**CHALLENGES THE JUDICIARY FACES IN HANDLING ARBITRATION - ADR RELATED DISPUTES AND APPEALS**

**PROTOCOLS**

Firstly, let me thank the management of the Nigerian Institute of Chartered Arbitrators for the honor and privilege for the invitation to be discussant during this conference. I am grateful.

**INTRODUCTION**

The core essence of Arbitration simply lies in its ability to settle dispute outside of a formal judicial process or adjudicatory litigation procedure, it is founded on mutual agreement. This has been an age long practice dating back to pre-colonial Nigeria [[1]](#footnote-1). Society has since then experienced exponential growth in population and a consequential evolution in the regulation of human interaction. This has necessitated a more structured and formal practice of Arbitration under the *Arbitration and Conciliation Act, 2004*, (ACA) a re-enactment of the *Arbitration and Conciliation Act*, *1988*. Section 19(d) provides a basis for ratifying and respecting International laws and treaty[[2]](#footnote-2). Thus the United Nations Commission on International Trade Law (UNCITRAL model law 1985) and UNCITRAL Rules were substantially adopted to domesticate, the *Arbitration and Conciliation Act* (ACA), *1988*[[3]](#footnote-3). It is the foundational legal framework governing Arbitration in Nigeria. This has triggered positive ripple effect for several laws and institutions to favorably tend towards employing Arbitration as a speedier, convenient and flexible mechanism in dispute settlement. *The Federal High Court Act[[4]](#footnote-4) , Court of Appeal (ADR) Rules*[[5]](#footnote-5), various High Court Rules[[6]](#footnote-6) are examples of the judiciary promoting conciliation.

The gains of effective arbitration in a nations legal system can not be over emphasized. ThisDay Newspaper reported in 2020 that, that the Nigerian National Petroleum Corporation saved about $5.4billion in court cases through the resolve to resort to arbitration[[7]](#footnote-7). Laudable progress has been made over the years though at a snail speed, however there is still much to be done as the Judiciary still faces grave challenges in handling Arbitration disputes and appeals. This shall be the focus of this paper.

**CHALLENGES THE JUDICIARY FACES**

I came across a survey conducted by the Queen Mary’s University of London and the law firm, White and Case in 2018 which indicated that 64% of the respondents believed that one of the main reasons for selecting arbitration for the resolution of commercial disputes is “*avoiding specific legal systems/national courts*”.[[8]](#footnote-8) The respondents also believed that the essential factors for selecting the seat of arbitration include a neutral judicial system and one with a track record for enforcing arbitral agreements and awards. These factors also influence the choice of an arbitration seat ideal and these are some of the challenges that the judiciary faces when it comes to arbitration.

1. ***Judicial Interference/ Non-Neutrality***

Ordinarily, the judiciary is meant to be neutral in dealing with the arbitration process. If the losing party voluntarily accepts and complies with the award as agreed upon or handed down by the arbitral tribunal, in this case there would be no need for the winning party to pursue enforcement of the award through litigation, the judicial mechanism enshrined. However, this is not the case as we all know. The Nigerian judiciary has been regarded as reluctant towards accommodating Arbitration/ ADR as a means of dispute resolution due to the presumption that it encroaches on arbitration by the application of frustrating rules and in a slow pace, even though parties intend to settle their disputes through alternative means devoid of technicalities. \*

In Several cases emanating from arbitration proceedings have resulted in judges in the past setting aside arbitration agreements, thus impeaching the presumption of judicial neutrality towards arbitration. This “apathy” towards arbitration is exacerbated even further as the parties have long held the view that the massive involvement of the courts in arbitration, from the granting of injunctions, enforcement of awards, and appointment of arbitrators creates a sense of caution and frustration towards arbitration in Nigeria. After all, it is meant to be an alternative to litigation, completely devoid of in some regards. But the heavy handed involvement of the courts seemingly suggests otherwise. \*

1. ***Delays in Judicial Proceedings***

There is no easy way to say it but in fairness, the judicial system is not adequately prepared to play the neutral and supportive role when it comes to commercial arbitration, especially international commercial arbitrations. Courts should be collaborating with arbitration institutions by isolating their involvement in arbitral proceedings. What we find instead is litigation seemingly becoming the final stage of arbitration and very slow. Parties favour arbitration as the means of resolving their commercial disputes due to, among other reasons, speedy dispensation of actions. However, when the judiciary is heavily involved in the arbitration space like in Nigeria and under the normal rules of court, this creates complications.

