. Mew,**[24] the court recognized the existence of an implied duty of confidentiality as the natural extension of the undoubted privacy of the hearing in an international commercial arbitration.[25]

Under the Arbitration and Conciliation Act, the complete, unabridged publication of awards is contrary to the traditional rule of privacy and confidentiality of arbitration. Where parties to an agreement in Nigeria, have failed to expressly include the confidentiality provisions including the publication of the award arising from the arbitration, the Arbitration and Conciliation Act[26] which is primarily fashioned from the 1985 UNCITRAL Model Law on International Commercial Arbitration incorporated the traditional implied confidentiality rule.

An arbitration agreement is a private contractual agreement to arbitrate between parties. Where the said arbitration agreement is silent on the publication of an award, an arbitrator can infer confidentiality and privacy of reference drawing his powers from the provisions of the Arbitration and Conciliation Act.

The need for consistency in commercial Arbitration cases in Nigeria or not:

Precedent has been defined as a series of consistent decisions on a given question of law.[27] To be deemed as precedents, awards must also be consistent with each other.[28] In other words, one may be able to infer from different arbitral awards the same legal principles.[29] Under the Nigerian Judicial system where Courts are in a hierarchy, the lower courts are bound by the decision of the higher court. In other words for consistency to be maintained in our judicial system, where a point or principle of law has once been officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those bound to follow its adjudication, unless it be for urgent reasons and in exceptional cases. See the cases of **Ardo vs. Nyako**[30]**; AG Lagos State vs. Eko Hotels LTD & Anor.**[31] The Supreme Court was also well guided to explain the circumstances at which it would not be important to rely on the doctrine of stare decisis to maintain consistency by stating thus:

"Facts have no views. A Judgment should always be read in light of the facts on which the case was decided. The rules of stare decisis do not allow Courts to apply the ratio of a case across the board and with little regard to the facts of the case before them".[32]

Consistency entails a control mechanism as the judicial system in Nigeria. If no full legal control were possible, consistency could not be ensured.[33] Therefore consistency requires the arbitral

[15] Ibid
[16] Ibid
[17] Ibid
[18] Ibid
[19] Clyde & Co LLP, *op. cit.*
[20] Clyde & Co LLP, *op. cit.*
[21] Clyde & Co LLP, *op. cit.*
[22] Redfern and Hunter on International Arbitration ed. Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter (Oxford University Press) P. 136
[23] (1991) 1 All ER 890
[24] (1993) 2 Lloyd's Rep. 243
[25] Redfern and Hunter *op. cit.,* P.137
[26] Arbitration and Conciliation Act *op. cit.,*
[27] B. Starck, H. Roland, L. Boyer, Introduction Au Droit 868, at 327 (Litec, 5th ed. 2000)
[28] Nicolas Beguin *op. cit.,* P.4
[29] Ibid
[30] Per Onnoghen JSC, (as he then was) 2014, LPELR-22878 (Supreme Court)
[31] Per Kekere-Ekun JSC (2017) LPELR-43713 (Supreme Court) (PP. 13-15, Paras F-B)
[32] Ibid, (P.15, Paras B-E)
[33] Nicolas Beguin *op. cit.,* P.4

institution or a superior panel be empowered to fully review the findings contained in the awards.[34]

The question that then arises is whether and to what extent the earlier decisions in arbitration are relevant or have to be taken into account by the tribunal deciding the present? Arbitral precedents are merely persuasive suggestions and must not be strictly followed. Where arbitrators are not bound by the decisions of earlier proceedings, it is therefore likely that they will not be followed. Although the arbitrator may be well advised by an earlier decision, he is not strictly bound by them. The effect is that, arbitration precedents are non-binding.

Conclusion

It is clear that arbitral precedents are available, therefore one of the highlighted advantages that precedents have the ability to create study and research materials to be considered as a guide in subsequent similar circumstances, towards the understanding of a legal issue and the reasoning behind these decisions is settled.
The second aspect which talks on the ability of precedent to create a consistency in making legal principles that will serve to decide later cases in which similar or analogous issues arise cannot successfully operate in Nigeria. However, the concept of precedents can be approached from a different perspective, namely the concept of Persuasive Precedent.

In summary, Persuasive Precedent can be defined as de facto tendency for an international arbitrator to accept what has been consistently decided in a significant number of past arbitral decisions.[35] It would therefore be misguided to describe the concept of precedent in arbitration from the same perspective as that applied to Courts.[36]

[34] Ibid

[35] Alexis Mourre, "Definition of Precedent" in International Arbitration, ed. Emmanuel Gillard, Yas Banifatemi"; IAI Seminar (Paris-December 14, 2007, Juris Publishing Inc.) P. 41

[36] Ibid

INCLUDING ARBITRATION CLAUSES IN CONTRACTS OF EMPLOYMENT IN NIGERIA: A CASE OF CARRYING COAL TO NEWCASTLE?

By Nelson Chilotam Onuoha, ACIArb (UK)

1.0 Background

In a bid to quickly resolve and determine employment claims, some employers in Nigeria have taken the initiative of including arbitration clauses in contracts of employment designating arbitration as the sole means of resolving any dispute arising from such contracts, and that the decision of the arbitrator shall be final, binding and conclusive of that dispute.

This epiphany could not have come at a better time as most employers, especially corporate bodies, have always disliked the idea of having employment/labour claims drag on in court for years. Most corporate bodies would also prefer that certain information remain confidential and not exposed to public access by litigation, hence the preferred choice of arbitration as a faster and more discreet means of resolving employment disputes.

In Nigeria, it remains the position of the Courts that where the award to be made in arbitration is agreed by the parties as final and binding on them, no court shall have the powers to sit on appeal over that award. A court can only hear and determine applications to have the award set aside for misconduct of the arbitrator(s) or for being improperly procured. A court cannot review, reassess or vary the findings or conclusions of the arbitrator in making the award.[1] The only discretion the court can exercise over an award is to determine whether or not the arbitrator applied proper methods in arriving at the award. This position is apt for commercial arbitration but does not appear to be applicable to employment/labour disputes' arbitration in light of the provisions of the Nigerian Constitution.

2.0 Appellate Jurisdiction of the National Industrial Court of Nigeria over Arbitral Awards on Employment/Labour disputes and its Implications

In Nigeria, jurisdiction (whether original or appellate) is conferred on a court or tribunal by the Nigerian Constitution or some other statute. It is against this background that the Nigerian Constitution (Third Alteration) Act, 2010 was passed into law on March 4, 2011, effecting alterations to Sections 243, 254, 287, 289, 292, 294, 316 and 318 of the 1999 Nigerian Constitution, establishing the National Industrial Court of Nigeria (NICN) and conferring it with exclusive original jurisdiction over labour/employment related disputes *inter alia*. The new provisions of the Constitution introduced by the Third Alteration Act which are relevant to arbitration in Nigeria are Sections 254C (3) and (4) of the Nigerian Constitution (as amended). While Section 254C(3) provides that the NICN may establish an Alternative Dispute Resolution Centre in respect of Labour/Employment disputes, Section 254C(4) provides that the NICN exercises jurisdiction over the enforcement of arbitral awards made in respect of labour/employment related disputes.

