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Nigeria's Rules on Party Representation in Arbitration Proceedings: A Clog in the Wheel to Attraction?

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The interplay between the principle of party autonomy and procedural flexibility in arbitration greatly accounts for the growth of international arbitration as the preferred method of dispute resolution for cross-border commercial disputes. The growing trend of this preference is reflected in the most recent International Arbitration Survey conducted by the School of International Arbitration at Queen Mary University of London. The ability of parties to design many aspects of their proceedings including the seat of arbitration, the procedural rules that may be applicable (*ad hoc* or institutional) and the law applicable to the merits of the dispute partly account for the most valued reasons why parties would choose arbitration over other dispute resolution mechanisms. Tangential to the determination of a person's civil rights and liabilities in any form of dispute resolution mechanism, including arbitration, is the need to guarantee parties' fundamental right to a fair hearing. Embedded in this right to a fair hearing is the right of parties to select competent and experienced professionals to represent their interests, especially in light of the increasing value and complexity of international commercial disputes. Given the significance of this need, most jurisdictions and institutional rules recognise that arbitrating parties are free to appoint representatives of their choice, irrespective of nationality and professional qualification. Section 36 of the English Arbitration Act and Section 594(3) of the Austrian Arbitration Law are some examples of this position. Similarly, Article 4 of the UNCITRAL Arbitration Rules and Article 26(4) of the International Chamber of Commerce Arbitration Rules ('ICC Rules') recognise this freedom by providing that parties may appear in person or may be "represented or assisted by persons of their choice" or "through duly authorised representatives".

However, some jurisdictions deviate from the norm by either proscribing 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 of Thailand, for instance, 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.[1)] In Chile, local regulations continue to forbid foreign counsel from representing parties in arbitration proceedings seated within its territory. Furthermore, Article 19 of the Angolan Arbitration Act provides that "parties have the right to appoint a lawyer" and "lawyers" are defined as only those legal practitioners qualified to practise in Angola for the purposes of this Act. Consequently, foreign legal practitioners are prevented from participating in arbitration proceedings as the Angolan bar only accepts Angolan lawyers.

The position is the same in Nigeria, where Article 4 of the Arbitration Rules provides that "parties may be represented or assisted by legal practitioners of their choice". In determining who a "legal practitioner" is, the Nigerian Supreme Court has held in several cases, including *Okafor v Nweke*,[2] that based on the Legal Practitioners Act, such person must have had his name on the roll "*otherwise he cannot engage in any form of legal practice in Nigeria*". While this pronouncement was made with respect to litigation proceedings, it is not difficult to predict that a court faced with the same question in arbitration proceedings will adopt the literal rule of statutory interpretation in holding that the term "legal practitioner" as used in Article 4 is restricted to persons qualified to practice law in Nigeria. This will be particularly so if the court is informed of the previous position, where 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".[3]

While Nigerian law provides for exceptions in the following instances:

1. Section 2(2) of the Legal Practitioners Act to the effect that any person licensed to practice law in a jurisdiction similar to Nigeria's may apply to the Chief Justice of Nigeria for authorisation to practice as a barrister for the purposes of any particular proceedings in Nigeria in which case, lawyers from common law jurisdictions may apply; and
2. with respect to international proceedings seated in Nigeria where the Arbitration and Conciliation Act (ACA) is adopted as the *lex arbitri*, parties may exclude the application of Article 4 and the Nigerian Arbitration Rules in general through Section 53 of the ACA by agreeing that their proceedings will be governed by any other international arbitration rules;

it appears these provisions, among others, are insufficient in plugging the hole through which Africa-related disputes continue to seep through to Europe for resolution. For example, in a 2005 study, Drahozal and Naimark found that between 1996 and 2003, commercial parties selected Nigerian law and seat in only two international commercial arbitration agreements in contrast with western seats including London, Paris and New York.[4] In addition, while there has been a general increase in the number of African-related disputes resolved through arbitration as a result of increased investments in Africa, very few of these proceedings are seated in African jurisdictions. For example, the 2018 LCIA Annual Casework Report recorded that out of 317 cases referred to under the LCIA Rules, only 8% of parties were African with a 2.8% Nigerian representation. More significantly, none of the parties chose Nigeria as a seat although Nigerian law was chosen three times.

One could argue that the protectionist approach taken by Nigerian rules to restrict parties in selecting their preferred representatives in arbitration proceedings, among other reasons, partly accounts for its poor "formal legal structure" and "national arbitration law." These are major factors business persons continue to consider before choosing a seat of arbitration and the continued persistence on this protectionist approach is unlikely to attract international arbitration to the region. This is especially so in light of jurisdictions like Singapore and California, who recognised the adverse effects of restrictive rules and have taken active steps to reverse their previous positions. Similarly, in a bid to enhance Ghana's chances of being chosen by parties as a seat of arbitration, the Alternative Dispute Resolution Act of 2010 is based on internationally recognised principles and includes many modern and forward-looking provisions including the right of parties to be represented by counsel or any other person of their choice.[5]

In light of the foregoing, and given the globalization of legal services, it is expedient that foreign respondents are able to have (foreign or non-legal) counsel of their choice, who may be well versed with the intricacies of their transaction and dispute. Given the growing interest of states to provide more favourable conditions to arbitration, considering its importance to domestic and foreign investors, it is more likely than not that protectionist approaches such as the position in Article 4 of Nigeria's Arbitration Rules will become a thing of the past. This is especially so in light of the Doing Business 2019 findings that Nigeria ranks 92nd out of 190 economies surveyed on the ease of enforcing contracts within the region. In conclusion, where parties are denied the choice of selecting persons who are familiar with their transaction solely on the basis of nationality and/or qualification, there is no gainsaying that this ranking will probably not improve. The determination to maintain this parochial position will inhibit Nigeria's potential of being an attractive seat of arbitration on the African continent and the world at large.

References

?1 Polkinghorne, ‘More Changes in Singapore: Appearance Rights of Foreign Counsel’ (2005) 22 Journal of International Arbitration 75, 78.

?2 (2007) 10 NWLR (Pt. 1043) 521, 531.

?3 *Turner (East Asia) Pte Ltd v Builders Federal (HK) Ltd, Josef Gartner & Co.* [1988] 5(3) Journal of International Arbitration 139, 147.

?4 Christopher R Drahozal and Richard W Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2005) 344.

?5 Ghana’s Alternative Dispute Resolution Act of 2010, Section 42.