SOURCES AND DEVELOPMENT OF ARBITRATION LEGISLATIONS IN NIGERIA*

Abstract

Arbitration legislation in Nigeria has undergone significant development over the years, shaping the landscape of alternative dispute resolution in the Country. This paper delves into the sources and evolution of arbitration laws, shedding light on their origins and subsequent modifications. This examination relies on a thorough review of legislative documents, scholarly articles, and judicial decisions pertinent to arbitration in Nigeria. By analyzing the legislative frameworks, historical context, and judicial interpretations, this study provides a comprehensive understanding of the sources that have influenced the development of arbitration legislation in Nigeria. The research findings underscore the multifaceted nature of arbitration legislation in Nigeria. It reveals a complex interplay between colonial-era laws, indigenous legal traditions, international conventions, and domestic reforms. Furthermore, the study highlights the evolving nature of arbitration laws, influenced by socio-economic changes, global trends in arbitration practice, and the quest for legal certainty and efficiency in dispute resolution. In conclusion, this paper emphasizes the dynamic nature of arbitration legislation in Nigeria, shaped by a myriad of sources and factors. While providing insights into the historical foundations and contemporary trends, it underscores the importance of continuous evaluation and adaptation of arbitration laws to meet the evolving needs of the Nigerian legal system and its stakeholders.

1.0. Introduction

According to Black's Law Dictionary, arbitration is 'the reference of a dispute to an impartial third party (the Arbitrator) chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award which is issued after a hearing at which, both parties have an opportunity to be heard.'[1] Domke defines arbitration as 'parties willingly choosing to bring their disputes to an unbiased third party, an arbitrator, that they select for a final decision grounded on the evidence and arguments presented to the arbitration committee. They concur beforehand that they will acknowledge the arbitrator's judgment or the award as ultimate and binding upon them.'[2] Arbitration is an alternative dispute resolution system that is very similar to the courtroom system. In arbitration, the parties agree to submit their dispute to an independent and neutral panel of one or multiple people, who are referred to as the arbitrators. The arbitrator is also known as 'the judge(s)' on the case.[3] The arbitrator(s) who is usually an expert on the subject of dispute decides the case on its merits. The parties reach an agreement on who they want to arbitrate their case and he is also paid by the parties.[4] The arbitrators are usually chosen by (or on behalf of) the parties.[5] According to Akpata- 'Arbitration or mediation was used for resolving conflicts because of their emphasis on moral persuasion and their ability to maintain harmony in human relationship'.[6] On the case, the arbitrator is a neutral third party. He sits as an independent umpire, assesses the evidence supplied by each party and gives judgment based on the merits of the case and the party with the most persuasive evidence. This is quite similar to the courtroom system.

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[1] *Black's Law Dictionary* (5th edn., 1979).

[2] Domke, *Commercial Arbitration*, (2015) 1.

[3] F Adekoya and P Iwu 'Arbitration Procedures and Practice in Nigeria: Overview' (2007) < https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=(sc.Default)&firstPage=true > Accessed September 17, 2024

[4] <https://millerlawpc.com/alternative-dispute-resolution/> Accessed January 24, 2024

[5] <https://www.hkiac.org/arbitration/what-is-arbitration/ >Accessed January 24, 2024

[6] 1E Akpata, *The Nigerian Arbitration Law in Focus* (West African Book Publishers Ltd, 1997) 1

In arbitration, the parties give the possible resolutions that they seek for their case which the arbitrator can either accept or reject. At the end of the arbitration process, the arbitrator reaches a decision which is usually binding[7] on the parties. This decision can also be taken to a traditional court for enforcement. This decision can also be referred to as an award. For many people, arbitration is better because it is cost effective in the long run and it is quick.[8] Arbitration is known for its flexible process. Due to this, the parties engage in a confidential, fair, and efficient process that invariably leads to a final and legally enforceable award.

