The Restrictive Approach to Legal Representation in Arbitration Proceedings and Its Unintended Consequences in Nigeria

Oluwafikunayo D. Taiwo*

The issue of legal representation in arbitration proceedings accounts for one of the sub-factors of 'formal legal structure' and 'national arbitration law' that disputing parties consider before choosing a seat of arbitration. Indeed, the ability of disputing parties in arbitration to freely select their desired representatives is embedded in the foundational principle of party autonomy. In Nigeria, a literal interpretation of the national arbitration rules prevents parties from selecting persons not admitted to the Nigerian bar as their representatives in arbitration proceedings. This article examines the impact of this restrictive approach on the attractiveness of Nigeria as a seat of arbitration. The article identifies scope for reform in the law and makes suggestions to create a more liberal legislative and judicial framework in order to promote Nigeria as a preferred seat for arbitration.

Keywords: Arbitration, Legal representation, Seat, Nigeria

1 INTRODUCTION

The principle of party autonomy and procedural flexibility in international commercial arbitration, which allows parties the freedom to agree on the substantive and procedural laws applicable to their arbitration, is widely accepted across the world.[1] It is a basic tenet of international commercial arbitration, which enables parties to dispense with the technical formalities and procedures of national court proceedings and encompasses the ability to adopt flexible procedures.[2] Based on this principle, parties are typically able to design many aspects of their proceedings including the seat of arbitration, the procedural rules that may be applicable (ad

* PhD candidate, University of Essex School of Law. The author is grateful to Oladimeji Ojo and Tochukwu Anaenugwu for their comments on a draft of this article.
Emails: dorcasotaiwo@yahoo.co.uk; fikayo.taiwo@essex.ac.uk.

1 Gary B. Born, *International Commercial Arbitration* 84 (Kluwer Law International 2014).

2 *Ibid.*; Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* 355 (6th ed., Oxford University Press 2015); *Fouchard Gaillard Goldman on International Commercial Arbitration* 31 (Emmanuel Gaillard & John Savage eds, Kluwer Law International 1999); Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* 4 (Kluwer Law International 2003).

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hoc or institutional), the venue for meetings and hearings, and the law applicable to the merits of the dispute. The party autonomy principle largely accounts for the success of arbitration as the choice dispute resolution mechanism for international commercial transactions. For example, a survey by the School of International Arbitration at Queen Mary University of London has consistently found that international arbitration is the preferred dispute resolution mechanism for cross-border commercial disputes, for reasons including its flexibility and the ability of parties to select their arbitrators based on expertise for specialized proceedings.[3]

The fundamental nature of the right to fair hearing in the determination of a person's civil rights and liabilities, as guaranteed by most national laws[4] and international conventions,[5] is also of utmost importance in international arbitration. This is so even though arbitration is a private justice system, albeit supported by the state for enforcement of agreements and awards. In exercising this right, parties are to be given a 'full opportunity'[6] or 'reasonable opportunity'[7] to present their case, and to do this, it is reasonable to expect that parties should be free to select their desired legal representatives for arbitration proceedings. In light of the increasing value and complexity of international commercial disputes, and the quality of a party's case and/or defence being largely dependent on its chosen legal representatives, it is expedient that parties are unfettered in the exercise of their right to choose competent and experienced professionals from across the world.

This article examines the impact of the rules restricting parties' choice of representation in arbitration proceedings seated in Nigeria. First, the article discusses the diverse approaches to party representation across jurisdictions and arbitral institutions. The article then critically discusses the position in Nigeria and argues that the restrictive approach adopted by the Arbitration and Conciliation Act (ACA)[8] undermines the fundamental principle of party autonomy thereby contributing to the jurisdiction being less arbitration friendly, and militating against the popular and consistent choice of the ACA as procedural law and Nigeria as a seat.

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3 In the *2018 International Arbitration Survey: The Evolution of International Arbitration*, 97% of the respondents indicated that international arbitration is their preferred method of dispute resolution. *See* www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf (accessed 7 Dec. 2019).

4 *See* e.g. Constitution of the Federal Republic of Nigeria (as amended), s. 36 (1999).

5 *See* e.g. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(1)(b) (1958) ('New York Convention').

6 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, Art. 18, U.N. Doc. A/40/17 (1985), Annex 1 with amendments adopted in 2006 to improve its legislative framework and introducing provisions aimed at improving the international arbitration process.

7 English Arbitration Act 1996, s. 33(1).

8 Arbitration and Conciliation Act, CAP A18 Laws of the Federation of Nigeria 2004. The Act domesticates Nigeria's treaty obligations arising from the New York Convention.

The article concludes with a proposal for reform of the law, not only to accommodate foreign-trained lawyers but also other professionals, if parties so desire.

2 PARTY REPRESENTATION IN ARBITRATION PROCEEDINGS: AN OVERVIEW

Historically, parties have relied on legal counsel or other special agents of their choice in arbitral proceedings.[9] Indeed, the fundamental character of arbitration reflects parties' entitlement to present their case in arbitration through counsel freely chosen from virtually anywhere in the world irrespective of domicile, nationality, or qualification.[10] Most arbitration-related provisions recognize that arbitrating parties are free to appoint representatives of their choice, irrespective of professional qualification.[11] This acceptance is reflected in the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration[12] ('Guidelines'), a set of non-binding rules which reflect good practice in matters of counsel conduct and party representation in international arbitration. The Guidelines permit any person, 'whether or not legally qualified or admitted to a Domestic Bar',[13] to make submissions, arguments or representations on behalf of a party in arbitration proceedings.

