

IMPEACHMENT OF DOMESTIC ARBITRAL AWARD*

Abstract

An award given in an arbitration proceeding is in par with the judgment of the court. Parties who went to arbitration as a mechanism for the dispute resolution expect that the award when made shall be complied with and shall bring the dispute to its finality. However, when the arbitral award fails to meet the fair expectation of a party or parties, the remedy available to them is to challenge or question the arbitral award. The party who intends to challenge an award is at liberty to take steps against the arbitral award and can do so either by applying to the high court for setting aside of an award. Under the repealed Act (Arbitration and Conciliation Act), it provides for the court to set aside an award on the grounds of misconduct of an arbitrator or error on the face of the award, however the New Innovation of the Arbitration and Mediation Act, by virtue of Section 55(3) of the Act provides for grounds to recourse to a court against an arbitral Award. Furthermore, the New Act also affixed a time within which the application for setting aside an award could be made. The aim of this work is to unearth and explore the key innovation of impeachment of domestic arbitral award under the new Arbitration and Mediation Act of 2023. Doctrinal method of research which includes the use of primary sources, secondary sources and internet resources are employed in the course of this research. This paper recommends that the new Act should be amended to provide for misconduct and error of law to be listed as grounds for impeachment under the Act as it will curb substantial injustice to an applicant faced with such issue and preserve the integrity of the finality of an arbitral award.

Keywords: Arbitration, Mediation, Award, Impeachment.

1. Introduction

Award is the judgment of the arbitration panel and the end product of arbitration proceedings. Under the definition section of the new Arbitration and Mediation Act of 2023,¹ it failed to define an Award. The term 'award has been given different definitions by various scholars and decided cases. In *Maritime Academy of Nig .v. A.Q.S*, it was held that ' An Arbitral award extinguishes any right of action of former matters in difference between the parties thus, the other party's claims in the substantive and stated matter becomes extinguished when the arbitral award is made.² According to Nwakoby, an Award means the decision of arbitral tribunal.³ Russel defined arbitral award as the final determination of a particular issue of claim in arbitration.⁴ Arbitral award is the final determination of issues by arbitral tribunal after its proceedings. Arbitral Award is binding on the parties except where a party to the proceedings applies for setting aside/ impeachment of an award on the grounds that the award by the tribunal would cause substantial injustice to the party. The principle of arbitral award is that it must be given in fairness, conform with the law and be valid, however where a party to the arbitration proceedings is dissatisfied with an award given by an arbitrator and can show that the award is invalid, he can raise an objection for impeachment of award on the following grounds listed under the Section 55(3) Arbitration and Mediation Act of 2023, unlike the Repealed Act, Section 55(2) Arbitration and Mediation Act which specifically excluded error on the face of the award as one of the grounds for challenging an arbitral award except for those grounds expressly stated in Section 55(3). Section 55(4) of the New Act also made provision for time limitation for impeachment of Arbitral Award for the grounds listed under the Act. A party who is aggrieved by an arbitral award applies to the court. Section 91 defined court to mean, the State High court, Federal high court or the High Court of the Federal Capital Territory.⁵ The court to which an application for impeachment shall be the court with proper jurisdiction to try the matter.

The mode of application to attack or challenge an Arbitral award may be instituted by the aggrieved party through an originating motion⁶, accompanied by supporting affidavit, outlining the relief sought, questions for

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¹Section 91 of the Arbitration and Mediation Act of 2023

² (2008) ALLFWLR (Pt 406) 1892

³ Greg C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (1st Edn Enugu: Lyke Ventures Press,2004) p206

⁴ D Simon, *Russell on Arbitration* (21st edn. Gloucester: Sweet and Maxwell, 2001) p.249.