However, the critical provision to

this discourse is the proviso to Section 254C(3) of the Nigerian Constitution (as amended) which confers the NICN with appellate jurisdiction to hear and determine appeals against any award made by an arbitral tribunal in respect of labour/employment related disputes or any other matter over which the NICN exercises original jurisdiction. For clarity and ease of reference, Section 254C (3) of the Nigerian Constitution (as amended) is reproduced hereunder as follows:

"(3) The National Industrial court may establish an Alternative Dispute Resolution Centre within the Court premises on matters which jurisdiction is conferred on the Court by this Constitution or any Act or Law:

Provided that nothing in this subsection shall preclude the National Industrial Court from entertaining and exercising appellate and supervisory jurisdiction over an arbitral tribunal or commission, administrative body, or board of inquiry in respect of any matter that the National Industrial Court has jurisdiction to entertain or any other matter as may be prescribed by an Act of National Assembly or any Law in force in any part of the Federation. (Underlined for emphasis)

It is clear from the above provision that the Nigerian Constitution (as amended) has conferred the NICN with the powers to sit on appeal over any arbitral award made in respect of labour/employment disputes or any other subject matter within the NICN's exclusive original jurisdiction. The NICN has the constitutional powers to review the merits or otherwise of the findings and/or conclusions reached by an arbitrator(s) in making an award over a labour/employment dispute.

Inevitably, the right to appeal an arbitral award made over a labour/employment dispute displaces or defeats the comparative advantages of speed and confidentiality which arbitration generally bears over litigation. This is because even after the dispute is resolved by arbitration, an appeal to the NICN and a further appeal to the Court of Appeal[3] protracts the dispute and brings all facts and documents relating to the dispute to public access. Even more, these appeals would definitely bring about more cost on the parties in addition to the cost they bore during arbitration. Inexorably, the perceived reasons or benefits for including an arbitration clause in a contract of employment and ultimately engaging arbitration instead of litigation to resolve employment disputes, are completely undone by the right of either party to the arbitration to appeal the award to the NICN and to further appeal the NICN's appellate decision to the Court of Appeal.

Given the above, one is left wondering whether there is any need engaging arbitration to resolve an employment/labour dispute in Nigeria. It would appear that it is perhaps a faster, more cost-effective and neater process to litigate employment disputes directly at the NICN instead of

engaging arbitration, as appeals against the decision of the NICN on employment/labour disputes can only be made to the Court of Appeal. The decision of the Court of Appeal thereon is final and conclusive, as no party would have a right of further appeal to the Supreme Court.[4]

Recommendation

Many Jurists and Arbitrators have proposed that in order to circumvent the constitutional right of appeal against arbitral awards made in respect of employment/labour disputes, parties should include in the arbitration clause that the award shall not be subject to appeal. Including the foregoing in an arbitration clause presupposes that parties have agreed to waive their constitutional right to appeal the award and by ultimate implication divested the NICN of jurisdiction to hear and determine any appeal against the award.

However, it is humbly submitted that this strategy is untenable in law. It is the settled position of Nigerian Law that parties cannot by their agreement confer or divest a Court of original or appellate jurisdiction.[5] It is also the settled position of Nigerian Law that the provisions of the Constitution are supreme and binding on all persons and authorities.[6] Where the Constitution has conferred certain powers on any Court or Tribunal, no person, agreement or authority can oust such powers. Thus, no provision in an arbitration clause can stop the NICN from exercising its constitutionally conferred appellate jurisdiction over arbitral awards made in respect of labour/employment disputes.

It is rather suggested that in order to obviate the right to appeal the arbitral award, parties should nominate a seat of arbitration that is not Nigeria or any other country that provides for the right to appeal arbitral awards made in respect of labour/employment disputes. The 'seat of arbitration' is the particular country (system of laws) with the responsibility to administer and control the arbitration as opposed to the 'venue of arbitration' which simply refers to the physical location where the arbitration will be conducted. Thus, where parties choose a seat of arbitration that is not Nigeria, the provisions of the Nigerian Constitution, including provisions conferring the NICN with appellate jurisdiction over arbitral awards made in respect of labour/employment disputes, will not apply to the arbitration or the resultant award even if the venue of the arbitration is in Nigeria.

Unless the above step is taken, it would appear that including an arbitration clause in a contract of employment, and ultimately engaging arbitration instead of litigation to resolve employment disputes in Nigeria, is as needless as carrying coal to Newcastle.

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1 Baker Marine Nigeria Ltd. v. Chevron Nigeria Ltd. (2000) 12 NWLR (Pt. 681) 393

2 Garba v. Mohammed(2016) LPELR – 40612(SC)

3 All decisions of the NICN, both in its original or appellate jurisdiction, can be appealed against to the Court of Appeal. See Section 240 of the Nigerian Constitution(as amended); Skye Bank v. Iwu (2017) 16 NWLR (Pt. 1590) 24

4 The decision of the Court of Appeal on civil appeals against the decision of the NICN is final. See Section 243(4) of the Nigerian Constitution(as amended)

5 Eligwe v. Okpokiri (2014)LPELR – 24213(SC)

6 Section 1 of the Nigerian Constitution(as amended)

THE PITFALL OF JUDICIALIZATION OF ARBITRAL PROCESS IN NIGERIA

By

Muhammad Doko Idris

INTRODUCTION

Arbitration is a part of the ADR process and the most preferred method of dispute resolution mechanism by both local and international trading communities. The available statistics that support this assertion can be attested to by the proliferation of so many arbitral institutions across the globe[1]. However, there is a growing concern that the arbitral process is being judicialized partly on account of intervention by court and the increasing formalization of arbitral procedure that introduces cumbersome processes that elongate time, increase cost and entrench technicalities which are the attributes of litigation[2]. Although it has been argued that arbitral proceedings are not necessarily expeditious if the applicable laws and rules of proceedings are over simplify. It is however important to note that the incessant judicial intervention, particularly as it relates to enforcement of award defeats the purpose of arbitration, which is time and cost- efficiency. In the same manner, lawyer's involvement in arbitration can been counterproductive. This is because some of them approach or direct arbitration proceedings like litigation. To them arbitrator is a judge and the other party is an opponent who must be brought or worn down by all means. The consequences of this, is that arbitration is unnecessarily bogged down by technicalities and bottlenecks of litigation.

Arbitration as a judicial process.

Arbitration is an extension of the judicial process and also a product of the private justice system that emanates from contract. This presupposes that party autonomy is the heart and soul of arbitration. In essence, arbitration is an indispensable tool for socio-economic development. This is because virtually every commercial venture particularly of international dimension is initiated by means of written contract where party's obligations, duties and rights are well spelt out. These

obligations albeit entered voluntarily represent wishes of the parties and are judged by them in the event of any dispute. Orojo and Ajomo lend their voices in the following words:

"The resolution of commercial disputes is obviously a very crucial aspect of the operation of the national economy and of the judicial system"[3]

Arbitration and legitimacy of judicial intervention in Nigeria.

As rightly stated earlier, arbitration is an extension of judicial process because the contractual agreement which provides reference for arbitration in the event of disputes by the parties is recognized and enforceable by the Court of law. Section 1(2) of Arbitration and Conciliation Act provides:

"Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract."

Invariably, where parties freely and voluntarily enter into an agreement with arbitration clause, it is not their intention that dispute should be resolved by courts. Even the Courts have established the jurisprudent that they do not interfere in the agreement of the parties but merely interpret and enforce their intention. In other words, the Court respects the sanctity of the contracts. In the words of Oputa JSC of blessed memory, in the **Sonnar (Nigeria) Ltd v Partenreedri MS Nordwind owners of the ship M V. Nordwind** [4]

"There is no doubt that parties to a contract are allowed, within the law, to regulate their rights and their liabilities themselves. Courts do not make contracts for parties. It cannot be emphasized enough to say that Courts will only give effect to the intention of the parties as expressed in and by their contract."