In addition, a combined reading of international arbitration conventions such as article 44 of the International Centre for Settlement of Investment Disputes (ICSID) Convention[14] and rule 18(1) of the ICSID Arbitration Rules[15] expressly guarantees parties' freedom to choose their legal representatives in arbitral proceedings. Similarly, Article 4 of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (as revised in 2010)[16] and Article 26(4) of the International Chamber of Commerce (ICC) Arbitration Rules[17] recognize this freedom by providing that parties may appear in person or may be 'represented or assisted by persons of their choice' or

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9 Convention for the Pacific Settlement of International Disputes, Art. 62 (1907) ('Hague Convention I') which entitles parties to appoint 'special agents' to act as intermediaries and 'counsel or advocates' for the defence of their rights and interests before the tribunal.

10 Gaillard & Savage, *supra* n. 2, at 677.

11 Amr Omran, *The Appearance of Foreign Counsel in International Arbitration: The Case of Egypt*, 34(5) JIA 901, 902 (2017).

12 Adopted by a resolution of the IBA Council on 25 May 2013.

13 *Ibid.*, at 4.

14 Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966.

15 The Arbitration Rules were adopted on 25 Sept. 1967 and became effective on 1 Jan. 1968.

16 UNCITRAL Arbitration Rules, 1976, Resolution 31/98 adopted by the U.N. General Assembly on 15 Dec. 1976. In 2010, the Rules were revised in order to cater for changes in arbitral practice. The new Rules became effective on 15 Aug. 2010.

17 International Chamber of Commerce Arbitration Rules 2012 as amended in 2017.

'through duly authorized representatives'.[18] On the other hand, although some international arbitration conventions lack express provisions guaranteeing parties' right to representation by persons of their choice,[19] Born argues that the effect of a combined reading of their provisions in combination with institutional rules is that parties' right to fair hearing includes their right to be represented by lawyers or others of their own choosing.[20] Born argues that parties' right to choose any legal representative may be derived from a combined reading of Article II(1) and (3) of the New York Convention, which mandatorily provide for recognition and enforcement of arbitration agreements in accordance with the parties' desires, with most institutional rules providing for freedom to select legal representatives.

It is noteworthy that the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985[21] ('UNCITRAL Model Law') and the UNCITRAL Arbitration Rules provide model provisions designed to assist states in reforming and modernizing their laws on arbitration. Many states fully adopted these provisions[22] while others introduced some innovations to suit their specific national needs.[23] Although the UNCITRAL Model Law contains no express reference to the subject beyond requiring a party to be 'given a full opportunity of presenting his case', many national arbitration laws based on the UNCITRAL Model Law adopt the liberal path of guaranteeing parties' right to representation of their choice in line with parties' expectation when agreeing to arbitrate. Section 36 of the English Arbitration Act 1996[24] provides that in the

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[18] More institutional examples: HKIAC Administered Arbitration Rules 2018, Art. 13.6 ('The parties may be represented by persons of their choice'); SIAC Rules 2016, rule 23.1 ('Any party may be represented by legal practitioners or any other authorized representatives'); VIAC Rules of Arbitration 2013, Art. 13 ('In the proceedings before the arbitral tribunal, the parties may be represented or advised by persons of their choice'); CRCICA Arbitration Rules 2011, Art. 5 ('Each party may be represented or assisted by one or more persons chosen by it'); DIAC Arbitration Rules 2007, Art. 7.1 ('The parties may be represented or assisted by persons of their choice, irrespective of, in particular, nationality or professional qualification'); ADCCAC Procedural Regulations of Arbitration 2013, Art. 3 ('The parties may at any stage select those who shall act for them, drawn from among lawyers or others').

[19] For example, the New York Convention does not make any express reference to rights to representation.

[20] Born, *supra* n. 1, at 2834.

[21] UNCITRAL Model Law, *supra* n. 6.

[22] National arbitration legislations based on the UNCITRAL Model Law have been adopted in eighty states and 111 jurisdictions. *See* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed 3 Dec. 2019).

[23] These include France, Switzerland, and England. In England, the Departmental Advisory Committee on Arbitration embarked on an extensive exercise to adapt the provisions to suit the nation's needs. *See* Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) Arb. Int'l 19 (2001); Mark Saville, *The Origin of the New English Arbitration Act 1996: Reconciling Speed with Justice in the Decision-Making Process*, 13 Arb. Int'l 237 (1997).

[24] English Arbitration Act, *supra* n. 7.

absence of contrary agreement, 'part[ies] to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him'. Likewise, Section 594(3) of the Austrian Arbitration Act[25] guarantees this right and goes a step further by providing that 'this right cannot be excluded or limited'. The issue of freedom of choice in relation to legal representatives and its importance to arbitration proceedings is so well accepted across jurisdictions,[26] and even more so not in contention, that there are only a handful of judicial decisions in respect thereof. Furthermore, although challenges to party representation by foreign counsel are not common, courts in most jurisdictions tend to favour liberal interpretations of local law in respect of party representation in arbitration.[27] The foregoing represents the internationally accepted practice of permitting parties to exercise their procedural autonomy with respect to representation in their mutually agreed arbitration proceedings.

