

IMPEACHMENT OF ARBITRAL AWARD: REVIEW OF ARBITRATION AND MEDIATION ACT 2023

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Abstract: The essence of this research work is to critically examine the nature of arbitral award as a judgment and the finality nature of the same. To consider the possibility of setting aside of an arbitral award, the ground pursuant to which it could be impeached and the time within which the application could be made. The research will among other things inquire into the Nigerian Arbitration and Mediation Act 2023 with the intention of determining whether the Act has widened or narrowed the scope of the grounds for impeachment of arbitral awards in Nigeria. Doctrinal method of research was used in course of this study which includes the primary and secondary sources of the laws of Nigeria.

1. Introduction

Impeachment of an arbitral award means an attack on the arbitral award with intent to set aside, vacate, modify, or vary it. It is not always that a successful application for impeachment may vary, modify or qualify the award in material particular. Successful application for impeachment may sever some parts of the award, that is, remove the part of the award that is offensive and retain the part which is not offensive particularly where the arbitral tribunal went beyond what was referred to it or beyond the scope of the agreement of the parties or the subject matter.

Parties who went to arbitration expect that the award when made shall be complied with and shall bring the dispute to finality. This does not always happen as parties who expect finality of an arbitral award also expect that the award shall be fair and just without element of bias, partiality, and misconduct. When the arbitral award fails to meet the fair expectation of a party or parties, the remedy available to them is to impeach the award. The court should not readily impeach an arbitral award but should rather consciously consider every application for impeachment knowing full well that arbitrators are not bound to act as the court could have acted in litigation. In *Zermalt Holding SA v Nu-Life Upholstery Repair Ltd*,² Bingham J had this to say,

As a matter of general approach, the courts strive to uphold arbitration awards. Meticulous legal eye

endeavoring to pick holes, inconsistencies and faults in awards and with objectives of upsetting or frustrating the process of arbitration. Far from it, the approach is to read an arbitration award in a reasonable and commercial way, expecting, as usual, the case, that there will not be substantial fault that can be found in it. From the foregoing, it is expected that the court should not unnecessarily interfere with the arbitral award unless there is a compelling reason and need to do so particularly where allowing it will work hardship on the party complaining or occasion injustice on him.

The parties who entered into an arbitration agreement impliedly agreed that where the award is made, it shall be complied with. In some arbitration agreement, it is usually stated expressly that the arbitral award when made shall be final. The ICC Arbitration Rules, Articles 24 (2) provides inter alia that,

By submitting the dispute to arbitration by the ICC Rule 2, the parties shall be deemed to have undertaken to carry out the resultant award without delay and to have waived their right to any form of appeal...

Where such applies, the award when made remains final unless any contrary intention is expressed. By implication, when an award is made, the right to revert to court with respect to the original dispute is extinguished. The only right and duty that will arise is the duty to perform the obligations and liabilities enshrined in the award and the right to realize same.

The finality of arbitral award does not mean that the award cannot be challenged or impeached. The parties who went on arbitration expect that the arbitration will be conducted with fairness and regularity which the parties assumed. If however, the arbitration runs short of the expectation of the parties or party, the party is entitled to question or challenge the arbitral award. In *Adwork Ltd v Nigeria Airways Ltd*¹ the Court of Appeal of Nigeria stated that,

In arbitral proceedings parties are at liberty to seek to impeach the award by application to court should any of them feel that the arbitrator has gone beyond his powers, made wrong award or misconducted himself in some other way known to law, if unchallenged the award remains binding on and enforceable by the parties.

It is the duty of the applicant for the setting aside of an arbitral award, to place before the High Court to which the application is made sufficient materials that justify the setting aside of the award.⁴

The party who intends to challenge an award is at liberty to take an active or passive step against the award. The active step is where the party set out to impeach the award immediately after it was published by filing his application to court for the same whereas passive approach will arise where the aggrieved party waits until the successful parties applies to enforce the award before using the issue of challenges as shield and defence in the application for enforcement.

2. Method for Impeachment of Arbitral Award

A party who intends to attack or impeach an award has a duty to file his application to the court setting out his

³(2000)2NWLR (Pt.645)415 at 433. See also the cases of *Ogbunike Sons Ltd v ED & F Man Nig. Ltd & Ors* (2010)LPELR 4688. *Vessel MV Naval Gent & Ors v. A.C.I. Ltd* (2015)48WRN 102.

