**COURSE TITLE: ALTERNATIVE DISPUTE RESOLUTION**

**COURSE CODE: LPB 206**

**TOPIC: The Role of the Courts in Arbitration in Nigeria**

1. **Introduction**

The role and assistance offered by Courts in Nigeria is very important and essential to the overall success of arbitration in the country. A party before the commencement of arbitration may want to explore the right of hearing in court which could contravene a particular clause in their arbitral agreement and the other would also seek the intervention of the Court again to make the other party resort to *status quo ante* as agreed between the parties which is to give in for arbitration.

These are some of the vital roles performed by the court which this topic will explore with the backings of some decided cases to give insight to this essential role by the Courts.

* 1. **Enforcement of Arbitration Agreement**

Nigerian Courts have adopted a positive approach to the enforcement of arbitration agreements. A review of the decided cases shows a general recognition by Nigerian Courts of arbitration as a good and valid alternative dispute resolution mechanism. In ***C.N. Onuselogu Ent. Ltd. v. Afribank (Nig.) Ltd,[[1]](#footnote-1)*** the Court held that arbitral proceedings are a recognized means of resolving disputes and should not be taken lightly by both counsel and parties. However, there must be an agreement to arbitrate, which is a voluntary submission to arbitration.

Where there is an arbitration clause in a contract that is the subject matter of Court proceedings and a party to the Court proceedings promptly raises the issue of an arbitration clause, the Courts will order a stay of proceedings and refer the parties to arbitration. Although the Arbitration Conciliation Act (ACA) in Section 13 gives the arbitral tribunal power to make interim orders of preservation before or during arbitral proceedings, it does not expressly confer the power of preservative orders on the Court and Section 34 of the ACA limits the Courts’ power of intervention in arbitration to the express provisions of the ACA.

* 1. **Breach of an Arbitration Agreement**

The Nigerian Courts have a serious approach to the commencement of Court proceedings in an apparent breach of an arbitration agreement. Generally, where a party in Court proceedings raises the issue of an arbitration agreement promptly, the Court will uphold the arbitration agreement and stay proceedings pending arbitration. However, the Courts will usually require the requesting party not to have taken some positive steps in furtherance of the proceedings apart from appearance in Court. The Notice of Arbitration or any other evidence that arbitral proceedings have been set in motion will help to convince the Court that the party invoking the arbitration clause is serious and desirous of pursuing arbitration. But in the absence of that, the Courts are still inclined to stay proceedings in favour of arbitration upon being convinced that there exists a valid arbitration agreement.

However, while some Courts treat an arbitration agreement as a compelling ground for a stay of Court proceedings, others treat it as discretionary. This point is illustrated by the cases of ***M.V. Lupex V. N.O.C.[[2]](#footnote-2)*** and ***K.S.U.D.B. V. Fanz Ltd.[[3]](#footnote-3)***

**1.3 Determining Whether A Dispute Is Arbitrable or Not**

The ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the Courts. In ***Ogunwale v. Syrian Arab Republic***,[[4]](#footnote-4) the Court of Appeal held that the test for determining whether a dispute is preferable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. However not all disputes are necessarily arbitrable. Only disputes arising from commercial transactions are referable to arbitration.

Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for immediate enforcement of right or preservation of res e.g. the enforcement of fundamental human rights, application for Anton pillar, Mareva and other injunctions are less suitable for arbitration than litigation. In addition, since an arbitrator has no statutory power of joinder under the ACA, multi-party proceedings may be less suitable for arbitration unless the arbitration agreement makes specific provision for it.

* 1. **Jurisdiction And Competence**

Generally, by virtue of Section 12(4) of the ACA, a ruling by the tribunal on its jurisdiction is final and binding and is not subject to appeal. This is strengthened by Section 34 of the ACA which provides that “A court shall not intervene in any matter governed by this Act, except where so provided in this Act”. However, an aggrieved party who can prove circumstances of lack of impartiality or independence on the part of the tribunal can challenge the tribunal’s ruling in Court on the basis of Section 8(3) (a) of the ACA which provides that “An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”. But even so, the challenge should be first made to the tribunal itself unless the challenged arbitrator withdraws from office or the other party agrees to the challenge. If the other party does not agree to the challenge and the challenged tribunal does not withdraw, the Court can address the issue at the instance of the challenging party.

Also, the Court can address the issue of jurisdiction and competence of an arbitral tribunal after the award has been made and proceedings have been instituted for setting aside or refusal of recognition and enforcement of the award. Lack of jurisdiction is not expressly stated to be a ground for setting aside or refusal of recognition and enforcement of an award under the ACA so as to make it an issue which the Court can address, but it has been held to constitute misconduct on the part of the tribunal for which an award may be set aside under Section 30 of the ACA.

Where the seat of arbitration is Nigeria, mandatory laws of Nigeria would prevail over any agreement of parties that is contrary to public policy or that will amount to a contravention of another relevant law within the jurisdiction. For instance a choice of foreign law as the law governing the contract which is perceived to be intended to evade tax laws, or as an outright breach of constitutional provisions may not be upheld. Similarly, as a matter of public policy, Courts in Nigeria even in applying foreign law as the law chosen by the parties, are not obliged to apply provisions of foreign law that are incompatible with their own mandatory rules or those of another country with which the contract is closely connected. The doctrine of freedom of contract or party autonomy is exercisable to the extent of statutory restriction or intervention.

Under the ACA, parties are free to agree on the method of appointment of arbitrators but where they do not stipulate the method or the method chosen by them fails, the arbitrator(s) will be appointed by the Court. Section 7 of the ACA prescribes a default procedure. It provides that the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.

Where no procedure is specified, in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third but if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the Court on the application of any party to the arbitration agreement. In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the Court on the application of any party to the arbitration agreement made within thirty days of such disagreement.

Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under the procedure or the parties or two arbitrators are unable to reach agreement as required under the procedure or a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the Court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment. A decision of the Court under subsections (2) and (3) of section 7 shall not be subject to appeal.

The extent of intervention of the Courts is limited by section 34 of the ACA to the extent permitted by the ACA. The Court’s power of intervention as permitted by the ACA is limited to such issues as appointment of tribunal or substitute arbitrators, removal of arbitrator on ground of misconduct, making of interim orders, compelling attendance of witnesses, enforcement and recognition of awards or refusal of same, setting aside of awards. By virtue of Section 33 of the ACA, any procedural issues in arbitration ought to be raised before the tribunal and it is only if the tribunal fails to deal with the issues or does not adequately deal with them that the Court can be called upon to deal with the procedural issues after the conclusion of arbitral proceedings. This is usually done by way of an application to set aside the award in whole or in part or to refuse recognition and enforcement of same. In this regard Nigerian law is more in consonance with the Model Law and does not allow the United Kingdom Arbitration Act 1996 procedure which allows intervention by the Courts on various questions of law decided by the tribunal.

1. (2005) 1 NWLR Part 940 577 [↑](#footnote-ref-1)
2. (2003) 15NWLR (Part 844) 469 [↑](#footnote-ref-2)
3. (1986) 5 NWLR (Part 39) 74 [↑](#footnote-ref-3)
4. (2002) 9 NWLR (Part 771) 127, ] [↑](#footnote-ref-4)