However, in reality, and by the provisions of the law, arbitration relies heavily on coercive power of the Court which is sometimes necessary for parties to realize its benefits.[5] Sections 2, 4, 5, 7, 23, 29(1) & (3), 30 & 31 of ACA allows the court to intervene in the arbitration process in Nigeria. The instances of these interventions are: (i) Revocation of the arbitration agreement, (ii) Stay of court proceedings, (iii) Establ ishment of an arbitral tribunal, (iv) Compelling the attendance of a witness to testify or produce a document, or producing a prisoner to be examined by an arbitral

[1] W. Karanja; N. Muriuki; (2016)The Proliferation of International Arbitral Institutions in Africa and What the Future Holds for Institutional Arbitration on the African Continent" available at www.transnational-dispute-management.com. Visited on the 15th December, 2019

[2] Lutz, R.E, 1988. International Arbitration and Judicial Intervention, 10 Loy. L. A. Int'l & Comp. L. J.621.

[3] Orojo Olakunle .J. and AjomoAyodele M. Law and Practice of Arbitration and Conciliation in Nigeria, Lagos: Mbeyi& Associates (Nig.) Ltd.(1999) p IV.

[4] (1987) LPELR-3494 (SC)

[5]

tribunal. (v) Setting aside of a domestic award (vi) Setting aside of an award or the removal of an arbitrator for misconduct. (vii) Recognition and enforcement of domestic awards. See section 34 ACA.[6] The inviolability of this section was tested in the case of **Bendex Eng. v Efficient Pet. (Nig.)**[7] In that case the Court of Appeal declared the provision of the section 34 an as ouster clause because it encroached on the right of appeal of individuals as enshrined in the Constitution.

The question that readily comes to mind is that with the Nigerian tradition of rigid common law reasoning, will there be any judicial pronouncement that will advance the cause of arbitration in Nigeria? Although certain decisions from the courts of the land seem to assuage this feeling, the course is still not clear as the existing laws regulating arbitration create avenues for employment of legal technicalities in arbitration proceedings

The lawyer as arbitrator

The Nigeria lawyer is trained in the art of litigation and had the mastery of its techniques. The lawyer's trade is to participate in the resolution of dispute. It earns the sobriquet 'minister in the temple of justice' because the law and the society see the role of lawyer as such. Although section 7 ACA does not provide for any particular professional requirement to be met before a person can be appointed an arbitrator. To that extent, lawyers are not barred to act as arbitrators. However, since the arbitration proceedings mimic or have the trappings of litigation, lawyers have become the special bride to look for. For this purpose, not only do they become arbitrators but counsel in the arbitration proceedings. In fact, recent statistics shows that they dominate arbitral institutions and proceedings across the landscape and it is therefore convenient for them to dictate the pace.[8]

It is unfortunate that some lawyers brought their litigious mindsets to the arbitration proceeding which is inimical to an efficient dispute resolution process. For example, in the course of proceedings, they deploy the panoply of civil law procedure which they believe is necessary to protect their client interest(s). These tactics deployed by theses lawyers which include the traditional delaying techniques such as requests for particulars, interrogatories, disputes about disclosure of documents and the formal steps of examination in chief, cross-examination and re-examination etc encourage judicialization of arbitral proceedings or process in Nigeria.

The pitfall of judicialization of arbitral process

Trade and commerce which stimulate economic activities can only thrive under a regime that guarantee sensible balance between legal or juridical order and the arbitral process. This is because arbitration as a process is meant to positively influence economic development.[9]

The significance of the forgoing is that the major reason for giving the parties or investors the needed confidence in the commercial affairs of countries is to insulate the arbitral process from partiality and undue judicial interference. In the world of commerce or business, parties prefer to settle their disputes or differences privately and in a manner that is accustomed to their trade without causing harm to their future business relationship. Therefore, judicial intervention that have metamorphose into judicial control and the introduction of cumbersome procedure will certainly detract from the existing philosophy upon which the arbitration stands. It will also have the effect of strangulating it growth and development in the country. The argument that the introduction of new procedural rules which unfortunately adds to the cumbersomeness of the arbitral process were meant to improve the decision making in multifaceted and complicated disputes was seriously deprecated on the justification that it would encourage apathy and cynicism. Private dispute resolution should depict simplicity and not be legalistic.

The future of arbitration in Nigeria.

The future of commercial arbitration in Nigeria is blurry or at worst can be described as bleak. Preliminary survey of critics and commentators alike suggest that the commercial arbitration regime in Nigeria is excessively rigid, complex and cumbersome. This criticism can hardly be faulted. It is clear that lawyers and judges dominates the arbitral landscape. The attitude of such arbitral convocation is predictable. Some of these lawyers and judges entrenched litigation culture in arbitral process. To wit, what characterizes the arbitral process where lawyers are the active players is, acceptance of lengthy briefs and adoption of formal proceedings that produces awards that resemble detailed common law decisions, and are subject to cost and delay and become recipe for judiciary review.

Again the single piece of legislation that regulates commercial arbitration in Nigeria has been in existence for more than three decades and has become crusty and rusty.[10] In other to further develop the efficiency of arbitration, it is suggested that the most recent UNCITRAL model law rules of 2013, should be adopted with adaptation to Nigeria business environment. Although there has been extensive work done on Nigeria arbitration law which has been developed into a bill currently undergoing the process of becoming law in the National Assembly. It is hope that when the new law come on board it will significantly improve the practice of arbitration in Nigeria.

Conclusion

The biggest problem in arbitration is delay and inefficiency due to incessant judicial intervention. The way forward in this wise is to remove those outmoded rules and procedure, delimit the intervention of court in arbitral process; educate the lawyers and the judge on how arbitration should differ from civil litigation and enlighten the end users of arbitration of the need to deemphasize seeking formal and protracted proceeding in the pursuit of legitimacy and certainty.

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6 Arbitration and Conciliation Act

7 [2001] 8 NWLR (Pt.715) 33

8 UChenna Jerome orji (2012) Law and Practice of Conciliation in Nigeria. *Journal of African Law* Vol. 56, No. 1 pp. 87-108

9 Adewale A O, (2009) Charting new waters with familiar land Marks, the changing face of arbitration law and practice in Nigeria,26.j int.arb,3 pg 376.

10 Ibid.

HINTS ON ARBITRATION IN THE CONSTRUCTION INDUSTRY IN NIGERIA

by
Emmanuel Dike[1]

1.0. Introduction

1.1. Construction arbitration is one of the oldest and commonest forms of arbitration in Nigeria. Arbitration is very popular in the construction industry because the chances of disputes arising from construction contracts are higher than many other contracts2

1.2. Construction arbitration may be described as the art and practice of blending the knowledge and practice skills of an arbitrator; with the application of the knowledge of the operations of contracts and regulations applicable in the construction industry; in order to settle disputes arising from construction contracts by arbitration, efficiently.

2.0. Nature of Construction Contracts:

2.1. A construction contract is a contract in which one party (the Contractor), undertakes to carry out works for another party (the Employer/Client); involving the erection, alteration, repair or demolition of buildings or other structures on land3.

2.2. Such contracts are usually referred to as building contracts; where they relate to building; and civil engineering contract where they relate to work of infrastructure; such as roads, bridges, harbours and other similar works.

3.0. Persons Involved in the Conduct of Construction Arbitration in Nigeria.

3.1. The construction arbitration space in Nigeria is dominated by professionals in the built environment, especially Quantity Surveyors, Architects and Engineers. These are what could be termed as "first responders"; in the event of disputes arising from the performance of any construction contract; because they are either, the contract administrators, project managers, construction managers or supervisors.

