

## **ARBITRATION AND CONCILIATION ACT CAP A18 LAWS OF THE FEDERATION OF NIGERIA 2004 -CALL FOR AMENDMENT\***

### **Abstract**

*The primary sources of the Nigerian Law of Arbitration are the English Common Law, the Nigerian Customary law and Nigerian statutes. The English common law and the doctrines of equity including the English statutes of general application were received into Nigeria by the local legislatures during the colonial administration. However, the local legislatures have terminated the reception of English Statutes of General Application in some parts of Nigeria but the common law and doctrine of equity still play important roles in our arbitration practice. Nigerian Arbitration and Conciliation Act 2004, which was a re-enactment of 1990 Act plays important role in our arbitration and conciliation practice. Before 2004, a lot of juristic ink was poured out calling for the amendment of certain provisions of the Act. Unfortunately, the 2004 Act failed to address any of the issues raised by these jurists and scholars who are experts in Arbitration. To address these issues again motivated this work.*

### **1. Sections of the Act Requiring Amendment**

The sections of the Arbitration and Conciliation Act which require urgent amendment include among others, the provisions of sections 4, 7(4), 15, 30, 31, 51, and 54.

#### **A. Sections 4 & 5 - Stay of Proceedings**

Sections 4 & 5 of the Act are on the same subject issue which is the issue of stay of proceedings in court. For proper appreciation of the need for this call for amendment of section 4 (1) & (2), I will reproduce the provisions of the two sections.

- 4(1) A court before which an action, which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.
- (2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.
- 5(1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay proceedings.
- (2) A court to which an application is made under subsection (1) of this section may, if it is satisfied-
  - (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
  - (b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Sections 4 & 5 provide for stay of proceedings where a party to an arbitration agreement commences an action in court with respect to any matter which comes within the purview of

---

\* **Prof. Greg. Chukwudi Nwakoby**, Former Dean, Faculty of Law, Nnamdi Azikiwe University, Expert in Commercial and Property Law, a Professional Arbitrator, and Fellow Chartered Institute of Arbitration of Nigeria (FCIArb).

the arbitration agreement. The applicant must file his application for stay before taking step in the proceedings.<sup>1</sup>

Section 5 of the Act confers on the court (High Court) the discretion to either grant or refuse an application for stay of proceedings and the section went further in its subsection (2) to state the issues which the court may consider before either granting or refusing such application. Unfortunately, section 4 failed to recognize the inherent discretion of the court or judge to either grant or refuse an application made before it. The subsection 2 of the said section 4 gives the impression that an applicant for stay has the right to go on with arbitration proceedings notwithstanding the fact that the court has refused the application for stay of proceedings. This implies that the action in court can go on concurrently with arbitration proceedings. This seems unconstitutional as it constitutes a challenge to the inherent jurisdiction of the court to determine matters within its jurisdiction as prescribed by the Constitution.<sup>2</sup> S.4(2) of the Act failed to state what will be the position of an award made during the pendency of the matter in court or the position of a judgment of the court rendered during the pendency of the matter before the arbitral tribunal. Section 4 of the Act and particularly its subsection (2) is an attack on the court which is contrary to the philosophical base of arbitration and ADR in general. The question which nobody has answered is why we have two conflicting sections on the same subject issue within the same piece of legislation. Section 4 is unnecessary as it is unconstitutional and also contrary to the philosophy of arbitration and ADR in general. ADR is not antagonistic of the court system, rather, it is an alternative to litigation with intent to promote speed and efficiency in dispute resolution. It is for these reasons that I am calling for the repeal and or the amendment of section 4 of the Act as section 5 is preferred.

## **B. Section 7 – Appointment of Arbitrators**

It is for the parties to appoint their arbitrators or specify the number of arbitrators, their qualifications, and the procedure for the appointment.<sup>3</sup> Where however, they fail to do so, the number shall be deemed to be three and would be appointed in accordance with the provisions of section 7(1)(2) &(3) of the Act. Where either party fail to appoint his own arbitrator or the two arbitrators so appointed by the parties fail to appoint the third arbitrator within thirty days of such disagreement any of the parties shall apply to the court to appoint the arbitrator. The application shall be made to the very High Court which has jurisdiction to try the matter taking into cognizance the parties and the subject.<sup>4</sup>