⁴ *Units Environmental Science Ltd. V. Revenue Mobilization Allocation & Fiscal Commission* (2022)32 W.R.N 99 at 107.

grounds for the challenge. By application we mean motion on notice or originating summons. The implication is that the aggrieved party shall file his application and put the other party on notice. The application shall be accompanied by supporting affidavit setting out the grounds for the impeachment. Section 55 (1) of the Act provides that “recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsection (3) and (4)”.

The application shall be made to a court. The court in this regard is the court that has the original jurisdiction to hear and determine the matter taking into cognizance the parties and the subject matter. The application shall not just be made to just any court without regard to the subject matter and parties. This is because the Arbitration and Mediation Act has neither modified, varied nor added to the jurisdiction of any court as provided in the Constitution of the Federal Republic of Nigeria as amended. This means that if the Federal High Court has the original jurisdiction to hear and determine the matter considering the subject matter and the parties, then the application for impeachment shall be made to the Federal High Court and no other. The same shall apply if the State High Court has the original jurisdiction to hear and determine the matter but for the arbitration agreement, the application for impeachment shall be made to the State High Court.⁵ The Act in its Section 91 defined court to mean the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court. This definition has not given parties the right to just file an application in arbitration matters to any of the courts of their choice without regard to their original jurisdiction. The court to which an application shall be made must be the court with the requisite jurisdiction in the matter.

3. Time for impeachment of Arbitral Award

The former Arbitration and Conciliation Act CAP A18 Laws of the Federation of Nigeria, 2004, provides in its section 29 (1) that “a party who is aggrieved by an arbitral award may within three months-

- a. From the date of the award; or
- b. In the case of falling within Section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal...”²

Section 29 of the Act deals with the issue of jurisdiction whereas Section 30 relates to issue of misconduct. Section 30 (1) & (2) of the Act provides that;

- (1) Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, have been improperly procured, the court may on the application of a party set aside the award.
- (2) An arbitrator who has misconducted himself May, on the application of any party be removed by the court.

From the foregoing, the previous Act of 2004 made provision for impeachment of an arbitral award within three months with respect to challenge or application for impeachment on grounds of lack of jurisdiction. Unfortunately, the Act made no provision for impeaching an arbitral award for reasons of misconduct. Unfortunately, the Nigerian courts before the coming into existence of the Arbitration and Mediation Act 2023

² 5 Afcon Nig. Ltd. V. Registered Trustees of Ikoyi Club (1938) (1996) FHCLR 371.

have decided on this matter as if there is no provision of time limitation for impeachment of arbitral awards in Nigeria. The Supreme Court of Nigeria in *K.S.U. D.B v Fanz Const.Co. Ltd*⁶ decided that “an application to set aside or remit an award may be made at any time within six weeks after the award is made and published to the parties but this time may be extended.” In *Ekeng Ita v Edet Idiok*,³ a motion on notice to set aside an arbitral award was filed almost three years after the publication of the arbitral award. The court held that any application to set aside the award must be made within 15days of the publication. With respect, the decisions of the courts in *KSUDB v Fanz Const. Co Ltd*⁸ and *Ekong Ita v Edet Idiok*⁹ are not good decisions unless for arbitration proceedings made pursuant to the High Court Rules or State Laws and in which case, the High Court Rules or the State Laws must have provided for six weeks or 15days as the case may be.

It is pertinent at this stage to reproduce the provisions of Section 55(4) of Arbitration and Mediation Act, 2023. Section 55(4) of the Act provides that, “an application for setting aside shall not be made after three months have elapsed from the date on which the party making that application had received the award, or if a request had been made under Section 49 of the Act from the date on which that request had been disposed of by the arbitral tribunal.”

Section 55(4) of the Arbitration and Mediation Act 2023 is preferred to the provisions of section 29 and 30 of CAP A18 Laws of the Federation of Nigeria 2004 which did not provide for time limitation within which to impeach an award for reasons of misconduct. Section 55 (4) made general provision for time limitation within which to impeach an award for reasons of lack of jurisdiction and misconduct. Section 55(4) has remedied the defect in the previous Arbitration and Conciliation Act, 2004. The new Act of 2023 made general provision for time limitation for impeachment of arbitral award for reasons of any of the grounds set out in the Act.

