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A COMPARATIVE ANALYSIS OF THE LAWS GOVERNING SUBSTANTIVE VALIDITY OF ARBITRATION AGREEMENT

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Introduction

Presently in Nigeria and even all over the world, there is a growing preference for the use of arbitration in the resolution of commercial disputes, most especially the international commercial dispute. Arbitration which is one of the numerous types of Alternative Dispute Resolution mechanisms[1] stands out as the most suitable avenue for resolving commercial disputes.[2]Many definitions of arbitration have been given by different notable writers and through judicial decisions. For instance, Ojukwu *et al*[3] define 'arbitration' as a method of settling dispute through an impartial third party or parties called arbitrator(s) other than through the court'.To Afolayan *et al,*[4]arbitration is a mechanism for the resolution of disputes which take place usually in private, pursuant to an agreement between two or more parties, under which the parties agreed to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations after a fair hearing, such decisions being enforceable at law. While ascertaining the meaning of arbitration in the African context, Elias[5] described it as one of the many African Customary modes of referring a dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award, which either party is free to resile at any stage of the proceedings up to that point.[6]

In summary, arbitration proceeding derives its strength from the consent of the parties to submit or refer their dispute to arbitrator(s) of their choice for determination upon the receipt of evidence in judicial manner. Given

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[1] Other types of ADR mechanisms are: Negotiation, Mediation, Conciliation, Summary Jury Trial, Mini Trial, Med-Arbitration, Early Neutral Evaluation (ENE), Online Dispute Resolution and other hybrids. See generally Odoh Ben Uruchi, "Alternative Dispute Resolution (ADR) as Important Component in the Promotion of Social Justice in Nigeria" (2015) Vol. 6 No. 2, *Ebonyi State University Law Journal*119;FagbemiSunday Akinlolu. "Recognition and Enforcement of Arbitral Awards: The Law and Practice" (2006) 5 *University of Ibadan Journal of Private Law* 111-140; Aina Kunle. "Alternative Dispute Resolution" (1998) 2 (1) *Nigerian Law and Practice Journal,*169 and Godwin Obla SAN, "Arbitration as a Tool for Dispute Resolution in Nigeria: How Relevant Today", in Jide Olakanmi, *ADR: Alternative Dispute Resolution Cases and Materials,* (Abuja: LawLords Publication, 2013) 2.

[2]Hon. Justice Kayode Eso in the Foreword to *Commercial Arbitration Law and International Practice in Nigeria* by Candide-Johnson and CA Shashore SAN. (South Africa: LexisNexis, 2012) v

[3]Ernest Ojukwu and Ojukwu C.N., *Introduction to Civil Procedure,* (3rd edn, Abuja: Helen-Roberts Ltd, 2009) 301.

[4]Afolayan, A.F and Okorie, P.C. *Modern Civil Procedure Law,* (Dee-Sage Nigeria Ltd, 2007) 567

[5] Elias Teslim, *The Nature of Customary Law,* (Manchester University Press, 1956) 212, in Ayinla L.A,"ADR and The Relevancy of Native or Customary Arbitration in Nigeria' (2009) *Unillorin Law Journal,* Vol. 5 (1) 258.

[6] See the case of *Okere v Nwoke* (1991) 8 NWLR (Pt. 209) 317. In that case, the Supreme Court of Nigeria adopted the above description with an approval of the system as a common method of settling disputes in all Nigerian societies.

credence to this position, Ajogwu,[7] posits that the strength of arbitration lies in the enabling law that confers it with the sanction of enforcement once a final award is made in a judicious matter.The rationale for the preference of arbitration in the resolution of commercial disputes as against the traditional system of resolving disputes by litigation in courts is not farfetched. Arbitration offers some advantages which litigation from its nature can never provide.[8] Some of these obvious advantages amongst others include: parties autonomy to determine arbitration process, quick resolution of dispute, comparatively reduced costs, informality and most importantly the finality of the award rendered[9].

Arbitration though now a preferred choice in the resolution of dispute is however not a new concept in Nigeria and other parts of the world. Resolving disputes by agreeing to be bound by the decision of a third party entrusted by the disputants existed long before law was established or courts were organized or judges had formulated principles of law.[10] Specifically in Nigeria, disputes were referred to the family head or an elder of the family or to the village head for resolution and such decisions were binding on the parties. It is this informal mode of resolution of dispute that later became known as Customary Arbitration.[11] Similarly, two traders, in dispute over the price or quality of goods delivered, would turn to a third person whom they trusted for his decision; or two merchants, arguing over damaged merchandise would settle their dispute by accepting the judgment of a fellow merchant.[12] However, in view of the nature and complexities of commercial activities in modern time, which involve huge financial investment and procedures. Arbitration has graduated into a procedure for the settlement of dispute under which the parties agree, prior to disputes, to be bound by the decision of an arbitrator whose decision is, in general, binding on both parties. This procedure derives its force principally from the agreement of the parties and in, addition, from the state as supervisor and enforcer of the legal process. So where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or

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[7] Fabian Ajogwu, SAN, *Commercial Arbitration in Nigeria: Law & Practice,* (2nd edn, Lagos: Mbeyi & Associates (Nig) Ltd, 2013) 5; see generally Oboh Ben Uruchi (n 1)119.

[8] Adenipekun Adebayo SAN, "Arbitration" *The University of Ibadan Students' Society Journal* (Ibadan: Ariez Publishing 2008) 9.

[9] See generally Fagbemi Sunday Akinlolu,"The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?" (2015) 6 (1),*Afe Babalola University: J. of Sust. Dev. Law & Policy,* 222-246.

