Revamping the Arbitration Process in Nigeria in Ensuring Speedy Resolution of Commercial Disputes: A Consideration of the Case of *Mekwunye v. Imoukhuede*

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1. Introduction

As global trade continues to plummet due to the disruption of economic activities occasioned by the COVID-19 pandemic ("**COVID-19**" or the "**pandemic**"), the International Monetary Fund ("**IMF**" or the "**Fund**") foresees the world facing its worst recession since the great depression of the 1930s.[2] Thus, to foster global growth and economic stability, the Fund has offered emergency support to some of its member nations to cushion the effect of the acute economic impact of the pandemic. In order to support Nigeria's actual balance of payment needs induced by the sharp fall in international oil prices, IMF recently approved the sum of $3.4 Billion for Nigeria's emergency funding.[3]

Although, oil remains Nigeria's major foreign exchange earner and hence, the basis for the IMF funding, the current economic instability and reduction in Nigeria's gross domestic product ("**GDP**") is partly caused by the extreme economic challenges confronting businesses as a result of the pandemic and measures implemented to combat same. The National Bureau of Statistics pegs the contribution of small and medium scale enterprises ("**SMEs**") in Nigeria to the GDP at 48% in the last five years.[4] In fact, the World Bank posits that SMEs represent about 90% of businesses and account for 50% of employment globally.[5] Accordingly, the importance of SMEs to the Nigerian economy cannot be overemphasized and as such, plausible recovery plans must be implemented to address the harsh impacts of the pandemic.

One of the impacts of the pandemic on SMEs is the inability to meet contractual obligations which may likely result in invoking *force majeure* clauses, relying on the common law doctrine of frustration in the absence of *force majeure* clauses in contracts or simply terminating such contracts. While the pandemic may, indeed, qualify as a supervening event, determining the correctness of discharging an obligation under a contract on that basis may require judicial intervention. Thus, there is a looming threat of breach of contract litigation for businesses, post-COVID 19, for the determination of claims for damages. Litigation is one of the roadblocks SMEs must contend with as an aftermath of the pandemic and their business recovery plans must accommodate the utilization of the best procedure - in terms of effective time and cost management - in resolving such disputes.

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2 BBC News, "Coronavirus: Worst economic crisis since 1930s depression, IMF says", https://www.bbc.com/news/business-52236936, assessed on 25th April 2020.

3 The Guardian, "IMF approves $3.4 billion for Nigeria's emergency funding", https://guardian.ng/news/imf-approves-3-4-billion-for-nigerias-emergency-funding/, assessed on 28th April 2020.

4 The Nation, SMEs contribute about 48% to GDP https://thenationonlineng.net/smes-contribute-48-gdp/, assessed on 27th April 2020.

5 The World Bank, "Small and Medium Enterprises (SMEs) Finance, Improving SMEs access to finance and finding innovative solutions to unlock sources of capital", https://www.worldbank.org/en/topic/smefinance, assessed on 25th April 2020.

For effective time and cost management, arbitration is usually considered a preferred mode of resolving commercial disputes. In addition to the fact that it may preserve the business relationship of the disputing parties, it saves the time of the parties and reduces the cost that may be incurred in a protracted litigation. Consequently, invoking arbitration clauses in commercial agreements or executing submission agreements in the absence of an arbitration clause would aid the recovery of SMEs after the pandemic and limit the adverse effects such disputes may have on businesses in terms of cost and time wastage.

However, while arbitration is a fast-paced process in principle, its implementation as a post-COVID 19 business recovery plan for SMEs in Nigeria may be inhibited by judicial intervention as recently experienced in the case of ***Mekwunye v. Imoukhuede***.[6] There is therefore a need to urgently revamp the arbitration process in Nigeria, particularly as it relates to the intervention of courts, with a view to preserving its attraction as a time and cost saving alternative dispute resolution mechanism. The first section of the article briefly considers the arbitration process with a view to highlighting its time and cost saving benefits. The second section reviews the case of *Mekwunye v. Imoukhuede* and explains how judicial intervention retards the time and cost saving benefits of arbitration. The conclusion proffers pragmatic measures that can be implemented to preserve the concept of arbitration in its pristine form as being a time-effective and cost-effective process.

