

X-RAYING THE CONSTITUTIONALITY OF ARBITRAL AWARD IN NIGERIA

BY

OLATINWO KHAFAYAT YETUNDE*

The urge to sustain and promote the arbitral system has informed the series of multi-door court house system established in places like Abuja and Lagos State and also the passing into laws (arbitration law) by some states to compliment the Arbitration and Conciliation Act 1988 to cater for arbitral processes in such states. However there is this discrepancy and argument that the outcome of arbitration i.e arbitral award is inferior to the judgment of a regular court. This discrepancy is often based on the argument that the judge who makes judgment derives his power from the Constitution. In order to clear the doubt as to the Constitutionality of arbitral award, this paper examines some of the supporting theories of arbitration and the source of the powers of the makers of Arbitration and Conciliation Act 1988.

1.0 INTRODUCTION

The expected end result of arbitration is a final decision which has a binding¹ effect on the parties to the Arbitration Agreement or Submission Clause. This decision is called an *award* and has been defined as the final determination of a particular issue of claim in the arbitration² i.e. the final decision of an arbitrator appointed by parties in the settlement of an issue/dispute.

Though judicial power is vested in Courts³ which possess the power to hand down a binding and enforceable decision, nonetheless, an arbitral award possesses the same binding effect as the judgment of a Court except for the mode of enforcement.

Since arbitration itself is not a Constitutional provision (as in the case of the judiciary), then how constitutional is the award which is a resultant effect of an effective arbitration under ACA 1988.

This paper will thereafter look into the constitutionality of Arbitration because, if the arbitration itself is not constitutional, then the end result i.e. the “arbitral award” will undoubtedly and necessarily be unconstitutional. In addressing this, this paper will discuss the judicial power under the 1999

Lecturer, Department of Law, College of Humanities, Management & Social Science, Kwara State University, Malete.
E-mail: khafayat.olatinwo@kwasu.edu.ng

¹ See Section 31 Arbitration And Conciliation Act 1988

² Orojo J.O & Ajomo M.A, Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates, Nig. Ltd, Lagos, 1999) p.238

³ See section 6 Constitution Of The Federal Republic Of Nigeria, 1999

Constitution (as amended), the legal nature and effect of arbitral award and whether an arbitral tribunal exercises judicial power.

2.0 EFFECT OF ARBITRAL AWARD

An arbitral award which could take the form of interim, final, agreed, additional, convention, interlocutory, partial or default award is conclusive and binding between the parties in an arbitration which is enforceable without the need for enforcement procedure where none of the parties to the agreement declines the award.

A valid award is final and binding thus making the Arbitral Tribunal become *functus officio* unless there is a statutory power to perform any other function(s) for instance clerical error or make additional award.⁴ The award therefore creates *estoppel* and operates as *res judicata* with regards to the matter with which the award is made concerning the parties, hence, none of the parties can re-ligate or re-arbitrate on the same matter for which the award is made.⁵ The Supreme Court offered the effect of an award in the following words:

*“The effect of an award by an arbitrator on the parties concerned is such as agreement of reference expressly or by implication prescribes where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be final and binding on the parties and any person claiming under them respectively. The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement.”*⁶

Customary arbitration award is also of binding effect as it was held in *Nwuka V. Nwaeche*⁷ where the Court of Appeal quoted with approval the view of the Supreme Court⁸ that “--- in submission to arbitration, the general rule is that the parties choose their own arbitrator to be the judge in the dispute between them: they cannot when the award is good on its face, object to its decision either upon the law or the facts--- and when matter in difference between the parties are investigated at a meeting and, in

⁴ Section 28 ACA 1988

⁵ *Fidelitats shipping co ltd V VIO Exportchleb (1965) 1Lloyds's Rep.223 C.A.*

⁶ *K.S.U.D.B V FANZ LTD (1990) 4 NWLR.PT142 SC1*

⁷ (1991) 5 NWLR 295 at P.308

⁸ *Okpuruwu V Okpuka (1988) 4 NWLR 55*

accordance with customary and general usage, a decision is given, it is binding on the parties and the supreme court will enforce such decision.⁹

From the above therefore, it is obvious that both statutory and customary arbitration award are binding and enforceable like the judgment of a regular Court except for the mode of enforcement.¹⁰

3.0 THE JUDICIAL AND ARBITRAL POWERS UNDER THE CONSTITUTION

If both arbitral award and judicial decisions have a binding effect, it is then essential to look at the powers or the basis of both the judiciary and arbitrator to make such binding decision from the Constitutional angle/point of view in order to determine whether arbitral award is Constitutional or not.