[10]Kellor F. 1948. American Arbitration, its History, Functions and Achievements in Ogundele L. O. "Customary Arbitration – A Valuable Dispute Settlement Strategy in Nigerian Jurisprudence", (2006) *Fountain Quarterly Law Journal,* 30. See also Ezejiofor Gaius, *The Law of Arbitration in Nigeria,* (Lagos:Longman Nigeria Plc, 1997) 15.

[11] See the cases of *Agu v Ikewibe* (1991) 3 NWLR (Pt. 180) 385, 407; *Ohialeri v Akabeze* (1992) 2 NWLR (Pt. 221) 1, 24; *Okere v Nwoke* (1991) 8 NWLR (Pt. 209) 317; *Uzoewulu v Ezeaka* (2000) 14 NWLR (Pt. 688) 629 and *Obioha v Akukwe* (2000) 5 NWLR (658) 699. In all these cases, the Nigerian Courts recognized and enforced decisions made pursuant to customary arbitration.

[12] Godwin Obla SAN, (n 1) 1

more impartial persons of their choice, in a judicial manner, the agreement is called an arbitration agreement.[13]

A careful look at the Arbitration and Conciliation Act, 2004 (ACA) reveals that the term 'arbitration agreement' is not defined, thus recourse is made to Article 7 (1) of the United Nations Commissions on International Trade Law (UNCITRAL Model Law), which defines an arbitration agreement *inter alia* as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.[14]According to Obla[15] arbitration agreement is the foundation or basis of arbitration proceeding; the arbitral tribunal's jurisdiction is derived solely from the existence and valid arbitration agreement of the parties thereto. In the word of Mallika,[16] 'it is the singular document upon which the entire arbitration proceedings rest'. Arbitration agreement by nature is a private agreement whereby two or more parties agree that a dispute in connection with a particular legal relationship will be finally settled by one or more arbitrators.

Premised on the foregoing, arbitration agreement is primarily a substantive contract by which the parties agree to refer their disputes to arbitration instead of the state courts. When parties enter into a contract, more often than not, there is usually an arbitration clause contained in the agreement. This arbitration clause is referred to as arbitration agreement. However,arbitration agreement may be in a separate agreement. Hence, whether the arbitration agreement is contained in the contract or not, it is subject to the seperability principle, which is to the effect that the arbitration agreement is different from the contract. Thus, even where the contract itself is invalid or void as the case maybe, it does not affect the arbitration agreement.[17]

This implies that for the agreement to come into existence, the requirements for the conclusion of a contract must be fulfilled. The parties must have agreed on the extent of the referral to arbitration and there should be no factors present which may vitiate their consent. So in drafting an arbitration agreement, parties must agree on the applicable law to guide the process

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[13] J. Olakunle Orojo and M. Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria,* (1st edn, Lagos: Mbeyi & Associates (Nigeria) Limited, 1999) 3. See also Halsbury's Law of England, (3rd edn, vol. 2) 2.

[14]See section 3 (1) of the Lagos Arbitration Law, 2009.

[15] Godwin Obla SAN, (n 1) 7

[16] Mallika Taly, *Arbitration Law – A Primer,* (Lucknow: Eastern Book Company Limited, 2011) 45

[17]On the import of an arbitration agreement or clause, the Court of Appeal, Lagos Judicial Division in the case of *Lagos State Water Corp. v Sakamori Construction (Nigeria) Ltd*. (2011) 12 NWLR (Pt. 1262) 569, 598, paras B-C, held thus:*"An arbitration clause is a written submission agreed by the parties to a contract and like other written submissions, it must be construed according to its language and the light of the circumstances which it is made"*. See further the case of *M. V. Lupex v NOC & S Ltd. (2003) 15 NWLR (Pt. 844) 16* see Mallika Taly (n 16) 46.

when finally resorted to.[18] They must take into consideration all the requirements of a valid arbitration agreement. However, it has been observed that more often than not, parties may agree on the applicable law to guide the process, they usually forget to advert their minds to the applicable law that will guide the arbitration agreement itself in terms of its validity, forgetting that the process and the arbitration agreement itself are two separate things. As a result of this lacunae, when issues arise as to the substantive validity of the arbitration agreement, parties are then in a fix as to the particular law to apply. Hence, when the arbitral panel set in to resolve this issue, they often choose an applicable law based on certain factors which are determined in choosing the applicable law to guide the arbitration agreement without regard to original intention of the parties.

In order to shed light on the necessary requirements of a valid arbitration agreement and to prevent an arbitral panel from imposing on the parties the law not intended or chosen by them during arbitral proceedings, this paper seeks to analyze the laws governing the substantive validity of arbitration agreement. The paper highlights the legal framework for arbitration in Nigeria. Of course, the primary focus of this paper is to examine the provisions of the Nigerian Arbitration and Conciliation Act, 2004 on the substantive validity of arbitration agreement. However, in order to assess the adequacy or otherwise of the Nigerian arbitration law, the paper compares it with the arbitration law of other jurisdictions such as India, United States of America and United Kingdom etc. The paper also discusses the consequences of failure to have a valid arbitration agreement and concludes with recommendations.

