



THE SCOPE OF ARBITRATION CLAUSES IN AGREEMENTS IN NIGERIA: AN OVERVIEW

DUSU THOMAS SHUT * & YEBO STEPHEN DABUP **

Abstract

This article seeks to examine the scope of arbitration agreements in contracts between parties. It also appraises the sources of arbitration law, the nature and basis of arbitration and what constitutes arbitration agreement. The article sheds light on the status of arbitration clause in a contract and whether said clause is independent and autonomous of the contract. It also examines the rights of parties to an agreement containing arbitration clause, the benefits of arbitration as an alternative dispute resolution mechanism and the consequences of an arbitral declaration on parties. The requirements of a valid arbitration agreement, how to draft a valid arbitration clause, the right of parties to include arbitration clause in their agreement and how an arbitral award is enforced vis-à-vis the Arbitration and Mediation Act, 2023 is discussed. Using the doctrinal research methodology, this article examines the nature of arbitration clause and how it can be executed or terminated, what disputes can be referred to arbitration. The powers and roles of the institution or body saddled with the responsibility of governing the arbitration process protecting the rights of parties who enter into agreements containing arbitration clauses. The loopholes in the laws governing arbitration clauses are laid bare and practical recommendations are proffered for the purpose of ensuring proper drafting and execution of arbitration clauses in agreements in Nigeria.

Keywords: Litigation, Contract, Arbitration, Arbitrator, Arbitration Clause, Arbitration Agreement

INTRODUCTION

Litigation is not the sole method by which disputes are resolved. There are other options, i.e., dispute resolution mechanisms. Arbitration is one of the various ways of resolving disputes. What this means is that disputing parties can resort to Arbitration, rather than a long-drawn litigation that will incur heavy cost, financially and materially. Arbitration is a procedure for the settlement of disputes. It is pertinent to state that under this procedure, the parties agree to be

bound by the decision of an arbitrator whose decision is, in general, final and binding on the disputing parties legally. Another interesting feature of arbitration is that the process derives its force principally from the agreement of the parties and, additionally, from the State as supervisor and enforcer of the legal process. Consequently, where two or more parties to a dispute agree that a dispute or potential dispute between them shall be decided by one or more impartial persons or umpires of their choice, in a manner that is both legally binding and judicial, the agreement is called an arbitration agreement.

In Nigeria, the common law, *lex non scripta*, and statute are the two sources of arbitration law. The statutory source did not codify arbitration law to the exclusion of common law. Parties to a dispute can resort either to litigation, i.e., to the courts, or to arbitration as a dispute-resolution mechanism. The disputing parties to a contract can resort to arbitration by mutual agreement in writing. This occurs when an arbitration clause is inserted into the contract or agreement. The arbitration clause in a contract is independent or autonomous, in the sense that it has its own life. Captured more succinctly, the arbitration clause or agreement can be drafted separately or it may form part of the transaction between the parties. It is crucial to state that where the arbitration clause is part of the contract, it is regarded in law as a separate contract, with a life of its own.

Flowing from the foregoing, where there is repudiation or total breach of a contract, the arbitral clause survives. Put in another way, the termination of an agreement by a party, or the breach of a contract by a party, does not terminate the arbitration agreement. Rather, it is a precursor to the arbitration agreement, which means that the breach of a contract that contains an arbitration clause or an arbitral clause, is what activates the arbitration agreement.

THE NATURE, MEANING AND BASIS OF ARBITRATION

Before delving into the nature and basis of arbitration, it is apt to understand what a dispute means. A dispute means a conflict or controversy, particularly of the type that has given rise to a particular case. Arbitration is a procedure for the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is, in a general sense, final and binding legally on the disputing parties.¹ The process of arbitration derives its strength and force

* **D.T. Shut** LLB, BL LLM (Uni-Jos), Lecturer II, Faculty of Law, Plateau State University, Bokokos. Phone number: 08060691007. E-mail: dusushut@plasu.edu.ng

** **Yebo S. Dabup** LLB, BL, LLM (Uni-Jos), Magistrate, Plateau State Judiciary. Phone number: 08137574955. E-mail: yebostephen@gmail.com

from the parties principally, and from the State additionally. This is because the State supervises and enforces the legal process.² Therefore, where two or more parties agree that any dispute or any potential dispute between them shall be resolved or decided in a legally binding way by one or more neutral persons of their choice, in a judicial manner, such an agreement is called an arbitration agreement.