4. Grounds for Impeachment.

It is the expectation of the parties in an arbitration agreement that a valid and final award which will be enforceable would be made at the end of the proceedings. If however, these valid expectations of the parties are not met, any of the parties to the arbitration agreement may file an application to set aside the award as made by the arbitral tribunal. Some of the grounds for impeachment of arbitral awards in Nigeria include the following:

a. Legal Incapacity:

The capacity to enter into arbitration agreement is the same with the capacity to contract. By the provisions of the New York Convention, any person capable of entering into a contract may be a party to an arbitration agreement.¹⁰ Section 55 (3) (a) (i) provides that the court may set aside an arbitral award, where the party who makes the application furnishes proof that “a party to the arbitration was under some legal incapacity.” The applicable rules governing incapacity of a person to enter into arbitration agreement are not uniform. For a

³ 6 (1990)4NWLR(Pt.142)1at41.

⁷ 4NLR 100

⁸ ibid

⁹ ibid

natural person that is a human person, capacity may depend on his nationality or on his place of residence, For Corporation or company, capacity is dependent on the law of place of incorporation or the place of business. A person who had the capacity to enter into contract has also the right and capacity to submit any dispute arising from it to arbitration. An agreement to contract or arbitration agreement entered into by an infant is voidable at his instance unless it relates to his benefit or supplies of necessities.¹¹ In *Slade & Anor v Metrodent Ltd*⁴, the court held *inter alia*, that;

Where a deed of apprenticeship to which an infant is a party contains an arbitration clause, that clause cannot be treated as an independent agreement separate from the deed and even assuming that the clause is not beneficial to the infant, he will nevertheless be bound by it if the agreement as a whole is for his benefit.¹³

A solicitor consulted by a party to act on his behalf in court has no right to enter into an arbitration agreement without the express consent and authority of his client. A client whose solicitor entered into arbitration agreement without his consent and authority has right to seek for impeachment of the arbitral award when made as the arbitration proceedings took place without his authority and agreement. Where a bankrupt enters into agreement to submit to arbitration and such an agreement affects the right of his creditor, unless the trustees in bankruptcy adopt such a contract, the arbitration agreement will be void for reason of legal incapacity.

b. Lack of Fair Hearing:

The arbitrator or arbitral tribunal is under a duty to accord the parties fair hearing. Right to fair hearing is a constitutional right provided for in the Constitution of the Federal Republic of Nigeria. Section 36(1) of the 1999 Constitution of Nigeria (as amended) provides that;

In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a number as to secure its independence....

Other tribunals as in Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria includes arbitral tribunal and arbitration constituted for the determination of rights, duties, obligation and interest of persons or citizens. In arbitration, parties must be given adequate notice of the arbitration and proceedings. They must be heard in full with their witnesses and must be given the opportunity to prepare their case, cross examine witnesses of the other parties and expert witnesses if any. A party who is not given adequate notice of the appointment of the arbitrators and of the arbitral proceedings may successfully impeach the arbitral award when made. The Arbitration and Mediation Act 2023 provides that a party to the arbitration can apply for the impeachment of the arbitral award if “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”¹⁴

⁴ Article v(i)(a) New York Convention

¹¹ *Slade & Anor v. Metrodent Ltd* (1953)2Q.B. 112

¹² *ibid*

¹³ (1953)2Q.B. 112 at 114.

The arbitral tribunal is by law expected to observe certain minimal procedural standard if its award is to be enforced by the court. Fair hearing in this context entails that the parties must be heard either in person or through their representatives, that proper notice must be served on the parties on the appointment of the arbitrators and every proceedings of the arbitral tribunal, right to attend the sittings of the tribunal, for the taking of evidence or any oral hearings which the arbitral tribunal may order, right to be represented or assisted by a lawyer or counsel by his choice, right to examine in chief and cross examine the witnesses. The failure to observe any of these procedural requirements will constitute a strong ground for impeachment of the arbitral award as made by the arbitral tribunal.⁵

It is certainly obvious that where the rules of fair hearing are breached, miscarriage of justice will be occasioned. It is for this reason that the arbitral tribunal must operate in accordance with the provisions of fair hearing and accord the parties' equal treatment and fairness in the entire proceedings. Section 30 Arbitration and Mediation Act provides thus;

