Joinder of Third Parties in Arbitration Proceedings under Nigerian Law*

Abstract

Joining a third party to arbitration proceedings is a subject worth careful consideration because arbitration, as a mechanism for resolving commercial disputes, is founded on party autonomy. Although joinder of third parties could enhance procedural efficiency and encourage consistency in decision-making, it is important that such step is taken in line with applicable laws and rules. This paper seeks to assess the Nigerian law position on joinder of third parties to existing arbitration proceedings governed or administered in accordance with Nigerian law, particularly the Arbitration and Conciliation Act 1988 and its corresponding procedural rules.

Key words: Arbitration, Joinder, Third Parties, Nigerian law.

1. Introduction

The common practice for commercial parties in a contractual agreement is to set out their terms in writing. Those terms often include a dispute resolution provision which stipulates the mechanism(s) which the parties will adopt in resolving any dispute or difference that could arise in their relationship. Amongst other mechanisms, such clause may provide that any dispute which arises from the contract shall be submitted to arbitration.

Arbitration is, indeed, quickly becoming the preferred mechanism for the resolution of commercial disputes because of the confidentiality that the process offers, the minimisation of procedural delays resulting in faster resolution of disputes, enforcement of arbitral awards, as well as flexibility of the process, such as the ability to choose arbitrators, seat of arbitration, and procedural rules, among others. For an arbitration agreement to be valid under Nigerian law, it must be in writing[1] and both parties must have mutually agreed,[2] just like in every contract, to the procedure in respect of an arbitrable dispute.[3] In some instances, contractual relationships between different but related commercial parties can, sometimes, create complementary rights and obligations. Therefore, a dispute that arises out of one contract in

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1 Section 1(1) Arbitration and Conciliation Act 1988, Section 3(3) Lagos Arbitration Law 2009.

2 *Mekwunye v. Imoukhuede* (2019) 13 NWLR (Pt. 1690) 439 p. 500, paras. G-H: (*"the consensual nature of the agreement to refer disputes to arbitration is the most distinguishing feature of arbitration proceedings*."). *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385 (*"the legal basis of all arbitrations is voluntary agreement. If there is a distinct agreement to appoint an umpire to determine the difference between the parties and other conditions are present, there is an arbitration. Thus, voluntary submission of both parties of their cases or points of difference between them for arbitration is basic to a binding arbitration"). Commerce Assurance Ltd. v. Alli* (1992) 3 NWLR (Pt. 232) 710 (*"it is the law that to constitute a proper arbitration which the courts can enforce there must be an agreement to submit the matter to arbitration"*).

3 In *Kano State Urban Development Board v. Fanz Construction Limited* (1990) 4 NWLR (Pt. 142) 1, p 33, paras a-b, the Nigerian Supreme Court recognized categories of matters that are not arbitrable in Nigeria - they include: (i) indictment for an offence of a public nature; (ii) disputes arising out of an illegal contract; (iii) disputes arising under agreements void as being by way of gaming or wagering; (iv) disputes leading to a change of status such as divorce petition; and (v) any agreement purporting to give an arbitrator the right to give judgment in rem. Recently, the Nigerian Court of Appeal has extended the scope of non-arbitrability in Nigeria to tax disputes. In *Esso Petroleum and Production Nigeria Ltd & SNEPCO v. NNPC* (Unreported Appeal No. CA/A/507/2012; delivered on 22nd July, 2016) and *Shell (Nig.) Exploration and Production Ltd & 3 others v. Federal Inland Revenue Service* (Unreported Appeal No. CA/A/208/2012; delivered on 31st August 2016), the Court found that the disputes submitted to arbitration in both cases are tax-related and therefore not arbitrable in Nigeria.

the network could trigger separate but related causes of action for the enforcement of rights and obligations which may involve other contracting parties.

Overall, the consensual nature of an arbitration agreement begs the question: can a third party, who is not a party or signatory to the arbitration agreement, be bound to arbitrate a dispute that arises therefrom, or be joined as a party to such arbitration proceedings? Section 2 below seeks to analyse the extant position of Nigerian law on this issue.