The problem in section 7 is to be seen in section 7(4) which provides that “a decision of the court under subsections (2) & (3) of this section shall not be subject to appeal.”<sup>5</sup> The provisions of section 7 (4) of the Act is contrary to sections 241(1)&(2) and 242 of the 1999 Constitution of Federal Republic of Nigeria<sup>6</sup> and as such should be deemed unconstitutional because of the effect of section 1 (3) of the 1999 Constitution.<sup>7</sup> The Constitution by its provisions in sections 241 & 242<sup>8</sup> provide for the right of appeal and this is a constitutional right of the parties. The

---

<sup>1</sup> **Hallam v. A.G. Plateau State** (1996)9 NWLR (Pt.471)242 at 249. **Commerce Assurance Ltd v. Alli** (1992)3 NWLR (Pt.232)701 at 703. **UNIC Co. Ltd. & Ganiyi Olowo v. Odogbenro** (1981) CA 241. **Mbeledogu v. Aneto** (1996)2 NWLR (Pt.425)157. **K.S.U.D.B. V Fanz Const. Co. Ltd.** (1986)5NWLR(Pt.39)1. **Hasting v. Nig. Railway Corp.** (1964) LLR 135.

<sup>2</sup> Constitution of the Federal Rep. of Nig. CAP C 23 LFN, 2004

<sup>3</sup> Section 6 of Cap A18 L.F.N. 2004

<sup>4</sup> **Afcon Nig. Ltd. v. Registered Trustees of Ikoyi Club 1938** (1996) FHCLR 371.

<sup>5</sup> **Bendex Engineering & Anor v. Efficient Petroleum Ltd** (2001)8 NWLR (Pt.716) 506. **Nig. Agip Oil Co. Ltd. v. William Kemmer & 7 ors** (2001) 8 NWLR (Pt. 716)506. **Chief Felix Ogunwale v. Syrian Arab Republic** (2002)9 NWLR (Pt. 771)127.

<sup>6</sup> CAP C 23, LFN, 2004

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

decision of the court appointing an arbitrator is a judicial decision and not an administrative one. A party who is aggrieved with the appointment should not be barred from appealing against such a decision. Where parties specified the qualifications which their arbitrator must possess, and the court or judge appointed a person without such qualifications, why should appeal not be maintained to set aside such decision? Section 7(4) should be repealed as it is unconstitutional.

### **C. Section 15 – Arbitral Proceedings**

Section 15 of the Act deals with the actual arbitral proceedings. Section 15(1) provides that “the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act.” The section went further in its subsections (2) & (3) to provide that where there is a lacuna in the procedure as in the Rules, the arbitral tribunal may, subject to the Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure a fair hearing.

One of the philosophical basis for arbitration is the issue of party autonomy which provides that the parties to arbitration agreement have the right to determine the rules of the game.<sup>9</sup> This implies that the parties have the right to determine the applicable procedure so as to ensure efficiency. This explains why the provisions of the Evidence Act and the technicalities in our Civil Procedure Rules of the court were removed from applying to arbitration. The Rules as set out in the First Schedule are quite stringent and rigorous. It is for this that I strongly feel that section 15(1) should be amended to give the parties the right to determine the procedure for their arbitration if the one in the First Schedule fails to meet their requirement. It is wrong to tie the parties to the Rules in the First Schedule which are rigid and not flexible.

### **D. Section 30 – Setting Aside of Arbitral Award in Case of Misconduct by an Arbitrator**

Section 30 of the Act deals with the issue of misconduct of an arbitrator and its consequence. The consequences of misconduct are impeachment of the award and the removal of the arbitrator. Unfortunately, the Section has failed to define the meaning of misconduct, rather it provides that;

1. Where an arbitrator has misconducted himself, or award has been improperly procured, the court may on the application of a party set aside the award.
2. An arbitrator who has misconducted himself may, on the application of any party be removed by the court.

In **Taylor Woodrow Nig. Ltd V. S.E.W. GmbH**<sup>10</sup> the Supreme Court itemized what constitute misconduct for the purposes of arbitration practice. The problem in section 30 of the Act is that there is no specific limitation period within which an applicant for application for impeachment of an award for reasons of misconduct must file his application. Section 29 which is for impeachment for reasons of lack or excess of jurisdiction prescribed three months as mandatory period within which an applicant could file his application. The problem is that the Supreme Court has decided that the three months period as in section 29 also applies to section 30.<sup>11</sup> This interpretation as given by the Supreme Court is rather wrong for obvious reasons.

