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Legal Practitioners, Arbitrators and Notaries Public

FOREIGN COUNSEL IN NIGERIAN ARBITRATIONS: HOW FAR CAN THEY GO?[1]

Arbitration and Dispute Resolution
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Introduction:

The scope of foreign counsel's involvement in Nigerian seated arbitrations has been a subject of interest to the arbitral community in recent times. Apart from scholarly discussions[2] on this issue, an eminent arbitral tribunal and the Nigerian Court of Appeal had ruled in separate cases that a person who is not qualified as a legal practitioner in Nigeria may not represent parties in arbitration proceedings in Nigeria.

What are the issues?

As a starting point, the legal profession in Nigeria is a regulated one and the Legal Practitioners Act[3] (LPA) provides for the circumstances in which a person can practice law in Nigeria. Section 24 of the LPA defines a 'legal practitioner' as a person who is entitled to practice as a barrister and solicitor in Nigeria, *either generally or for the purpose of any particular office or proceedings.* Furthermore, Section 2(1)(a) and (b) of the LPA provides that a person is only *entitled to practice* as a barrister and solicitor if his/her name is on the roll of the Supreme Court of Nigeria, or he/she is authorized to practice as a barrister by a warrant of the Chief Justice of Nigeria for the purposes of a particular proceeding.

The above provisions of the LPA were upheld by the Supreme Court of Nigeria in the celebrated case of *Okafor v. Nweke*,[4] where the Court pronounced that:

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[1] Kolawole Mayomi, Partner Dispute Resolution, S.P.A. Ajibade & Co., Lagos Office.
[2] See for example, TEMPLARS LP, '*Domestic Arbitration in Nigeria: Can Foreign Counsel still run the Race*?' Dispute Resolution Newsletter (September 2012). http://www.templars-law.com/wp-content/uploads/2015/05/DOMESTIC-ARBITRATION-IN-NIGERIA-CAN-FOREIGN-COUNSEL-STILL-RUN-THE-RACE.pdf; Mofesomo Tayo-Oyetibo, Dispute Resolution in Nigeria: Representation of Parties to Arbitration Proceedings in Nigeria by Foreign Counsel, available at http://issuu.com/mofesomotayo-oyetibo/docs/dispute_resolution_in_nigeria_repre accessed on 6th October, 2016.
[3] Chapter L11, Laws of the Federation of Nigeria, 2004.
[4] [2007] 10 NWLR (Part 1043) 521, 531.

"For a person to be qualified to practice as a legal practitioner he must have his name in the roll, otherwise he cannot engage in <u>any form</u> of legal practice in Nigeria."

Does the LPA preclude foreign counsel from representing clients in arbitrations seated in Nigeria?

Undoubtedly, arbitration is a form of legal practice/proceedings in Nigeria. In *Ezenwa v. Bestway Electronic Ltd*,[5] the Court of Appeal stated that legal proceedings *"includes all proceedings authorized or sanctioned by law and brought or instituted in a court or legal tribunal for the acquiring of a right or the enforcement of a remedy."* Meanwhile, the learned authors, Candide-Johnson & Shashore,[6] described arbitration as a procedure where parties agree that disputes between them must be decided in a *legally binding way* by one or more impartial persons in a judicial manner on the basis of evidence before them.

The primary arbitration statute in Nigeria is the Arbitration and Conciliation Act[7] (ACA). It covers both domestic as well as international arbitrations seated in Nigeria. The ACA is divided into 3 parts: Part I deals with domestic arbitrations, Part II deals with conciliation, and Part III with international arbitration. Section 15 (in Part I) provides that all arbitral proceedings *shall* be conducted in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to the ACA. Article 4 of the Arbitration Rules deals with representation before arbitral tribunals, and provides that "*the parties may be represented or assisted by **legal practitioners** of their choice*". By way of background information, we note that the Arbitration Rules is an adaptation of the 1976 UNCITRAL Arbitration Rules, and that Article 4 of the said UNCITRAL Rules similarly provides that *"the parties may be represented or assisted by **persons** of their choice."* Thus, the only difference between Article 4 of the Nigerian Arbitration Rules and Article 4 of the 1976 UNCITRAL Rules is the change from the word "**persons**" to "**legal practitioner**".