Legal Framework for Arbitration Proceedings in Nigeria

The first statute on Arbitration in Nigeria was the Arbitration Ordinance of 1914 which was an adaptation of the English Arbitration Act 1889[19] and later became Chapter 13 of the Revised Laws of the Federation of Nigeria 1958 which was applicable to the regions and later the states. This law was amended to redress the arbitration problems associated with the international trade which had started to boom and the Arbitration and Conciliation Decree 1988 was promulgated and became operative on 14th March 1998. The Arbitration and Conciliation Decree 1988 has been incorporated into the 2004 Laws of the Federation of Nigeria and christened Arbitration and Conciliation Act. The Act provides for a unified legal framework for both

[18]For the purpose of arbitration agreement, 'party' is defined by the Arbitration and Conciliation Act 2004 to means a party to the arbitration agreement or to conciliation or any person claiming through or under him and "parties" shall be construed accordingly. See section 57 of Arbitration and Conciliation Act, 2004.

[19] Candide-Johnson C.A and Shasore O SAN, *Commercial Arbitration Law and International Practice in Nigeria*, (South Africa: Lexis Nexis, 2012) 13.

domestic and international arbitration and applies only to disputes arising from commercial transactions.[20]

In the case of *C. N. Onuselogu Enterprises Ltd. v Afribank (Nigeria) Plc.*[21] it was held that 'the relevant law in Nigeria dealing with arbitration is the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 1990'. The Act applies throughout the federation and lays down both law and procedure for arbitration proceedings. The Act adopted the model law ofthe United Nations Commission onInternational Trade Law: the UNCITRAL Model Law. Some States in Nigeria have also enacted their own Arbitration and Conciliation Laws following the form of the Arbitration and Conciliation Act.[22] The Act also deals with conciliation proceedings for amicable settlement of dispute between parties to an agreement in relation to that agreement. The Act also makes provisions relating to international commercial arbitration and conciliation proceedings.

The arbitration proceedings, by virtue of the foregoing; is governed by the National Law. That is, the Arbitration and Conciliation Act, the Arbitration Rules made pursuant to the Act as well as various State Laws. The Act and the Rules apply to all arbitration proceedings whose seat is in Nigeria unless the parties have agreed on another choice of law. The Act and the Rules and other States Arbitration Laws also apply to any arbitration which parties have agreed will govern the dispute.[23] Other Laws applicable to arbitration proceedings in Nigeria apart from the National Law are the Lagos State Arbitration Law 2009,[24] Lagos Court of Arbitration Law, 2009, Arbitration Laws of Northern Nigeria, 1963, Rules of Court and International Arbitration Laws. For Example, the applicable legislation in the United Kingdom is the Arbitration Act of 1996, which was equally modeled after the UNCITRAL Model Law.[25]

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[20]Section 57 (1) Arbitration and Conciliation Act, 2004; Fagbemi Sunday Akinlolu. 2006. (n 1) Olakunle Orojo and M. Ayodele Ajomo, (n 8) 3

[21] (2005) 1 NWLR (Pt. 940) 572, 582

[22] For instance in Oyo State, it is enacted as Arbitration Law, Cap. 13, The Laws of Oyo State of Nigeria, 2000.

[23]Section 15 (1) of the ACA 2004 provides that '[t]he arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act. See also the long tittle to the Arbitration and Conciliation Act, which provides thus:"A Decree to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention for the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration."

[24]It should be noted thatLagos State recently amended its Arbitration Law by passing the Lagos State Arbitration Law No. 18 of 2009 and assented to on the 18th of May 2009. By virtue of the amendment, the Lagos State Arbitration Law contains some provisions, which are slightly different from the provisions of the Act.

[25] Ditto the Indian Arbitration and Conciliation Act, 1996 as amended. It should be noted that the India Arbitration and Conciliation Act, 1996 had been amended in 2015 by virtue of the Arbitration and Conciliation (Amendment) Ordinance, 2015 (No. 9 of 2015), which has radically overhauled the Arbitration and Conciliation Act, 1996. The amendments brought about by the Ordinance, is aimed at rendering the Act more object oriented.

Comparative Analysis of Laws Governing Substantive Validity of Arbitration Agreement

The jurisdiction of the Arbitral Tribunal is derived solely from the existence of and valid arbitration agreement. According to Obla,[26] if there is to be a valid arbitration, there must first be a valid agreement to arbitrate. In other words, arbitration agreement is the proof that the parties have agreed to resolve their dispute by arbitration and to remove their dispute from a state court system. As noted earlier, the ACA did not define arbitration agreement. However, under the UNCITRAL Model Law[27] and India Arbitration and Conciliation Act,[28] arbitration agreement is defined *inter alia* as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Furthermore, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[29]

The arbitration clause refers to dispute not in existence when the agreement is executed. Such dispute might never even arise. The submission agreement on the other hand refers to conflicts that have already arisen; hence, it can include an accurate description of the subject matters to be arbitrated.

According to Russel,[30] at common law, agreement to refer future disputes to arbitration is referred to as an arbitration agreement while an agreement to refer to arbitration a dispute that has already arisen is referred to as a submission agreement. Of course, the drafting of arbitration agreement presents the parties with the opportunity to take control of the reference to arbitration. Similarly, arbitration agreement may include endless combination of provisions. However, it is advisable for parties to strive for simplicity, clarity and avoid equivocation during the drafting of the agreement.[31]

In the determination of a valid arbitration agreement, the specific conditions required by the applicable law should be taken into consideration. The validity of an arbitration agreement is premised on its ability to meet the requirement of the law, failing which the agreement is rendered invalid or void as the case may be and this may be a ground for requesting for the setting aside of an arbitral award or for challenging its enforcement.[32] It is worthy of note that arbitration agreement is like any other agreement and so it must satisfy the normal legal requirement of a contract such as: capacity of

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[26] Godwin Obla SAN (n 1) 7

[27] Article 7 of UNCITRAL Model Law.

