CHALLENGES AGAINST AN ARBITRAL AWARD (JURISDICTION AND CONFLICTS)

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Background of Participants

• My Lords, you are the Court; determiners of rights and privileges in Nigeria’s justice architecture.

• Before your elevation to the Bench, many of you were practising lawyers; mostly litigation lawyers; typically pushing for good outcomes in the cases you handled.

• Now my Lords you deliver judgments impartially, but still guarding your jurisdictions jealously. Judges do everything to protect the sanctity of the judgments they deliver, against the possibility of their being easily overturned on appeal, right? Judges look to set up good precedents that will be upheld on appeal and cited with approval for a long time.
Background of Participants

• Some of you are trained arbitrators and do not need anyone to tell you how arbitration awards are arrived at; nor why it is important that awards remain final and binding in effect.

• Some of you do not know much about what arbitration is, and have never had the opportunity of a training or participation in arbitral proceedings.
Background of Participants

• **Yet some of you hate the idea of arbitration.** I’ve heard lawyers proudly chant ‘I’ll have my day in court! What’s this arbitration that can easily be set aside if you know what you are doing as a lawyer?!’

• This paper specially seeks those among you, if any, that are still operating under this subterfuge. This paper is premised on the idea that we all realize that LAW has moved on, GLOBALLY, especially in the area of commerce and construction industry. Courtroom leg work is no longer fanciful. The court dockets do not need to overflow endlessly with matters that can be sorted out in more business-friendly fashion, such as arbitration and other dispute resolution mechanisms. Commerce does not need the needless delays that used to be typical of court cases.
Background of Participants

• At this point: Ask yourself what category you fall into
• While you are at it, note that many Rules of Courts now recognize arbitration as one of the many doors open to disputants to settle matters, especially of a commercial nature; and with finality. In July this year we had the pleasure of attending the opening of the FHC Dispute Resolution Centre; The Uwais Centre has been there for a while; there’s one at the Court of Appeal
• The objective of this paper, is therefore, to bring to the same table, arbitrators and Judges, as co-participants in the Temple of Justice
The place of arbitration in final resolution of disputes

• Arbitration, unlike mediation is meant to end in an award that is binding and final. ‘Binding and final’ means that parties to an arbitration must accept the award given by the tribunal freely chosen by them, just as they accept a court’s judgment.

• Indeed on rendering an award, the arbitral tribunal becomes functus officio, same as judges after rendering judgments...

• The rule is that an award is final

• No appeal lies against an award except under given circumstances
EXCEPTIONS: Jurisdictional and Conflict issues

Challenge

• A Challenge is an ‘appeal’ or ‘recourse’ against an award, to (a properly constituted tribunal, if that is prescribed in the arbitral agreement), or to a court of law

• The UNCITRAL Model Law uses the term ‘recourse’

• Nigerian Law of Arbitration is modeled after the UNCITRAL Model Law
Challenge under ACA

• Note that the ACA deals with both domestic and international arbitration awards. Rarely do disputants like to lose. So yes, as judges, you will be called upon, to set aside arbitral awards.

• It is very important that you do not forget that you must not seek to re-litigate the subject matter of the arbitration. You will assume the position of an appeal court, with the notion that you are about to inspect what is meant to be ‘final and binding’ for possible defects
Preconditions for a Challenge
Redfern and Hunter’s three broad areas:

• 1. **Adjudicability**: eg non-existence of a valid and binding arbitration clause, or other grounds (Incapacity; invalid agreements to arbitrate, tribunal’s excess of powers, or non-arbitrability of the subject matter of the dispute)

• 2. **Procedural grounds**: eg failure to give notice of the appointment of arbitrator (or composition of the arbitral tribunal)

• 3. **Substantive grounds**: mistake of law; Public policy

**NOTE THAT**: i. Agreement of the parties and any local remedies must be exhausted

• ii. Requirements of Law of the Seat must be adhered to
Source

Nigerian Law of Arbitration (ACA)

• Sections 29, 30 and 48 ACA provide for Challenge

• ACA (incorporates Art 34 UNCITRAL Model Law and Article V of the New York Convention, 1958), into its Section 48.

• An application for setting aside must be made within three months of the date of the award or the matter would become statute barred.
Section 29 ACA

• (1) A party who is aggrieved by an award may, within three months –
• (a) From the date of the award: or
• (b) In cases falling within section 28 .... (for correction or interpretation) ... from the date the request for an additional award is disposed of by the tribunal, by an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

• (2) The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however, that if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.
Section 29 Contd.