2. Joining a third party to arbitral proceedings under Nigerian law

As mentioned in Section 1 above, voluntariness and consent are bedrock requirements of a valid arbitration agreement under Nigerian law.[4] As such, it is generally presumed that only parties to such an agreement are bound by same and can refer a dispute arising from their relationship to arbitration. This presumption is backed up by the general common law doctrine of privity of contract which has been adopted under Nigerian law, [5] that only parties to a contract have the right to sue and be sued on the obligations of such contract.[6] Specifically, Nigerian courts have held that contracts only bind parties to it and a person who is not a party to the contract cannot be expected to carry out any obligation on the contract.[7]

The extant Arbitration and Conciliation Act 1988—the principal federal legislation that regulates arbitration in Nigeria, which also contains procedural rules in its schedule—does not contemplate or have any specific provisions regarding joinder of third parties to arbitral proceedings. Nevertheless, judicial decisions have shed light on this issue. The Nigerian Supreme Court has, earlier this year, confirmed that *"only a party to a contract can sue on it and/or take the benefit of the arbitration clause therein."*[8] Also, the Nigerian Court of Appeal has held that "*an arbitral clause … can only bind the parties to the agreement entered into and not third parties...*"[9] Therefore, it is safe to take the view that the general position of Nigerian law is that a third party who is not a party to the arbitration agreement cannot be joined as a party to arbitral proceedings pursuant to such an agreement.[10]

It bears mentioning, however, that Nigerian courts take the view that where, in a commercial agreement, the parties intended that a third party will be created as part of their arrangement, such a third party is deemed to be an original party in the contract. In *Metroline (Nig) Ltd &*

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[4] See *Mainstreet Bank Capital Ltd. v. Nig. RE* (2018) 14 NWLR (Pt. 1640) 423, per Kekere-Ekun, J.S.C., p. 444, para. A&C: (*"A major feature of arbitration is that it is consensual. The parties have a choice. An arbitration agreement is an agreement by which two or more parties agree that present or future disputes shall be resolved by arbitration"*).

[5] *Nospetco Oil & Gas Ltd. v. Olorunnimbe* (2022) 1 NWLR (Pt. 1812) 495 per Augie, J.S.C., pp. 531-532, paras. H-A: (*"Privity of contract is the relation between the parties in a contract, which entitles them to sue each other, but prevents a third party from doing so. Thus, the doctrine of privity of contract is all about the sanctity of contract between the parties to it, and it does not extend to others from outside"*). *Vital Inv. Ltd. v. CAP Plc* (2022*)* 4 NWLR (Pt. 1820) 205, per Ogunwumiju, J.S.C., p. 253, paras. D-F: (*"A contract cannot confer enforceable rights or impose obligations arising under it on any person, except parties to it and this is referred to as the doctrine of privity of contract which is to the effect that a contract is a private relationship between the parties who made it and no other person can acquire rights to or incur liabilities under it*.").

[6] Notable exceptions to the doctrine of privity of contract are (a) Covenants in agreements, especially those concerning land, (b) Agency, and (c) Assignment. See *Nissan (Nig.) Ltd. v. Yoganathan* (2010) 4 NWLR (Pt. 1183) 135; *Makwe v. Nwukor* (2001) 14 NWLR (Pt. 733) 356.

[7] *Integrated Finance Ltd v. NPA & Anor* (2019) LPELR-49321 (CA).

[8] *Williams v. Adold Stamm Intl (Nig.) Ltd*. (2022) 5 NWLR (Pt. 1822) 23.

[9] *Gamji Fertilizer Company Limited & Anor v France Appro SA S & Ors* (2016) LPELR-41245(CA).

[10] *Bill & Brothers Ltd v. Dantata & Sawoe C.C.N Ltd* (2021) 12 N.W.L.R (Pt 1789) 50 (*"a non-party to an agreement cannot enforce the same even if it is made for his benefit."*).

Ors v Dikko,[11] the Supreme Court held that a special purpose vehicle created by the parties to the contract was not a third party to arbitral proceedings conducted pursuant to that contact. Instead, the special purpose vehicle was "*part and parcel of the agreement*" because it is "*the child born out of the agreement of the parties*", even though it was not an original party to the underlying contract. More so, the fact that "*dispute arising from the agreement cannot be effectually and completely determined*" by the arbitral tribunal makes it even more deserving to find that the special purpose vehicle is a "*necessary party*" to the contract.

Notwithstanding the general position, Nigerian law admits of exceptions where a third party could be joined as a party in arbitral proceedings arising from a contract where it was originally not a party. These exceptions are discussed in turns below.