3.1 THE JUDICIAL POWER

By the provision of S.6 of the 1999 Constitution (as amended), judicial powers of the federation shall be vested in the Courts¹¹ to which this section relates, being courts established for the Federation. This power extend to all inherent powers and sanctions of a court of law and include the power to hear and determine all matters between persons, or between government or authority and to any person in Nigeria and to all actions and proceeding relating thereto for the determination of any question as to civil rights and obligations of that person.

The nature of the inherent power of the Courts under this section was described by Oputa JSC¹² as: “simply put, the inherent power of any Court is that power which is itself essential to the very existence of the court as an institution and to its ability to function as such institution- namely, as an institution charged with the dispensation of justice, such as the power to punish for contempt, the power to grant an adjournment in the interest of justice, e.t.c. An inherent power has to be inherent in the sense that it forms an essential and intrinsic element in the whole process of adjudication. It is innate in a Court, and it is not a subject of specific grant by the constitution or by legislation. That is why inherent powers of the Courts cannot be taken away or abridged by legislation for he who gave, he only can take away. .. As soon as a court is established, all its inherent powers adhere and attach to it. Inherent powers of the Court are those powers that are reasonably necessary for the determination of justice in the court.”

⁹ See also *Idika & Ors V Erisi & Ors* (1988)2 NWLR 565

¹⁰ S.31 An application for registration of the award is made to the court for enforcement.

¹¹ See subsection 5

¹² In *Adigun & Ors. V A-G Oyo State & Ors* (No.2) (1987)2 NWLR (Pt 50) 197

From the provision of Section 6 of the Constitution and the case cited above, judicial power are solely vested in the Court without been made subject to any other provision of the Constitution or Laws¹³ and the Court cannot be divested of this power save by constitutional amendment,¹⁴ that is, the role of administration of justice between the state and its subject, and the latter inter se, is a role appertaining only to the court.¹⁵

According to Obaseki JSC, no other body or institution or authority within the state, except an independent or impartial Court can effectively and legitimately administer justice.¹⁶

Mustill and boyd¹⁷ are also of the view that other bodies who act judicially do so at the sufferance of the State and accordingly, controllable by the later through one of its organs-the Court. Herein then lies the basis for the court's power to participate in and to control, the arbitral process which itself as some judicial element¹⁸

From the foregoing, one may want to conclude that since there is no provision in the Constitution giving judicial power whether inherent or not to the arbitrator to so act, by give binding decision between parties to a dispute in an arbitration, arbitration is not constitutional and to that effect, the result of Arbitration which is the Arbitral Award is unconstitutional. It is therefore necessary to look in-depth into the provisions of the Constitution and not make a hasty conclusion that Arbitration is unconstitutional.

4.0 LOOKING FOR THE BASIS OF ARBITRATOR'S POWER

Though judicial powers are only conferred on the judiciary, an arbitral tribunal may by contract or agreement between the parties make decision which is judicial in nature under Customary Law, Arbitration and Conciliation Act 1988 or Nigeria's International arbitral obligations.¹⁹ This power of the arbitral tribunal to make decision is less than judicial power.²⁰

The Constitutionality of arbitration can be found on the argument that ACA 1988 is an act of the National Assembly which is derived from the constitution even²¹ though the power to give a binding

¹³ See Section 6(5) (a-i)

¹⁴ Asouzu A.A. Arbitration and judicial powers in C.C Nweze (ed), justice in the judicial process: Essays in honour of HON.Justice Eugene C Ubaezonu, JCA, (Fourth Dimension pub.,2002) p.340

¹⁵ *Ibid*

¹⁶ Chief Gani Fawehinmi V NBA (No2) (1989) 2 NWLR (Pt.105) 558,627.