Arbitration can also be defined as a process of dispute resolution in which a neutral third party called arbitrator renders a decision after hearing at which both parties have an opportunity to be heard.³ It is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.⁴ The Arbitrator, who is not an umpire, has the jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, i.e., something other than what the parties submitted to him for determination, he will be acting outside his authority. Consequently, the whole proceedings will be null and void and of no effect. This will include any award he may subsequently make.⁵

THE STATUS OF ARBITRATION CLAUSE IN CONTRACTS

An arbitration clause in a contract is autonomous and independent of the contract. The arbitration agreement may be drawn up separately or may form part of the transaction between the parties. Where the arbitration clause is part of the contract, it is nevertheless regarded in law as a separate contract.⁶ Accordingly, where there is a repudiation or total breach of a contract, the arbitral clause survives. On this point, the case of *U.B.A. Plc v. Trident Consulting Ltd.*⁷ is instructive. In the aforesaid case, the Supreme Court held as follows:

“...I agree with the court below when it held on page 176 of the records as follows:

“I think the termination of the contract without paying the owed invoices did not do away with the arbitration agreement. Rather it was the precursor to the arbitration agreement. In other words, the alleged breach of the contract to make good the unpaid invoices generated the disagreement or controversy between the parties bringing to the fore or activation the fall-back facility of the arbitration agreement for possible amicable settlement.”

¹ *U.B.A. Plc v Trident Consulting Ltd.* [2023] 14 NWLR (Pt 1903) 95 at 127, paras. C-D.

² *Ibid.*

³ *Ayisagi (Nig.) Ltd. v S.B. & F. (Nig.)* [2024] 6 NWLR (Pt 1933) 57 at 73, paras. A-D.

⁴ *Ibid.*

⁵ *Nigerian Petroleum Corporation (NNPC) v Lutin Investments Ltd.* [2006] 2 NWLR (Pt 965) 506.

⁶ *Ibid* at 1, 95 at 130, paras. B-H.

⁷ *Ibid.*

...The courts have always upheld the autonomy and independence of the arbitration clause in the contract. The arbitration agreement may be drawn up separately or may form part of the transaction between the parties. Where the arbitration clause is part of the contract, it is nevertheless regarded in law as a separate contract....”

Flowing from the foregoing, it is pertinent to state that the severability and autonomy of an arbitration clause from the contract to which it relates is to the effect that an arbitration clause which forms part of a contract shall be treated as an arrangement independent of the other terms of the contract and a decision by the arbitral tribunal and that the contract is void shall not affect the validity of the arbitration clause. Section 14 (2) of the Arbitration and Mediation Act, 2023 provides:

“For the purpose of subsection (1), an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is void does not entail ipso jure the invalidity of the arbitration clause.”⁸

Section 3 of the Act, 2023 provides that unless a contrary intention is expressed by the parties in an agreement or a contract, an arbitration agreement is irrevocable except by agreement of the parties or by leave of the court or judge.⁹ As has been noted earlier, an arbitration clause is activated by the dispute between the parties to the arbitration agreement. It is the dispute that should be submitted to arbitration. The law of arbitration envisages that where an arbitration clause exists and there is a dispute between the parties, they should submit the technical and delicate issues inherent in the subject of the contract to an impartial arbitrator or a group of arbitrators versed in the technical nuances of the contract for proper resolution. The appointment of the arbitrators must be mutually done or consented to by the disputing parties. Afterward, when that portion of the dispute is resolved between the parties, then the contract may be mutually terminated before the parties go further to fulfill other yet-to-be-performed portions of the works hitherto contracted.

REQUIREMENTS OF A VALID ARBITRATION CLAUSE

⁸ S. 14 (1), Arbitration and Mediation Act, 2023.

⁹ S. 3, AMA, 2023.