[28] Section 7 of India Arbitration and Conciliation Act, 1996 as amended

[29] United Nations Conference on Trade and Development, 2015. "Dispute Settlement", available at <unctad.org/en/Docs/edmmics232add39_en.pdf> accessed on 10 October, 2015, p. 3

[30] Russel, R. *The Law of Arbitration,* (21st edn. London: Sweet and Maxwell, 1999) 40

[31] United Nations Conference on Trade and Development, 2015. "Dispute Settlement", available at <unctad.org/en/Docs/edmmics232add39_en.pdf> accessed on 10 October, 2015, p. 40

[32] Sections 48 (1) and 52 (1) of Arbitration and Conciliation Act, 2004

parties, consensus *ad idem* of parties, written agreement, legal relationship of the parties, execution of the agreement and arbitrability of the subject matter.[33] Other requirements of the arbitration agreement, which makes up the contents of a valid arbitration agreement is the choice of arbitrators,[34] seat of arbitrators,[35] substantive law applicable to arbitration and the language of the arbitration.[36] These conditions are briefly discussed hereunder.

i. Mutual Consent

The parties consent is the basic requirement for the arbitration agreement. Their intention to submit to arbitration must unequivocally arise from the agreement. In an arbitration agreement, parties must undertake to submit their disputes to arbitration. Hence, the agreement must originate from their free will and this in essence means that if one of the parties has been induced by error or as a consequence of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate is void *ab initio*.[37]

ii. Legal Capacity

In entering into any agreement, capacity is one of the general requirements. The arbitration agreement is subjected to the same rules applicable to the validity of contracts in general, which means that parties to arbitration agreement must have contractual capacity.[38] It follows that some categories of persons who may be exploited due to their status like: an infant, persons of unsound mind and bankrupts cannot generally enter into a valid arbitration agreement.[39] Similarly, arbitration law prohibits some parties from submitting to arbitration and these include a state, state institutes, state companies, institutes, companies.[40] For instance, in Europe, it is generally accepted that the capacity of a party to submit to arbitration is determined by the domestic law of the party. In England and the United States of America, the capacity of parties to execute a valid arbitration agreement is determined

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[33]Sections 1 (1) of Arbitration and Conciliation Act, 2004;Article 7 of UNCITRAL **Model Law; section 7 of India** Arbitration and Conciliation Act, 1996 as amended and sections 5, 6, and 7 of **English Arbitration** Act, 1996

[34]Sections 6 and 7 of Arbitration and Conciliation Act, 2004

[35]Section 16 of Arbitration and Conciliation Act, 2004

[36] For a valid arbitration agreement see Fagbemi Sunday Akinlolu. 2015. (n **9) 7; David, R.,** ***Arbitration in International Trade*** (Kluver Law International1985) 29;Bandei F, 'Online Arbitration **Definition and Its** Distinctive Features, <www.ceur.ws.org> 2 *and* Mustill, A. O, "Arbitration: History and Background" **(1989)** Vol. 2 No. 3, *Journal of International Arbitration* 6-43.

[37] See United Nations Conference on Trade and Development Dispute Settlement, available at <unctad.org/en/Docs/edmmics232add39_en.pdf> accessed on 10 October, 2015.

[38] Parties in this context may be a natural or artificial person(s) such as: a corporation, state or state agency

[39] Unless it is a contract for the supply of necessaries and beneficial contract of service. See Sagay Itse. E, *Nigerian Law of Contract,* (2nd edn, Ibadan: Spectrum Books Ltd, 2000) 457

[40]Guiditta Cordero Moss, 2009. "Legal Capacity : Arbitration and Private International Law, available at www.jul.uio.no/ifp/english/research/project/choice-of-law/events/209/presentation/article_cordero-moss_pdf> accessed on 7th October, 2016 at 11.53 am, p. 53; Saad Balah. 2014. "Incapacity of Parties and Invalidity of Arbitration Agreement as Grounds for Refusing Recognition and Enforcement in Kuwaiti." *AGORA International Journal of Juridical Sciences,* No. 3, p. 14. See also the case of *Kano State Urban Development Board v Fanz Construction Ltd* (1990) 4 NWLR (Pt. 142) 37. In that case, the Supreme Court of Nigeria set aside the order of the trial court staying proceeding pending the decision of arbitrator.

by the law applicable to the agreement.[41] The manifestation of will by a party who is not legally entitled to assume obligations has no legal effect. One of the grounds for refusing enforcement of arbitral award is that the parties to the arbitration lack capacity in terms of the applicable law to them.[42] With respect to International Commercial Arbitration, it is always advisable that the parties' capacity to agree to arbitration is verified at the outset especially when a state entity is involved. Also, a representation that the state has capacity to agree to arbitrate may be included in the arbitration clause.[43]

Where one of the parties is an artificial person such as a company or a state agency,[44] it is important to verify that the artificial body is duly registered and whether the artificial body or state entity is a special purpose vehicle with a limited lifespan. For instance, in the case of *Dallah Real Estate and Tourism HoldingCompany v The Ministry of Religious Affairs, Government of Pakistan,*[45]the appellant had entered into an arbitration agreement with a government entity incorporated to exist until a certain date. All of the efforts made by the appellant to hold the government of Pakistan bound by the agreement entered into by its entity were refused by the courts.

iii. Written Agreement

The Arbitration and Conciliation Act[46] provides that the Arbitration Agreement must be in writing or must contain in a written document signed by the parties. In similar vein both the UNCITRAL Model Law[47] and the New York Convention[48] require that the agreement be made in writing. The notion of writing is however broad and may include situations where the agreement was not printed on paper and signed by both parties. For instance, under section 3 (3) of the Lagos Arbitration Law, the word 'writing' in connection with arbitration agreement is defined to include 'data that provides a record of the arbitration agreement or is otherwise accessible so as to be usable for subsequent reference. Data on the other hand includes 'information generated, sent, received or stored by electronic, optical or similar means such as but not limited to Electronic Data Interchange (EDI), electronic mail, telegram, telex or photocopy'[49].