1.1 Sources and Development of Arbitration Legislations in Nigeria

Arbitration legislation in Nigeria has been influenced by a variety of sources. For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which Nigeria ratified in 1970, has had a significant impact on the development of arbitration laws in the country. The New York Convention applies to Convention awards in half of the countries of Sub-Sahara Africa. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) provides a framework for the recognition and enforcement of arbitral awards in countries that are party to the Convention. The New York Convention is considered one of the most important international instruments in the field of arbitration and its principles have been incorporated into Nigerian arbitration legislation. Additionally, Nigeria is also a party to other international conventions such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the African Charter on Human and Peoples' Rights. These conventions have influenced the development of arbitration legislation in Nigeria and have provided a basis for the recognition and enforcement of arbitral awards. The major sources of Nigerian Arbitration Legislation are local and foreign/international statute. The local legislations include the Arbitration and Mediation Act 2023, The Foreign Judgments (Reciprocal Enforcement) Act. The foreign legislations on the other hand includes the UNCITRAL Model Law, the New York Convention and the UNCITRAL Arbitration rules. Other secondary legislations include case laws, common law and equity and trade usage and customs.[9]

2.0. Earlier Laws Influencing Development of Arbitration in Nigeria

2.1. The Arbitration Act 1914

The Arbitration Act of 1914 was a clone of the 1889 English Arbitration Act. But it was repealed at the advent of the Arbitration and Conciliation Act of 1988.

2.2. The Arbitration and Conciliation Act 1988

The Arbitration and Conciliation Act 1988 was in force until 2023 and incorporated many important provisions from the 1985 UNCITRAL Model Law on International Commercial Arbitration. Nigeria was the first African country to adopt the UNCITRAL model law in 1988 through the Arbitration and Conciliation Decree, No 11, which it adopted on the 14th of March 1988.[10] One of the flaws of this Act that the 2023 Arbitration and Mediation Act sought to correct was the non-inclusion of provisions guiding the institution and procedure for settling disputes through mediation[11]. One flaw in the Act was in sections 4 and 5 which allows the court to stay proceedings if a request is made by either of the parties

[7] Although in limited circumstances, the arbitral award may be set aside or unenforceable.

[8] <https://www.rics.org/dispute-resolution-service/alternative-dispute-resolution> Accessed 24 January 2024

[9] MB.Tochukwu and OC. Okenyi *Overview of the Laws and Practice of Arbitration in Nigeria* May, 2020

[10] <https://www.acerislaw.com/arbitration-in-nigeria/:> Accessed January 30, 2024

[11] 'Demystifying the Nigerian Arbitration and Conciliation Bill 2017' [2018], <http://arbitrationblog.kluwerarbitration.com/2018/05/11/demystifying-nigerian-arbitration-conciliation-bill-2017/> Accessed 17, September, 2024.

before the submission on the merit. contrary section 5 states that the court may stay proceedings on two conditions:

a. When there's no reason why the case should not be referred to arbitration based on the arbitration agreement,
b. When the party applying was and is ready to do anything that will facilitate the arbitration process.

Though many have argued that section 4 applies to the New York Convention and is in relation to an international arbitration agreement while section 5 was in relation to domestic arbitration. This ambiguity was cleared out in section 5(1)-(3) of the Arbitration and Mediation Act, 2023 which states that if any of the party requests, the court must refer all disputes to arbitration not later than after the first submission of their statement on the first substance of the dispute. And in such cases, Arbitration awards may be made while a case is still pending before the court and in situations when the court issued a stay of proceedings order, the court may also make supplementary orders in order to preserve the rights of the parties to the dispute.[12]

Current Primary Legislations in Nigerian Arbitration Space

2.3. The 2009 Lagos State Arbitration Law

This legislation is restricted to disputes on arbitration that fall within the jurisdiction of Lagos State except it is otherwise expressly agreed by the parties. Section 2 of the Law states:

> From the commencement of this Law, all arbitration within the State shall be governed by the provisions of this Law except where the parties have expressly agreed that another Arbitration Law shall apply.[13]

2.4. The Arbitration and Mediation Act 2023

The Arbitration and Mediation Act 2023 (AMA) is a primary legislation in arbitration in Nigeria. But the Act also allows the use of other legislations to guide arbitration disputes; some of which have been mentioned above. The Nigerian Arbitration and Mediation space has experience tremendous growth in recent times. Current International Arbitration legislations have also seen a lot of improvement. And these improvements have continually factored in evolving global practices. Nigeria, wanting to match these evolutions enacted the Arbitration and Mediation Act 2023. This Act repealed the Arbitration and Conciliation Act of 1988; it had been in force for 35 years. The Act was enacted in a bid to improve the weaknesses and inadequacies present in the 1988 Act. It adopted a lot of its updates from the UNCITRAL Model Law 2006.[14] This was done to match Nigeria's Arbitration legislations with that of international standards. The new Act has 92 sections and was aimed at providing a unified framework for settling commercial disputes using arbitration or mediation. It also approved the enforcement of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Nigeria or in disputes that arise out of international commercial transactions.[15]The Act is divided into 3 major parts:

