Domestic Arbitration In Nigeria: Can Foreign Counsel Still Run The Race?

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The Starting line

Party autonomy is a fundamental feature of arbitration globally. The concept of party autonomy is rooted in the understanding that parties to an arbitration process should be able to determine the conduct of their arbitration proceedings. Arbitration and awards thereof are essentially private arrangements by the parties, which the State simply puts into effect through subsequent enforcement.

One key manifestation of party autonomy is the choice of representation by the parties to the arbitral proceedings. *Article 4* of the United Nations Commission on International Trade Law Arbitration Rules ('UNCITRAL Rules') made pursuant to the UNCITRAL Model Law on International Arbitration (Model Law) underscores this position by providing that "*the parties [to arbitration] may be represented or assisted by persons of their choice…*".

It appears though, that the Nigerian domestic Arbitration Rules ('the Rules') made pursuant to the **Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 ('the ACA')**, has introduced a limitation to this freedom of choice of representation.

Article 4 of the Rules, provides that "*the parties [to arbitration] may be represented or assisted by* ***legal practitioners*** *of their choice…*" *(Emphasis supplied)*. It is useful to highlight that both the ACA and the Rules are adaptations of the UNCITRAL Model Law and Rules and Article 4 of the Rules is very similar to Article 4 of the UNCITRAL Rules save for the change from the word "*persons*" to "*legal practitioner*"

A tribunal in a pending domestic arbitration recently considered *Article 4* of the Rules regarding representation of the parties and held that the words *'legal practitioner'* in Article 4 restricts representation of parties to persons who are qualified to practice law in Nigeria. On that basis, the tribunal declared the foreign counsel who appeared for the

claimants not qualified to represent the claimants in the arbitration proceedings. Consequently a person who is not qualified as a 'legal practitioner' in Nigeria may not represent parties in domestic arbitration proceedings in Nigeria.

The tribunal's ruling raises a few considerations for parties to an arbitration and the practice of arbitration in Nigeria generally: Is the tribunal's interpretation of *Article 4 correct?* If so, is the qualification of representation in domestic arbitration by *Article 4* desirable? Are there any exceptions to the requirement for Nigerian legal practitioners in domestic arbitration? These questions are addressed below.

The Hurdle

The critical issue is the substitution of the word ***'persons'*** as contained in the UNCITRAL Rules with the words ***'legal practitioners'*** in Article 4 of the Rules. The term '*legal practitioner*' has a strict statutory definition under Nigerian Law. ***section 18*** of the **Interpretation Act, Cap I23, Laws of the Federation of Nigeria, 2004** provides that the term '*legal practitioner*', when used in any enactment, has the meaning assigned to it by the **Legal Practitioners Act Cap L11, Laws of the Federation of Nigeria, 2004 *('LPA')***. ***Section 24*** of the LPA defines a legal practitioner as a person entitled "*to practice as a barrister or as a barrister and solicitor, either generally or for the purpose of any particular office or proceedings*". By virtue of *section* ***2(1)(a)*** and ***(b)*** of the LPA, persons who may be entitled to practice as a barrister and solicitor include persons *whose names are on the roll* and persons *who have obtained a warrant of the Chief Justice of Nigeria upon an application made in that respect*. See ***Atake v. Afejuku (1994) 9 NWLR (Pt. 368) 379***

Thus, by the combined effect of the above provisions '*legal practitioner*' as specified under *Article 4* of the Rules is restricted to only persons who are qualified to practice law in Nigeria. *A' fortiori,* a person who has not been enrolled to practice law in Nigeria is not permitted to represent any party in domestic arbitration proceedings unless the Chief Justice of Nigeria, upon application by the party concerned, grants a warrant to such person to represent the party in that particular proceedings. It is in deference to this legal position that the earlier referred arbitral tribunal in the arbitration held that foreign counsel cannot represent the parties in a domestic arbitration governed by the Rules. This position, which applied to litigation by virtue of the Supreme Court decision in ***Awolowo v Sarki (1966) A.N.L.R. 171***, appears to have fuelled more worries that arbitration may in fact be shifting towards undue technicality.

The Stakes

In the light of the restrictive definition of *'legal practitioner',* It may be argued that in as much as *Article 4* of the Rules require participation of local counsel in

domestic arbitration, the provision lends support to 'local content' growth and may be viewed as deserving of commendation. Nevertheless, some of the perceived adverse repercussions of its strict interpretation deserve consideration too.