3.2. Lawyers who are arbitrators; are making significant attempt to participate in the numerous arbitration work arising from construction projects. In order to fully participate in this type of arbitration, a modicum of knowledge and subject-matter-competence skills-set on the operation of construction contracts, from letter of award stage to commissioning is

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[2] Orojo & ajomo: Law and Practice of Arbitration and Conciliation in Nigeria pg 59

[3] Mosey & Mudoch: Butterworths'Building and Engineering Contract: A Construction Practitioner's Guide pg 545.

required.

3.3. The Institute of Construction Industry Arbitrators (Formerly Society of Construction Industry Arbitrators) offers trainings in various construction arbitration practice acquisition skills.

3.4. Such trainings include; subject-matter competence skills training for experienced arbitrators, who may be admitted to Fellow status of the Institute after successfully completing the training; membership entry training for those without much experience in arbitration; and monthly arbitration clinics together with Fellow upgrade course for existing members.

4.0. How Construction Disputes Arise

4.1. In a typical construction dispute, issues of cost, design, (whether architectural or engineering), procurement and construction; are closely tied together. A basic body of knowledge that cuts across these issues is required by a legal practitioner faced with the challenges of issues arising from construction contract; in order to deal with them effectively

4.2 A glance at some of the major cases that have proceeded from construction arbitration; would reveal that basic knowledge of construction issues is a necessity towards prosecuting either litigation or arbitration proceeding arising from construction contracts.

4.3.In Obembe vs Wemabod Estates Ltd4; a consulting engineer was engaged to supervise the construction of a building. The conditions of engagement were governed by a booklet published by the Association of Consulting Engineers in London.

4.4.Disagreement arose about the quality of steel recommended by the consulting engineer and his appointment was terminated. Issues arising from this simple transaction include; fees for structural and civil works, costs of resident supervision by resident engineers; and scale of fees in the Association's booklet; as well as the arbitration clause in the booklet incorporated by reference.

4.5.In Kano State Urban Development Board vs Fanz Construction Co. Ltd5; a breach of the construction contract threw up the following issues;
(i) Value of unpaid certificates.
(ii) Fluctuation claims.
(iii) Variation claims
(iv) Provisional claim on fluctuation on materials used on site for period not covered by variation.

4.6. In Taylor Woodrow of Nigeria Ltd vs S.E GMBH6; the dispute relates to the construction of a hospital in Minna; although the issue resolved by the arbitrator was a breach of contract due to the non opening of letters of credit by the Appellant in favour of the Respondent.

4.7.In City Engineering Nig. Ltd vs Federal Housing Authority7; the issue is breach of contract arising from building housing units in Festac Town Lagos.

4.8.The common features in all the cases are;
(I) there were frequent use of industry terms and practice as a matter of course.
(ii) The contracts are either specialized or there were presence of standard form contracts.
(iii) The frequent resort to arbitration.
(iv) The arbitrators were mainly Lawyers
(v) Counsel to the parties were Lawyers.

4.9. It is true that Lawyers are not trained to be construction men. But, if Lawyers must continue to enjoy the confidence of their clients; there is an imminent need to understand the business of their clients.

4.10. In the life cycle of a typical construction project; there is usually a multiplicity of documents forming a single contract. Each of the documents carries legal obligations; for instance invitation to bids and tender documents, bill of quantities and preliminaries, letter of award and agreement, drawings and specifications, conditions of contract; among others. So it may not be possible to have the entire construction contract terms and conditions embodied in a single document.

4.11. Similarly; in a lump sum contract; that is a contract that ordinarily should not permit any variation; the bill of quantities may provide for provisional sum at the same time; especially for works in the substructure. An argument that the contract does not permit variation may not succeed.

4.12. In an EPC (Engineering, Procurement and Construction), disruptions and delays may still arise; because of wrong use of contract forms or alterations leading to an isolated hybrid. .
In conclusion, I wish to thank the

Chairman of CIArb (Nigeria Branch) the Executive Council and in particular Mrs Sola Adegbomire, for extending the invitation to speak and my fellow CIArb (Nigeria Branch) members for granting me audience at in meeting.

Thank you for listening.

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[4] [1977]5SC 115
[5] [1990] 4NWLR (Pt 142)1
[6] [1993]NWLR (Pt 286) 127
[7] [1997] 9NWLR (Pt 520) 224

Data Protection And Confidentiality In Remote Proceedings - By Mrs Oluwaseun Oloruntimehin

The Protection And Confidentiality Of Parties, Case Information And Arbitral Proceedings Is Fundamental To The Advent And Rise Of Arbitration. These Distinctive Features Should Never Be Sacrificed On The Bed Of Expediency Or Our Current Reality Of Social Distancing And Rising Online Communication. However, The Increasing Dependence On Digital Records And Online Interactions Create Significant Cyber Security Vulnerabilities. The Recent Increase In Pervasive Cyber Threats Makes Clear That One Of The Hallmarks Of Arbitration (*confidentiality*) Can Easily Be At Risk When Using Technology Platforms. This Begs The Need For Intentional Strategies That Should Be Implemented For Its Protection. Therefore, In Order To Achieve A Successful Relationship Between Technology And Arbitration, Data Security And Privacy Concerns Should Be Assuaged.

A Recurring Debate Has Been The Appropriateness Of Virtual Proceedings And Its Efficacy In Arbitration Vis-à-vis The Traditional In-person Hearings And Proceedings. This Article Delves Into Essential Tasks That Should Be Undertaken By Key Stakeholders Of Arbitration To Protect Data And Preserve Confidentiality So As Ensure Successful And Enforceable Outcomes. Practical Steps[iii] On How To Identify And Protect Confidential/sensitive Data, Detect And Respond To Electronic Data Breaches As Well As Recover Information Lost Or Corrupted Would Be Explored. In Addition, Retention And Destruction Polices, Certificate Of Compliance With Information Security Measures, As Well As Guidance On How To Preserve The Confidentiality And Privacy Of The Parties And Proceedings Would Be Examined.

1. Data Protection And Security

Data Protection And Information Security Issues Are Closely Connected And Usually Interrelated. This Is Also Recognized By Data Protection Regulations Which Mandate Organizations Processing Personal Data To Implement Information Security Measures[iv]. Remote Proceedings Typically Favour The Use Of Videoconferencing, Cloud-based Storage, Artificial Intelligence, Virtual Hearing Rooms And Related Technologies. These Technologies Which Envisage Digital Transmission, Use And Storage Of Information Are However Vulnerable To Electronic Data Breaches. Electronic Data Breaches Or Cyber-attacks Have Taken Diverse Forms, From Hacking Of Virtual Meetings To Unauthorized/illicit Access, Transfer Or Use Of Case-related Information By Hackers. The Possible Consequences Of Successful Cyber Attacks Include:

- Out-of-pocket Expenses For Forensic Investigators To Identify Type And Extent Of Attack And Legal Advice To Mitigate Liability;
- Economic Loss To Individuals Whose Commercial Information Or Personal Data Has Been Compromised;
- Loss Of Integrity Of Data Or Questions About The Reliability And Accuracy Of Data;
- Unavailability Of Data, Networks, Platforms Or Websites Due To Disruption Caused By The Security Breach;
- Regulatory Liability And Penalties Imposed By Authorities;
- Damages Awarded In Civil Claims; And
- Reputational Damage To Arbitration And Its

Stakeholders.