Every arbitration agreement must satisfy the normal requirements of a contract such as consensus, capacity and legal relationship. Like any other contract, the terms must be clear and certain. There must also be a valid underlying substantive contract in existence and an arbitration agreement, the terms of which are certain and enforceable. The court would, however, lean towards a construction that will give effect to the intentions of the parties.¹⁰

The essence of an arbitration agreement is to refer disputes arising between parties to arbitration. The words by which the reference is made must therefore be clear and express, as an inference will not be implied. So also, what is referred must be clearly and sufficiently stated to ensure that jurisdiction is conferred on the arbitrator. Where the arbitration clause covers all the disputes arising from the contract or transaction without any limit, the arbitrator ought to have power to deal with such a dispute in order to avoid multiplicity of actions.¹¹ It should be borne in mind that parties to a contract can include an arbitration clause which allows for disputes to be settled by arbitration instead of litigation. At the end of the arbitration process, the agreement reached, i.e., the award would be enforced by the courts after registration in court.

DISPUTES TO BE REFERRED TO ARBITRATION

The scope of arbitration clauses is considered in their natural meanings within the context and circumstances of each case. Disputes which are subject of an arbitration agreement must be arbitrable. What this implies is that criminal matters or disputes where fraud is alleged and raised are, as a matter of public policy, not to be settled privately by arbitration.¹² A claim for defamation arising out of libel is a claim at common law. It remains a question of law and can only be effectively determined by a court of law. An arbitrator or an arbitral panel is not imbued with the power to answer legal questions. Consequently, an arbitrator cannot grant a relief for damages arising from the determination of the legal question.

Parties who refer any disputes arising from their legal relationship to arbitration clearly intend to avoid other usual or ordinary ways or methods of settling disputes, such as litigation in ordinary courts which involves cumbersome procedures, unimaginable delays, expenses and general inconvenience.¹³

BINDINGNESS OF ARBITRATION CLAUSE ON PARTIES AND COURT

¹⁰ Ibid at 1, 132, paras. D-F.

¹¹ Ibid at 1, Pp. 132-133, paras. G-A.

¹² *Baker Marine (Nig.) Ltd. v Chevron (Nig.) Ltd.* [2006] 13 NWLR (Pt 997) 276.

¹³ *Mainstreet Bank Capital Ltd. v Nig. RE* [2018] 14 NWLR (Pt 1640) 423.

Where parties to an agreement make provision for arbitration before an action can be instituted in a court of law, any aggrieved party must first seek the remedy available in the arbitration. This raises the poser: What is the effect of non-compliance with arbitration clause? The answer is not farfetched. If a party goes straight to the court to file an action without reference to the arbitration clause as contained in the agreement, the court of law in which the action is filed is bound to decline jurisdiction in the matter. However, it should be noted that before a court of law can decline jurisdiction based on arbitration clause, the law requires that such clause must be mandatory, precise and unequivocal.¹⁴

Furthermore, once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court should give regard to the contract by enforcing the arbitration clause. It is therefore the general policy of the court to hold parties to the bargain into which they had entered, unless there was a strong, compelling and justifiable reason to hold otherwise or interfere.¹⁵ The case of *Onward Ent. Ltd. v. MV. Matrix*¹⁶ is instructive. In the said case, the court held thus:

“Once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court should give regard to the contract by enforcing the arbitration clause. ...It is therefore the general policy of the court to hold parties to the bargain into which they had entered unless there was a strong, compelling and justifiable reason to hold otherwise or interfere. In the instant case appellant who had the onus to advance compelling reason as to why this court should not interfere with the discretionary power of the trial Judge had failed to do so. There is nothing to show that the arbitration agreement was imposed on the appellant. Since both parties voluntarily entered into the agreement same should therefore be binding on them. ...Appellant must honour the agreement.”

(Underlined for emphasis).

Flowing from the foregoing, the effect of non-compliance with arbitration clause is that where a party goes straight to court instead of complying with an arbitration clause in an agreement, the defendant has a remedy. The remedy is by way of stay of proceedings pending the determination of arbitration. The court, once it is satisfied that there is no sufficient reason preventing it from

¹⁴ Ibid at 3, P. 73, paras. D-F.

¹⁵ *Onward Ent. Ltd. v MV “Matrix”* [2010] 2 NWLR (Pt 1179) 530 at Pp. 557-558, paras. F-A.