• (3) The court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.

• **Note i.** that Section 29(2) allows the judge to excise an offending part of an award proved not to be part of the reference; thus preserving part of the award.

• ii. Subsection (3) anticipates that the judge may order the tribunal to reconvene to remedy the award, if found to contain extraneous matters.
Section 30 ACA

• (1) Where an arbitrator has misconducted himself, or where the arbitral proceedings 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.

• The notions of ‘misconduct’ of the arbitrator and ‘improperly procured award or proceedings’ go to establish lack of integrity and Conflict against the arbitrator, for which he can be dismissed by the court according to Section 30 (2).
Section 30 ACA Contd.

• Internationally, arbitrators are required to exhibit the highest level of integrity. Virtually all institutions have produced regulations and codes of ethics guiding the conduct of arbitrators.

• Arbitrators are trained to guard their professionalism over and above every other consideration. It is the integrity of an arbitrator that gives him the audacity to be able to declare his jurisdiction under the competence de la compétence (Kompetenz-kompetenz) concept, subject only to the agreement of the parties. (See Section 12 ACA)
Misconducts that raise Conflicts against the arbitrator or the proceedings

• ‘Misconduct’ is not defined by ACA. But NOTE the following from Common Law:

• Atkin J in *William v. Wallis & Cox* (1914)2 KB 497 at 485: ‘...such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice’; quoted in Orojo, et al, *Law and Practice of Arbitration and Conciliation in Nigeria*, 1999, at p. 274

• It means irregularity and breach of natural justice of fairness, transparency etc.
Misconduct Contd.

- Misconduct must be substantial to warrant setting aside an award. Eg
- Failing to decide all matters referred; deciding based on a different contract from the one based on which the matter before the tribunal arose.
- Award is inconsistent, or uncertain, or ambiguous.
- Irregularities in the proceedings, eg where arbitrator descends into the arena and takes examination of witnesses out of the hands of the parties; fails to act fairly between the parties, eg, hearing one party and refusing to hear the other, or failing to give a party opportunity to examine the evidence of the other party.
- Partiality, dishonesty; error of law on the face of the award.
- But note that mere mistake of fact; delay by arbitrator etc, are not misconduct as such.
Section 48 ACA

- The court may set aside an arbitral award –
  - (a) If the party making the application furnishes proof –
    - (i) That a party to the arbitration agreement was under some incapacity; or
    - (ii) That the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria; or
  - (iii) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or
• (iv) That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

• (v) That the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that if the decisions on matters submitted to arbitration can be separate from those not submitted, only that part of the award which contains decisions on matters submitted may be set aside; or

• (vi) That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision this Decree from which the parties cannot derogate; or
Section 48 ACA Contd.

• (vii) Where there is no agreement between the parties under sub-paragraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Decree; or

• (b) If the court finds –

• (i) That the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or

• (ii) That the award is against public policy of Nigeria.
Summary of Section 48

• 1. Incapacity of parties (or one of them)
• 2. Invalidity of the arbitral (or submission) agreement
• 3. Lack of notice (of appointment of arbitrators or of proceedings)
• 4. Excess of jurisdiction – matter not contemplated or exceeding the scope
• 5. Composition of arbitral tribunal or procedure not in conformity with parties’ agreement. Indeed if it can be established that parties were not ad idem on their agreement, an arbitrator lacks jurisdiction.
• 6. Non-arbitrability
• 7. Offends Public Policy of Nigeria
WRITING OF AN AWARD

• One notable aspect of an arbitration award that makes it easy for the judge to decide on whether or not sufficient grounds exist to set it aside, is the fact that the arbitrator recites in details every process he or she has followed to arrive at the final award.

• Many allegations made against an award, can be glimpsed from the award itself, except such allegations as improper conduct or bribery etc.

• What judges, therefore, need to do, is to view every application coming before Your Lordships, against the words of the award itself. A judge’s task is not to go outside the award to seek evidence or query the reasoning of the arbitrator in reaching a final decision.
Finally . . .

• As a learned Law Lord stated long ago:

• ‘... we must not be overready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings.’ Cockburn J. in Re Hopper (1961) 31 L. J. Ch. 420; Orojo, et al, at p. 274
• THANK YOU FOR YOUR ATTENTION MY LORDS!