Given The Potential Risk And Consequence Of Cyberattacks, Comprehensive Data Protection And Information Security Policies Should Be Formulated For Remote Proceedings. These Policies Should Guide Participants On The Following:

- The Identification Of Confidential Information (information)
- The Protection Of The Exchange, Use And Storage Of Information
- The Period Recommended For Retention, And Time Frame For Destruction, Of Arbitration-related Data
- Confirmation Of Compliance With Data Protection And Confidentiality Policies
- Tools To Detect Cyber Security Incidents
- Response To The Security Breach Which Includes Notification And Mitigation
- Recovery Of Lost, Deleted Or Corrupted Information

Identification Of Sensitive/confidential Information

1.1 Risk Assessment On Whether A Case Requires An Enhanced Level Of Cyber Security, Privacy And Data Protection Should Be Done. The Risk Profile Of A Case Takes Into Account The Subject Matter Of The Case, Value Of Dispute, Evolving Threats And Technology As Well As The Likelihood That A Security Breach Would Cause Significant Loss.

1.2 International Arbitrations With Multi-jurisdiction Elements And Investor-state Arbitration That Involves Investment Treaties/agreements Of Host States, Would Be Typical Examples Of Proceedings That Require Heightened Levels Of Data Protection And Confidentiality

1.3 This Does Not However Discount The Need For Data Security And Confidentiality In Domestic Arbitration Where Confidential/privileged Information May Be Exchanged And Cases May Be Subject To Confidentiality Agreement Or Data Protection Laws.

1.4 In Addition, An Assessment Of Whether The Risk Of A Cyber-attack Is High Or Low And Whether Consequences Of A Security Breach Are Likely To Be Minor, Moderate Or Severe Should Be Undertaken. These Determinations Would Also Be Dependent On The Identity Of Parties, Subject Matter Of The Dispute, The Size And Value Of The Dispute, Prevalence Of Cyber Threats, Applicable Regulations And Severity Of Possible Consequences For Breach.

1.5 A Determination Of Whether Third Parties Such As Fact Witnesses, Experts Or Vendors Like Stenographers Would Need Access To The Case Related Documents Should Also Be Made. The Documents Relevant To Be Transmitted To Such Third Parties Should Be Agreed And The Mode Of Transmission And Storage Secured.

1.6 Sensitive/confidential Information Would Include Personal, Classified, Financial, Commercial Or Confidential Information Such As National Identification Numbers, Dates Of Birth, Medical Health Information, Intellectual Property, Trade Secrets, Credit Card Details Or Financial Account Numbers, Privileged Information Or Information Subject To Express Confidentiality Agreements.

1.7 In This Regard, Collation Of A List Of Documents That Would Be Submitted Or Exchanged During Arbitral Proceedings Would Be Prudent. An Identification Of Possible Confidential Data That Might Be Vulnerable To Cyber Threats Should Be Made From The List Of Documents.

1.8 Confidential Information That Are Not Relevant To The Case But Form A Part Of Relevant Data Should Be Redacted. In The Case Of Relevant Confidential Information, Reasonable Information Security Measures Should Be Agreed And Implemented.

Protection Of Information (*exchange, Use And Storage*)

1.9 Party Autonomy Is Fundamental In Data Protection And Security As With Other Aspects Of Arbitration. Therefore, Appropriate Data Protection Policies Would Require Consultation And Agreement Between The Tribunal And Parties.

1.10 Post-dispute Arbitration Agreements Or Preliminary Meetings Should Address Appropriate Information Security Measures To Safeguard The Transmission, Use And Storage Of Sensitive Data. Consequently, Procedural Orders That Provide Directions On Agreed Security Protocols Should Be Made At The Very Start Of Arbitral Proceedings

And Should Be Circulated To Participants.

1.11 Recognizing That The Need And Ability To Implement Information Security Measures Would Invariably Be Dependent On The Size, Sophistication And Available Resources Of The Parties, Arbitrations, Arbitral Institution And Other Stakeholders, There Are Basic Security Measures That Can Be Implemented By Custodians Of Arbitration-related Information.

1.12 The Basic Security Measures May Include Access Controls, Communication Security And Encryption To Secure The Exchange And Transmission Of Arbitration-related Information.

1.13 *Access Controls* To Information Should Be Properly Guarded With Encryption And Should Include The Control Of User Accounts By Utilizing The Requirement For Strong And Complex Passwords, Biometric Controls And/or Multi-factor Authentication Especially When A Shared Third Party Platform Is Used To Host And Access Arbitration-related Data.

1.14 Passwords Should Be Based On Unique Passphrases, At Least 8 Characters Long With Lowercase, Uppercase Letters And A Symbol, Which Is Easily Remembered. In Addition, Common Dictionary Words, Past Passwords, Repetitive Or Sequential Characters And Context-specific Words Should Be Avoided. Changes To The Passwords At Set Intervals Should Also Be Done.

1.15 *Communication Security* Involves The Protection Of The Means Used To Communicate And Share Information Electronically, This Includes Internet Networks And Email Communications. These Can Be Protected By Exercising Caution With Downloading Attachments And Clicking Links (confirm Sender And Avoid Downloading Strange Attachments Or Clicking Unsecured Links), Using Enterprise-grade Email Systems Only, Using Secure File Sharing Services Instead Of Email And Avoiding Public Networks Or Mitigating The Risks Of Use.

1.16 Transmission Or Exchange Of Sensitive Information Can Also Be Protected By *End-to-end Encrypted Electronic Transfers* Such As Encryption Of Data In Cloudbased Storage Or In Transit Via Email Communication, Encryption Of Videoconferencing, Hard-drive Encryption And Encryption Of Flash Drives. The Password For Decryption Should Be Communicated Separately From The Encrypted Information And The Servers Used Should Be In A Secured Region.

1.17 The Storage Of Arbitration-related Information Can Also Be Protected By Minimizing The Processing Of Confidential Commercial Information, Personal

Data, Or Other Sensitive Information In Relation To The Arbitration And Limiting Certain Information To The Parties And Their Representatives Only.

1.18 Effective Information Security Requires That All Custodians Of Arbitration Related Information Adopt Appropriate Information Security Practices. This Is Because The Security Of Information In Arbitral Proceedings Ultimately Depends On The Decisions And Actions Of All Stakeholders.

1.19 The Possible Custodians Of Arbitration-related Information Include The Parties, Their Representatives, Fact Witnesses, Arbitrators, Administering Arbitral Institution, Supporting Personnel (*including Employees, Lawyers, Legal Assistants, Law Clerks, Trainees, Administrative Or Other Support Staff, Case Management Personnel, And Tribunal Secretaries*) And Independent Contractors And Vendors (*including Consultants, Experts, Translators, Interpreters, Transcription Services, And Document Production Or "e-discovery" Vendors And Professionals).*

1.20 Any Break In The Security Of Arbitral Information By Any Participant May Potentially Compromise The Security Of The Entire Arbitration And Affect All Participants. Therefore, The Parties, Arbitrators And Administering Institution Should Ensure That The Information Security Measures Of Such Custodians, Their Cyber-protocols As Well As Data Protection Arrangements With Third Party Service Providers Are Satisfactory And Compliant With The Security Measures Adopted In The Proceedings. In Addition, The Policy On Further Dissemination Of

The Information By Authorized Recipient(s) Should Also Be Agreed.

1.21 In Acknowledgment Of The Fact That Nothing In Life Is

Constant, The Data Protection Measures Initially Formulated May Be Modified Further To The Concerns Or Request Of Any Party Or By The Tribunal *Suo Motu.* The Various Factors That May Necessitate This Modification Includes Changes In The Circumstances Of The Case, Changes In The Qualification Of Confidential Information And Changes In Applicable Law, Institutional Protocols Or Technological Developments. Any Modification To The Data Protection Policies
Should Be Subject To Prior Notification Or Agreement Of The Parties.

Retention And Destruction

Retention And Destruction Policies That Apply During And After The Proceedings Can Be Used For Asset Management. These Policies Should Provide Guidance On The Time Frame For Retention Of Arbitration-related Documents And When They Should Be Destroyed.