First, the restriction of representation to only Nigerian lawyers could constitute a subliminal disincentive to foreign investments in Nigeria. In an increasingly globalized world there is emphasis on the isolation of arbitration proceedings as much as possible from unnecessary inhibitions of local laws, in order to promote foreign investments. To insist then that legal representation in domestic arbitrations must be handled exclusively by local counsel appears to be a subversion of one of arbitration's key features. It could ultimately discourage potential foreign direct investors in Nigeria who may be more inclined to retain foreign counsel with whom they are more conversant to represent them in arbitral proceedings, particularly where the dispute is multi-jurisdictional and involves exceptionally substantial claims.

Secondly, *Article 4* of the Rules could trigger retaliatory measures by other States, who may likewise alter their rules by restricting representation in their domestic arbitration to local counsel and thus deny Nigerian practitioners the opportunity to acquire cross-jurisdictional experience that is essential in today's global market place.

For parties who are represented by persons not enrolled to practice law in Nigeria, *Article 4* of the Rules and its recent application by an arbitral tribunal presents a challenge. The role of foreign counsel would be limited to advisory or consultancy services in domestic arbitrations with only Nigerian lawyers able to represent parties formally.

Nonetheless, we are of the view that parties may avoid this restriction by removing the proceedings from the purview of domestic arbitration.

The Bypass

It would appear that the ACA creates an escape route for parties who desire to avoid the provision of *Article 4* of the Rules. Parties are at liberty to expressly designate their arbitration *'international'*, and on the strength of that designation, apply the UNCITRAL Rules (or any other international rule) in their arbitration proceedings. This position holds sway notwithstanding that the parties to the agreement are local entities.

The assertion above is deducible from the combined provisions of ***sections 15, 53*** and ***56*** of the ACA. For ease of reference, the relevant provisions in these sections are reproduced:

> ***Section 15(1)***:
>
> *'The arbitral proceedings shall be in accordance with the procedure*

contained in the Arbitration Rules set out in the First Schedule to this Act.'

Section 56:

(2) *'An arbitration is international if –*

(d) *'the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.'*

(5) *'Where a provision of this Act –*

(a) refers to the fact that parties have agreed or that they may agree; or

(b) in any other way refers to an agreement of the parties,

such agreement includes any arbitration rules referred to in the agreement.

Section 53*:*

'Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that the dispute in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.'

In interpreting the provisions above, practitioners agree that the provision of ***section 15*** of the ACA relates solely to domestic arbitration. The mandatory language in which the section is rendered suggests that the applicability of the provisions of the Rules may not be derogated from in domestic arbitrations. Thus, it does appear settled that the restriction on representation by foreign counsel contained in *Article 4* of the Rules must be observed in domestic arbitrations.

In ***Section 56(2)(d)*** however, the ACA defines *'international arbitration'* to include any arbitration that the parties have expressly agreed in their agreement to treat as such notwithstanding the nature of the contract. The poignancy of this definition lies in the words: *'despite the nature of the contract…'*. These words, demonstrate beyond doubt that the parties' discretion to expressly designate their arbitration as *'international'* is neither fettered nor circumscribed by the nature of their contract. *A' fortiori,* such considerations as the citizenship of the parties, the place of performance of the contract and related matters have no bearing on the recognition of parties' arbitration as being *'international'* once the parties have declared it to be so.

The practical application of ***section 56(2)(d)*** would therefore mean that parties could validly agree to treat arbitrations arising out of their commercial transactions as ***"international"*** notwithstanding that every aspect of their contract is to be performed in Nigeria, and by Nigerians. If so, the crucial question would then be: what assistance would this approach afford in avoiding the provision of *Article*

4 of the Rules? Or better still, what is the correlation between an international arbitration and *Article 4* of the Rules?

Section 53 appears to proffer an answer to the above questions. The provision thereof gives parties to international commercial transactions the freedom to determine the arbitration rules that would regulate the conduct of their proceedings. The parties may agree to arbitrate '*in accordance with the Arbitration Rules…, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties*'. This position may be contrasted with the analogous position in domestic arbitration, where *section 15* appears to have made application of the Rules mandatory in such proceedings.