However, a number of jurisdictions restrict the rights of foreign lawyers and other professionals from representing parties before arbitral tribunals sitting in their jurisdiction, a position which some argue falls short of safeguarding parties' right to representation by persons of their choice[28] making these jurisdictions 'anomalies that deviate from the international norm'.[29] Through legislation, these jurisdictions either proscribe representation by persons other than legal practitioners called to the local bar or specifically require that local counsel advise parties in arbitration either as to local law issues or otherwise. This is the position, for instance, in Thailand where, in certain circumstances, the law restricts representation by foreign lawyers in arbitrations involving Thai law or where the award will be enforced in Thailand.[30] In

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[25] Austrian Arbitration Act, 2013.

[26] *See* e.g. Swiss Procedure Code 2008, Art. 373(5) which provides that 'each party may act through a representative' and Australian International Arbitration Act (as amended), s. 29(2) (1974) which provides: 'A party may appear in person before an arbitral tribunal and may be represented:
(a) by himself or herself;
(b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or
(c) by any other person of that party's choice'.

[27] 'Even in states where legislation does not expressly guarantee the parties' right to select their representatives, recognition of this right is generally implied: … this freedom has historically been recognized in the arbitral process, is an inherent aspect of the arbitral process, is based on each party's internationally-guaranteed opportunity to present its case and is what commercial parties expect when agreeing to arbitrate. In the few cases where the issue has arisen, courts have generally rejected claims that local law forbids foreign counsel from appearing in a locally seated international arbitration. Indeed, the issue is so well accepted that it seldom arises in practice and even less frequently results in judicial decisions on the issue'. (Footnotes omitted). Born, *supra* n. 1, at 2836.

[28] Omran, *supra* n. 11, at 903. For a comparative analysis of the liberal and restrictive approaches, *see* David W. Rivkin, *Keeping Lawyers Out of International Arbitrations*, 9(2) Int'l Fin. L. Rev 11 (1990) and David W. Rivkin, *Restrictions on Foreign Counsel in International Arbitrations*, XVI Y.B. Com. Arb. 402 (1991).

[29] Born, *supra* n. 1, at 2840.

[30] Michael Polkinghorne, *More Changes in Singapore: Appearance Rights of Foreign Counsel*, 22 JIA 75, 78 (2005).

Chile, local regulation forbids foreign counsel from representing parties in an international arbitration seated within its territory.[31] Representation in international arbitration proceedings by non-lawyers and/or foreigners is considered as 'unauthorized practice of law' in these jurisdictions. The justification for this position lies mainly in the supposed need to ensure the integrity and quality of legal advice and to protect the public from claims to legal services by unauthorized persons. Some courts have proceeded to affirm this argument while others have generally rejected claims that local law forbids foreign counsel from appearing in locally seated international arbitration.[32] At some point in Singaporean arbitration history, parties became representation-handicapped when, in 1988, the High Court of Singapore construed the Singapore Legal Profession Act to have taken away the 'common law right to retain whomsoever [parties] … desire or prefer for their legal services in arbitration proceedings in Singapore'.[33] One commentator argued that the decision 'may have undone all the good that was achieved toward making Singapore attractive as an international arbitration venue'.[34]

In the United States of America, the Federal Arbitration Act[35] does not expressly address parties' right to representation in international arbitrations, thereby leaving it to the local laws and regulations of states. In a similar fashion, the Uniform Arbitration Act (UAA),[36] drafted as a model arbitration statute to allow each US State to adopt a uniform law of arbitration, does not expressly prohibit non-lawyer representation in arbitration. In Section 16, the UAA provides that 'a party to an arbitration proceeding may be represented by a lawyer'. However, while the UAA drafting committee expressed concern 'about incompetent and unscrupulous individuals, especially in securities arbitration who hold themselves out as advocates', they stated that the provision is not intended to preclude 'individuals who are not licensed to practice law either generally or in the jurisdiction in which the arbitration is held'.[37] Parties are thereby permitted to exercise their freedom of contract save for proceedings regulated by law. As such, some US States generally permit non-lawyer representation in arbitration while restricting representation in certain specialized proceedings. In Florida, for

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31 Organic Code of Tribunals Act 2007, Art. 526; Figueres & Ros, *Notes on the New Chilean Law on International Arbitration*, 20(7) Mealey's Int'l Arb. Rep. 21, 25–26 (2005).

32 *Government of Malaysia v. Zublin Muhibbah Joint Venture*, 3 M.L.J. 125 (1990).

33 *Turner (East Asia) Pte. Ltd. v. Builders Federal (HK) Ltd., Josef Gartner & Co.*, 5(3) J.I.A. 139, 147 (1988).

34 Michael Polkinghorne, *The Right of Representation in a Foreign Venue*, 4(4) AI 333, 334 (1988).

35 Enacted 12 Feb. 1925, codified at 9 US Code Ch. 1.

36 1955 as revised in 2000.

37 Uniform Arbitration Act 2000 with prefatory notes and comments drafted by the National Conference of Commissioners on Uniform State Laws at the 109th Annual Conference meeting held at St. Augustine Florida, 28 July – 4 Aug. 2000, 57, www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af&forceDialog=0 (accessed 7 Dec. 2019).

instance, non-lawyers representing parties in securities arbitrations are deemed to be engaged in the unauthorized practice of law.[38]

However, while some US State courts have held that it amounts to the unauthorized practice of law,[39] others have relied on the special nature of arbitration to find otherwise. For example, in the oft-cited case of *Williamson v. John D. Quinn Construction Co.*,[40] the US District Court for the Southern District of New York adopted the view that party representation in the context of arbitration does not amount to the practice of law. The court also held that the rules of evidence and procedure in arbitration are distinguishable from those employed in litigation before the courts.