¹⁶ Ibid.

referring the matter to arbitration, would stay proceedings.¹⁷ By virtue of section 5 (1) of the Act, the court is empowered to refer the parties to arbitration. For the sake of clarity, the said provision is reproduced as follows:

“5. (1) Notwithstanding the provisions of any other law, a court before which an action is brought in a matter, which is the subject of an arbitration agreement shall, if any of the parties request, not later than when submitting their first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is void, inoperative or incapable of being performed.”¹⁸

What is more, subsections (2) and (3) of the same section 5 of the Act provides:

“(2) Where an action referred to in subsection (1) has been brought before a court, arbitral proceedings may be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

(3) Where a court makes an order for stay of proceedings under subsection (1), the court may, for the purpose of preserving the rights of parties, make an interim or supplementary order as may be necessary.”

In light of the above provisions, it is crystal clear that the right to invoke the arbitration clause must be asserted before a party takes any other step in the proceedings. Where parties to a contract have, under the terms of said contract, agreed to submit to arbitration if there is any dispute arising from the contract between them, a defendant who has not taken any steps in the proceedings commenced by the other party may apply to the court for stay of proceedings of the action, to enable the parties go to arbitration as contracted.¹⁹ The case of *Enyelike v Ogoloma*²⁰ is instructive on this point. In the aforesaid case, the court stated that:

“...if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay proceedings. In the instant case, either the appellant or the respondents had the right to, at any time after entering an appearance but before filing any pleadings (including statement of defence) or taking any other steps (e.g. filing

¹⁷ [2003] 15 NWLR (Pt 844) 469.

¹⁸ AMA, 2023.

¹⁹ Ibid at 15, 557, paras. E-F.

²⁰ [2008] 14 NWLR (Pt 1107) 247 at Pp. 257-258, paras. E-A.

of motions), apply to the court to stay the proceedings. It was therefore inappropriate for the appellant who had filed a statement of defence and a counter-claim to file a Notice of Preliminary Objection to dismiss the suit.”

Let it be borne in mind that an application seeking for stay of proceedings to enable parties refer to arbitration is not granted as matter of course. For such an application to be granted, the condition precedent is that the applicant must have taken no step in the proceedings. Consequently, there is no gainsaying that to succeed in application for stay of proceedings, the applicant is duty bound to refrain from taking any step in the proceedings. In the event that a party jumps the gun of arbitration and files an action in a court of law, the defendant has the right to stay the proceedings. The court shall, if it is satisfied that there is no cogent reason why the matter should not be referred to arbitration, stay the proceedings.²¹ This is in tandem with section 5 (1), (2) and (3) of the Act as reproduced earlier.

NATURE OF ARBITRAL TRIBUNAL

Jurisdiction, it has been stated time and gain, is the lifeblood of adjudication, the absence of which renders proceedings null and void, from the beginning to the end. Arbitration proceedings are, by their very nature, *sui generis*²². Consequently, instituting an action for breach of contract before the trial court is not the same as instituting an action for the enforcement and recognition of an arbitral award. At this juncture, it is pertinent to state that an arbitral award is regarded as a final and conclusive judgment on all matters referred, and the courts are enjoined, as far as possible, to uphold and enforce arbitral awards, having regard to the fact that it is a mode of dispute resolution voluntarily agreed upon by the parties.²³

Furthermore, an agreement to submit a dispute to arbitration does not automatically oust the jurisdiction of the court. Therefore, either party to such an agreement may, prior to when submission to arbitration is made, commence legal proceedings regarding any claim or cause of action contained in the submission. At common law, the court has no jurisdiction to stay such proceedings. Where, however, there is a provision in an agreement for submission to arbitration, the court has jurisdiction to stay proceedings by virtue of its power under section 5 of the Act. Thus, where the defendant abstains from asking for a stay of proceedings, or if the trial court in

²¹ *Kurubo v Zach-Motison (Nig.) Ltd.* [1992] 5 NWLR (Pt 239) 102.

²² *A.-G., Bayelsa State v Odok* [2025] 4 NWLR (Pt 1982) 385.