2. Time Management in Arbitration

The maximization of profit is the hallmark of businesses[7] and disputes are probable incidences of commercial transactions. Thus, the maximization of profit, when considered from the prism of dispute resolution, would entail the adoption of a time effective procedure geared towards saving cost associated with a prolonged adjudicatory process like litigation. Arbitration offers such effective time management and it can only be utilised upon the agreement of parties in writing.[8]

The written agreement of parties to submit to arbitration is a decision the law considers important as parties are precluded from reneging on it except with leave of court or the subsequent agreement of parties to rescind it.[9] In fact, while an arbitration agreement cannot oust the jurisdiction of courts,[10] courts are enjoined to give effect to the agreement of parties. Hence, where a party to a contract that contains an arbitration clause rushes to court without first opting to resolve the dispute through arbitration, the other party may, before taking other steps in the proceedings, apply to the court to stay proceedings pending the determination of the dispute through arbitration. The courts are usually not reluctant to stay proceedings pending the determination of arbitration which, on the average, only takes about 3 months to conclude.

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6 (2019) LPELR-48996(SC).

7 This entails effective time management when considered from the standpoint of economic touchstones like the Pareto principle of time management, the time perspective principle, opportunity cost among others.

8 Section 1, Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004

9 Section 2, Arbitration and Conciliation Act, Cap A18 Laws of the Federation of Nigeria, 2004

10 Section 6(6)(b), Constitution of the Federal Republic of Nigeria 1999 (as amended).

Upon the conclusion of arbitration and the delivery of an award, if the unsuccessful party does not willingly comply with the award, the successful party may approach the court for the enforcement of the award. However, the unsuccessful party may in deserving cases challenge the award in court. Judicial attitude, in recent times, in upholding unnecessary technical challenges to arbitration awards (with the attendant effect of either jettisoning such awards or extending their time of enforcement upon reversal of such decisions by a higher court) has impeded the efficacy of arbitration as an expeditious dispute resolution process. In *Mekwunye v. Imoukhuede*, it took about 12 years to uphold an award as a result of undue reliance on technicalities.

3. Review of *Mekwunye v Imoukhuede*

The appellant and the respondent executed a tenancy agreement containing an arbitration clause. After a dispute had arisen between the parties, the appellant prepared a notice of arbitration which was served on the respondent. Both parties submitted to arbitration and an award was made by the arbitrator in May 2007. When the appellant sought to enforce the award, the respondent by an originating motion sought to set aside the arbitral award. The trial court refused to set aside the arbitral award and this became the subject of an appeal at the Court of Appeal. Surprisingly, the Court of Appeal set aside the arbitral proceedings on the grounds that (a) the notice of arbitration was defective for non-compliance with Article 3(3) of the Arbitration Rules, (b) the arbitration institution referenced in the arbitration agreement was non-existent[11], (c) the arbitrator was not validly appointed as the appointing authority had only merely recommended her, and (d) the arbitrator misconducted herself when a letter of adjournment was written by the arbitrator on a firm's letter-head rather than on the arbitrator's personal letter head.

Upon appeal to the Supreme Court by the appellant, the apex court reversed the decision of the Court of Appeal on the basis, *inter alia*, that the respondent had waived his rights to challenge the award having participated in the arbitration proceedings without any objection. The decision of the Supreme Court which jettisoned technical justice has been lauded by stakeholders, who had criticized the decision of the Court of Appeal in several articles and seminars. Prior to the decision of the apex court, arbitration had taken a huge hit in terms of its attraction in the commercial realm as a timely dispute resolution process since the Court of Appeal failed to preserve the sanctity of the arbitration agreement and the ensuing arbitral award on the basis of technicalities.

