Dispute Resolution/ Arbitration
2nd April 2024

THE APPLICABLE ARBITRATION LAW TO A DEFECTIVE ARBITRATION CLAUSE[1]

Introduction

Arbitration is a private dispute resolution mechanism constituted by a neutral third party, the arbitral tribunal. The parties' agreement to arbitrate is the foundation of any valid arbitration from which the tribunal derives its power and authority. The arbitration clause is typically stated in the main contract between the parties but it can also be a separate agreement. Whether included in the main contract or a separate document, it is distinct from the contract or agreement, such that the arbitration clause survives and remains valid even when the main agreement or contract comes to an end.[2]

Whilst the jurisdiction of a court is conferred by the 1999 Constitution of the Federal Republic of Nigeria (CFRN) or statutes, the jurisdiction of an arbitral tribunal has its roots in the parties' agreement. Furthermore, one of the attractiveness of arbitration is that parties are at liberty to choose the applicable law, an arbitration clause usually names its applicable law.[3]

An arbitration clause or agreement must satisfy the requirements of a contract such as consensus, capacity, and legal relationship. Like any other contract, the terms must be clear and certain.[4]

---

1 **Opeyemi Ojebode, Associate, Dispute Resolution Department, S.P.A. Ajibade & Co., Lagos, Nigeria**.

2 UBA Plc. v. Triedent Consulting Ltd (2023) 14 NWLR (Pt. 1903) 95 at 131.

3 Article 15 (1) of the Arbitration and Mediation Act 2023 provides that, “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.”

4 In Kurubo v. Zach-Motison (Nig.) Ltd**.** (1992) 5 NWLR (Pt. 239) 102, the Court of Appeal held that, “Before a court of law can refuse jurisdiction, the arbitration clause must be mandatory, precise and unequivocal. The arbitration clause should contain the mandatory "shall" and not the permissive and discretionary "may"**.”** See also Environmental Dev. Const. v. Umara Assoc. (2000) 4 NWLR (Pt. 652) 293 at 303 -304.

Aside from disputes not legally arbitrable,[5] there may also be difficulties in the application of laws to defective arbitration clauses.

A defective arbitration clause

A defective clause in an arbitration agreement is known as a "pathological clause or agreement", being one which may lead to disputes as to its interpretation. A defective arbitration clause is an ambiguously drafted arbitration agreement that arises due to various reasons including poor drafting, failure to satisfy legal requirements, or factual inaccuracies. Its interpretation may clash with the intention of the parties. Most national courts in arbitration-friendly jurisdictions uphold such a clause where it is possible to give meaning to it to give effect to the general intention of the parties to submit to arbitration notwithstanding the defective arbitration clause.[6]

The doctrine of covering the field in arbitration

The doctrine of "covering the field" is a doctrine relevant under a federal system of government. The doctrine postulates that where a Federal Constitution or a federal enactment has already covered a particular legislative field, no State or Local Government law can be enacted to cover the same field already covered by the Constitution or the Federal enactment. The doctrine thus postulates the mutual non - interference among the federating States on the one hand and the Federal (Central) government on the other hand, especially by legislative action, in the affairs of the other with a view to achieving a very strong and effective working of the Federation.[7]

Where the doctrine of covering the field applies, it is not necessary that there should be inconsistency between an Act of the National Assembly and a Law passed by the State House of Assembly. The fact that the National Assembly has enacted a law on the subject is enough for such a law to prevail over the law passed by a State House of Assembly, but where there is inconsistency, the State law is void to the extent of the inconsistency, by virtue of section 4(5) of the CFRN.[8]

The Arbitration and Mediation Act 2023 (AMA)[9] which repealed the Arbitration and Conciliation Act,[10] did not expressly repeal the other existing arbitration laws. Although

---

5 United World Ltd. Inc. v. M.T.S. Ltd. (1998) 10 NWLR (Pt. 568) 106 at 116, Sakamori Constr. (Nig.) Ltd. v. L.S.W.C. (2022) 5 NWLR (Pt. 1823) 339 and K.S.U.D.B v. Fanz Const. Ltd (1990) 4 NWLR (Pt. 142) 1 at 31 – 32.

6 Mekwunye v. Imoukhuede (2019) 13 NWLR (Pt. 1690) 439.

7 AG Lagos State v. AG Federation (2013) 16 NWLR (Pt. 1380) 249 at 327 - 328.

8 C. G. de Geophysique v. Etuk (2004) 1 NWLR (Pt. 853) 20 at 49.

9 On 26th May 2023, the former President of the Federal Republic of Nigeria, President Mohammadu Buhari assented to the Arbitration and Mediation Bill 2022 which morphed into the Arbitration and Mediation Act 2023.