This change of words has however proved to be critical, considering the statutory definition attached to "legal practitioner" under Nigerian law. For instance, Section 18 of the Interpretation Act[8] provides that the word "legal practitioner" when used in *any* enactment, has the meaning assigned to it by the LPA. We have already seen that under the LPA, "legal practitioner" refers to only persons who are enrolled to practice law in Nigeria. Thus, a literal application of article 4 of the Arbitration Rules means that a person who is not qualified to practice law in Nigeria will not be 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.

Indeed, this was a problem that confronted an eminent arbitral tribunal led by a retired English law lord in a Nigerian seated multi-million dollar arbitration between a major oil producing company and the Nigerian State oil company. The oil company/claimant was represented by a London magic circle law firm, supported by a Nigerian law firm. At the oral hearing, the Respondent's counsel pointed out that the proceedings were a domestic arbitration which was governed by the Arbitration Rules and, relying on Article 4, objected to the foreign counsel's conduct of the claimant case as he was not a "legal practitioner" within the *lex arbitri* under Nigerian arbitration law. Although the tribunal was displeased

[5] [1999] 8 NWLR (Part 613) 61, 78 para F.
[6] *Commercial Arbitration Law and International Practice in Nigeria*, LexisNexis, 2012, 27.
[7] Chapter A18, Laws of the Federation of Nigeria, 2004.
[8] Chapter I23, Laws of the Federation of Nigeria, 2004.

by the Respondent's ambush tactic, it had no choice, in the face of the mandatory terms of Section 15 of the ACA and the unequivocal nature of Article 4, but to hold that foreign counsel cannot represent the parties in a domestic arbitration governed by the Rules. On that basis, the tribunal declared that the claimant's foreign counsel was not qualified to appear in that arbitration proceeding.

In another arbitration proceeding between Shell E & P Ltd and the Nigerian State oil company, the claimant's notice of arbitration and statement of claim was jointly signed in the name of an English law firm and a Nigerian law firm. The respondent objected to the jurisdiction of the tribunal, arguing that, under the LPA, only a legal practitioner i.e. a person who is enrolled to practice as a barrister and solicitor in Nigeria, and not a law firm, is competent to sign these processes. Accordingly, it was argued, that the initiating processes were bad, and the arbitral tribunal had no jurisdiction to adjudicate. The tribunal dismissed this objection, proceeded to hear the matter on its merits and eventually issued an award. However, before the award was handed down, the Nigerian federal tax authority (FIRS) filed an action in court to contend that the claims before the arbitral tribunal are tax disputes, and are non-arbitrable under Nigerian law. The court upheld this contention, and nullified the arbitration proceedings. Shell appealed,[9] and one of the major issues that was canvassed at the Court of Appeal was whether the initiating processes in the arbitration was valid, having been signed by law firms that were not licenced to practice law as legal practitioners in Nigeria.

In its judgment, whilst the Court of Appeal accepted Shell's arguments that article 3(3) of the Arbitration Rules which contains a checklist for a valid notice of arbitration does not require signature by a legal practitioner who practices in Nigeria, the court gave primacy to article 4, to the effect that once the claimant chose to be represented by a legal practitioner, such a legal practitioner must be a person who meets the requirement of the LPA in Nigeria. Since the foreign law firm, and even the local Nigerian law firm, could not show that it was a "legal practitioner" enrolled to practice law in Nigeria, the initiating processes were invalid, and the entire arbitral proceedings that were conducted on that basis was a nullity.