⁵ Arbitration and Mediation Act of 2023

⁶ Section 2 Arbitration Proceeding Rules 2020 in the third schedule of the Arbitration and Mediation Act, 2023.

determination, details of the challenged award and the ground(s) under the Act under which the claim is brought. The applicant must show that the ground or grounds under which the award is made has caused or will cause substantial injustice to the applicant⁷. Thus if the court is satisfied that an applicant has proved one or more of the conditions, the court may set aside the award in whole or in part, vary or modify the award or reinstate the award if it is irrelevant to set aside the award. The objective of the new Act for intervention of the court focuses only when the statutory grounds are clearly proven rather than re-examining the merits of the Award⁸

2. Setting Aside an Arbitral Award under the Arbitration and Mediation Act

A dissatisfied party involved in an arbitration proceeding can apply to set aside or impeach an arbitral award, the application should specify the grounds relied upon as outlined in Section 55 (3) (a) and (b) of the Arbitration and Mediation Act of 2023. The grounds briefly include: incapacity of the party, invalid arbitration agreement, lack of proper notice or fair hearing, award beyond scope of submission to arbitration, improper composition of tribunal or procedure, misconduct of the Arbitrator, non – arbitral dispute and public policy violation.

Incapacity of parties: An application for setting aside an arbitral award can be affirmed where the party to the arbitration is incapable of entering into a contract, incapable of taking care of their interest and also not represented by a person who can protect their rights. Section 55 (3) (a) (i) of the Arbitration and Mediation Act provides that ‘the court may set aside an arbitral award, where-(a) the party who makes the application furnishes proof that-(i) a party to the arbitration agreement was under some legal incapacity’. In Nigeria, there is no uniform law governing capacity of a person to enter into a contract, An infant or minor lacks the capacity to enter into a contract except for the supplies of necessities or where represented by a guardian.⁹ Under the Infants Relief Act of 1874, contract for loans, contract for goods other than necessities becomes absolutely void, the competence of an infant to submit to arbitration stands on the same pedestal as his eligibility to enter into any other contract.¹⁰ Some other persons in the society who may lack legal capacity are illiterates¹¹, bankrupt and mentally insane person. Contracts made by illiterate persons are binding on them and would be liable for all his obligations, however the position is different when the contract is written. The laws containing the provisions on the protection of illiterate person in contractual agreements are; the illiterates protection Act and Land Instruments Registration Law. Where a debtor or bankrupt enters into an agreement to submit to arbitration and such an agreement affects the rights of his creditor, unless the trustees in bankruptcy adopts such contract, the arbitration agreement will be void for incapacity.¹² A submission to an Arbitration entered into by an insane person is valid except where he lacks capacity to understand the nature of the arbitration proceedings, thus any award rendered pursuant to such an agreement may not be recognized and enforced by the courts. Where a power of attorney is given to a client by a solicitor to act on his behalf, the solicitor has no right to bind the other party in an arbitration agreement without the consent of his client. A party may request the court to set aside award on the part of the solicitor who entered an agreement without the requisite consent to do so.

Invalidity of arbitration agreement under laws: Section 55 3(ii) of AMA provides that ‘A court may set aside an arbitral award where the arbitration agreement is not valid under the law to which the parties have subjected it, or failing such indication, under the laws of Nigeria’. This implies that an arbitration agreement or an agreement which the arbitration clause is mentioned is held invalid on the grounds of fraud, mistake, undue influence and duress, then an arbitration award passed by the arbitral tribunal on the matter arising out of such agreement shall be invalid. The basis of this position is that if the arbitration agreement is found to be legally invalid, both the reference to arbitration and award based on such reference shall be invalid and set aside.

Inadequate Notice Not Given to the Parties of Arbitration Proceedings: The arbitration and Mediation Act provides that a party to an arbitration proceeding may seek to set aside an award if ‘the party who makes the application furnishes proof that the party who makes the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present its case.’¹³The arbitral tribunal owes a duty to ensure that notice of the appointment of arbitrators and adequate notices are issued at each stage of arbitration proceedings to avoid impeachment for failure to issue adequate notice .Improper notice as a ground pertains to the ‘right to fair hearing’¹⁴ which is a constitutional right provided for in the constitution of the federal

⁷Section 55(5) Arbitration and Mediation Act, 2023.