2.1 Consent of the parties

Given that the consent of parties stands as an important prerequisite to arbitration proceedings and forms the basis for a valid arbitration agreement, a joinder is possible under Nigerian law where the original parties to the arbitration agreement and such third party consent to it.[12] Indeed, the Lagos State Arbitration Law 2009, which exists in parallel with the Arbitration and Conciliation Act 1988 and applies in Lagos State, provides that "*a party may, by application and with the consent of the parties, be joined to arbitral proceeding.*"[13] More so, the recent Arbitration and Mediation Bill 2022 provides that an arbitral tribunal shall "*have the power to allow an additional party be joined to the arbitration, provided that, prima facie, the additional party is bound by the arbitration agreement giving rise to the arbitration.*"[14]

This could be the case where the third party is a necessary party in the determination of the claims or issues pending in arbitration, for example. In that scenario, a party who was not an original part of the arbitration agreement could, by application, be joined in the proceedings, subject to the consent of the other parties.

2.2 Agency relationship

Nigerian law recognises the concept of agency which typically connotes a relationship where one has authority or capacity to create a legal relationship between a person in the position of principal and third parties. Generally, a relationship of agency exists in law when one person called the 'agent' is vested with authority to act on behalf of another called the 'principal' and he consents to act.[15] This relationship may be created by contract or by conduct.[16] It implies that the principal would be bound by the acts of the agent given that the agent is acting on

[11] *Metroline (Nig) Ltd & Ors v Dikko* (2018) LPELR-46853(CA).

[12] In *Mekwunye v. Lotus Capital Ltd & Ors* (2018) LPELR-45546(CA), the Court of Appeal held that "*there can be more than one party to an arbitration proceeding emanating under one contract, in so far as the parties involved consent to submit to arbitration."*

[13] Section 40(3) Lagos State Arbitration Law 2009

[14] See Section 40(1) of the recent Arbitration and Mediation Bill 2022. See also Section 39. The Bill is currently awaiting the President's assent as at the date of this paper before it can become law.

[15] *Eyiboh v. Mujaddadi* (2022) 7 NWLR (Pt. 1830) 381.

See also *Bamgboye v. University of Ilorin* (1991) 8 NWLR (Pt. 207) 1 where the court found that "*the relation of agency arises whenever one person, called the agent, has authority to act on behalf of another, called the principal and consents to act."*

[16] *Moussallati & Ors v Knight Frank Estate Agency* (2017) LPELR-42893(CA) where the court highlighted the ways in which principal and agent relationship may arise/can be created. Additionally, the Court held that such relationship may be created "*retrospectively, by subsequent ratification by the principal of acts done on his behalf by the agent, by operation of law under the doctrine of agency of necessity and in certain other cases. Agency may also operate by estoppels where the principal may be precluded from denying that another person acted on his behalf in an arrangement with a third party*."

behalf of the principal, so long as the agent has acted within scope and authority.[17] The Latin maxim: *qui facit per allium, facit per se*—that is, he who has procured another to do an act is presumed to be the doer of that act—is the underlying applicable principle.[18]

Consequently, if an agent signs an arbitration agreement on behalf of a principal, such a principal would be bound by the agreement and could, as a third party, be joined as a party in arbitration proceedings arising from the subject of the contract. The reason is simple: the fiduciary relationship creates a link between the third party (i.e., the principal) and the signatory to the arbitration agreement (i.e., the agent). Thus, the principal, as a third party, is deemed to be a party to the arbitration agreement.

2.3 Assignment and Novation

Assignment has been defined by the Nigerian Supreme Court as "*…the right to transfer a chose in action, and a chose in action is essentially the right to sue."*[19] Examples of choses in action include a contractual right such as a debt, shares in a company, insurance policies, negotiable instruments, bills of lading, patents rights, copyrights, trademarks, rights of action arising from a contract, for example right to damages for its breach. Simply put, assignment occurs when a party to an existing contract (i.e., the assignor) wishes to transfer its contractual obligations to another party (i.e., assignee)**.**

For an assignment to be valid, certain conditions need to be met. These include: (i) only the benefit of an agreement may be assigned, (ii) the assignment must be absolute; (iii) the right to be assigned must be wholly ascertainable and must not relate to part only of a debt; (iv) the assignment must be in writing and signed underhand by the assignor debtor (no particular form of wording is necessary); and (v) notice of the assignment must be received by the other party or parties for the assignment to take effect.[20] However, an assignment that fails to comply with those formalities may still be effective as an equitable assignment.[21]

More so, an assignment of clauses in a contract is subject to the express terms of the contract. For example, such an assignment must be permissible under the underlying contract. The Nigerian Supreme Court has held that *"parties are bound by the terms of their contract and are not expected to read into the contract what is not in it, either by subtraction or addition. Where a contract has been reduced into writing it is that document that constitutes the guide for its interpretation and the court has no power to restructure the agreement of the parties reduced into written form."*[22]

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[17] *Salbodi Group Ltd & Anor v. Doyin Investment (Nig) Ltd & ors* (2022) LPELR-57458(CA) ("*In law, for the act of an agent to bind the principal, the agent must have acted within the scope of his authority*").