3 LEGAL REPRESENTATION IN NIGERIAN-SEATED ARBITRATION PROCEEDINGS

In Nigeria, the ACA[41] governs arbitration, a federal law premised on a decree made under military rule and preserved upon Nigeria attaining democratic rule in 1999.[42] The ACA is largely influenced by the UNCITRAL Model Law and is aimed at providing 'a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration'[43] throughout the Nigerian federation. The Nigeria Arbitration Rules as contained in the First Schedule to the ACA, which governs arbitration procedure in Nigeria except the parties agree otherwise, is also based on the UNCITRAL Arbitration Rules.

As stated above,[44] in determining persons qualified to act as counsel in arbitration proceedings, the UNCITRAL Arbitration Rules provides for parties' freedom to choose any person to represent them. However, Nigeria's adaptation of the provision in Article 4 of the Arbitration Rules specifically replaces 'persons' with 'legal practitioners' and provides that 'parties may be represented or assisted by legal practitioners of their choice'. While this may appear irrelevant, this substitution has legal consequences. Under Nigerian law, the term 'legal practitioner' has a strict statutory definition, which the courts have interpreted restrictively. Section 18(1) of the Interpretation Act[45] provides that the term 'legal practitioner' has the meaning assigned to it by the Legal Practitioners Act[46]

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38 Florida Bar Advisory Opinion on Non-Lawyer Representation in Securities Arbitration, 696 So.2d, at 1178 (Fla. 1997).
39 *Birbrower, Montabano, Condon & Frank, PC v. Superior Court*, 949 P.2d, at 1, 3 (Cal. 1998).
40 537 F. Supp. 613 (SDNY 1982).
41 Arbitration and Conciliation Act, *supra* n. 8.
42 Constitution of the Federal Republic of Nigeria, *supra* n. 4, s. 315.
43 Arbitration and Conciliation Act, *supra* n. 8, long title of the Act.
44 UNCITRAL Arbitration Rules, *supra* n. 16.
45 CAP I23 Laws of the Federation of Nigeria 2004.
46 CAP L11 Laws of the Federation of Nigeria 2004.

(LPA). Section 24 of the LPA defines a legal practitioner as a person entitled 'to practice as a barrister or as a barrister and solicitor, either generally or for the purpose of any particular office or proceedings'. In addition, Section 2(1) of the same LPA provides that persons entitled to practise as barristers and solicitors are those whose names are on the roll of lawyers.

With respect to litigation, Nigerian courts have had the opportunity to interpret the term 'legal practitioner'. In *Okafor v. Nweke*,[47] the Supreme Court of Nigeria was faced with determining the question whether a person not called to the Nigerian bar could sign court processes. Specifically, the question bordered on the propriety of a law firm issuing or signing a court process. In deciding that such processes are incompetent and liable to be struck out, the court held that:

> from the above provision, it is clear that the person who is entitled to practice as a legal practitioner must have had his name on the roll … 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 any form of legal practice in Nigeria.

Furthermore, in *First Bank of Nigeria PLC v. Maiwada*,[48] the Supreme Court reiterated its strict stance on the issue by relying on the provisions of the LPA to hold that only a person called to the bar in Nigeria can sign court processes. This excludes law firms who are not natural persons and could not have been called to bar in Nigeria. Presently, the position of the law is that only persons called to the Nigerian bar can practice as legal practitioners in Nigeria.

With respect to arbitration, there appears to be some uncertainty in the jurisprudence with respect to arbitration proceedings subject to Nigerian procedural law. The Court of Appeal has taken two different approaches to interpreting the representation rules in arbitration proceedings. Following the literal rule of statutory interpretation, the combined effect of the statutory provisions and the decisions of court will be that the term 'legal practitioner' as used in Article 4 of the Arbitration Rules is restricted to persons who are qualified in Nigeria. This much was confirmed by a tribunal in a domestic arbitration in Nigeria, which considered Article 4 of the Arbitration Rules and held that the words 'legal practitioner' restrict representation of parties to persons who are qualified to practice in Nigeria. It was on this basis that the tribunal disqualified the claimants' foreign counsel from continuous participation in the proceedings.[49] Similarly, in *Shell Nigeria Exploration & Production Company & 3 Ors v. Federal Inland Revenue*

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47 10 NWLR (Pt. 1043) 521, 531 (2007).

48 5 NWLR (Pt. 1348) 444 (2013).

49 Oghogho Akpata & Adewale Atake, *Domestic Arbitration in Nigeria: Can Foreign Counsel Still Run the Race?* (Mondaq 21 Feb. 2014), www.mondaq.com/Nigeria/x/293850/Arbitration+Dispute+Resolution/Domestic+Arbitration+In+Nigeria+Can+Foreign+Counsel+Still+Run (accessed 1 Dec. 2019).

Service & Anor[50] ('SNEPCo. decision'), the Court of Appeal affirmed the decision of the Federal High Court and declared the arbitration proceedings a nullity. Here, the court extended the rule from *First Bank of Nigeria PLC*[51] and held that the Notice of Arbitration was incompetent as it was signed by persons not admitted to the Nigerian bar – Clifford Chance LLP and AELEX Legal Practitioners.