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[41] Lawal Thanadsillapakul, "International Commercial Arbitration", Duke University available at <www.meawatch.org>, accessed on 22nd May, 2016

[42]Section 52 (2) of the ACA 2004; Generally all problems concerning the legal status of a legal entity is governed by the law of the state in which it has seat and from which it derives its legal capacity. See also Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of June 10, 1958, (New York Convention) and section 5 (1) (a) of the Panama Convention on Arbitration.

[43] Candide Johnson C.A. & Shasore O SAN, (n 19) 38

[44]In some countries such as Pakistan, the state or state agency cannot enter into an arbitration agreement without the approval of the appropriate authority. There is however no such restriction in Nigeria.

[45] [2010] UISC 46

[46] Section 1 of Arbitration and Conciliation Act, 2004

[47] Article 7 (2) of UNCITRAL Model Law

[48] Article II (2) of the New York Convention

[49]Article 7 (4) of UNCITRAL Model Law

Specifically, the New York Convention[50] provides that 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by both parties or contained in an exchange of letters or telegrams'.Similarly, the UNCITRAL Model Law states that an agreement is in writing even if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

In view of the foregoing, it is submitted that virtually all the statutory provisions on arbitration agreement on the format of the agreement provides for modern means of communication and would be admissible in evidence by the provision of section 84 of the Evidence Act, 2011 which allows the use of information generated from computer or other electronic devices.[51]

iv. Defined Legal Relationship

The arbitration agreement must refer to disputes that have arisen or which may arise between parties in respect of a defined legal relationship, whether or not contractual. The parties must have a legal link which has given or may give rise to the controversies submitted to arbitration. The arbitration agreement must refer to a concrete and specific legal relationship between the parties. The above position found support in Article 7 (1) of the UNCITRAL Model Law, which is *impari materia* with section 1 (2) of the ACA *albeit* in a modified form. The implication of this is that Nigerian arbitration proceeding apply only to dispute arising from contractual legal relationship and not otherwise. In view of this, Idornigie[52] has opined that ACA is a breach of Treaty obligation since it derogated from the provision of the Convention to which Nigeria is a party, which is supposed to apply to dispute arising in any legal relationship whether contractual or not. Be that as it may, it is submitted that every country has a right to modify international treaties to suit its own internal circumstance so long as that modification did not defeat the purpose and intendment of the Treaty or best global practices.

v. Arbitrability of the Subject Matter

The disputes submitted to arbitration by the parties under an arbitration agreement must be arbitrable.[53] The concept of arbitrability is related to the nature of the disputed rights. Arbitration is statutorily a dispute resolution mechanism arising out of an agreement whereby the parties confer upon the

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[50] Article II (2) of the New York Convention

[51] Fagbemi Sunday Akinlolu, 2011. "Admissibility of Computer and other Electronically Stored Information in Nigeria Courts: Victory as Last". *University of Ibadan Law Journal*, Vol. 1. No. 2, pp. 151-175

[52] See generally Idornigie P. O, "The Principle of Arbitration in Nigeria Revisited" (2004) Vol. 23 (3), *Journal of International Arbitration*, 279-288.

[53] Section 48 (b) (i) of the ACA, 2004

arbitrators the function of administering justice. It is certain that not all disputes can be arbitrable. Given credence to this position, Ezejiofor[54] rightly submitted that dispute that can be referred must be justiciable issues which can be tried as civil matters. Such disputes will invariably include amongst others, disputes involving any real or personal property, disputes as to whether contract has been breached by either party thereto, dispute as to whether contract has been discharged from further performance thereof, terms of deed of separation between husband and wife and specific question of law. Conversely, any dispute arising from illegal transaction, disputes arising from void transactions such as gaming contracts and criminal charges are not arbitrable.[55]

vi. Choice of Arbitrators

There are many ways of appointing an arbitrator. The most usual are by the agreement of the parties.[56] In doing this, parties need to decide whether to have one or three arbitrators. The parties, in doing this, may have to consider how complicated the transaction is, the likelihood that a dispute will arise and the estimated value of the potential dispute. The ACA in sections 6 and 7 makes provision for appointment of arbitrators. Similar provision is contained under the UNCITRAL Rules, the general rules is that where the parties to an arbitration agreement do not determine the number of arbitrators, the number of arbitrators is deemed to be three.[57].