In *IPCO (NIG)LTD.V. NNPC*, an arbitral award enforcement proceeding lasted 11 years, the Supreme Court stated:

***“… the mill of Justice can grind very slowly in Nigeria. In particular, Nigeria is not geared towards arbitration in the manner which meets the international standards it agreed to”.[[9]](#footnote-9)***

*In, Mekwunye .v. Imoukhuede[[10]](#footnote-10) ,* the litigation process took a total of 12 years*.* Last year, the law firm Templars released a report which showed it had reviewed 19 arbitral award enforcement cases that were appealed up to the Supreme Court, and found the slowest proceeding lingered for about 17 years to final determination[[11]](#footnote-11).This grossly defeats the time saving essence of Arbitration and a sad contrast to other jurisdictions that keyed into arbitration for the benefits of their nations with economic and commercial advantages. Courts are constantly plagued with congested cause lists, heavy caseloads, insufficient structural and technological facilities and tools, which culminates in massive delays and more congestion. Lawyers who represent parties in court have compounded the situation by devising various means of causing delays, they take steps deliberative to cause delay. Some of the practices cannot even be thought of in saner climes because the disciplinary mechanism in those jurisdictions are stringent and lawyers dare not make certain applications because they could loose their licence. The disciplinary procedure in Nigeria is a topic for another day.

Parties have an unrestricted right to appeal arbitral award, thus, deliberately turning towards courts to challenge appointments of arbitrators and even enforcement of arbitral awards through appeals, even when it is obvious that it is unmeritorious. The utilisation of litigation as a means of frustrating arbitral proceedings, coupled with the already besieged judicial proceedings creates the challenge for the judiciary[[12]](#footnote-12). It is impossible to outlaw a party’s right to approach the court for redress[[13]](#footnote-13) and while courts now have pro-arbitration outlooks as exemplified in *Mekwunye .v. Imoukhuede[[14]](#footnote-14), and* *NITEL .V. Okeke*[[15]](#footnote-15)*,* where the Supreme Court has pronounced that a court should not upset the expectation of the parties except for the clearest evidence of wrongdoing or manifest illegality on the arbitrators part. We still see the judiciary facing this heavy involvement in arbitral proceedings, in part with no deliberate intention of the courts.

1. ***Tedious enforcement of arbitral awards guidelines***

This is very particular to international arbitration. We are all aware of the modalities and frameworks for enforcement of foreign awards by Nigerian courts, through the *Foreign Judgment Registration and Enforcement Statutes* but this process is not straightforward as we all know very well. Before the courts will register an international arbitral award, the award must have become enforceable in the jurisdiction where it was awarded by a court of competent jurisdiction in that place. In addition, the foreign award is required to be a monetary award for a sum certain i.e. can be ascertained by a simple arithmetical process in order to qualify for registration[[16]](#footnote-16). Furthermore, this entire process is also susceptible to being bogged down in litigation by unsuccessful parties from arbitration resulting proceeding going on for several years which defeat the purpose of Arbitration.

**NEW DEVELOPMENTS AND THE WAY FORWARD**

There is a silver lining however, as over recent years thanks to numerous judicial trainings organised by several key arbitration stakeholders, such as the Nigerian Institute of Chartered Arbitrators (NICArb), with the goal of sensitizing the judiciary towards the gains of Arbitration being implemented for the settlement of commercial disputes. This has been done with the aim of assuaging the perception that arbitration and alternative dispute resolution mechanisms pose a threat to the judiciary. Courts are now aligning towards a pro-arbitration approach, respecting the wishes of parties towards arbitration and other dispute resolution mechanisms and refusing stay proceedings or declining jurisdiction altogether.