In contrast, in *Stabilini Visinoni Ltd. v. Mallinson & Partners Ltd.*[52] ('*Stabilini*'), the same Court of Appeal had previously taken a permissive approach in similar circumstances. In *Stabilini*, the appellant contended that the arbitration proceedings were a nullity for failure to comply with the rule that originating processes – including a Notice of Arbitration – must be signed by a legal practitioner. The court held that having agreed to submit to arbitration and subsequently benefitted from its procedural flexibility, the appellant could not turn round to insist that the strict legal principles that obtain in litigation should be applicable in arbitration. The court added that 'arbitration is not limited to the legal community; it is open to lawyers and non-lawyers, and it cannot be a requirement that the notice of arbitration initiating same must be signed by a legal practitioner'.[53]

On the whole, the uncertainty created in the jurisprudence points to a seemingly restrictive stance. Several commentators have justified this protectionist position of the law especially in relation to foreign-trained lawyers while giving little or no consideration to its impact on the attractiveness of Nigeria as a seat of arbitration. Akpata and Atake[54] recognize the potential for the restrictive nature of the rules to result in retaliatory legislation in other jurisdictions, which would limit Nigerian practitioners in other jurisdictions. However, they argue that the rule is 'deserving of commendation' as it 'lends support to local content growth'. On the other hand, commentators such as Shasore[55] and Chukwuemerie[56] argue that the restrictive rule should not be national policy as it is inimical to the spirit and intent of the principle of party autonomy.

However, while the SNEPCo. decision is on appeal to the Supreme Court, parties appear free to choose foreign lawyers and non-lawyers to represent them in arbitration proceedings using *Stabilini* as their precedent. Indeed, representation by foreign lawyers and non-lawyers, usually alongside Nigerian counsel, appears to be

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50 Unreported Appeal No. CA/A/208/2012 delivered by the Court of Appeal, Abuja Division on 31 Aug. 2016.

51 *First Bank of Nigeria PLC*, *supra* n. 48.

52 12 NWLR (Pt. 1420) 134 (2014).

53 *Ibid.*, at 172.

54 Akpata & Atake, *supra* n. 49.

55 Olasupo Shasore, *Representation at Arbitration Proceedings Compared to Litigation – The Recent Trend in Shell v. FIR* (Mondaq 9 Nov. 2018), www.mondaq.com/Nigeria/x/753548/trials+appeals+compensation/Representation+At+Arbitration+Proceedings+Compared+To+Litigation+The+Recent+Trend+In+Shell+v+FIRS (accessed 27 June 2019).

56 Andrew I. Chukwuemerie, *Restricted Rights of Non-Lawyers and Foreigners to Practice Arbitration in Nigeria: Lawmaker's Inadvertence or National Legal Policy*, 1(1) NDRJ 57 (2004).

prevalent in arbitration practice in Nigeria provided they do not hold themselves out as legal practitioners properly so called. However, in the absence of a clear definite legal provision permitting this, it will be prudent to err on the side of caution. It is advisable for foreign lawyers and non-lawyers acting in arbitration proceedings seated in Nigeria and subject to Nigerian law to prevent their participation from extending to signing documents and/or processes submitted to tribunals in order not to run the risk of their awards being declared a nullity.

Although fraught with limitations, an additional possible way of circumventing the possible application of the strict approach exists in Section 2(2) of the LPA. This provision permits any person entitled to practice as an advocate in a jurisdiction similar to Nigeria to make an application to the Chief Justice of Nigeria for authorization to practice as a barrister for the purposes of any particular proceedings in Nigeria. In this context, a foreign-trained lawyer licensed to practice in any country where the legal system is similar to Nigeria may be given a warrant to practice as a barrister in Nigeria should the Chief Justice of Nigeria find it expedient to do so. Alternatively, where the parties in international arbitration proceedings seated in Nigeria adopt the ACA as their procedural law, they may exclude the application of Article 4 and the Nigerian Arbitration Rules in general through Sections 53 and 57(2)(d) of the ACA by agreeing to treat their arbitration as an international one. This way, parties to an international arbitration under the ACA are then capable of referring their proceedings in accordance with other international arbitration rules, including the UNCITRAL Arbitration Rules.

Nonetheless, based on the extant law and rules in Nigeria and barring the application of the foregoing escape routes, parties appear limited in their freedom of choice of representation in both domestic and international arbitration proceedings seated in Nigeria. The LPA makes no provision for private agreements to opt out of the limitation on foreign counsel and non-lawyers. Also, the LPA explicitly includes 'or proceedings' in its definition of a legal practitioner, making it safe to argue that arbitration proceedings are included in the activities reserved for members of the Nigerian bar.

4 WHY SHOULD THIS MATTER?

Notwithstanding the escape routes provided above, the impact of the restrictive nature of the representation rules and the undue technicality it portends on the attractiveness of Nigeria as a seat of arbitration must be reviewed. In the absence of documented evidence as to the reasoning for deliberately amending the wordings of Article 4, we must have recourse to the prevailing view verbally expressed by many legal practitioners in Nigeria. The main sentiment expressed by lawyers borders around the protectionist need to close the legal services market from

infiltration by foreign trained lawyers in order to save legal jobs from being 'pilfered'. This sentiment extends to arbitration, which has become 'big business' with its potential for foreign exchange earnings. Most arbitration clauses in Nigeria feature in many major oil and gas contracts, an industry which remains Nigeria's highest earner of foreign exchange, with companies like ExxonMobil, Royal Dutch Shell, Total, Eni and Petróleo Brasileiro spending their petro-dollars on arbitration as their choice dispute resolution method for major claims. It is in the light of the fear that these petro-dollars will be exported to foreigners and non-lawyers that some Nigerian legal practitioners insist that the representation rules remain restrictive. Indeed, the Local Content Act[57] reinforces this restrictive position and poses an additional constraint in this regard.