The rules of some arbitral institutions however provide that where the parties do not specify the number of arbitrators, it will be deemed to be one;[58] this is to reduce costs and save time. Parties may also want to set forth specific qualification that the arbitrators should have, such as experience or expertise in a particular field or the ability to speak a particular language.

vii. Seat of Arbitration

This is important because generally the arbitration law of the arbitral *situs* will be the law that governs the arbitration (*the lexarbitri*).[59] Parties want an arbitration friendly regime, one that will not unduly interfere with the arbitral process. If any court intervention is needed or occurs during or after the arbitration proceedings, the local law governing the arbitration seat will have an impact on the proceedings.[60]

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[54] Ezejiofor Gaius, (n 5) 2-3

[55] Godwin Obla SAN, (n 1) 7

[56] Greg Chukwudi Nwakoby and Charles Emenogha Aduaka, "Appointment of the Arbitrator and the Duty of Disclosure", (2015) Vol. 6, No. 2, *Ebonyi State University Law Journal*, 246, 248

[57] *Ibid* 249. See also Article 5 of the UNCITRAL Model Arbitration Rules; sections 10 and 11 of the India Arbitration and Conciliation Act, 1996 as amended.

[58] Section 10 (2) of India Arbitration and Conciliation Act as amended

[59] Redfern Allan and Hunter, M and Blackbay N and Partasides C, *Law and Practice of International Arbitration*, (4th edn, London: Sweet and Maxwell, 2004) 131.

[60] It should be noted that one of the significant amendments which the India Arbitration and Conciliation (Amendment) Ordinance, 2015 has introduced to seat of arbitration, is the applicability of Part I of the Act to

The arbitration agreement should contain the place of arbitration and more often than not, this is determined largely by convenience; but in international arbitration, economic, social, political and legal considerations are very important. Where the agreement makes no provision for the choice of venue, the provisions in the ACA should be adhered to. For instance, section 16 of the ACA provides that the place of the arbitration proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the parties' convenience. Under the International Chamber of Commerce (ICC) Rules, 2012, the venue is determined by the ICC Court of arbitration unless the parties agree otherwise.[61]

viii. Substantive Law

The substantive law governing the contract does not necessarily have to be in the arbitration agreement but it is advisable to be there. This will prevent one side from arguing that the substantive law governing the contract is not the substantive law governing the arbitration agreement. It is therefore advisable for the parties to specify the substantive law on which they have agreed in order to avoid unnecessary disputes at the time of the arbitration.

The general law as regards procedural law is that the arbitration proceeding is governed by the mandatory rules of law in that place, unless the parties agree otherwise. Thus, where the agreement makes no provision for the choice of law a number of national courts have applied this rule in recent times arriving at this result on the basis of an independent choice of law analysis.[62]

In the determination of the substantive validity of arbitration agreement, it is appropriate to consider the intention of the parties as to the scope within which they want to operate. The formulae for this include the conclusion of the arbitration agreement, that is, the validity of offer and acceptance and

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the Foreign Seated Arbitrations. The question as to whether part I of the Arbitration and Conciliation Act, 1996 would apply to foreign seated arbitration was first examined by the Honourable Supreme Court of India in a celebrated judgment by a three Judge bench in the year 2002 titled *Bhatia International v Bulk Trading SA*, [2002] 4 SCC 105 ("Bhatia International). The core issue before Hon'ble Supreme Court was the interpretation of section 2 (2) of the un-amended Act which stated that, *"This Part shall apply where the place of arbitration is in India."*The Honourable Apex Court had compared the said provision with the UNCITRAL Model Law, which clearly stated in its preamble that, *"the provisions of this law ... apply only if the place of arbitration is in the territory of this State,"* The Act is based on the UNCITRAL Model Law and while interpreting section 2 (2) of the un-amended Act, the court had held that during the enactment of the legislation, the word *"only"* was excluded from the provision on purpose. The court further observed that the intention of the legislature behind the exclusion was to make Part I of the Act applicable upon arbitrations held outside India unless the intention of the parties was to expressly or impliedly exclude its applicability. However, the Honourable Supreme Court of India in the case of *Bharat Aluminum and Co. v. Kaiser Aluminum and Co* [2012] 9 SCC 552 (BALCO) had revisited the law laid down in *Bhatia International*and overruled the same. In the landmark judgment pronounced by the Constitution Bench of Honourable Supreme Court of India on September 06, 2012 it was concluded that *"Part I of the Arbitration & Conciliation Act, 1996 is applicable only to the arbitrations which take place within the territory of India."* See Singhania & Patner LLP, "India: The Arbitration and Conciliation (Amendment) Ordinance, 2015: Impact of Law Laid Down in BALCO", available at Mondaq 3 March, 2016.

[61]Article 14 of the ICC Arbitration Rules

[62] Gary Born, International Commercial Arbitration (2nd edn, Kluwer Law International, 2014) 9

determination of the moment of conclusion of contract as well as errors of consent such as fraud, coercion, undue influence or force, the execution and termination of the arbitration agreement such as duration, impossibility, the prerequisites and consequence of cancellation and the application of the rule *exceptio non adimpleti contractus*.[63]

According to Orojo *et al*,[64] the importance of the substantive law or applicable law especially with regards to international arbitration is emphasized by Section 52 (2) (vii) of the ACA which provides that the recognition and enforcement of award may be refused by the court if the party against whom the award was made proves that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the law of the country where the arbitration took place.[65]

Despite the fact that this approach has gained tremendous recognition both from national and international courts and commentators and despite the fact that this approach is a very easy approach to come up with, it however, has some deficiencies in its applicability. For instance, the approach has been criticized on the ground that it is based upon an exclusive focus on the procedural aspect of arbitration and ignores the contractual character of the agreement to arbitrate.[66] An automatic application of the law of the seat of arbitration is also mistakenly conflates with the law governing the arbitration agreement and the law governing arbitral proceedings, which do not necessarily coincide.[67]Furthermore, an exclusive focus on the law of the arbitral seat also disregards the intimate connection between the arbitration agreement and the underlying contract.