²³ *NITEL Ltd. v Okeke* [2017] 9 NWLR (Pt 1571) 439.

its discretion deems expedient to refuse to stay proceedings, then the court duly seised of the dispute can decide the rights of the parties.²⁴

Arbitration and litigation are not mutually exclusive. The court complements and supplements the functions and powers of the arbitrator; for example, by staying court proceedings in appropriate cases, or by issuing subpoena, or by appointing arbitrators where the parties cannot agree or where a party defaults on appointment of arbitrators, and by enforcing awards or setting aside awards where necessary. In those cases, the court intervenes to ensure the proper functioning of arbitration.²⁵

Furthermore, despite an existing arbitration agreement, there are some instances where, even though parties have submitted to arbitration, the suitability of litigation preponderates over arbitration. Such instances²⁶ include:

- (a) where the issue for resolution is essentially a legal one; or
- (b) where the issue turns largely on the credibility of the evidence; or
- (c) where immediate enforcement of a right is required; or
- (d) where one of the parties is intransigent; or
- (e) where there are multi-party disputes arising from a transaction.

Thus, as has been noted earlier, an arbitration agreement cannot and does not completely oust the jurisdiction of the court. The general position at common law is that where there is an arbitration clause, a court can refer a case before it to arbitration and compel the parties to submit thereto. Under the Act²⁷, the court does not order the parties to submit to arbitration, hence the need to satisfy the court of the willingness and readiness to arbitrate. Thus, where an order is made pursuant to the Act, the implication is that the party who fails and or refuses to submit to arbitration flouts the order of court, and contempt proceedings could be commenced against him. Before an applicant moves the court to stay proceedings pending arbitration, there must be in existence an arbitration proceedings or specific things done by the applicant like appointing an arbitrator(s), filing a statement, etc.²⁸ It is apparent that the intention of the draftsmen of the Act is that the provision only applies where the arbitration proceedings have, in fact, been initiated,

²⁴ *Sakamori Const. (Nig.) Ltd. v. L.S.W.C.* [2022] 5 NWLR (Pt 1823) 339.

²⁵ *Ibid* at 1, P. 128, paras. A-B.

²⁶ *Ibid*, paras. C-E.

²⁷ S. 5, AMA, 2023.

²⁸ *Ibid* at 1, P. 137, paras. B-G.

i.e., either party may have filed their statement before the arbitral tribunal. By virtue of section 14 (1) of the Act, the arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Furthermore, in any arbitral proceeding, a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission to the points of defence and a party is not precluded from raising such a plea by the fact that it has appointed or participated in the appointment of the arbitrator.²⁹ By virtue of section 14 (4) of the Act, a plea that an arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings and the arbitral tribunal may, in a case falling either under subsection (3), admit a later plea where it considers the delay justified.

Under the Act³⁰ the arbitral tribunal may rule on any plea referred to it under section 14 (3) and (4), either as a preliminary objection or in an award on the merits and the ruling is final and binding. In the event that the tribunal rules as a preliminary question that it has jurisdiction, the party may request, within thirty (30) days after having received notice of the ruling, the Court to decide the matter.³¹ By virtue of section 14 (7) of the Act, where the arbitral tribunal rules on its jurisdiction as a preliminary question, it may continue with the proceedings and make an award notwithstanding that a party has recourse to a Court in respect of such ruling.

Let it be borne in mind that in arbitral proceedings, the arbitral tribunal shall decide the disputes in accordance with the rules of law that is chosen by the parties as applicable to the substance of the dispute.³² Any designation of the law or the legal system of a given jurisdiction or territory shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction or territory and not to its conflict of law rules.³³ By virtue of the Act³⁴, where the parties fail to choose or designate any law or legal system of a given jurisdiction or territory as required as required by the Act³⁵, the arbitral tribunal shall apply the law determined by the conduct of law rules which it considers applicable. Unless the parties have expressly authorized it to do so, the arbitral tribunal shall not decide *ex aequo et bono* or as *amiable compositeur*.³⁶

²⁹ S. 14 (3), AMA, 2023.

³⁰ S. 14 (5), AMA, 2023.

³¹ S. 14 (6), AMA, 2023.

³² S. 15 (1), AMA, 2023.

³³ S. 15 (2), AMA, 2023.

³⁴ S. 15 (3), AMA, 2023.