However, proponents of this argument fail to recognize the potential adverse effects of this position. In a 2005 study, Drahozal and Naimark[58] found that between 1996 and 2003, commercial parties selected Nigerian law and seat in only two international commercial arbitration agreements. This is in contrast to western seats, including London, Paris, and New York, which are selected more often. The researchers remarked:

> Out of the one hundred per cent of the international commercial matters settled by commercial arbitration matters around the commercial world between 1996 and 2003 and 2003 and 2013, ninety-nine per cent were settled in western venues with only two in Nigeria. The research work found that a variety of considerations go into the parties' choice of the place of arbitration, including accessibility of the site to the parties, availability of necessary infrastructure, the applicability of a treaty (such as the NYC) providing for the enforceability of arbitration agreements and arbitral awards.

While these findings may not have directly been attributable to the representation rules, one cannot rule out the potential contribution this may have had on the consciousness of parties when choosing seats for their arbitration. This is so especially in light of the findings of the Queen Mary School of International Arbitration survey which continues to find Africa-related and/or originated commercial disputes being submitted for arbitration in seats other than Nigeria, with respondents identifying 'formal legal structure' and 'national arbitration law'[59] as

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[57] The Nigerian Oil and Gas Industry Content Development Act 2010 seeks to increase indigenous participation in the Nigerian oil and gas industry by prescribing minimum thresholds for the use of local services and materials in order to promote transfer of technology and skill to Nigerian staff and labour in the industry.

[58] Christopher R. Drahozal & Richard W. Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* 344 (2005).

[59] These phrases were coined in the Queen Mary University School of International Arbitration *2010 International Arbitration Survey: Choices in International Arbitration*, www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf (accessed 29 Nov. 2019).

major factors to consider before choosing a seat of arbitration.[60] It is noteworthy that the rules in Nigeria are not reflective of the general position in Africa, as shown for example, by the rules in Ghana, Nigeria's co-west African counterpart, and colonized by the same imperial lords with similar laws, where parties are allowed to be represented by counsel or any other person of their choice.[61]

In recognition of the negative impact of a restrictive approach to representation in arbitration proceedings, certain jurisdictions took active steps to reverse their previously held position. For instance, in February 2017, after the negative impact of the decision in *Birbrower, Montabano, Condon & Frank v. Superior Court of Santa Clara County*[62] began to be felt, the California Supreme Court International Commercial Arbitration Working Group remarked that:

> California should join the 13 U.S. jurisdictions (including New York, Florida, Illinois, Texas, and the District of Columbia) and numerous foreign jurisdictions (including Great Britain, France, Italy, Switzerland, Singapore, and Hong Kong) that authorize foreign and out-of-state attorneys to represent parties in international commercial arbitrations without any filing or fee requirement.[63]

In response, the California Senate signed Senate Bill 766 into law on 18 July 2018. Section 1297.185 of the Code of Civil Procedure of California describes 'qualified attorney[s]' permitted to provide legal services in an international commercial arbitration or related proceedings as individuals 'admitted to practice law in a state or territory of the United States or the District of Columbia or a member of a recognized legal profession in a foreign jurisdiction'.[64]

Similarly, the Cairo Court of Appeal and Egyptian Court of Cassation provided clear guidance on a perceived lacuna in Egyptian representation law. In parallel proceedings arising from an Egypt-seated arbitration[65] where the courts

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60 The most recent survey in this regard from the School of International Arbitration, Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* found London, Paris, Singapore, Hong Kong, and Geneva to be the most preferred seats of arbitration in the world. *Supra* n. 3.

61 Alternative Dispute Resolution Act, s. 42 (2010).

62 17 Cal. 4th 119 (1998).

63 California Supreme Court International Commercial Arbitration Working Group Report and Recommendations, 40 (10 Apr. 2017), https://newsroom.courts.ca.gov/news/court-working-group-recommends-proposal-for-international-commercial-arbitration (accessed 3 Dec. 2019).

64 An Act to add Art. 1.5 (commencing with s. 1297.185) to Ch. 5 of Title 9.3 of Part 3 of the Code of Civil Procedure, relating to international commercial disputes.

65 Omran, *supra* n. 11, at 904; Public Prosecution Case No. 15063/2005 (Kasr Al-Nil Misdemeanours), 13 Mar. 2006; South Cairo Primary Court, Case No. 2433/2006 (Central Cairo Appellate Misdemeanours), 24 Jan. 2007; Cairo Court of Appeal, Petition No. 42119/JY77 (Criminal Cassation), 1 Feb. 2012; Cairo Court of Appeal, Case No. 70/JY123 (Commercial Arbitration) (First Review), 7 May 2008; Court of Cassation, Petition No. 10132/JY78 (Commercial) (First Review), 11 May 2010; Cairo Court of Appeal, Case No. 70/JY123 (Commercial Arbitration) (Second Review), 9 Mar. 2011; Court of Cassation, Petition No. 7595/JY81 (Commercial) (Second Review), 13 Feb. 2014.

were faced with the question whether foreign lawyers, who are normally prohibited from practicing law in Egypt except on a *pro hac vice* basis, may represent parties to an arbitration conducted in Egypt. While recognizing that the 'procedural rules governing the conduct of arbitral proceedings are tailored to the exigencies of international commerce', the judges employed judicial activism in holding that the parties' choice of the ICC Rules of 1998 was a reflection of their intention to displace the Arbitration Law. The court held that a choice of rules becomes an integral part of an arbitration agreement that must be enforced, and concluded that parties are as able to appoint others to appear in their stead, as they are to appear in person in arbitral proceedings irrespective of whether these persons are foreigners or lawyers.