It is obvious from the above criticisms that despite the acceptance of this approach, it is however not devoid of its own challenges.

ix. Language of Arbitration

Parties should state the language of the arbitration in the arbitration agreement. In international commercial arbitration, it is of high importance to state the language of the arbitration in the arbitration agreement. This is because parties may be nationals of different countries with different languages. Some parties assume that the language of the contract will be the language of the arbitration; this may not necessarily be the case. The tribunal could decide differently unless the parties have specifically agreed on a language. Section 18 (1) of the ACA provides that the parties may by

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[63] Lalive Pierre, Poudret Jean-Francois, Reymond Claude, *Le Droit de l'Arbitrage. Interne et International en Suisse* (Editions Payot 1989)

[64] J Olakunle Orojo and M Ayodele Ajomo (n 13) 3

[65] Article VI (d) of the New York Convention, 1958

[66] The Right Honourable the Lord Collins of Mapebury, Chan Leng Sun SC and Michael Hweng SC,"The law Governing International Arbitration Agreements: An International Perspective". (2014) Vol. 26,*Singapore Academy of Law Journal, Special Issue (Conflict of the Law Governing Law in Arbitration)* 831

[67] Ibid

agreement determine the language, but where they do not do so, the arbitration tribunal shall determine the language bearing in mind the circumstances surrounding the case.[68]

Consequences of Failure to have a Valid Arbitration Agreement

Nigerian Courts have adopted positive approach to theenforcement of arbitration agreements. A review of the decidedcases shows a general recognition by Nigerian Courts of arbitration as a good and valid alternative dispute resolution mechanism. For instance, in the case *C.N. Onuselogu Ent. Ltd. v Afribank (Nig.) Ltd.*[69] the Court held that arbitral proceedings are arecognised means of resolving disputes and should not be takenlightly by both counsel and parties. It has also been recognized that arbitral proceeding is premised on a valid agreement to arbitrate. Thus, where there is an arbitration clause in a contract which is the subject-matter of Court proceedings and a party thereto raises the issue of an arbitration clause, the Courts willorder a stay of proceedings and refer the parties to arbitration.[70]

In the case of*MinajSystems Ltd. v Global Plus Communication Systems Ltd. & 5 Ors,*[71] the Claimant instituted a Court action in breach of thearbitration agreement in the main contract and on the Defendant'sapplication, the Court granted an order staying proceedings in theinterim for 30 days pending arbitration.[72] Similarly in *M.V. Lupex v N.O.C,*[73] the Supreme Court of Nigeria held that it was an abuse of the Court process for the respondent toinstitute a fresh suit in Nigeria against the appellant for the samedispute during the pendency of arbitration proceedings in London.

The above judicial decisions are practical testimonies to how courts in Nigeria treat arbitration agreement and arbitral proceedings. However, the fundamental principle of arbitration proceedings as relate to arbitration agreement and the resulting arbitral award are that where parties lack capacity to execute arbitration agreement in terms of the law applicable to them or that the arbitration agreement is invalid under the governing law agreed to by the parties, or in the absence of an agreement under the law of the country in which the award is made, or where the agreement is ambiguous and or contrary to public policy, court will readily refuse recognition and enforcement to the arbitral award arrived on the premise of faulty arbitration agreement. Thus, in practical terms, where an arbitration

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[68] Section 22 of the India Arbitration and Conciliation Act as amended and Article 17 of UNCITRAL Model Law.

[69](2005) 1 NWLR (Pt. 940)527, 577

[70]Sections 4 and 5 of ACA 2004;See sections 6 (3) and 21of the Lagos Arbitration Law 2009,which empower the Court to grant interim orders or reliefs to preserve the *res* or rights of parties pending arbitration. See also the case of *Kano State Urban Development Board v Fanz Construction Ltd (supra).*

[71]Unreported Suit No. LD/275/2008

[72] See also the case of *Niger Progress Ltd. v N.E.I. Corp.*(1989) 3 NWLR (Part 107) 68, where the Supreme Court followed section 5 of the ACA, which gives the Court the jurisdiction to stay proceedings where there is an arbitration agreement.

[73](2003) 15 NWLR (Part 844) 469

agreement is invalid, null and void, the consequences of its failure to follow the substantive legal requirements, which is setting aside of or non-enforceability of arbitral award, could be declared at any of the following stages:

i. When discussing the enforceability of the arbitral award.[74]

ii. When the arbitral award is challenged by a party in setting aside proceedings.[75]

iii. When an action for the enforceability or recognition of the arbitral award is instituted.[76]

Premised on the foregoing, it is safe to conclude that the issue of legal capacity of parties to arbitration agreement and failure to follow the substantive law governing arbitration agreement are crucial factors in the determination of enforceability of arbitral award. Hence, courts in virtually all jurisdictions will readily hold ineffectivean international arbitral awards on the basis that the arbitration agreement was not binding on either of the parties in accordance with the law applicable to that party. For instance, in the Swedish case of *State of Ukraine v Norsk Hydro ASA,*[77] a Shareholders Agreement, containing an arbitration clause, which was signed by two officers of the Ukrainian defendant who put their names beside the line for signature but left empty for the signature of the defendant's Chairman. The Chairman never signed, and the defendant contested that the agreement had become binding on it. The Shareholders Agreement contained a choice of law clause that determined Swedish law as the governing law. The Court affirmed repeatedly that Ukrainian law is applicable to the question of the capacity of a person to sign an agreement with binding effects for a Ukrainian entity. The Court examined the authority of the two officers under Ukrainian law and concluded that one of them had the authority to bind the defendant, whereas the other one did not. The Court examined what formal requirements Ukrainian law has for the effectiveness of the signatures put under the agreement, and it concluded that, under Ukrainian law, the Shareholders Agreement would have required two signatures, whereas the arbitration agreement contained in the arbitration clause could become binding with only one signature. The court set aside an arbitral award rendered in the frame of the Stockholm Chamber of Commerce. The Court of Appeal affirmed this decision and held among other things, that the law of Ukraine is applicable to the question of the legal capacity of the Ukrainian