1.23 It Is Recommended That Once The Purpose Of Such Information Has Been Achieved, They Should Be Securely Destroyed So As To Minimize The Risk Of Confidentiality Breach.

1.24 However, Factors That Need To Be Considered Before Arbitration-related Information Are Destroyed Include Applicable Legal Or Ethical Obligations, Rules Relating To The Correction Of Awards And Award Recognition/enforcement Proceedings, And Legitimate Interests In Retaining Information.

1.25 In Cases Where Documents

And Data From Concluded Arbitration Are Retained For Conflict Checking, Tax Purposes, Precedent Purposes, Or Other Legitimate Reasons, It Should Be Considered Whether Some Or All Of The Data Can Be Anonymized Or Redacted And Whether It Can Or Should Be Stored In Archived Form (e.g., Segregated From Active Files On An Offline, Encrypted Hard Drive Or Secure Cloud Service).

1.26 In Instances, Where It Is Appropriate To Destroy Such Documents Or Data, It Should Be Securely And Completely Destroyed So That It Cannot Be Recoverably By Forensic Tools. For Instance, Information In The Trash Folder Of Emails Should Be Emptied And Permanently Deleted.

1.27 Custodians Of Arbitration-related Information Should Also Be Obligated To Confirm In Writing That They Had Complied With These Policies By Retaining The Data In A Secure Way Or Destroying Such Information Completely And Securely.

Certificate Of Compliance

1.28 The Data Protection And Confidentiality Policies Of The Proceedings Should Be Circulated To All Custodians Of Arbitration-related Information Before They Have Access To Such Information. The Access To Or Transfer Of Such Information Should Be Subject To Their Explicit Consent (using Electronic Signatures Or Consent Tick Box) To Compliance With The Policies.

1.29 Such Custodians Should Also Be Obligated To Provide Confirmation In Writing Of Compliance With The Policies At Different Stages. This Includes, Their Compliance During Further Transmission, Use, Storage, Retention And Destruction Of The Information.

Detection Of Cybersecurity Incidents

1.30 Participants Should Have Tools To Detect Possible Cybersecurity Breaches And Phishing Attempts. This Includes Malware Protection Tools For Computer End Points That Detects And Protects The Computer From Common Malware, Like Viruses, Worms, Trojan Horses, Spyware And Ransomware.

1.31 These Intrusion Detection And Prevention Systems Monitor Networks And Systems To Detect, In Real-time/near Real-time Unauthorized Attempts To Access System Resources. If A Successful Cyber-attack Has However Taken Place, Custodians Are Likely To Notice The Unauthorized Access.

Response To Security Breach

1.32 Applicable Regulations And Sometimes Professional Or Ethical

Obligations May Impose Breach Response Obligations, Which May Include Notification To Affected Persons And Other Remediation Measures.

1.33 As Part Of The Data Protection And Confidentiality Policies, Arbitrators, Parties, And Administering Institutions Should Also Agree On An Incident Response Plan That Includes Specific Plans And Procedures For Responding To A Security Breach.

1.34 The Planning And Response Should Be Facilitated By Awareness Of The Requirements Of Applicable Laws, The Digital Architecture Of Participants And Location Of Data. Cybersecurity Risk Insurance Should Also Be Considered To Cushion The Impact Of A Security Breach.

1.35 The Mitigation Of The Incident Can Include Suspension Of Proceedings Until The Cyber Risk Is Addressed, Use Of Computer Forensics To Identify The Threats And Alternatives To Recover Information As Well As The Use Of Cryptography To Protect Uncompromised Documents From Unauthorized Persons.

1.36 Related Costs May Also Be Allocated Among The Parties And The Tribunal May Impose Sanctions On The Party/parties That Enabled Such Breach. The Sanctions May Be Premised On Regulatory Liability, Liability In Contract (breach Of Agreed Policies/contract On Data Protection), Professional Malpractice Or Negligence (breach Of Duty Of Confidentiality).

Recovery Of Information

1.37 Data- Backup Systems That Stores Copies Of Files And Programs Can Be Utilized To Recover Information That Is Lost, Accidentally Deleted, Corrupted Or Made Inaccessible.

1.38 The *3-2-1 Rule* Of Backing Up Data Should Be Used Routinely. This Rule Provides That 3 Copies Of Data Should Be Made In Total, 2 Copies Should Be Stored Locally In Different Storage Media (which Can Be A Physical External And Encrypted Back-up Drive And A Cloud-based Back-up Service) And 1 Copy Should Be Stored Off-site.

1.39 A "cold" Back-up Which Is A Back-up That Is Kept Offline And Disconnected From One's Network Should Be Maintained So That If One's Network Is Compromised, There Would Be An Uncompromised Back-up Of The Network Data.

1.40 These Back-up Systems Become Incredibly Useful When There Is A Need To Recover Otherwise Inaccessible Information Or Data.

Pre-virtual Proceedings

2.1 The Participants Of Virtual Arbitral Proceedings Include: The Parties, Representatives, Fact Witnesses, Arbitrators, Administering Arbitral Institution, Supporting Personnel (*including Legal Assistants And Tribunal Secretaries*) And Independent Contractors And Vendors (*including Experts, Translators, Interpreters, Transcription Services, And Computer Technicians).*

2.2 The Identify Of Each Authorized Participant Including Their Full Names And Role Should Be Collated And Circulated To All Prior To The Hearing Dates. The Hearing Dates, Agenda For Each Hearing Date, List Of Participants Allocated For Each Date And Time Slots For Each Participant Should Also Be Compiled And Circulated Ahead Of The Hearing Dates. This Is To Properly Notify Participants And To Prevent Unallocated Participants Such As Witnesses Not Scheduled To Give Evidence From "mistakenly" Joining The Proceedings.

2.3 All Participants Should Be Educated On The Confidentiality Policy Of The Proceedings And Should, At The Commencement Of Proceedings, Be Obligated To Consent To The Policy Using Digital/electronic Signatures Or Consent Tick Box.

2.4 The Policy Affirmed By Participants Should Also Set Out A Duty For All Participants To Use Their Best Efforts To Ensure The Security, Privacy And Confidentiality Of All Participants And The Proceedings. There Should Also Be Consequences Or Contractual Penalties For Breach As A Deterrent.

Virtual Proceedings

2.5 The Platform Used For Virtual Proceedings Should Have A Unique, Automatically Generated Id Meeting Number For Each Hearing. As An Additional Layer Of Security, Each Hearing Should Be Password-protected With A Unique Password. This Password Should Be Shared With Valid Participants Immediately Before The Meeting Via A Medium Other

Than The Virtual Hearing Invitation Email.

2.6 At The Start Of The Proceedings, The Tribunal Should Verify The Identity And Role Of Each Participant. Each Participant Should Re-affirm The Identity And Role Of Every Individual Present With Him/her, Leaving An Opportunity For Legitimate New Participants In The Case Of An Unavoidable Replacement For Absent Participants. The Replacements Should Also Be Obligated To Consent To, And Uphold, The Confidentiality Policy.

2.7 Each Participant Of The Video-conferencing Meeting Should Be Visible And A Fair Share Of The Virtual Hearing Room Used By Such Participant Should Be Displayed.

The Virtual Hearing Rooms Should Only Be Accessible To Allocated Participants Of That Hearing(s).

2.8 Other Measures To Protect Confidentiality And Privacy May Include Procedures For The Handling Of Any Transcripts, Recordings, Or Videos Which Are Made; Restrictions On What Technology, Such As Smartphones, Attendees May Bring To, And Use At, Hearings; And Establishing A Protocol For Remote Testimony. Furthermore, When Hearings And Conferences Are Held Telephonically, Secure Telephone Services Should Be Used.