The Arbitration & Mediation Bill, 2022 (referred to as “the bill), aligns more favorably with current international best practices as contained in UNCITRAL 2006. This innovation if enacted into law, can potentially improve the efficacy of Arbitration in Nigeria. The bill provides that there shall be an Arbitration Review Tribunal, which give parties option to specify in their arbitration agreement that awards made in arbitrations seated in Nigeria may be reviewed by second arbitral tribunal, within 60 days from when the tribunal is constituted, before resorting to courts. Misconduct or improper procurement are no longer grounds for setting aside (domestic) awards; Courts awards and set aside, declare ineffective or remit to the tribunal only a part thereof. When implemented these and many more innovations will give the Nigerian Arbitration space an uplift and be more effective and efficient. But that is not all that can be done to eliminate or mitigate these challenges.

There should be specific rules for Arbitration proceedings and such should have timelines with little discretion for the judges to maneuver. Furthermore, punitive cost should be awarded against the party that tries to frustrate arbitral awards unjustly. The heads of court should only assign arbitration matters to judges specifically trained in Arbitration while educating others to fully understand the role of the judiciary in Arbitration and Alternative Resolution mechanisms.

**CONCLUSION**

Arbitration has definitely gained considerable growth within and even outside of the Nigerian legal space. Nigeria cannot afford to lag behind. Delays have ripple effect on our pride as a nation. Timely resolution is encouraging to Parties, especially those involved in commercial transaction gain from speedy and more effective means of dispute resolutions within their own convenience. Where dissatisfied, parties still have the right to appeal to the judicial mechanism for enforcement or redress, when dissatisfied. However, there exist a heavy interference of the judiciary which seems to truncate the essence of ADR in the extant Arbitration and Conciliation Act, which the Courts have made attempts to make less technical and more progressive. That is informed by the Nigerian Constitution that gives access to court, that cannot be outlawed. The National Assembly are also making concerted effort to make the legal from work align with present day International best practices through the Arbitration and Mediation Bill, 2022. However, these gains are still not recognised on a wide scale to significantly mitigate the problem on a national level. The collaboration and concerted efforts to help mitigate these challenges must not be dissuaded but spurred on even further.

Thank you for listening.

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1. *Okpuruwu .v. Okpokam (1988)4 NWLR(PT 90) 554.* [↑](#footnote-ref-1)
2. 1999 Constitution of the Federal Republic of Nigeria (as amended) [↑](#footnote-ref-2)
3. Arbitration and Conciliation Act, Cap. A18) LFN 2004 [↑](#footnote-ref-3)
4. Section 17 Federal High Court Act, [↑](#footnote-ref-4)
5. Court of Appeal (Alternative Dispute Resolution) Rules, 2021 [↑](#footnote-ref-5)
6. For example: Order 28, Lagos State High Court (Civil Procedure)Rules, 2019 [↑](#footnote-ref-6)
7. Ejiofor Alike&Emmanuel Addeh; ThisDaylive; [www.thisdaylive.com/index.php/2020/09/17/nnpc-saves-5-4bn-in-court-cases-wins-africa-arbitration-award/](http://www.thisdaylive.com/index.php/2020/09/17/nnpc-saves-5-4bn-in-court-cases-wins-africa-arbitration-award/) [↑](#footnote-ref-7)
8. *Australian Corporate Lawyer*, Vol 28, Issue 3, pp10 – 12. [↑](#footnote-ref-8)
9. 3 (No. 3) [2015] EWCA Civ 1144 and 1145 [↑](#footnote-ref-9)
10. (2019) 13 NWLR (PT 1690) 439 ` [↑](#footnote-ref-10)
11. TEMPLARS Arbitration Report On Nigeria; [www.templars.law.com](http://www.templars.law.com) ; October 2021 [↑](#footnote-ref-11)
12. Metroline (Nig) Ltd & Ors v. Dikko (2021) 2 NWLR (Pt. 1761) 422 at 445 [↑](#footnote-ref-12)
13. SECTION 6(6) and 36(1),1999, Constitution of the Federal Republic of Nigeria (as amended). [↑](#footnote-ref-13)
14. Supra ` [↑](#footnote-ref-14)
15. (2017) 9 NWLR (PT 1571)439 [↑](#footnote-ref-15)
16. Foreign Judgment Registration and Enforcement Statues: Reciprocal Enforcement of Judgment Ordinance 1922, Cap. 175, Laws of Federation of Nigeria (LFN) 1958; The Foreign Judgment (Reciprocal Enforcement) Act, Cap. F35, LFN 2004. [↑](#footnote-ref-16)