In arbitral proceedings, the arbitral tribunal shall ensure that the parties are-

Treated equally and that each party is given reasonable opportunity of presenting its case; and Accorded a fair resolution of the dispute without unnecessary delay or expense.¹⁵

The law requires that the party initiating the arbitration must issue to the other party a notice or a written communication.¹⁶ The arbitral proceedings shall be deemed to have commenced on the date of which the respondent received the notice from the claimant. Unless otherwise agreed by the parties, the arbitral proceedings is deemed to have commenced on the date the request to refer the dispute to arbitration is received by the adverse party.¹⁷ The notice issued by the claimant to the respondent shall contain among others a demand that the dispute be referred to arbitration, the name and address of the parties, identification of any contract or other legal instrument out of or in relation to which the dispute arises or in the absence of such contract instrument, a brief description of the relevant relationship, a brief description of the claim and a an indication of the amount involved, if any, the relief or remedy sought, and a proposal as to the number of arbitrators, language, and seat of the arbitration if the parties have not previously agreed thereon.¹⁸ Though Article 3(3) of the First Schedule to the Act provides for the content of the notice, no special language or format is required. The notice must not be issued by lawyer or in a special legal language. It is enough if on the four corners of the document of the notice the basic information is conveyed to the respondent in such a manner that he can be

⁵ 14 Section 55(3)(a)(iii) Arbitration & Mediation Act 2023. New York Convention ArticleV(i)(b) The Model Law Clause 34(2)(ii).
¹⁵ Section 30(a)(b) Arbitration & Mediation Act 2023.

¹⁶ Article 3(1) Arbitration Rules to Arbitration & Mediation Act 2023. Continental Sales Ltd. V R Shipping Inc (2012)23WRN151

¹⁷ Article 3(2) of the First Schedule to the Act. Section 33 Arbitration and Mediation Act 2023.

¹⁸ Article 3(3) of the First Schedule to the Act.

¹⁹ Allianz Versicherungs AG & Ors v. Fortuna Co. Inc (1999)All ER625. Continental Sales Ltd. V. R Shipping Inc (supra) 151.

deemed to have received adequate information of the arbitration.¹⁹

On the issue of service of notice of arbitration, notice shall be received if served personally on the respondent or if it is delivered at his habitual place of residence or place of business or mailing address. The notice shall be deemed to be received on the day it was so served or delivered. It is however advised that the notice should be served through registered mail or express post like DHL so as to obtain evidence of service and delivery to the respondent. Some have advised that the notice should be served through the registry of the court so as to be served by the bailiff on the respondent. Though this sounds good, it may however violate the principle of confidentiality and privacy in arbitration. It is suggested that adequate care should be taken in the service of the notice of arbitration, appointment of arbitrators and arbitral proceedings so as to avoid the unfortunate situation of impeachment of an arbitral award over the flimsy excuse that notice was not served. For the purpose of calculation of period of time under the Arbitration and Mediation Act, such period shall begin to run on the day following the day when a notice, notification, communication, or proposal is received and where the last day of such period is an official holiday or non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows, and official holidays or non-business days occurring during the running of the period of time are included in calculating the period.²⁰

It is the duty of the arbitral tribunal to ensure that adequate notices are issued at each stage of the arbitration. In arbitration, two or more notices are involved. The first is the notice usually issued by the claimant to the respondent notifying him that dispute has occurred and also indicating his intention to refer the matter to arbitration.²¹ The second will be the notice of the arbitral tribunal indicating seat or place of arbitral tribunal, date of arbitration and time thereof. Where the notice for commencement of arbitral proceedings is issued but the respondent fails to show up, a prudent and an experienced arbitrator will insist on the service of a second notice before commencing the arbitral proceedings ex parte. Failure to serve adequate notice of arbitral proceedings constitutes a ground for impeachment. A recalcitrant party who is desirous of frustrating the successful party in arbitration will always raise the issue of inadequate notice if there is any failure or breach of it in the proceedings.²² To avoid impeachment for failure to issue adequate notice, both the parties and the arbitral tribunal must ensure that proper notices are served through an efficient and effective means. It is important to obtain acknowledgement of service on the respondent if that is possible.

c. Lack of Jurisdiction

Lack of jurisdiction does not mean one thing but many. Lack of jurisdiction will arise in more than two situations. It will arise where the parties did not enter into arbitration agreement before

²⁰ Article 2(6) of the First Schedule to the Act 2023.