---

<sup>9</sup> Paul Idornigie “Anchoring Commercial Arbitration in Fundamental Principle” **Corpus Juris**, Vol. 1, June 2003, page 9.

<sup>10</sup> (1993) NWLR 127 at 141. **Arbico Nig. Ltd. v. Nig. Machine Tools Ltd.** (2002)15 NWLR (Pt.789) 1 at 6-7. **A Savoia Ltd v. A.O. Sonubi** (2000)12NWLR (Pt.682)539 at 547.

<sup>11</sup> **Emmanuel Araka v. Ambrose Ejagwu** (2000)15 NWLR (Pt. 692) 684. **Alhaji Alibishir & Sons Ltd v. B.U.K** (1996)9 NWLR (Pt. 470)37.

Sections 29 & 30 are distinct and separate with each dealing on a particular ground for impeachment, that is, section 29 being on want or excess of jurisdiction, and section 30 being on misconduct. Section 30 is not made subject to section 29 and the three months period in section 29 was not made by the legislature to apply to section 30. The two sections are unambiguous, hence the literal rule of interpretation shall apply to them and if so applied, it will be very clear that section 30 has no limitation period. It is for this reason that an amendment is required to make section 30 subject to section 29 or in the alternative, fix a limitation period in section 30 as was done in section 29.

#### **E. Section 31 – Recognition and Enforcement of Awards**

Section 31 is on the recognition and enforcement of arbitral award made pursuant to arbitration agreement under the Act. The section provides for enforcement by application to court as in section 31(1), and also enforcement by leave of the court or judge as in section 31(3) of the Act. Unfortunately, some have interpreted section 31 to mean that leave must be obtained by *ex parte* application before a formal application by motion on notice. Some also argued that enforcement by leave is faster and more expeditious than enforcement by application to court as only awards which are very clear and not subject to argument can be enforced by leave of court or judge.<sup>12</sup> Who determines whether an application or originating summons made to the court or judge will attract argument or not? At which point would the issue of clarity of an award be determined? The procedure for enforcement by application to court, and by leave of court or judge are the same. The procedure is by originating summons which must be on notice.<sup>13</sup> If the procedure is the same, why then do we have these two forms of enforcement methods in the same section of the legislation as if they are different. I strongly recommend the amendment of the section with S.31.(3) being thrown out as it serves no purpose. Section 31(1) & (2) are both subject to section 32 and the argument that only S.31(1) is subject to section 32 of the Act is not tenable as section 32 deals with the discretion of the court to refuse or grant an application for enforcement generally. Section 31(3) is a reproduction of section 13 of the repealed Arbitration Act and it is my candid opinion that the section ought not to be in our legislation as it serves no purpose.

#### **D. Section 51 – Enforcement of Foreign Award by Application**

This section provides for the enforcement of international arbitral award in Nigeria. For international arbitral award or foreign judgment to be enforced in Nigeria, there must be evidence that the country where the foreign judgment or foreign award was made accords favorable treatment to judgments, and arbitral awards made in Nigeria. This means that the principle of reciprocity is very important in the enforcement of foreign judgments and awards. The implication of this statement is that the country where a foreign award was made is very important and material. Unfortunately, section 51(1) provides that,

An arbitral award shall irrespective of the country in which it was made, be recognized as binding and subject to this section and section 32 of this Act shall upon application in writing to the court, be enforced by the court.

---

<sup>12</sup> *Middlemiss & Gould* (1973)1AA ER 172. *Union Nationas des eo Cooperative Agricostes de cereals Rober* (1959)1 All ER 721. Gaius Ezejiogor, *The Law of Arbitration in Nigeria*, Longman Nig. Plc. Lagos 1997, page 120.

<sup>13</sup> *Immani & Sons Ltd & anor v. Bils Const. Co. Ltd* (1999)2 NWLR (Pt.635)257. *Commerce Assurance Ltd. Alli (supra)*. *Kuforiji v. Nig. Railway Corp.* (1972)2 UILR 29. *Mauritius Steam Navigation Co. Ltd. v. International Shipping Lines Ltd.* (1969)3 ALR. Comm. 34.