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[74]Article 8 (1) of UNCITRAL Model Law and Article II (3) of the New York Convention.
[75]Article 34 of UNCITRAL Model Law
[76]Article 36 of UNCITRAL Model Law and Article V of the York Convention.
[77]*State of Ukraine v Norsk Hydro ASA, Svea Hovrätt*, 17 December 2007, T 3108-06 /ITA Monthly Report, Kluver arbitration, May 2008, Volume VI, Issue 5.

party, notwithstanding that the contract contained a governing law clause choosing Swedish law.

Also in the English case of *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan,*[78] the English High Court took a different approach to arrive at the same result when the Court refused to enforce an award rendered in the frame of the International Chamber of Commerce in Paris on the ground that the arbitration agreement was not valid. The party resisting enforcement of the award was the Government of Pakistan, which successfully argued that it was not bound by the arbitration agreement. The contract, including the arbitration clause, had been signed by a trust established by the Pakistani Government as a separate legal entity. The Government had participated in the negotiations of the contract, but had not signed it. The Court found that, according to section 103(2)(b) of the English Arbitration Act that enforcement of an award may be refused if the arbitration agreement was not valid under the law to which the parties had subjected it or, failing any indication thereon, under the law of the country where the award was made.

The Court found that this section on invalidity of the arbitration agreement applies also to the issue whether someone was a party to the agreement. After having established that the parties had not chosen a governing law specifically for the arbitration agreement, the Court proceeded to apply French law, it, being the law of the place where the award was rendered. The Court specified that it had to apply French substantive law, and not its conflict of laws rules. However, the Court found that French substantive law has a large approach to what elements must be taken into consideration when evaluating whether there was a common intention by the parties to be bound by the agreement. Among these elements are issues of foreign law, the Court proceeded therefore to examine Pakistani law, as the law of the party the intention of which was to be established. The Pakistani Constitution contained various restrictions to the possibility to enter into agreements binding on the state, that is, that the agreement must be made in the name of the President and with his authority. The Court found that it was not necessary to ascertain whether this rule was mandatory or not, because, it very existence was sufficient to convince the Court that there had been no subjective intent to bind the state.

The rules on legal capacity of Pakistani law were taken into consideration as elements to assess the intent to be bound, which was relevant to establish the validity of the arbitration agreement under the law governing it. Irrespective of the differences in approach, both decisions end up refusing to give effect to an international arbitral award on the ground that the losing party was

[78] [2008] EWHC 1901 (Comm)

deemed, under the law of that party, not to be bound by the arbitration agreement.

Conclusion

This paper has examined what an arbitration agreement is and its various requirements. It is noteworthy to state that parties to an arbitration agreement enjoy substantial autonomy to determine the parameters of the legal regime in which their disputes can be resolved. However, in international arbitration agreements, parties to arbitration agreements need to be well informed and educated about what are required to create a legal relationship that works well, that permits the procedure they desire, that minimizes disputes about the legal framework itself, that did not violate institutional or legal mandatory rules and that does not create the kind of ambiguities and uncertainties that can invalidate their agreement to arbitrate.

Due to adverse effects which an inelegant drafted arbitration clause may have on the enforceability of the arbitral award itself, this paper had shed light on the necessary requirements of a valid arbitration agreement. Hence, various adverse consequences noted in this paper should be avoided or at least mitigated by parties through due diligence in framing an arbitration clause or by adopting the model arbitration clauses provided by the various arbitral institutions, which have universal applicability.

It is also pertinent to note that the Nigerian Arbitration and Conciliation Act, 2004 is inadequate in terms of the laws governing substantive validity of arbitration agreement. For instance, the Act, unlike UNCITRAL Model Law and India Arbitration and Conciliation Act did not define arbitration agreement. The Act is also archaic in term of what constitute writing agreement. For instance, the word 'writing' in section 3 (3) of the Lagos State Arbitration Law is defined to include 'data that provides a record of the arbitration agreement or is otherwise accessible so as to be usable for subsequent reference. Data on the other hand includes 'information generated, sent, received or stored by electronic, optical or similar means. Similar provision is contained under the New York Convention and Article 7 of the UNCITRAL Model Law. Thus, the trends presently the world over is to admit information generated or stored by electronic means. Furthermore, the provision of Nigerian Arbitration and Conciliation Act applies to dispute emanating only from contractual relationship as oppose to dispute arising in any legal relationship whether contractual or not as obtained in other jurisdictions discussed in this paper.

Premised on the above findings, this paper recommends an amendment to the Nigerian Arbitration and Conciliation Act to keep it up-to-date with best global practices in arbitral proceedings. It is further recommended that parties must exercise due diligence in choosing an arbitral seat, because the

arbitral seat may contain mandatory requirements which may be onerous to one of the parties. The above measures, if carefully follow, it is suggested, will go a long way in helping parties to draft an effective arbitration agreement and render the Nigerian Arbitration and Conciliation Act more result oriented.