³⁵ Ibid at 32.

³⁶ S. 15 (4), AMA, 2023.

Furthermore, the arbitral tribunal has the power to grant interim measures. As the name implies, an interim measure is a temporary measure, whether in the form of an award or in another form, which, at any time before the award which decides the dispute is issued, the arbitral tribunal orders a party to:

- (a) maintain or restore the status quo pending determination of the dispute;
- (b) take action that may prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute or preserve the subject matter of the arbitration itself.³⁷

In arbitral proceedings, the arbitral tribunal shall ensure that parties are treated equally and each party is given reasonable or ample opportunity to present its case. In addition, the arbitral tribunal shall ensure that each party is accorded a fair resolution of the dispute without unnecessary delay or expense.³⁸ Subject to the provisions of the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, provided that where parties do not have arbitral agreement, the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules.³⁹

Under the said Rules⁴⁰, where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Act, then such disputes shall be settled in accordance with the Rules subject to such modifications as the parties may agree. Article 2 provides that the Rules shall govern the arbitration, except where any of the Rules conflict with a provision of the Act. The implication is that the provisions of the Act shall prevail.

COMPOSITION OF THE ARBITRAL TRIBUNAL

The Act⁴¹ provides that where parties have not previously agreed on the number of arbitrators, and if within thirty (30) days after the receipt by the respondent of the written communication containing a request for the dispute to be referred to arbitration the parties have not agreed that

³⁷ S. 20, AMA, 2023.

³⁸ S. 30, AMA, 2023.

³⁹ Article 1, Arbitration Rules.

⁴⁰ Ibid.

⁴¹ A. 7, AR.

there shall be only one arbitrator, one arbitrator shall be appointed. However, where no other parties responded to a party's proposal to appoint a sole arbitrator within the time limit provided by the Rules and the party or parties concerned have failed to appoint a second arbitrator in accordance with the Rules⁴², the appointing authority may, at the request of a party, appoint a sole arbitrator if that is most appropriate in light of the circumstances of the case.

The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case –

- (a) the appointing authority shall communicate to each of the parties an identical list containing at least three names;
- (b) within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference.
- (c) after the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties; and
- (d) where for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.⁴³

ARBITRAL PROCEEDINGS

The arbitral tribunal may, subject to the Rules, conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case. In exercising its jurisdiction, the arbitral tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.⁴⁴ As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal

⁴² Art. 9 & 10, AR.

⁴³ Art. 8 (2), AR.

⁴⁴ Art. 17 (1), AR.

may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under the Rules or agreed by the parties.⁴⁵

If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.⁴⁶ All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.⁴⁷ The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party in accordance with the Act⁴⁸, provided such a person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joined should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.⁴⁹

Regarding the seat and venue of arbitration, where parties have not previously agreed on the seat of the arbitration, the seat of the arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the arbitration. The award shall be deemed to have been made at the seat of the arbitration.⁵⁰ The arbitral tribunal may meet at any location (venue) it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.⁵¹

Subject to an agreement of the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. The determination shall apply to the points of claim, the points of defence, any further written statements and, if oral hearings take place, to the language or languages to be used at such hearings.⁵² The arbitral tribunal may order that any documents annexed to the points of claim or points of defence, and any

⁴⁵ Art. 17 (2), AR.

⁴⁶ Art. 17 (3), AR.

⁴⁷ Art. 17 (4), AR.

⁴⁸ S. 40, AMA, 2023.

⁴⁹ Art. 17 (5), AR.

⁵⁰ Art. 18 (1), AR.

⁵¹ Art. 18 (2), AR.

⁵² Art. 19 (1), AR.

supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.⁵³ At the closure of hearings, the arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.⁵⁴ It is important to point out that the arbitral tribunal, may, if it considers it necessary owing to exceptional circumstances decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.⁵⁵

A party who fails to object promptly to any non-compliance with the Rules or with any requirement of the arbitration agreement shall be deemed to have waived its right to make such an objection, unless such party can demonstrate that, in light of the peculiar facts and circumstances, its failure to object was justified.