⁸ *Abuja Environmental Protection Board.v. Mahaj Nigeria Ltd* 2021 LPELR-55590(CA)

⁹ *Peters v Fleming* (1840) 6 M&W 42

¹⁰ *Slade & Anor v. Metrodent Ltd* (1953)2 Q.B 112 @ 113

¹¹ *P. Z. CO. Ltd v Guasau* (1962) 1 All NLR, P244 and *Kantoma*

¹² G. C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2025) 3rd edn. Chenglo limited

¹³ Section 55(3) (a) (iii) of the Arbitration and Mediation Act 2023

¹⁴ *Zideeh v. Rivers State Civil Service Commission* (2007) LPELR-3544(SC).27

republic of Nigeria.¹⁵ In arbitration proceedings, Parties and arbitral tribunals must ensure that proper notices are served through an efficient and effective means, where notice is in effective and not properly served, it may lead to miscarriage of justice¹⁶. Unfortunately, the Act failed to provide what form or content of notice is required from an arbitrator or parties, however it has been argued that a notice which communicates in substance and in whatever words, that a dispute has arisen and that the claimant has appointed his own arbitrator should be deemed an appropriate notice for purposes of commencing arbitration.¹⁷

An Award not Falling Within the Terms of Submission to Arbitration: the dispute arising from the arbitration agreement serves as the basis for determining the jurisdiction of an arbitral tribunal, if an award is given on any matters that deals with a dispute not contemplated by or does not fall within the terms of the submission to arbitration¹⁸, such an award shall be deemed invalid and can be set aside on the grounds of it not falling within the terms submitted to arbitration. An arbitrator should always act under the authority as provided in the terms of agreement and not beyond that.

The Award contains decisions on matters which are beyond the scope of the submission to arbitration: Section 55 (3) (v) of the Arbitration and Mediation Act provides that the court may set aside an arbitral award if the party applying for the impeachment furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not submitted, only the part of award which contains decisions on matters not submitted to arbitration may be set aside for lack of or excess of jurisdiction. In some cases, a party may seek the court to set aside an award where the arbitral tribunal failed to deal with all matters referred to it, the court before which the application for impeachment is made on this ground can order the arbitral tribunal to deal with the matter which was left undecided instead of impeaching the entire award. The arbitral tribunal upon which a request is made by the parties for additional award, shall within 60 days of the request make additional award or may extend the time for making an additional award.¹⁹

The Composition of the Arbitral Tribunal or Arbitral Procedure was not in Accordance with the Parties Agreement: The parties to the arbitration agreement have the right to specify the number of the arbitrators, the procedure for their appointment or appoint the arbitrators in their agreement,²⁰ where there is no agreement as to the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.²¹ Parties have right to determine the procedure for the appointment of the arbitrators provided that where the arbitrators are three, each party shall appoint one and the two so appointed by the parties shall appoint the third. Where a party fails to appoint the arbitrator within 30 days of request to do so from the other party, the two arbitrators appointed by the parties fails to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made upon request of a party, by the appointing authority designated by the parties or, failing such designation, by an arbitral institution in Nigeria or by the court.²² Where the composition of the arbitral tribunal was not followed properly, the decision or award reached can be impeached and it is immaterial if the wrong composition affected only one or two arbitrators in an arbitration conducted by three or more arbitrators.²³ The arbitral tribunal must also conduct their proceedings in accordance with the agreement of the parties as to arbitral procedure, failure to do so will lead to miscarriage of justice and impeachment of an award.²⁴

No Agreement Between the Parties as to the Composition of Arbitral Tribunal or Arbitral Procedure which is not in Accordance with the Act: Section 55 (vii) of AMA provides that the court may set aside an arbitral award ‘where there is no agreement between the parties under (vi) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act’. An award can be discarded or challenged if the composition of the arbitral tribunal is not in obedience to the agreement of the parties or if the procedure of conduct of proceedings was not followed properly, thus if the arbitrator passes a decision of an award which is in deviation from the terms of reference and the arbitration agreement, then this would lead to the award being set aside and will amount to misconduct of the arbitrator.