It follows therefore that where parties have expressly designated arbitrations arising from their contract as **'international'**, the ***'internationalization'*** of such arbitrations would confer on the parties a concomitant right to designate the applicable arbitration rules. Accordingly, parties who comply with the provision of ***section 56(2)(d)***, and who are adverse to the restriction on foreign counsel contained in *Article 4* of the Rules, could nominate the UNICTRAL Rules or any other international rules to govern their proceedings. Clearly, there is no restriction on foreign counsel where the arbitration is international.

Further support for the foregoing position may be located in ***Section 56(5)***, which in effect provides that where the ACA refers to an agreement between parties, such agreement includes any arbitration rules referred to in the agreement. Therefore, if parties agree to treat their dispute as international arbitration as permitted by *section 56(2)(d)*, any arbitration rules designated by the parties will be enforceable as part of that agreement.

Going forward, the practical point to note from the provisions above may be summed up thus: **where contracting parties are uncomfortable with the restriction on foreign counsel representation contained in *Article 4* of the Rules, they may be able to eliminate same by including a declaration in their contract that arbitrations arising thereof are international, and are to be governed by any international arbitration rules of their choice**.

For parties whose contracts are already subsisting, similar results may also be achieved by execution of supplementary arbitration clauses tailored towards the same effect.

Another possible escape route for parties who desire to avoid the provision of *Article 4* of the Rules could arise in situations where a contractual claim also gives rise to a Bilateral Investment Treaty ("BIT") claim. This is especially where the requirement for parties to exhaust all local remedies is not a prerequisite to triggering a BIT claim.

Accordingly, where a parties' claim in arbitration also falls within the framework of an existing BIT, rather than

commence domestic arbitration under the Rules, such a party has the option to side step the Rules by electing to pursue the BIT arbitration under the relevant BIT and is thus free from the "shackles" of *Article 4* of the Rules.

Ironically, the Rules itself will be the first victim if the foregoing approach becomes widespread as the repeated boycott of its application could ultimately undermine its usefulness. Taking this into consideration, it is suggested that the provision of *Article 4* of the Rules should as much as possible be amenable to liberal interpretation. One way of doing this would be to construe the may in "*the parties may be represented or assisted by legal practitioners of their choice*…" as being permissive enough to allow parties to validly exclude the applicability of the prohibition on foreign counsel by express or implied consent, or in their arbitration agreement. This could potentially deflect the negative impact of *Article 4* of the Rules on party autonomy whilst simultaneously encouraging parties to adopt the Rules in the conduct of their arbitration proceedings.

Finally, it may be pertinent to note that a challenge on an award resulting from domestic arbitration under the ACA, on the ground that the successful party was represented by foreign counsel, may be futile if no timely objection was raised to such representation during the arbitration proceedings. This view is informed by ***Section 33*** of the ***ACA,*** which provides that:

> *"A party who knows –*
>
> *a. that any provision of this Act from which the parties may not derogate; or*
>
> *b. that any requirement under the arbitration agreement,*
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> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance within the time limit provided therefore shall be deemed to have waived his right to object to the non-compliance."*

Accordingly, where foreign counsel appears in an arbitration to which the ACA and the Rules are applicable, and the adverse party fails to either raise an objection or to do so within a reasonable time, such adverse party will be deemed to have waived his right to object to the non-compliance with the law.

The Finish Line

Protectionist laws are like the double edged sword which could harm the swordsman as much as the swordsman may use it to harm others. The restriction in *Article 4* of the Rules could have a net negative impact on domestic arbitrations should parties consistently designate their otherwise domestic arbitrations 'international'. It could also result in retaliatory legislation in other jurisdictions which would limit Nigerian practitioners. It remains to be seen whether other tribunals will take the same view going forward but it has become essential for

parties to commercial agreements with arbitration clauses to make adequate preparations for the hurdle of *Article 4* of the Rules before commencing their domestic arbitration race.

Contact

• **Oghogho Akpata**, *Managing Partner:*
+234 1 461 1891 (direct),
+234 802 291 0062 (mobile);
e-mail: **ogh.akpata@templars-law.com**

• **Adewale Atake**, *Partner & Head, Dispute Resolution:*
+234 1 279 9398 (direct),
+234 803 308 8759 (mobile);
email: **wale.atake@templars-law.com**

www.templars-law.com