Finally, in Singapore, the negative impact of the restrictive representation rules as reflected by the decision in *Turner (East Asia) Pte. Ltd. v. Builders Federal (HK) Ltd., Josef Gartner & Co.*[66] was acknowledged by the Minister for Law when they said:

> We have made good progress in promoting Singapore as an arbitration centre … To further promote this objective, we have reviewed the requirement for foreign counsel to appear … It is a requirement which puts us at a disadvantage … as it may be a factor against the use of Singapore as an arbitration venue. Foreign parties are more likely to recommend or choose a place with less restrictions. To be competitive in this field, we need to remove this requirement, and allow foreign counsel the choice of appearing without local counsel.[67]

To counteract the possible diminution in the attractiveness of Singapore as a seat, the legislature made a series of amendments to Singapore's representation laws. After several attempts, this finally resulted in the law as stated in Section 35(1)(b) of the Singapore Legal Profession Act[68] to the effect that any person representing parties in arbitration proceedings shall not be deemed to be illegally practicing law. Today, for several other reasons including its representation laws, Singapore has cemented a solid reputation as a preferred seat among international arbitration users.[69]

5 PROPOSAL FOR REFORM

Despite the acknowledged practice of foreign counsel and non-lawyers participating in arbitration proceedings seated in Nigeria or arbitration with ACA as the

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66 *Turner (East Asia) Pte. Ltd.*, *supra* n. 33.

67 S. Jayakumar, Minister of Law, *Second Reading Speech on Legal Profession (Amendment) Bill*, Singapore Parliament Report, Vol. No. 78 Column No. 96 (15 June 2004) in Born, *supra* n. 1, at 2839.

68 2009 (revised edition).

69 39% of the respondents in the 2018 Queen Mary School of International Arbitration survey identified Singapore as their preferred seat, *supra* n. 3.

procedural law albeit in a limited capacity, and the escape routes suggested above, Nigeria is still seldom chosen as a seat of arbitration. In light of the ability of commercial parties to relocate their proceedings to more arbitration-friendly seats, thereby avoiding protectionist jurisdictions, it is imperative that Nigerian stakeholders take a deliberate action to rectify this anomaly. This is especially so on the basis of the enormity of the contribution Nigeria makes to the economy of Africa, as well as her market's potential to attract foreign investment. In suggesting reforms, this article refers to other existing rules and laws within the Nigerian legal framework that indicate a contrary intention to Article 4 and an indication that there may be some recognition of the anachronistic nature of the representation rules.

First, is the absence of a nationality or qualification requirement in the law for arbitrators. Nowhere in the ACA and its annexed rules is there a prescription to parties on who they can appoint to serve as arbitrator(s) to determine their dispute. The question that then arises is, of what benefit is it to guarantee parties the freedom to choose arbitrators while leaving restrictions on party representatives in place?[70] It appears there is none.

Secondly, in prescribing persons qualified to sign pleadings in litigation, order 13 rule 4(3) of the Federal High Court (Civil Procedure) Rules 2019[71] expressly requires pleadings to be signed by a legal practitioner.[72] On the contrary, in respect of the same issue, neither the ACA nor its annexed applicable rules expressly provide for persons qualified to sign the notice of arbitration, statement of claim, statement of defence, or any other documents used in the proceedings. One wonders if this departure from court procedure, which requires pleadings and applications submitted to court to be signed by a lawyer, is an implicit acknowledgement by the drafter of the nonessential presence of legal practitioners in arbitration proceedings.

Furthermore, in the Lagos Court of Arbitration Rules 2018,[73] it appears the promoters of the institution recognized the antiquated nature of restrictive representation rules by adopting the UNCITRAL Rules on representation without amendment. By Article 6 of the Rules, parties may be 'represented or assisted by persons chosen by them'. It is noteworthy that the Lagos Court of Arbitration International Centre for Arbitration and ADR (LCA) is a private sector-driven dispute resolution centre established under the Lagos Court of

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70 Gaillard & Savage, *supra* n. 2, at 677.

71 These rules will apply should the parties end up in court seeking any relief with respect to the ACA.

72 Alternatively, by the parties themselves if they appear in person.

73 Lagos Court of Arbitration International Centre for Arbitration and ADR, www.lca.org.ng/wp-content/uploads/2018/07/AMENDED-LCA-RULES-ilovepdf-compressed.pdf (accessed 3 Dec. 2019).

Arbitration Law No. 17 of 2009 pursuant to the Lagos State Arbitration Law, No. 18 of 2009.[74] The LCA was established with a 'desire to promote Lagos as the hub for the settlement of disputes'[75] across Africa. It is unsurprising therefore that the drafters adopted the flexible approach, as reflected in the general nature of arbitration to exempt parties from the formalities of representation before national courts.[76]

It is clear, therefore, that, with respect to the national laws and rules, deliberate reformative action on the part of the legislature is expedient. The ACA, its annexed rules, as well as the LPA require urgent amendment and this can be done in a variety of ways. These include providing an exception in the LPA that persons acting as representatives in arbitration proceedings will not be deemed to be engaged in the unauthorized practice of law. The provision may be worded similarly to the position in the Singapore Legal Profession Act 2009 (revised edition) and adapted to read:

> This provision shall not extend to any person representing any party in arbitration proceedings or the giving of advice, preparation of documents and any other assistance in relation to, or arising out of arbitration proceedings except for the right of audience in court proceedings.