¹⁵ Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 as amended.

¹⁶ *Williams v. Wallis* 7 Cox (1914) 2 K.B 478

¹⁷ *Peter Cremer GmbH & Co v. Sugat Food Industries Ltd, THE Rimon* (1981) 2 Lloyds Rep 640 at 64

¹⁸ Section 55(3) (a) (iv) of the Arbitration and Mediation Act 2023

¹⁹ Section 49 & 49(5) of the Arbitration and Mediation Act 2023

²⁰ Section 6 (1) of the Arbitration and Mediation Act 2023

²¹ Section 6 (2) of the Arbitration and Mediation Act 2023

²² Section 7 of the Arbitration and Mediation Act 2023

²³ Section 55 (vi) of the Arbitration and Mediation Act 2023

²⁴ *Government of Niger State & Anor v Alibishir & Sons* (1985) 3NWLR (Pt.13) 458 at 462

Disputes not Arbitrable: Generally, disputes against an individual which are civil and commercial in nature can be settled through arbitration, whereas disputes such as crime, election petitions which are mostly against the public at large are settled through courts or tribunals. It is not all subject matters that can be subject to and can be referred to arbitration, thus the courts in Nigeria may set aside or impeach the award if they find that the subject matter of the dispute is not capable of settlement by arbitration under the law of Nigeria.²⁵ In general, arbitrability of the subject matter is very necessary in determining whether to refer a matter to arbitration or not. Arbitrability issue may arise at so many stages in arbitration, it may arise during the arbitral proceedings before the arbitral tribunal, in this case the arbitral tribunal will have the jurisdiction to hear the application and determine the matter. Where the issue of arbitrability arises after making of award, the court before which the application is made will assume jurisdiction and determine the matter.²⁶

Public Policy: The Act failed to define the term ‘public policy’, however the House of Lords in *Egerton v. Brownlo*²⁷ described public policy as ‘that which has a tendency to be injurious to the public or against the public good.’ Duncan Miller referred to public policy as issues which have been labeled as issues and matters of justice, fairness and public interest.²⁸ In arbitration matters, where an application for impeaching award is based on grounds of public policy²⁹, generally, the issue of public policy in arbitration matters is interpreted narrowly so as not to set aside an award which could ordinarily be enforced. Thus, the court will not impeach an arbitral award on an irrelevant issue which has no serious effect on the award and the issue of public policy is not so clear on the face of the award.³⁰ In Nigeria public policy could be procedural in nature particularly on allegations of fraud in the composition of arbitral tribunal, breach of natural justice, lack of impartiality, lack of reasons in the award, manifest disregard of the law or facts. Public policy could also be substantive in the form of breach of mandatory rules, fundamental principles of law, actions contrary to good morals and national interest. In domestic arbitration, the concept of public policy varies from state to state for instance, an arbitral award on alcoholism may not be enforced on Islamic environment due to their belief.

3. Mode for Impeachment of Arbitral Award

The mode of application to attack or challenge an Arbitral award may be instituted by the Aggrieved party through an originating motion³¹, accompanied by supporting affidavit, outlining the relief sought, questions for determination, details of the challenged award and the ground(s) under the Act under which the claim is brought. The applicant must show that the ground or grounds under which the award is made has caused or will cause substantial injustice to the applicant³². Thus if the court is satisfied that an applicant has proved one or more of the conditions, the court may set aside the award in whole or in part, vary or modify the award or reinstate the award if it is irrelevant to set aside the award. The objective of the new Act for intervention of the court focuses only when the statutory grounds are clearly proven rather than re-examining the merits of the Award³³

4. Time within Which to Apply for Impeachment of Arbitral Award

Unlike the repealed Act which made provisions for impeachment of arbitral award specifically on the grounds of jurisdiction but failed to provide time limit for impeachment of award for reasons of misconduct, Section 55(4) of the Arbitration and Mediation Act made general provision for time limitation for impeachment of arbitral award for reasons of any of the grounds set out in the Act. According to Section 55(4) it provides that ‘An application for setting aside award shall not be made after three months has elapsed from the date on which the party making the application had received the award or, if a request had been made under section 49 of this Act, from the date on which that request had been disposed of by arbitral tribunal’.