Despite the fact that the Supreme Court corrected the negative perception that greeted the decision of the Court of Appeal, it took 12 years from the time the award was made in 2007 for the Supreme Court to affirm the award in 2019. The post-arbitration process in the case of *Mekwunye v. Imoukhuede* failed to satisfy the desired time-management result generally attributable to arbitrations. The parties must have (in addition to the cost of arbitration) expended a lot in prosecuting the dispute at the trial court, Court of Appeal and the Supreme Court. Though the Supreme Court has played its part in emphasising

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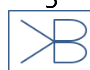
[11] In the arbitration agreement executed by the parties, the arbitration body was wrongly referred to as "Chartered Institute of Arbitrators, London, Nigeria Branch," instead of "Chartered Institute of Arbitrators, UK, Nigeria Branch". The Court of Appeal set aside the award on the basis of the fact that the "Chattered Institute of Arbitrators, London, Nigeria Branch", was a non-existent body.



the need to refrain from attaching importance to technicalities in arbitration, the process leading up to the decision cost the parties, particularly the appellant, who only benefitted from the award after 12 years. There is therefore a need to revamp the arbitration process and its challenge mechanism in ensuring the speedy resolution of disputes and the maximization of profit for SMEs and businesses generally.

4. Recommendation and Conclusion

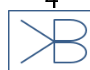
Expending time and resources on a 12-year dispute that could have been completely resolved in 3 months would undoubtedly limit the profit maximization goals of a business. No business wants to be caught in such legal web. In addition to the fact that businesses may suffer losses, it gives the country a bad reputation and undermines the ease of doing business when arbitration now takes as much time as litigation. Thankfully, the Supreme Court has already set the tone in *Mekwunye v. Imoukhuede*. However, other measures should be implemented to correct the anomaly.

One of such measures include the introduction of time limit(s) for determining a challenge to an award. Election petitions in Nigeria are constitutionally time-bound. A petition must be resolved within 180-days from the date of the declaration of results. Appeals lodged at the Court of Appeal must be determined within 60 days from the date of the judgment of the Tribunal and the Supreme Court also has 60 days to determine its Appeals.[12] In all, it takes 300 days to determine election petitions in Nigeria. This does not detract the courts from exercising the herculean task of reviewing the necessary Forms EC8s. Therefore, a similar time-bound challenge procedure can be implemented for arbitration considering its importance in encouraging the ease of doing business and maximization of profit. The entire arbitration process should not exceed six months, and this should be factored into the Regulation or an amendment of the Arbitration and Conciliation Act Cap A18 LFN 2004 imposing the time-limit. This would, in addition to the laudable provisions contained in the Arbitration and Conciliation Amendment Act (Repeal and Re-enactment) Bill currently pending before the National Assembly, enhance Nigeria's image as a global destination for arbitration.

In addition, expertise in arbitration should be made a criterion for judges and justices selected to determine cases filed to challenge arbitral awards. An arbitration expert is in a better position to appraise an arbitration agreement and an arbitral award in effectively determining a challenge to an award. This will reduce, to the barest minimum, falling into a similar error as the Court of Appeal did in the case of *Mekwunye v. Imoukhuede*. Resolution of these arbitration disputes is best served by **s**pecial knowledge or expertise on the part of the decision maker and the judiciary is therefore implored to invest in arbitration trainings for its justices.

Finally, there may be adverse consequences if parties simply adapt boilerplate arbitration clauses in resolving their disputes. An arbitration expert should be consulted at all times to either craft a bespoke arbitration clause to meet the needs of the principal agreement between the parties or review such

[12] Section 285, Constitution of the Federal Republic of Nigeria 1999 (as amended).



arbitration clauses. An arbitration expert would have easily discovered and pointed out that the agreement in the case of *Mekwunye v. Imoukhuede* referred to a non-existent arbitration body.