When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitral tribunal⁵⁶, and in the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.⁵⁷ It is needful to state that by virtue of the Rules⁵⁸, all awards made by the arbitral tribunal must be in writing and shall be final and binding on the parties who shall undertake to carry out the award without delay. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.⁵⁹ An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the seat of the arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.⁶⁰ It should be borne in mind that under the Rules⁶¹, the award may be made public only with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a

⁵³ Art. 19 (2), AR.

⁵⁴ Art. 39 (1), AR.

⁵⁵ Art. 39 (2), AR.

⁵⁶ Art. 41 (1), AR.

⁵⁷ Art. 41 (2), AR.

⁵⁸ Art. 42 (2), AR.

⁵⁹ Art. 42 (3), AR.

⁶⁰ Art. 42 (4), AR.

⁶¹ Art. 42 (5), AR.

Court or other competent authority. The arbitral tribunal shall communicate signed copies of the award to the parties.⁶²

The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. In the event that the parties fail to so designate, the arbitral tribunal shall apply the law which it deems appropriate.⁶³

ARBITRAL AWARDS

Arbitral awards are not the usual or ordinary decisions/judgments delivered by the ordinary or normal courts established by Law, but outcomes of proceedings and decisions by people or institutions freely and voluntarily chosen specifically by the parties in the course of their agreements/contracts that are fiduciary in nature to, in the event of any dispute arising from such relationship in which, very often, time is of essence, expeditiously and with relative ease, settle it conclusively to bind them.⁶⁴ Since an arbitral award arises from a determination of dispute(s) by an arbitrator freely and mutually chosen and appointed to determine same by the parties to the dispute, the parties who fully participated in the proceedings without objection, should accept and abide by such an award even if they do not like it because it did not go in their favour. They should be frank and sincere in their attitude towards such awards and should be discouraged from turning arbitral proceedings into a pre-litigation or an elongated litigation procedure for the sole purpose of frustrating and eventually defeating the primary purpose of such proceedings freely chosen by them. It defeats the purpose of an agreement to refer a dispute to arbitration if after fully participating therein, a party is allowed to raise technical objections to defeat the award. Put differently, where parties to a dispute have voluntarily submitted themselves to an arbitrator on the complaint raised, it would be unjust for one party to challenge it on its face.⁶⁵

WORDS AND PHRASES IN ARBITRATION CLAUSES

From the foregoing, it is discernible that an arbitration clause is a written submission agreed upon by parties to a contract and, like other written agreements, it must be construed according to its language and in light of the circumstances under which it is made. When construing the

⁶² Art. 42 (6), AR.

⁶³ Art. 43 (1), AR.

⁶⁴ *R. M. A. F & C. v U. E. S. Ltd.* [2011] 9 NWLR (Pt 1252) 379.

⁶⁵ *Mekwunye v Imoukhuede* [2019] 13 NWLR (Pt 1690) 439.

words and phrases in a contract or agreement, the words and or phrases must be taken at face value, i.e., in their ordinary sense. The scope of arbitration clauses is considered in their natural meanings within the context and circumstances of each case. In an arbitration clause, a phrase such as ‘arising from this agreement’ circumscribes to the limit to which the clause applies. What ‘arises’ from such arbitration agreement can only be predicated upon matters that take their root from the arbitral agreement. Put more succinctly, a claim sought to be incorporated into an arbitration clause must be the subject of the original contract from which the arbitration clause emanated.⁶⁶

Furthermore, in an arbitration clause a phrase such as ‘exclusively settled by arbitration’ raises an implied term that no action shall be filed until an arbitration had been conducted and the dispute is finally and exclusively settled by arbitration. The phrase rules out any other means of settling such a dispute. And a court should stay a suit before it where the arbitration clause is mandatory and not merely permissive.⁶⁷ ‘Shall’ is another word that may be contained in an arbitration clause. It is mandatory word and its function in an arbitration agreement which states that the parties shall use their best endeavours to amicably settle disputes arising from their agreement, failing which resort shall be made to arbitration in accordance with the Act, means that within the context of the substantive contract, any dispute should be subjected to arbitration. The party will bear the burden of meeting the conditions of arbitration.