¹⁷ Mustill and Boyd, the law and practice of commercial arbitration in England, 2nd Edn,(London: butterworths,1998),p 4

¹⁸ Asouzu A.A. Arbitration and judicial powers in C.C Nweze (ed), justice in the judicial process. P. 342

¹⁹ *Ibid*. see Section 12 CFRN 1999

²⁰ *Ibid*

²¹ *Ibid* p.362

award fall short of the requirement of Section 6 of the 1999 constitution of the federal republic of Nigeria (as amended) as their power has no enforcement authority i.e. their function is likened to that of judges but the resultant award is bereft of the required judicial sanction.

In *Agu vs. Ikewibe*²², Nnameka Agu pointed out that “it must be borne in mind that arbitrators are not Courts. They are not clothed by the Constitution with any judicial authority as such.” He also pointed out²³ while elaborating the non judicial power of the arbitrators- that it is to courts and not to non-judicial bodies that judicial powers of the FRN are vested. So the courts take the view that it is open to the parties to choose whether to follow the normal channel for determination of controversy through the machinery of the Courts or to submit the matter voluntarily to the non-judicial body for a decision.

In the quest for the basis of the jurisdiction of the arbitral tribunal, different theories have evolved. These theories are jurisdictional, contractual, mixed or hybrid and Autonomous (*sui juis*) theory.

Jurisdictional theory relies on the State power to control and regulate arbitrations which take place within its jurisdiction. This theory sees arbitrators as performing a quasi-judicial role which is an alternative to the normal judge and this so called quasi-judicial function is derived from the state itself. It follows that the arbitrator, like the judge draws his power and authority from the local law, hence the arbitrator is considered to closely resemble a judge.

According to this school the difference between a judge and an arbitrator is that the former derives his nomination and authority directly from the sovereign whilst the latter derives his authority from the sovereign but his nomination is a matter for the parties (by agreement).²⁴ Deduceably, this theory follows the earlier proposition that Arbitration and Conciliation Act 1988 is an act of the National Assembly who derives its power to make laws and give authorities (judicial or otherwise) from the Constitution.

Asouzu²⁵ pointed out that under the Exclusive Legislative list in the 1999 constitution (Section 4 & 2nd schedule, pt1), the National Assembly may make Law with respect to items that would definitely cover the revision of cap 19 or its subject matters.

²² (1991) 3 NWLR (PT.180) 385.

²³ In *Awosile V. Sotunbo* (1992) 5 NWLR (Pt.243) 514

²⁴ See Lillich & Brower (eds) International Arbitration Fouchard Galillard Goldman. On International Commercial Arbitration, paras 12-43.

²⁵ Asouzu A.A. Arbitration and judicial powers in C.C Nweze (Ed), justice in the judicial process. P.362

Hence, Item 62 (a) on that list deals with Trade and Commerce, and in particular, trade and commerce between Nigeria and other countries including importation of commodities into and exportation of commodities from Nigeria and trade and commerce between the States.²⁶ Item 31 deals with the implementation of Treaties relating to matters on the exclusive legislative list. Item 68 on the exclusive list confers power on the National Assembly to make laws with respect to any matter incidental or supplementary to any matter mentioned in the exclusive list and that it is undisputable that arbitration and conciliation are incidents of trade and commerce.

The provision of Section 57 is to the effect that arbitration under ACA only applies to dispute which is commercial in nature. The Act provides for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and, thus, not intended to usurp the jurisdiction of the court but as an alternative dispute settlement mechanism.²⁷ It therefore follows that the end result of an arbitration which derives its authority from the National Assembly is Constitutional. So, the award neither conflicts with the judicial power nor with the Constitution.

Contractual theory emphasis the contractual character of arbitration. According to this school, the existence and basis of arbitration is dependent on the arbitration agreement between the parties²⁸ and the Nigerian Courts in a plethora of cases have often laid emphasis on the arbitration agreement as a basis for arbitration in order to hold valid the award and its enforcement. Oguntade JCA²⁹ opined thus “I do not think it is contrary to public policy and not in accordance with natural justice, equity and good conscience for the parties to a dispute to submit to the adjudication of a third party when the disputants have confidence both as to his impartiality and competence-----”

Also in *Environmental Development Construction & Anor Vs Umera Associate Nigeria*³⁰ Obdina JCA emphasised that the law is well settled that parties have a choice. They may resort to the normal machinery for administration of justice by going to the regular courts of the land and have their disputes determined both as to the fact and as to the law, by the Courts. Or in the alternative, they may choose the arbitrator to be the judge between them.