[12] Arbitration and Mediation Act, 2023, s. 5(1)-(3),
[13] Lagos State Arbitration Law 2009 , s.2,
[14] The Arbitration and Conciliation Act was in force before the UNCITRAL Model Law on International Arbitration, 2006, the UNCITRAL Model Law on International Commercial Mediation, 2018, etc. Thus, the New Act merely adopted these Model laws thereby adopting international best practices.
[15] Explanatory Memorandum *Arbitration and Mediation Act* 2023.

1. Arbitration: this part encompasses ss.1-66 and focuses on arbitration disputes that arise from any of Nigeria's 36 states and the Federal Capital Territory.[16] It also factors in international or extraterrestrial disputes.[17]
2. The second part of the Act focused on Mediation. In the 1988 Act, provisions were not made for mediation as an alternative dispute resolution method and this 2023 Act was a huge improvement. It provided for the settlement of both domestic and international disputes using mediation under the Nigerian legislation
3. The third part of the Act contained the miscellaneous provisions,

The Act also has three schedules. The first schedule focused on Arbitration rules which serves as the framework for the resolution of disputes that fall under the jurisdiction of the new Arbitration and Mediation Act. Based on section.1(2) and 1(3), parties are at liberty to decide to be guided by this Act during their arbitration proceedings. Under the second schedule, the Act made provisions for the adoption of the Convention on the Recognition and Enforcement of Arbitral Awards (The New York Convention) under the Nigerian legal framework or jurisdiction.[18] The third schedule contains the arbitration proceeding rules. This was aimed at providing further procedural guidelines for arbitration proceedings that occur under the new act. It is further concerned with Arbitration applications before the Nigerian High Courts. All three schedules aid the efficient and effective application of the provisions of the new Act.

3.0. Secondary Legislations in the Nigerian Arbitration Space

3.1. The New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards:

According to Article 1 "[t]his Convention shall apply to the recognition, and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal .. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[19] The convention was adopted by Nigeria on the 17th of March, 1970 and was included in the preamble of the Arbitration and Conciliation Act 1988 and the current Arbitration and Mediation Act 2023.

3.2. Convention on the Settlement of Investment Disputes between States and Nationals of other States

Nigeria is a contractual party to this Convention which was adopted on 14th October, 1966, a few years after Nigeria gained her independence. The Convention established the International Centre for the Settlement of Investment Disputes and the centre "provides provide facilities for conciliation and arbitration of investment disputes between contracting States and nationals of other contracting States in accordance with the provisions of this Convention."[20]

[16] Arbitration and Mediation Act 2023, s.1(6)
[17] Arbitration and Mediation Act 2023, s.1(7)
[18] S. Gilbert, 'Proposed Changes to the Arbitral legal Framework in Nigeria for Modern Regulation' [2018] <https://webcache.googleusercontent.com/search?q=cache:p141R9Xr5pUJ:https://www.ibanet.org/Article/NewDetail.aspx%3FArticleUid%3D12f49f8d-e914-4e53-8158-4387fb82fad9+&cd=1&hl=en&ct=clnk&gl=ng> Accessed 17 May 2021
[19] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art.1
[20] Convention on the Settlement of Investment Disputes between States and Nationals of other States, Art 1 and 2

3.3. The Foreign Judgement Reciprocal Enforcement Act

The Foreign Judgement Arbitration Enforcement Act 2004 applies to all arbitral awards or judgements made in other countries which have the jurisdiction for their enforcement in Nigeria as well as judgements given in Nigeria and the jurisdiction for their enforcement is in Nigeria, except otherwise agreed by the parties.[21]

3.4. The UNCITRAL Model Law:

The UNCITRAL Model Law applies to international commercial arbitration and it came into force in the year 1985 and was amended in 2006; and came into force to assist States in modernizing their laws on arbitral procedure. It does this with an emphasis on the specific needs and requirements of International Commercial Arbitration. It also forms the basis for some of the sections in the AMA.[22] It includes all the stages of the arbitration process including the arbitration agreement, the arbitral tribunal, the extent to which the court can intervene.