CONCLUSION

In conclusion, Arbitration remains a really essential alternative to litigation in resolving disputes between parties who entered into a commercial and contractual agreement. This article establishes that arbitration clauses constitute an autonomous and mutually binding agreement which is independent of the main contract and is treated as such in practice. The arbitration clause, as succinctly demonstrated in this article, is not only valid and enforceable but is treated independently of the substantive contract, thereby surviving its termination or repudiation. Arbitration clauses are treated as a separate contract to such an extent that where the substantive contract is void, the arbitration clause remains valid. It therefore follows that a breach of contract does not in any way terminate the arbitration agreement but rather gives life to it, compelling the parties to resolve their dispute before an arbitral tribunal mutually agreed on by the parties.

⁶⁶ Ibid at 1, Pp. 133, paras. E-F.

⁶⁷ *African Ins. Dev. Corp. v Nigerian LNG Ltd.* [2000] 4 NWLR (Pt 653) 494.

Practically, where a party sues prematurely, courts will generally enforce the parties' arbitration agreement. It is where arbitration fails that the aggrieved party or parties can resort to litigation.

It has been made abundantly clear in this article that, for any arbitration agreement to be valid and enforceable, it must be shown that there exists consensus, capacity and legal relationship. Like any other contract, the terms must be clear and certain. Also, there must be a valid underlying substantive contract in existence and an arbitration agreement whose terms are certain, enforceable and satisfy the following: clear mutual consent, capacity of parties, and a demonstrable legal relationship. This article also made it clear that only arbitrable disputes may be submitted for arbitration to the exclusion of matters of public policy such as criminal offences or allegations of fraud, which must generally remain within the exclusive purview of the courts.

Finally, arbitral awards in Nigeria are reckoned with and accorded a high degree of finality. Our laws recognize arbitral awards as a final and conclusive judgment on the issues submitted, and our courts ordinarily enforce arbitral awards with little or no interference, save for cases in which there is gross miscarriage of justice or the arbitral tribunal acted outside its jurisdiction. At the same time, the courts complement the arbitral process in instances where the courts issue a stay of proceedings, compelling the appointment of an arbitrator, as well as other interim reliefs sought or issuing subpoenas, all in a bid to ensure arbitration functions optimally. On the whole, the arbitration clause offers parties an effective avenue with a friendlier approach and pocket-friendly nature for dispute resolution in Nigeria.

In light of the foregoing, these recommendations are proffered as follows:

1. By elaborating on any unclear or ambiguous clauses and advocating for arbitration-friendly changes, the National Assembly should expand on the Arbitration and Mediation Act 2023. To lessen confusion, they may, for instance, specify the reasons for nullifying arbitral verdicts and offer clear guidance on arbitration-related matters. To guarantee effective enforcement of awards and adherence to the required referral procedure in Section 5, consideration could also be given to creating or authorizing specialized arbitral institutions and fast-track procedures within the Act.
2. In accordance with established policy, Nigerian courts ought to take a pro-arbitration position, consistently. Judges should uphold the parties' "bargain" by enforcing

legitimate arbitration agreements properly. This calls for careful interpretation of arbitration agreements to preserve, rather than nullify, the parties' intent and the rigorous implementation of section 5 of the Act to stay or dismiss court actions when arbitration is agreed on. To promote uniform awareness and minimize needless court intrusion, judicial training and sensitization on the extant Act, notably its provisions on separability (i.e., section 14) and pre-arbitral procedures, would be beneficial. In order to ensure that any dispute over an arbitration agreement is settled swiftly and does not prolong proceedings unnecessarily, courts should also expedite the process for contesting jurisdiction (i.e., section 14 of the Act).

3. Arbitration clauses need to be drafted by legal practitioners and contracting parties, carefully and strategically. In addition to addressing pragmatic considerations such as the number of arbitrators, the appointing body and the venue, clauses should specify precisely the range of arbitrable conflicts, to avoid ambiguous references. The Act's conditions for a legally binding arbitration agreement can be made more widely known by professional advice and training from bar associations or arbitration forums, for instance. Additionally, legal practitioners should ensure that their clients invoke arbitration clauses as soon as possible before taking any litigation steps, and educate them on the advantages of arbitration. Legal professionals will bolster the independence of arbitration clauses and increase trust in the arbitral process by refining their drafting procedures and utilizing arbitration strategically.