From above, it can be accepted that when parties are given liberty to settle their dispute through arbitration and such parties have accepted and utilised the mechanism through an arbitration agreement

²⁶ See section 57

²⁷ *Scott V Avery (1856) 5 H.L. Cas. 811*. See also sections 4 & 5 ACA 1988

²⁸ Tsakatoura A. The Immunity of Arbitrators. http://www.inter-lawyer.com/lex-e-script_a/contributors/tsakatoura

²⁹ *In Okpuruwu V Okpokam (1988) 4 NWLR (Pt 90) 554*

³⁰ *(2000) 4 NWLR (pt. 625) 293, 308*

or submission clause, then the outcome of such arbitration cannot be held to be invalid and unconstitutional especially when the agreement is recognized as a contract and the awarded is accepted by the parties to the dispute. Since a mere contract or its performance is not seen as unconstitutional, then a contract to arbitrate and the award cannot be regarded as unconstitutional.

Also in order to give effect to the constitutionality and validity of customary arbitration award, Courts have upheld, despite the decision is *Okpuruwu Vs Okpuka*,³¹ that customary arbitration is a known concept in Nigeria customary law and its award is valid and enforceable.

For some scholars, arbitration award is not a contract but a mere joint act while others see arbitration proceedings and the award comprise only “a group of private contractual acts.”³² The modern or tradition versions of this school make a case for arbitration almost unlimited party autonomy i.e. private justice system hence, arbitration or its award does not conflict with the judicial power centered on the court but a mere contract between.

The mixed or hybrid theory encompasses the mixture of the above two i.e. the judicial theory and the contractual theory. This school believes that the reality lies somewhere in the middle of the two schools. That neither the arbitrator performs a legal function nor that the award is a contract. The arbitrators’ duty is to judge but the power to do so is conferred to him by the agreement of the parties.³³

Autonomous (*sui juris*) theory, originally developed by Rubellin Devichi in 1965 presumes that arbitration evolves in an emancipated regime. Here, the school sees arbitration from the point of functionality i.e. what it does, aims to do, how and why it functions the way it does. It is not far fetched, the intention of arbitration as a form of alternative dispute resolution which has been assisted by various laws made to that effect. Hence, arbitration is on its own and does not conflict with the judicial powers or the Constitution but only to be assisted by Courts as regard the enforcement of its award.

So far, arbitration award which is the resultant effect of arbitration is consistent with the constitution and will be enforced by the Courts as Obadina JCA said “if they take the latter course they cannot, when the award is good on the face of it, object to the award on grounds of law or facts ---”³⁴ Hence, arbitration award either Customary or not is binding on the parties and enforceable by courts and thus create

³¹ *supra*

³² Sierra B, The Juridical Nature of Private Arbitration. Its Projection Image and Practice XI YBCA602 (1986)

³³ Tsakatoura A. The Immunity of Arbitrators

³⁴ *Environmental Development Construction & Anor Vs Umera Associate Nigeria* .See also *Foli V Akese (1930) 1 WACA 1 at 2*

estoppel except in the circumstances provided for under Section 48,51 & 52 of Arbitration & Conciliation Act 1988.

5.0 CONCLUSION

In conclusion, and from the above it is clear that though judicial power is a clearly derived from the Constitution (Section 6), notwithstanding, arbitration cannot be said to be inconsistent with the constitution as the maker of the Legal regime of Arbitration also derives its power under the Constitution to make Laws under the Exclusive legislative list of which arbitration falls within.

Also both the parties and the arbitrator are seen to be brought together by way of Contract. The judicial decision and arbitral awards are both binding but the arbitral award however needs the Courts sanction for its enforcement where one of the parties refuses to carryout his/her own part of the obligation as a result of the award.

There is also the need to reconsider and amend S.6 and other relevant provisions of the constitution to accommodate Arbitration as part of the judicial process thereby making the arbitrators to also exercise judicial powers in order for their award to be enforced without the need for registration as we have now in Nigeria.

This would further remove the doubts as to the functionality and constitutionality of Customary, Statutory and International arbitration (and the award) in Nigeria as well as add more confidence in the arbitrator (in affirming his authority) and the parties to the arbitration.

It is however safe to conclude that an arbitral award is not inconsistent with the constitution.