[18] *Summit Fin. Co. Ltd. v. Iron BabaSons Ltd.* (2003) 17 NWLR (Pt. 848) 89 where the Court of Appeal held on the principle and rationale behind the doctrine of agency – (*"The general principle is that whatever a person who is sui juris can do personally can equally be done on his behalf through an agent. The rule is qui facit per alium facit per se meaning he who acts through another, acts himself*.") See also *Ndoma-Egba v Chukwuogor* (2004) All FWLR (Pt 203) 2043, where the Supreme Court held on the nature of agency –"*The Latin maxim "qui per alium facit per seipsum facere videtur" which is expressed in a short form as 'qui facit per alium facit per se' means he who acts by another acts by himself."*

[19] *Julius Berger (Nig.) Plc v. T.R.C. Bank Ltd* (2019) 5 NWLR (Pt. 1665) 219 (SC)

[20] *Ben Electronic Co. (NIG) LTD v ATS & Sons & ORS* (2013) LPELR-20870 (CA); *Julius Berger (Nig.) Plc v. T.R.C. Bank Ltd*, ibid.

[21] *Julius Berger (Nig.) Plc v. T.R.C. Bank Ltd*, ibid.

[22] *Julius Berger (Nig.) Plc v. T.R.C. Bank Ltd*, ibid. The Nigerian Supreme Court has also held in *Nika Fishing Co. Ltd v. Lavina Corporation* [2008]16 NWLR (Pt. 1114) 509 (SC) that *"no other person, not even the court, can determine the terms of contract between parties thereto. Thus, it is not the function of a court of law either*

Novation, on the other hand, has been defined as "*the substitution of a new contract for an existing one between the same or different parties. It is done by mutual agreement. It is never presumed. The requisites for novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation and the validity of the new one"*[23] Put differently, it is a form of assignment in which by consent of all parties thereto, a new contract is made and substituted for an existing contract.[24]

When an assignment or novation of contract occurs, the original party is typically relieved of its contractual obligations (including the obligation to settle all disputes arising from the contract by arbitration), and their role is replaced by the assigned third party.[25] Thus, the third party who was not an original party to the contract has the right to participate in arbitration proceedings arising from the subject of the assigned contract. It also bears mentioning that parties must ensure that in assigning and novating, the entire contract, including the arbitration clause, which is regarded as separate, is transferred if that is the intention of the parties.[26]

2.4 Corporate Veil Doctrine

The doctrine of piercing the corporate veil is a long-standing common doctrine which is a part of Nigerian law. Generally, an incorporated company is a separate entity, different from its shareholders and officers.[27] Therefore, Nigerian law cannot hold the corporation's shareholders and officers personally liable for the corporation's actions. However, there are instances where Nigerian law permits the lifting of the corporate veil. These include: (i) cases of fraud and improper conduct,[28] (ii) where a company is created to bypass legal obligations/where the

to make agreements for the parties or to change their agreements as made. The duty of the court is to interpret the terms of the agreement on its clear wordings. It is not the function of a Court of law either to make agreements for the parties or to change their agreements as made. Also, while a contract must be strictly construed in accordance with the well-known rules of construction, such strict construction cannot be a ground for departing from the terms which had been agreed by both parties to the contract."

[23] *NNPC v. Clifco Nig. Ltd* (2011) LPELR-2022(SC). See also *Jacob v. Eton* (2020) LPELR-49577(CA). Novation has been defined in *Onegbedan v. Unity Bank Plc* (2014) LPELR-22186(CA) as the *"act of substituting for an old obligation, a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party. A novation may substitute a new obligation between the same parties, a new debtor, or a new creditor*."

[24] *Onegbedan v. Unity Bank Plc* (2014) LPELR-22186(CA).