5. Summary Review of Arbitration and Conciliation Act (Repealed Act) on Impeachment of Arbitral Awards

Under the Arbitration and Conciliation Act (Repealed Act),³⁴ an aggrieved party can within 30 (thirty) days of receipt of an award, request the arbitral tribunal to correct any typographical or computational error or to give an interpretation of a specific point or part of the award. The ACA 2004 provided for only three grounds for setting aside an award namely;

²⁵ Section 55 (3) (vii)(b)(i) of the Arbitration and Mediation Act 2023

²⁶ *Prime Paint Corporation v. Food & Conkin Manufacturing Co* (1967)995 U.S. 388

²⁷ (1853) 2 Bing 228 at 252

²⁸ D Miller ‘Public policy in International commercial Arbitration in Australia’ Vol 9. No 2,199.167 at 172

²⁹ Section 55 (3) (vii)(b) (ii) of the Arbitration and Mediation Act 2023

³⁰ *Wilko v. Swan* (1953) 346 US 427

³¹ Section 2 Arbitration Proceeding Rules 2020 in the third schedule of the Arbitration and Mediation Act, 2023.

³² Section 55(5) Arbitration and Mediation Act 2023.

³³ *Abuja Environmental Protection Board v. Mahaj Nigeria Ltd* 2021 LPELR-55590(CA)

³⁴ Arbitration and Conciliation Act Cap A18, LFN,2004.

- An award that was rendered in the absence of jurisdiction
- An arbitral proceedings or award which was improperly procured
- Misconduct on the part of the Arbitrator.³⁵

The court could suspend proceedings to allow arbitral tribunal to resume proceedings and also the court could order the removal of the arbitrator if proven guilty of misconduct. The grounds for setting aside an award under ACA 2004 focused on the integrity of the proceedings and the conduct of the arbitrator while the new AMA 2023 primarily focused on the conditions that may lead to substantial injustice or may be caused to the applicant.

6. Consequences of Successful Application for Impeachment of Arbitral Award

Section 55 (5) of the Arbitration and Mediation Act provides that ‘where the court is satisfied that one or more grounds set out in subsection (3) has been proved and that it has caused substantial injustice to the applicant, the court may- (a) Remit the award to the tribunal, in whole or in part, for reconsideration; (b) Set the award aside in whole or in part. It is not always that a successful application for impeachment will lead to setting aside the arbitral award, however where the application succeeds wholly and the grounds complained leads to substantial injustice, the court will set aside the award and render it null and void. In some situations, the court may not tamper with the award if it discovers that no useful purpose would be served in setting the award aside.

7. Conclusion and Recommendations

The process of setting aside arbitral awards in Nigeria, as governed by the Arbitration and mediation Act of 2023 is a commendable step that marks a significant shift for an aggrieved party seeking for a recourse against an award to be subjected to ‘error on the face of the award and ‘misconduct of the arbitrator’ of which the Act failed to define what amounts to misconduct, giving room for an endless list of what could amount to a misconduct of an arbitrator. The provision of Section 55 of Arbitration and mediation strikes a balance between upholding the finality of arbitral award and ensuring justice however the involvement of the court on impeachment of award is most unsatisfactory it would birth delay in facilitating the whole judicial process. It is recommended that policy makers should look into alternative avenue to tackle impeachment procedure other than the court, for a better and forward-thinking arbitration process, also ‘error of law’ expunged by the Act should be reinstated as it is a vital ground for setting aside an award.

³⁵ Section 29 and 30 of Arbitration and Conciliation Act Cap A18, LFN,2004.