The words “**irrespective of the country in which it was made,**” is contrary to public policy or reason of state, and is also contrary to law and earlier decisions of the Supreme Court.<sup>14</sup> The country where a foreign judgment or award was made is very material in the enforcement of foreign judgment or arbitral award. In fact section 54 (1) (a) of the Act made it a condition precedent for the enforcement of awards to be made pursuant to the New York Convention. Section 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act<sup>15</sup> defined foreign judgment to include arbitral award made pursuant to international arbitral proceedings. Section 3(1) of the Act provides –

The Minister of Justice if he is satisfied that, in the event of the benefits conferred by this part of this Act being extended to judgments given in the Superior Courts of any foreign country, substantial reciprocity of treatment will be assured as respect the enforcement in that foreign country of judgments given in superior courts of Nigeria, may by order direct

- (a) that this part of this Act shall extend to that foreign country; and
- (b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for purposes of this part of this Act.

The simple implication of Section 3(1) of the Act and the earlier decisions of our courts is that the country of origin of an award or foreign judgment is very important and material. This being the case, section 51(1) requires urgent amendment so as to bring it into conformity with the law and these earlier decisions which are reasonable, just, and fair. It is for this reason that I suggest strongly the dropping of the words “**irrespective of the country in which it was made**” in section 51(1).

#### **E. Section 54 – Adoption of New York Convention in Nigeria**

Section 54 of the Arbitration and Conciliation Act<sup>16</sup> implemented the New York Convention. It is the section by which the Convention was domesticated in compliance with the provisions of section 12 of 1999 Constitution.<sup>17</sup> The section is not only limited in scope but a total breach of the treaty obligations which Nigeria assumed when she deposited her declaration on the New York Convention to the United Nations Secretary General. Nigeria acceded to the New York Convention in 1970 and this was formally implemented in Nigeria by the provisions of the Arbitration and Conciliation Act. Section 54 of the Act which purports to implement the two declarations which Nigeria entered into when she acceded to the Convention provides *inter alia*,

Without prejudice to sections 51 & 52 of this Act where recognition and enforcement of any award arising out of an international commercial arbitration are sought, the convention on the Recognition and Enforcement of Foreign Awards (hereinafter referred to as the Convention) set out in the second schedule to this Act shall apply to any award made in Nigeria or any contracting state:

- (a) provided that such contracting State has reciprocal legislation recognizing the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;

---

<sup>14</sup> **M.S.S. Line v. Kano Oil Millers Ltd.** (1974) NNLR 1. **A. C. Toepfer Inc. New York v. John Edokpolor** (1965) ALL N.L.R. 292.

<sup>15</sup> CAP F35 Laws LFN, 2004

<sup>16</sup> CAP A18 LFN ,2004

<sup>17</sup> CAP C23 LFN 2004

- (b) that the convention shall apply only to differences arising out of legal relationship which is contractual.

From the foregoing, it should be seen that section 54 is limited in scope as only awards rendered in a matter which is contractual can be enforced and thereby placing a bar against other forms of award. This legislation is not only limited in scope but also a breach of the treaty obligations of Nigeria which require that the New York Convention be applicable in Nigeria to differences arising out of legal relationships *whether contractual or not which are considered commercial under the Laws of the Federal Republic of Nigeria*. This will be clearer when considered against the declaration which Nigeria deposited in respect of this matter to the Secretary General of the United Nations which reads thus,

In accordance with paragraph 3 of Article 1 of the New York Convention already set out, the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a State party to this Convention and to differences arising out of legal relationship, **whether contractual or not which are considered as commercial** under the Laws of the Federal Republic of Nigeria.<sup>18</sup>

From the above submissions, it is clear that section 54 of the Act requires an amendment so as to bring it into conformity with the provisions of the declaration which Nigeria submitted to the Secretary General of the United Nations in 1970.

### **Conclusion**

It is intuitively obvious that the Arbitration and Conciliation Act Cap A18 of the Laws of Federation of Nigeria 2004 requires serious amendment. Before the amendment of the 1990 Act jurists and scholars had made wonderful and meaningful submissions on the areas of the Act that require amendment. It is unfortunate that what the law makers did was only to remove the word 1990 Laws of the Federation of Nigeria and substituted same with 2004 as if the problem was with the year of the law and not its provisions. It is expected that the law makers should look inwardly and undertake a second look at this Act. There are other sections which require amendment within the Act but I decided to take the very serious ones as my earlier paper to the National Assembly contains all these other sections.

---

<sup>18</sup> Amazu Asouzu, "African States and the Enforcement of Arbitration Awards", (*supra*)