2.9 The Participants Should Also Be Expressly Prohibited From Recording The Videoconference Except When Recordings Are Authorized By The Arbitral Tribunal. Videoconference Applications That Allows Only The Host Of The Meeting (in This Instance The Arbitral Tribunal) To Record Or Authorize Recording Should Be Used.

2.10 The Circulation Of The Videoconference Recordings (virtual Hearings) Should Be Protected Like Every Other Confidential Information Exchanged During The Proceedings And Parties Should Treat Same As Confidential Information.

Conclusion

The Aftermath Of The Covid-19 Pandemic Should Necessitate A Re-think Of The Drafting Of Arbitration Clauses/agreements Which In The Past Did Not Usually Envisage And Accommodate The Possibility Of Remote Proceedings. Going Forward, Explicit Consent To Remote Proceedings Can Be Indicated In Such Clauses Taken Into Consideration Its Attendant Cost Effective And Time Saving Benefits. In The Alternative, Consent To A Triggered Use Of Remote Proceedings Can Be Made In Arbitration Clauses. Possible Triggers Can Include Considerations Based On Health (pandemics, Ill-health) And Security Risks (wars, Riots, Unrests, Travel Bans). If Either Is Not Provided For In The Arbitration Agreement, Procedural Orders At Preliminary Meetings Should Record The Agreement Of Parties To The Use Of Remote Proceedings And Measures Formulated To Secure The Process.

Recognizing That Data Protection And Confidentiality Is A Shared Responsibility, All Custodians Of

[i] During the 2015 Philippines-China sensitive maritime border dispute, hackers famously targeted the Philippines' Department of Justice, the law firm representing the Philippines, and the website of the Permanent Court of Arbitration infecting several computers and data.

[ii] This article does not endorse any online platform nor does it guarantee the suitability or availability of any platform.

[iii] The security measures recommended in this article does not super-cede applicable laws and regulations, public policy and protocols of arbitral institutions but seeks to augment and complement these where necessary. The focus of this article is on the overarching issue of security of data and arbitral proceedings. The ICCA-NYC Bar – CPR Protocol on Cybersecurity in International Arbitration 2020 was examined.

[iv] The European Union General Data Protection Regulation 2016 sets out detailed information security requirements for organizations (engaged in professional or commercial activity) on processing (collecting, storing and managing) personal data of EU residents or transactions within the EU. The Nigeria Data Protection Regulations 2019 (NDPR) mirrors this and provides a local context for processing of the personal data of Nigerian citizens and residents.

[v] Encryption is the process of making plain text illegible by turning it into code which cannot be converted to readable information without decryption tools, such as passwords or encryption keys. It is a type of cryptography used to prevent unauthorized access and recipients. Pseudonymization, or anonymization of information are also security mechanisms that can be used to prevent unauthorized access to data.

[vi] Multi-factor authentication involves the requirement for an additional proof of identity apart from your password at the time of login. The additional proof may be a special code sent by the service provider to user via text message, email or a token.

[vii] The legitimacy of electronic signatures in the seat of the arbitration or possible country of enforcement should be ascertained before adopted.

PICTORIALS













VFD GROUP
PWC
PROVIDUSBANK





















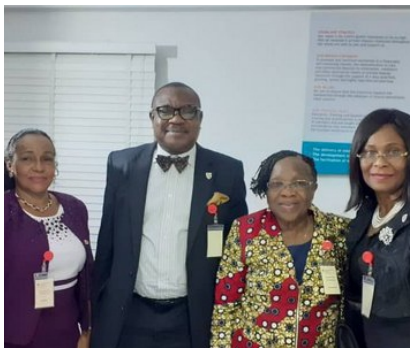

THE REGIME OF SETTING ASIDE ARBITRAL AWARDS: EFFACIOUS OR ANTITHETICAL TO THE ARBITRAL PROCESS?

Background

Arbitration has over the years, evolved to become one of the most preferred methods of dispute resolution amongst national and multi-national undertakings. This is largely because arbitration is party centred, and disputes can be resolved by arbitrators of choice within agreed timelines unlike litigation where the parties have no control over the process. Businesses therefore tend to lean towards the use of arbitration for the resolution of their commercial or investment disputes. It is pertinent to note that the privacy and confidentiality in arbitral proceedings is also a major consideration for users of arbitration. Despite the advantages of arbitration, several concerns have consistently been expressed by users of the process. One of such concerns is the alarming rate at which the losing parties in arbitral proceedings apply to set aside arbitral awards therefore delaying the winning party from reaping the fruits of the award and negating the consideration of time effectiveness which led parties to explore arbitration in the first place.

The aim of this discourse is to examine the law and procedure for setting aside arbitral awards in Nigeria and germane issues that stem from it. We will commence by explaining the nature of an arbitral award, then discuss the procedure for setting aside an arbitral award under Nigerian law, do a comparative analysis with other jurisdictions and finally make a reasoned case for the retention of the regime of setting aside an arbitral award.

Nature of 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 "[1]. Article 53 of the International Centre for Settlement of Investment Disputes (ICSID) Convention provides that, "parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention"[2]. Further to this, Article 54 provides that, " subject to any stay of enforcemen t ...., in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and every c ontracting s tate to recognize the award as binding and to enfor ce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court "[3].

The United Nations Commission on International Trade Law (UNCITRAL) also provides necessary guidance for the treatment and operation of arbitral awards, through its model law on International Commercial Arbitration 1985 (with amendments as adopted in 2006). Article 35 of the Model Law, provides that, " An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36 "[4]. There is no doubt as to the enforceability of arbitral awards in Nigeria, as Nigeria is a bona fide member state of the United Nations, and one of the contracting countries to the ICSID Convention. Therefore, both the ICSID Convention and the UNCITRAL Model Law apply to Nigeria.

Setting aside an arbitral award under Nigerian law The principal legislation that governs arbitration in Nigeria is the Arbitration and Conciliation Act 1988 Cap A18, Laws of the Federation of Nigeria 2004 (ACA). The ACA was modelled after the UNCITRAL model law.

Section 31 of the ACA makes provision for the recognition and enforcement of arbitral awards.

To set aside an arbitral award, is to invalidate the award. A dissatisfied party can actively seek a declaration that the award is set aside under certain limited circumstances. An arbitral award cannot be appealed in Nigeria. The purport of this is that the

substantive issues which the arbitral panel determined will not be subject of review by the courts because arbitration, by its nature is final.

The Supreme Court in K.S.U.D.B V. Fanz Limited (1990) 4 NWLR (Part 142) 1 at 43 on the power of the court to set aside an award held thus:

"Parties take their arbitrator for better or worse both as to decision of fact and decision of law. However, by virtue of t he 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 aside the award"

Sections 29, 30 and 48 of the ACA states the instances where a party can apply to set aside an arbitral award. Section 30 (1) of the Arbitration and Conciliation Act Cap A19 LFN 1990 (ACA) empowers any party to Arbitration to challenge an Arbitral award to be set aside on grounds of misconduct on the part of the Arbitrator or where the arbitral proceedings, or award, has been improperly procured but the ACA does not define the meaning of 'misconduct'. Nigerian Courts have consequently given their various interpretation of what amounts to misconduct of an arbitrator over time because of this lacuna. Section 48 also contains a list of grounds for an application to set aside an arbitral award. It is also important to note that an application to set aside an arbitral award in Nigeria is time bound, section 29 of the ACA provides that an aggrieved party may bring an application within three months from the date of the award.