The legislature may insert this provision as a proviso to Section 22(1) of the LPA Act, thereby opening the doors to foreign lawyers and non-lawyers alike, while at the same time catering to the sentiment of lawyers called to the Nigerian bar by restricting access to actual court proceedings when parties require the supervision or intervention of the courts.

Alternatively, legislature may reverse its deliberate amendment of Article 4 by either replacing 'legal practitioner' with 'any person' so that it reads the same as the UNCITRAL Rules, or including 'any person' in the following words:

> The parties may be represented or assisted by legal practitioners or other persons of their choice.
> OR
> The parties may be represented or assisted by any person of their choice.

This writer is not oblivious to the complexity and extensive delays associated with the passage and amendment of laws in Nigeria as reflected, for example, in the age-long attempt to amend the ACA to bring it in line with present

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[74] For issues bordering on the constitutionality and validity of these laws, *see* Gbenga Bamodu, *Legislative Competence over Arbitration in Nigeria*, 19(1) IALR 1 (2016).

[75] *See* www.lca.org.ng/ (accessed 3 Dec. 2019).

[76] However, the validity of this provision is unclear as it may be possible to convince a Nigerian court faced with an application to recognize and enforce an award emanating from such proceedings to nullify the award for failure to comply with the rules on signature.

commercial and technological advancements.[77] However, the ACA (Repeal and Re-Enactment) Bill 2017 pending before the National Assembly still does not address the issue of representation as one of the ways in which Nigeria can promote a legislative pro-arbitration outlook.

As such, pending the legislature's awareness of this need, we must look to the courts for mercy through ingenious judicial activism. Nigerian courts may adopt the reasoning of the High Court of Kuala Lumpur in *Zublin Muhibbah Joint Venture v. Government of Malaysia*,[78] where the court held that the Legal Profession Act 1976 had no application to an arbitration proceeding in West Malaysia on the basis that arbitration is a private dispute resolution mechanism. The Federal Court of Malaysia subsequently upheld this decision.[79] Similarly, in 1983, the High Court of Barbados stressed the essentially private nature of arbitration and ruled that the Legal Profession Act (Cap. 370A) did not derogate from the established 'common law right of everyone who is *sui juris* to appoint an agent for any purpose'.[80]

While recognizing that the inconsistency and ambiguity in the provisions of the law aided the courts in the aforementioned foreign decisions in contrast to the express wordings in Article 4, Nigerian courts are not left completely stranded. More courts should adopt the approach taken in *Stabilini*[81] by ruling that the effective use of the word 'may' in the provision is permissive rather than mandatory, so that parties may choose to be represented by persons other than legal practitioners called to the Nigerian bar. In addition, following the canon of interpretation that penal provisions should be interpreted restrictively and provisions derogating from common law rights should be resolved in favour of maintaining those rights, the courts can avoid the effect of Article 4. Judges need to give these provisions a narrow interpretation such that the rule should have no application in arbitration. Thus, the right to be represented by whomsoever a party chooses, a constitutional right which is implicit in persons' right to fair hearing[82] in the determination of their civil rights and obligations, can be enforced by the courts irrespective of the provisions of Article 4.

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77 Efforts to pass this law have been stultified in the legislative process. The attempts can be traced to the Report by the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria set up in 2005. *See* www.aluko-oyebode.com/insights/national-committee-on-the-reform-and-harmonisation-of-nigerias-arbitration-and-adr-laws/ (accessed 29 Nov. 2019).

78 *Government of Malaysia*, *supra* n. 32.

79 *Government of Malaysia v. Zublin Muhibbah Joint Venture*, Federal Court of Malaysia, 2 Jan. 1990. It is worth noting that the Legal Profession Act 1976 has been amended to expressly permit the appearance of foreign counsel in international arbitration in Malaysia. *See* Malaysian Legal Profession (Amendment) Act, s. 37(A) (2013).

80 *In the matter of an Arbitration between Lawler, Matusky, & Skelly, Engineers v. Attorney General of Barbados*, Civil Case No. 320 of 1981, 22 Aug. 1983.

81 *Stabilini Visinoni Ltd., supra* n. 52.

82 Constitution of the Federal Republic of Nigeria, *supra* n. 4.

6 CONCLUSION

It is incomprehensible and indeed, inexpedient to have foreign parties restrained from having (foreign or non-legal) counsel of their choice, who may be well versed with the intricacies of their transaction and dispute simply because the LPA and, invariably, the Arbitration Rules operate as a bar to these persons representing their clients in arbitrations seated in Nigeria. The globalization of legal services has meant that parties to an arbitration are able to retain highly qualified persons, lawyers or otherwise, located locally or abroad to deal with disputes arising from commercial transactions. This is so especially in relation to highly technical or factual disputes, including construction and commodities association trading which do not necessarily require lawyers to resolve.

Given the growing interest of states to provide more favourable conditions to arbitration, considering its importance to domestic and foreign investors, it is more probable than not that protectionist approaches will become a thing of the past. Indeed, openness to foreign counsel and other experts is crucial for any jurisdiction that strives to establish a place for itself in the modern universe of arbitration. If Nigeria is to hope for any signs of being a major seat for commercial arbitration, it must strive to improve the formal legal structure by reforming these laws or, alternatively, by judicial activism in the interpretation of the representation rules to exclude arbitration. In the absence of this, it is difficult to see how Nigeria may attain its full potential of being an attractive seat of arbitration. The same argument may be applicable in jurisdictions with similar rules.