[25] On the effect of novation: *Ashibuogwu v. A.G. Bendel* (1988) 1 NWLR (Pt. 69) 138 (*"...Usually, a new person becomes party to the new contract and some person who was party to the old contract is discharged from further liability.***"**) *Gum v. Alhaji Dash (Nig) Ltd* (2021) LPELR-56279 (CA) ("*...Substitution of a new contract, debt or obligation for an existing one, between the same or different parties.***"** On the effect of assignment**:** *Julius Berger (Nig.) Plc v. T.R.C. Bank Ltd* (2019) 5 NWLR (Pt. 1665) 219 **"***To transfer rights, property or title from the person legally entitled to them, to somebody else."*

[26] *NNPC v. Clifco Nig. Ltd* (2011) LPELR-2022(SC).

[27] Sections 43(1) and 90(1) Companies and Allied Matters Act 2020. *I.T.B. Plc v. Okoye* (2021) 11 NWLR (Pt. 1786) 163 per Kekere-Ekun, J.S.C. (P. 193, paras. A-C) ("*A limited liability company is a distinct legal personality that can sue and be sued in its own name. It is a separate legal entity from the subscribers to its Memorandum and Articles of Association"). Bulet Int. Ltd. v. Olaniyi* (2017) 17 NWLR (Pt. 1594) 260 per Kekere-Ekun, J.S.C. *Pp. 292-293, paras. H-A ("A company is a different person altogether from the subscribers to the memorandum and is neither an agent nor trustee for them"). Georgewill v. Ekine* (1998) 8 NWLR (Pt. 562) 454 per Katsina-Alu, J.C.A. *P. 463, paras. D-E ("An incorporated company is a separate entity from its shareholders")*

[28] *Adedipe v Frameinendur* (2011) LPELR-14271(CA) per Helen Moronkeji Ogunwumiju, JCA (PP 55 - 68 paras a - e) *"The law is that this veil should not be lifted unless under special circumstances. However, this veil can be pierced because a statute or rule of law will not be allowed to be used as an excuse to justify illegality or fraud where the application of the law will result in grave injustice. In such a case the Courts would be required to tear off the corporate veil and reveal the persons behind the unsavoury activities of the Company." See also Oyebanji v State* (2015) 14 NWLR (Pt. 1479) 270 the Supreme Court held that *"One of the occasions when the veil of incorporation would be lifted is when the company is liable for fraud."*

company is a sham,[29] (iii) where the number of members in a company fall below the statutory minimum,[30] and (iv) in the interest of justice.[31]

In relation to arbitration agreements and proceedings, where a third party (i.e., a non-signatory to the contract) is the *alter ego* of a party to the contract, and one or more of the exceptions for lifting the corporate veil of a corporation is satisfied, then such third party may be obligated to arbitrate by allowing the original parties in the arbitration proceedings to pierce the corporate veil.

3. Conclusion

The foregoing sections have established that joinder in arbitration involves bringing in a third person as a party in already ongoing proceedings. There is little doubt that joining a third party has advantages, particularly in construction disputes that often involve multiple parties engaged in the same project. For example, it could save time and reduce the cost of resolving disputes by avoiding the multiplicity of proceedings because joinder of all relevant parties to one consolidated arbitration proceeding ensures that all issues and claims are resolved once and for all by the same tribunal. In addition, the possibility of conflicting decisions in two or more parallel arbitration proceedings could also be avoided. Consent of the relevant parties is often the usual and straightforward way to join third parties without significant legal hurdles. In any event, it is important that such a joinder is in accordance with applicable law, in line with the general rule and exceptions discussed above.

[29] *Oboh v. N.F.L. Ltd.* (2022) 5 NWLR (Pt. 1823) 283 Peter-Odili, J.S.C (Pp. 334, paras. C-D, G-H; 333, paras. C-B) *"The corporate veil will be lifted when a company is used as a mere façade concealing the true facts, which essentially means it is formed to avoid pre-existing legal obligations."*

[30] *A.C.B. Ltd. v. Apugo* (1995) 6 NWLR (Pt. 399) 65, the Supreme Court held that "*The circumstances under which the courts lift the veil of incorporation for the purpose of paying regards to the economic realities behind the legal facade of incorporation are well defined. They include: -(a)where the number of members fall below the statutory minimum;(b) where the company has been carried on in a reckless manner or with intent to defraud creditors; and(c)where the company is a sham."*

[31] *International Offshore Const. Ltd. v. S.L.N. Ltd* (2003) 16 NWLR (Pt. 845) 157 Per JEGA, J.C.A. at pages 179-180, (paras. E-B) "*The corporate shell of an incorporated company can be cracked where the interest of justice so demands*."