3.5. UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules is a procedural law that sets out the procedure which arbitral parties may agree to for the conduct of their arbitral disputes. The Rules covers the arbitral process and even provides a sample arbitral clause. Providing the procedure for the appointment of arbitrators and the conduct of the arbitral proceedings[23]. It also establishes rules in relation to the form, effect and interpretation of the arbitral award. The rules initially came into force in the year 1976 and in that time, it has been used to settle a wide range of commercial disputes like private commercial disputes with no arbitral institution, investor-state disputes, state to state disputes, and even commercial disputes administered by an arbitral institution.[24]

3.6. Arbitral Precedents

The Oxford Dictionary defines precedent in law as 'a previous case or legal decision that may be or (binding precedent) must be followed in subsequent similar cases'.[25] Judicial decisions play a crucial role in shaping arbitration legislation in Nigeria. The decisions of Nigerian courts, especially the Supreme Court, have helped interpret and clarify the provisions of arbitration laws.[26] These decisions have provided guidance on issues such as the jurisdiction of courts in arbitration matters, the validity and enforceability of arbitration agreements, and the grounds for setting aside an award. In spite of arbitration's similarity to the traditional court system, there is no clear-cut principle on the application of arbitral precedents to arbitral cases. And although it is common knowledge that arbitral precedents are non-binding, and there is no official system for relying on precedents in the arbitration space, many lawyers in this space still rely on precedents to support their cases.[27] Arbitrators also sometimes rely on past awards or decisions before giving their award. Due to this gap, the last couple of decades have come with a demand for some uniformity in the administration of the decision of the Arbitrator so that there can

[21] Foreign Judgements (Reciprocal Enforcement) Act CAP F35 LFN.2004

[22] Arbitration and Mediation Act, 2023

[23] Latham and Watkins, 'Guide to International Arbitration' (n.d) < https://www.lw.com › thought leadership › guide-t..>.Accessed September, 2024

[24] <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration#:~:text=The%20UNCITRAL%20Arbitration%20Rules%20provide,as%20well%20as%20administered%20arbitrations./ > Accessed 30 January, 2024

[25] Oxford Dictionary

[26] S Bond and L Bergman (eds.), *SCC Arbitral Awards 2004-2009* (Juris Publishing 2011)

[27] Clyde & Co LLP, 'Precedents in Arbitration - A Practical Position (Part 1)' (Lexology, 17 September 2024) < https://www.lexology.com/library/detail.aspx?g=a0655987-d19c-49b1-b78f-5e2b9b6d7b58> Accessed 17 September 2024.

be development[28]. Over time, there have been arguments as regards the compatibility of precedents to arbitration. One of the arguments is that arbitral cases are protected by confidentiality. Both the arbitrators and parties are bound by confidentiality.[29] So there is no way that arbitrators and lawyers can have access to judicial precedents.

On the other hand, the ICC[30] publishes excerpts from international arbitrations because they believe that the publication 'is invaluable to both scholars and practitioners involved in the drafting and negotiation of international commercial contracts and the resolution of international commercial disputes'.[31] Similarly, the Supreme Court of Canada publishes arbitral awards. According to them- 'the extracts from the arbitral awards provide indispensable and extremely helpful insights into the attitudes of tribunals on arbitration matters and arbitral awards worldwide.'[32] UNCITRAL also gives permission for the publication of arbitral awards if the parties give their approval. Similarly, arbitral precedents become available to the public when awards are challenged or appealed in court. Although very often, the details and facts of the case are often made anonymous to protect the interest of the parties, the facts of the case provide useful information that can serve as precedents. Some include why some decisions were made in that arbitration and possibly the arbitrators' thoughts on some certain issues. The judgement, depending on the involvement of court and some other factors may then become precedents in some future arbitral hearing. But beyond this, the word precedents are not officially encapsulated in any law in the arbitration field.[33]

3.7. Legal Press

The legal Press, especially some specialized arbitration publications sometimes give valuable insight into what is currently applicable in the arbitration landscape all over the world. The report may not disclose all the details, or even as much as what the ICC can provide but these reports prove very useful in providing insight into what had been previously decided in arbitration. It is also useful for knowing about how arbitrators were appointed in the past and some of the known decisions that they have made.