APPROACH OF OTHER JURISDICTIONS

The United States of America has a similar approach in setting aside arbitral awards. US federal law does not permit the appeal of an arbitral award, but it allows for the setting aside of an award. The setting aside of an arbitral award is premised on the limited grounds laid down by the Federal Arbitration Act (FAA) [5] [6] Any petition to set aside an arbitral award must be served within three months of receiving the award.[7] Section 10 of the FAA states that a court may set aside/vacate an arbitral award only if it finds that one of the following grounds applies:

(I) the award is a result of corruption or fraud;
(ii) evident partiality or corruption of an arbitrator;
(iii) arbitrator misconduct, such as refusing to hear pertinent and material evidence; or
(iv) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award was not made.[8]

In France[9], for domestic arbitration, the arbitral award cannot be appealed unless the parties have agreed otherwise. The arbitral award can however be set aside unless the parties agreed to allow the appeal of the arbitral award.[10] For international arbitrations, no appeal is allowed but an application to set aside the award can be made. Appeal and setting aside procedures are initiated before the Court of Appeal of the seat of arbitration within one month as of the notification of the arbitral award but can be extended by two months when the party is located abroad. The filing of the appeal or the setting aside procedure suspends the enforcement of the decision in domestic arbitrations but doesn't suspend enforcement for international arbitration. The grounds and procedure for setting aside a domestic arbitral award are:

I. Arbitral tribunal declared itself wrongly competent or incompetent.
ii. Arbitral tribunal was irregularly constituted.
iii. Arbitral tribunal has ruled on the matter contrary to the given assignment.
iv. Adversarial principle has not been respected.
v. Arbitral award is contrary to public policy.
vi. Arbitral award is not grounded or does not state the date on which it has been rendered or the name of the arbitrator(s) or does not include the required signature(s) or was not rendered by a majority vote.

In international arbitration, the same grounds stated above apply to set aside the award except the sixth ground. What is interesting about the procedure in France is

the fact that unlike Nigeria where applications to set aside an award begins from the High Court all the way up to the Supreme Court, in France, the application is filed in the Court of Appeal whilst an appeal against the decision of the Court of Appeal may lie to the Cour de cassation (French Supreme Court).[11] Both the law and French case law are pro-arbitration and as a result it is very rear for an award to be successfully challenged in France.[12]

The case against setting aside an arbitral award

When closely assessed, setting aside of arbitral awards can create different issues. For example, it may create double control by having a party rely on two measures when in disagreement with an arbitral award; or the potential of conflicting decisions regarding the same ground between enforcement proceedings and setting aside proceedings.[13] "Double control" in this instance is when a party relies on the same grounds for setting aside an arbitral award and refusal of enforcement of the award. One of the reasons why this is a possibility is because the UNCITRAL Model Law has very similar grounds for setting aside and the grounds for refusal of enforcement in Article V (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The issue of double control can be resolved by statutory provisions like that of Section 1060 of the German Code of Civil Procedure which states that " Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected" [14]

The second issue is the potential of conflicting decisions regarding the same ground between enforcement proceedings and setting aside proceedings. It is possible for conflicting decisions to occur when the court enforcing the award abroad decides differently to the court setting aside the award in the country of origin. IN SPP v Egypt , a Decision by the President of the District Court of Amsterdam granted enforcement of the Award made in Paris and rejected Egypt's assertion that a valid arbitration agreement was lacking. Two hours after the same judgment was given, the Court of Appeal in Paris annulled the award for lack of a valid arbitration agreement.[15]

A third issue is the alarming rate at which the losing parties in arbitral proceedings apply to set aside arbitral awards therefore delaying the winning party from reaping the fruits of the award and negating the consideration of time effectiveness which led parties to explore arbitration in the first place. Arbitration which ought to be final in such cases may end up being challenged at the High Court and appeals to such decisions refusing to set aside the award may be made to the Court of Appeal and then to the Supreme Court of Nigeria. This generates concerns in the minds of users of arbitration as to whether the right of an aggrieved party to apply to set aside an arbitral award should not be removed since in the long run it would amount to delay in realising the fruits of the award.[12]

Conclusion and recommendations

Notwithstanding the identified setbacks, we opine that the setting aside of arbitral awards remains important as it gives the unsuccessful party an avenue for redress when an erroneous award is given. We contend that the advantages of the remedy of setting aside an award outweigh the drawbacks in the sense that if no review is made to arbitral awards, arbitrators may abuse this privilege and publish outlandish awards and basic fairness principles would be violated.

We recommend that parties select Arbitrators who are experts in the area of dispute and also knowledgeable on the rules and laws binding the arbitral proceeding and follow same to ensure sound Arbitral awards are delivered that will be virtually impossible to challenge or set aside. Where the Arbitrator is a non-lawyer, he/she should be guided by a lawyer where necessary to ensure rules and laws are adhered to in the award delivered.

We commend the recent efforts for the amendment of the ACA which is presently before the Nigerian National Assembly as the Arbitration and Mediation Bill.[16] It streamlines the instances where a

party can apply for the setting aside of an arbitral award to just the grounds stated therein as opposed to the extant position where a party may apply to set aside an award on the basis that there is an error on the face of the award or the wider ground of 'misconduct' which gives an endless list of what could amount to misconduct of the arbitrator or Tribunal. We are hopeful that the Bill would scale through and be enacted into law in Nigeria.

Notes:

1. This article is authored by Richard Obidegwu and Leroy Edozien with contributions from Betty Biayeibo, all Associates at PUNUKA Attorneys and Solicitors.
2. The views expressed in this article are those of the authors and not of the firm.

1 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 10 April 2020.

2 International Centre for Settlement of Investment Disputes, 'ICSID Convention, Rules And Regulations' (International Centre for Settlement of Investment Disputes 2006); Retrieved from <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf>; Accessed on April 10, 2020

3 Ibid

4 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 'UNCITRAL Model Law On International Commercial Arbitration 1985 With Amendments As Adopted In 2006' (United Nations 2008). Pg 20, Retrieved from <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>; Accessed on April 25, 2020 at 8:24pm.

5 *Hall Street Associates v Mattel*, 552 US 576 (2008)

6 'GAR Know How: Challenging and Enforcing Arbitration Awards 2019: United States' (*Globalarbitrationreview.com*, 2020) https://globalarbitrationreview.com/jurisdiction/1005969/unitedstates#answer3 accessed 11 April 2020.

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8 Federal Arbitration Act, Chapter 1 Section 10

9 Alexandre Bailly and Xavier Haranger, Morgan Lewis, "Arbitration procedures and practice in France: overview", Thomson Reuters Practical Law, Retrieved from https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1; Accessed May 26, 2020

10 Article 1491, French Code of Civil Procedure (CCP)

11 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, Retrieved from https://www.lexology.com/library/detail.aspx?g=506c081e-7edc-452d-8b85-de0d13eddcf2, Accessed May 26, 2020

12 Christophe Duge, "Global Legal Insights, International Aritration 2020- France", Retrieved from https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/france, Accessed May 26, 2020

13 Albert Jan van den Berg, *"Should The Setting Aside Of The Arbitral Award Be Abolished?"* (2014) http://www.hvdb.com/wp-content/uploads/2014-AJvdB-Should-the-Setting-Aside-of-the-Award-be-Abolished.pdf

14 Section 1060 of the German Code of Civil Procedure

15 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3

16 HB 91- A Bill for an Act to repeal the ACA and enact the Arbitration and Mediation Act to provide a Unified Legal Framework for the Fair and Efficient Settlement of Commercial disputes by Arbitration and Mediation, make the New York Convention applicable as well as the Singapore Convention and for related matters.