10 Cap A18, Laws of the Federation of Nigeria (LFN) 2004

Article 1 (5) of the AMA states that the Act shall apply to commercial arbitration within the Federal Republic of Nigeria, section 65(b) provides that the AMA does not affect any other law by virtue of which certain disputes may be submitted to arbitration only in accordance with the provisions of that or another law. It is reasonable to state that the AMA did not repeal the existing arbitration laws which are applicable where it is the parties' intention to be guided by arbitration laws. The pertinent issue that needs to be sorted is whether the AMA or arbitration laws will be applicable where the arbitration clause is defective.

In **Generale De Geophysique v. Dr Jackson Etuk,**[11] Clause 6 of the Tenancy Agreement between the parties stated that: *"All disputes, differences and questions which may at any time arise between the parties hereto or their respective (sic) or assigns touching or arising out of or in respect of this agreement shall be referred to an arbitration comprising of two independent estate valuers to be agreed upon between the parties, and the decision of such arbitration shall be final and binding on both parties."*

The court resolved the applicable law to the arbitration having regard to the Arbitration and Conciliation Act,[12] (ACA) on one hand and the Arbitration Law of Cross River State,[13] (applicable to Akwa Ibom State) on the other hand. The Court resorted to the doctrine of covering the field and held as follows:

> *That the fact that the National Assembly has enacted a law on the subject is enough for such law to prevail over the law passed by a State House of Assembly, but where there is inconsistency, the State law is void to the extent of the inconsistency. See section 4(5) of the 1999 Constitution which is in pari materia with section 4(5) of the 1979 Constitution. In the instant case, I am of the opinion that the Arbitration and Conciliation Act, 1990, has covered the whole spectrum or field of arbitration and conciliation and should prevail over the Arbitration Law of Cross River State, Cap. 12 (applicable to Akwa Ibom State). In other words, I hold that the applicable law to the arbitration in the instant case is the Arbitration and Conciliation Act, 1990.*[14]

However, in **Stabilini Visinoni Ltd. v. Mallinson & Partners Ltd.,**[15] it was written in the Local Purchase Orders between the parties dated 14th and 15th May 2009 that: *"[t]his clause should be deemed to be a submission to arbitration within the meaning of the law from time enforced in Nigeria".* Although the Court of Appeal upheld the application of the ACA, it gave

---

11 Ibid n. 7.
12 Cap. 19, Laws of the Federation of Nigeria, 1990.
13 Cap. 12, Laws of Cross River State, 1981.
14 Ibid, n. 7 at 49.
15 (2014) 12 NWLR Pt. 1420) 134 at 181 – 182.

the impression that had the Lagos State Arbitration Law been in force when the parties entered into the agreement, the Lagos State Arbitration Law would have been applicable.

Nonetheless, Section 15(3) of the AMA 2023 empowers the arbitral tribunal to apply the law determined by the conflict of law rules that it considers applicable. In **North Pole Navigation Co. Ltd v. Milan (Nig) Ltd**,[16] in the determination of the applicable law to arbitration, the Court of Appeal held as follows:

> *Generally, in a situation where venue is not stated in the arbitration clause, and applicable law is also not stated, the practice normally is that the law of the seat of arbitration becomes the applicable law that will guide the arbitration or tribunal. Generally, 3 basic questions are asked, these are: (i) Have the parties expressly chosen the governing law? (ii) If answer is no to (i) above have parties impliedly chosen governing law of the arbitration agreement? (iii) If answer is No to (i) and (ii) above, which system of law has the closest and most real connection with the arbitration agreement?*[17]

Conclusion

Arbitration is neither contained in the Exclusive nor the Concurrent Lists in the Second Schedule to the CFRN. The necessary implication is that it is part of the Residual List which falls within the legislative competence of a state legislature. Both the AMA and the arbitration laws of states are applicable in Nigeria.

To enforce the terms contained in an arbitration clause, the terms must be certain and enforceable. The court would, however, lean towards a construction that will give effect to the parties' intentions.[18] Although the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts, parties to an arbitration agreement must be careful in understanding both the ordinary and the legal meaning of the words contained in an arbitration clause.[19]

It is not in doubt that the applicable arbitration law is the law chosen by the parties. However, where the parties do not state the applicable law, the tribunal is to apply the implied arbitration law from the parties' agreement or the law that has the closest connection to the agreement. Where the arbitration clause is defective such that the tribunal cannot determine the implied arbitration law, the AMA empowers the tribunal to apply the law determined by the conflict of law rules which it considers applicable.

---

16 (2015) LPELR-25865(CA).

17 Ibid at 17.

18 UBA Plc. v. Triedent Consulting Ltd (supra).

19 S.A.& Ind. Co. Ltd. v. Ministry of Finance Incorp (2014) 10 NWLR (Pt. 1416) 515 at 534.

For further information on this article and area of law,
Please contact **Opeyemi Ojebode** at:
S.P.A. Ajibade & Co., Lagos by
Telephone (+234 1 472 9890), Fax (+234 1 4605092)
Mobile: (+2348165558660, +2349087355889)
Email**:** oojebode@spaajibade.com
www.spaajibade.com