4.1. Challenges and Limitations of Current Arbitration Legislations in Nigeria

One challenge of current arbitration legislations in Nigeria is the limited enforceability of arbitration awards. Despite the existence of the Arbitration and Mediation Act, there are instances where foreign arbitration awards are not recognized and implemented in Nigeria. This limits the effectiveness of arbitration as a means of dispute resolution, especially in international business transactions. Another limitation is the lack of clarity and consistency in the application of arbitration laws. The interpretation and application of arbitration laws by Nigerian courts have been inconsistent, leading to uncertainty and unpredictability in the arbitration process. This undermines the confidence of parties involved in arbitration and hampers the development of a robust arbitration system in Nigeria. Additionally, the inadequate capacity and expertise of arbitrators in Nigeria pose a challenge to the effectiveness of arbitration. The limited pool of qualified arbitrators and the lack of specialized training in arbitration result in delays and inefficiencies in the resolution of disputes. These challenges and limitations highlight

[28] Lexology, Arbitration in Nigeria – Lexology, [2019] < https://www.lexology.com › library › detail > accessed September 17, 2024

[29] Clyde and Co. Precedents in Arbitration, a practical position. (2012), 22

[30] International Criminal Court

[31] *Ibid*

[32] S Bond and L Bergman (eds), *SCC Arbitral Awards 2004-2009* (Juris Publishing 2011)

[33] *Ibid*

the need for reforms in Nigeria's arbitration legislations to enhance their effectiveness and promote a more reliable and efficient dispute resolution mechanism.[34]

4.2. Recommendations for Improving Arbitration Legislations in Nigeria

In order to address the deficiencies in the current arbitration legislations in Nigeria, several recommendations can be made. Firstly, it is crucial to establish a regulatory body or authority solely dedicated to overseeing arbitration proceedings and enforcing arbitral awards. This body should be independent and autonomous, ensuring impartiality and efficiency in the arbitration process. Secondly, efforts should be made to update and modernize the existing arbitration laws to align them with international best practices and standards. This could involve adopting the UNCITRAL Model Law on International Commercial Arbitration or incorporating all relevant provisions into the current legislation. Additionally, training and capacity-building programs should be implemented for judges, lawyers, and arbitrators to enhance their understanding of arbitration procedures and ensure competence in handling arbitration cases. Lastly, it would be beneficial to promote a culture of arbitration within the legal community and among businesses in Nigeria. This can be achieved by raising awareness about the advantages of arbitration as a dispute resolution mechanism through seminars, workshops, and publications.[35]

4.3. Conclusion

In conclusion, it is clear that there are several issues that need to be addressed to improve arbitration legislations in Nigeria. First and foremost, the lack of clarity and inconsistency in the existing laws need to be resolved through the enactment of a more comprehensive and unified arbitration law. Although the Arbitration and Mediation Act has been a tremendous improvement, it is not all encompassing. It is believed that the enactment of a more unified and all-encompassing law will greatly help the arbitration space. This will not only ensure predictability in the arbitration process but also enhance the enforceability of arbitral awards. Additionally, it is highly beneficial to establish specialized arbitration institutions that can administer and oversee arbitration proceedings effectively. These institutions should be equipped with the necessary infrastructure and resources, and staffed with professionals who possess the expertise and experience in handling complex arbitration cases. Furthermore, there is a need to enhance the capacity of arbitrators through specialized training programs to ensure their competence and professionalism. Lastly, efforts should be made to educate the public and promote awareness about the benefits of arbitration as an efficient and cost-effective alternative dispute resolution mechanism. By addressing these recommendations, Nigeria can establish itself as a hub for international arbitration, attract foreign investments, and ultimately contribute to its economic growth and development.

[34] F Emiri, G Deinduomo, "Law and Petroleum Industry in Nigeria" *African Books Collective*, (2009)

[35] E Onyema, "Rethinking the Role of African National Courts in Arbitration" *Kluwer Law International B.V.*, (2018) 28