The *Shell* case may be contrasted with the earlier decision of *Stabilini Visinoni Ltd v. Mallinson & Partners Ltd*,[10] where a different panel of the Court of Appeal (Lagos Division) ruled that since arbitration is not limited to the legal community; it being open to lawyers and non-lawyers, there cannot be a requirement that the notice of arbitration initiating the proceedings must be signed by a legal practitioner. However, a closer look at the facts of the *Stabilini* case shows significant differences between the two cases, and suggests that *Stabilini* is a doubtful precedence on this issue. First, the statement of claim (which supersedes a notice of arbitration) in *Stabilini* was properly signed by a legal practitioner. Second, more importantly, the court's attention (in *Stabilini*) was not drawn to the mandatory application of article 4 to domestic arbitrations. Thus, the court's statement of the law was based on the general principle that the legal technicalities which are associated with the courts will not apply to arbitral proceedings. Conversely, in *Shell*, the application and effect of article 4 was an issue that was fully canvassed before the court. Third, the Respondent in *Stabilini* did not raise any objection that the notice of arbitration was not signed by a legal arbitrator before the arbitral tribunal, and only

[9] *Shell Nig. E. & P. Ltd & 3 Others v. Federal Inland Revenue Service* (Unrep. Appeal CA/A/208/2012).
[10] [2014] 12 NWLR (Part 1420) 134.

raised this issue for the first time in its application to the court to set aside the award. Indeed, the Court of Appeal observed that *even* if this complaint is justified, the Respondent had clearly waived its right to complain since it never objected to the defective notice of arbitration before the arbitral tribunal.

So, is this the end of the road for foreign counsel in Nigerian seated arbitrations?

Not quite. The *Shell* case only resolves this issue as it relates to domestic arbitrations. The position is quite different if an arbitral proceeding is an international arbitration seated in Nigeria. As earlier stated, Section 15 of the ACA which provides for the mandatory application of the Arbitration Rules is only concerned with domestic arbitration proceedings. Indeed, Section 53 (in Part III) of the ACA provides that "*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 other words, the Arbitration Rules which ties party representation to a "legal practitioner" does not mandatorily apply to international arbitration proceedings in Nigeria. In this event, parties are free to agree to apply any set of Rules (e.g. UNCITRAL, ICC, LCIA), which are worded in a more liberal manner than Article 4, to their arbitration proceeding.

What qualifies an arbitral reference as 'international arbitration' in Nigeria?

Section 57(2) of the ACA provides a checklist of the circumstances in which a Nigerian seated arbitration will be considered to be an *international arbitration*, as paraphrased below:

(a) where the parties have their places of business in different countries; or
(b) one of the following places is situated outside the country in which the parties have their place of business-
    (i) the place of the arbitration if such place is determined in, or pursuant to the arbitration agreement,
    (ii) any place where a substantial part of the contract is to be performed or the place with which the subject matter of the dispute is most closely connected; or
(c) where the parties have agreed that their contract relates to more than one country; or
(d) *where 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*.

The attraction, particularly, of section 57(2)(d) lies in the words: "*despite the nature of the contract…".* This turn of phrase clearly shows that the parties' ability to expressly designate their arbitration as "*international"* is not fettered nor circumscribed by the nature of their contract. Accordingly, no matter the circumstances of the case and even if there is no international element to the parties or the dispute, the parties are at liberty to agree to treat the arbitration as an international one. Hence, if contracting parties are uncomfortable with the restriction on foreign counsel representation contained in Article 4 of the Arbitration Rules, they may be able to eliminate same by including a declaration in their contract that any arbitrations arising thereof are international, and are to be governed by another arbitration rules of their choice, notwithstanding that the *lex arbitri* is Nigerian arbitration law. For parties whose

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

Conclusion

The take-away from this discussion are three:

1. By virtue of article 4 of the Arbitration Rules, only a legal practitioner who is enrolled to practice law in Nigeria can appear in domestic arbitration proceedings in Nigeria. Foreign counsel may however seek authorization by a warrant of the Chief Justice of Nigeria for the purposes of that particular proceeding.

2. A law firm, foreign or local, is not a legal practitioner and cannot therefore engage in law practice in Nigeria, such as filing processes before an arbitral tribunal in Nigeria. It is however presently unclear whether this stipulation cuts across both domestic and international arbitration proceedings.

3. Where parties' arbitration agreement expressly designates their arbitration as "*international"*, they will be entitled to select a more liberal rules regime, and thus side-step the restrictions created by article 4 of the Arbitration Rules which mandatorily apply to domestic arbitration proceedings in Nigeria.

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