²¹ Article 3(1) of the Arbitration and Mediation Act.

²² *K. S. U. D. B. V Fanz Construction Co. Ltd.* (1990)4NWLR(Pt.142)1

commencement of the arbitration and in which case there is lack of jurisdiction, where the arbitration tribunal went beyond what was in the agreement of the parties (excess of jurisdiction); and the third is where the subject matter of the arbitration agreement is of public nature that cannot be subject to arbitration. This third one will be taken under a different caption on arbitrability.

What then is jurisdiction? Jurisdiction is essentially the power and authority of a court or arbitral tribunal to hear and determine claims and counter claims and power to render a particular judgment in question.²³ It is the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.²⁴ It is a legal power and authority of a court to make valid decision binding on party or parties concerned in any matter properly brought before it.²⁵

It is the agreement of the parties that confers jurisdiction on the arbitral tribunal hence the maxim “no agreement no arbitration”. If the parties have no arbitration agreement, invariably the arbitral tribunal shall have no jurisdiction to entertain the matter. If arbitral tribunal lacks jurisdiction to undertake a matter based on the fact that the parties did not have arbitration agreement, any award rendered thereto shall be a nullity and void.²⁶ An arbitral award will be impeached where the parties reached agreement to arbitrate but the award deals with disputes or subject matters not within the agreement of the parties or the award contains decision on matters which are beyond the scope of submission. Section 55 (3)(iv)(v) provides thus;

(iv) The award deals with a dispute not contemplated by or does not fall within the terms of the submission to arbitration.

²³ *Black’s Law Dictionary*, 853.

²⁴ John B Saunders, *Words and Phrases Defined*, 2nd Ed. Butterworth, London 1969,113.

²⁵ *Black’s Law Dictionary*, 853. *Anisminic Ltd. V. Foreign Compensation* (1986)2All ER 986.

²⁶ *Chidi Ekwueme v. Sani Zakari* (1972)ECSLR 1. In this case, two friends who were in a partnership business had dispute, there five mutual friends intervened in the matter and settled for them. One of the parties filed an application in the court for the enforcement of the terms purporting it to be an arbitral award that could be enforced by the court. Emmanuel Araka J after reviewing the application and the argument of the parties arrived at the conclusion that there was no arbitration. That what went on among them can at best be a mere negotiation for settlement but not arbitration as there was no agreement to arbitrate by the parties.

(v) The award contains decisions on matter which are beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration, can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

From the above, where the arbitral tribunal deals with issues not contemplated in the agreement or issues falling beyond the agreement of the parties or their submission, the award will be set aside for lack of or excess of jurisdiction provided always that where what is beyond the scope of submission of the parties can be severed, the court will sever the excess part and retain the once falling within the agreement. Some scholars have argued that where the arbitral tribunal fails to deal with all the matters referred to it, the award will be impeached on issue of jurisdiction without any attempt at issuing notice on the arbitrators to make additional awards to remedy the error. We strongly feel that this is a wrong assumption. It will be wrong to impeach an award merely because the arbitral tribunal fails to deal with all the matters referred to it (*infra petita*) and in which case the award may be deemed not final and conclusive. In this regard, the law provides that the parties or the arbitral tribunal will give adequate notice and reconvene for purposes of making additional award.²⁷ 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 the additional award. The arbitral tribunal has right to extend the time for making the additional award.²⁸ Issue of jurisdiction will also arise in a situation in which a party before the arbitral tribunal lacks the locus to refer the matter to the tribunal, in that he or she is not a party to the arbitration agreement. Only parties to the arbitration agreement or their authorized agents or representatives can refer matters to arbitration for determination. Where an agent, representative or solicitor to a party to the arbitrator agreement refer a matter to the arbitral tribunal without the consent and authority of his principal, the arbitral tribunal will not have jurisdiction to hear and determine the matter because of issue of privity of contract and lack of *locus standi*.

²⁷ Section 49 of the Arbitration and Mediation Act.

²⁸ Section 49(5) of the Arbitration and Mediation Act.

The next issue of jurisdiction is the matter of territorial jurisdiction. Parties have right of choice of venue and seat of arbitration. Where the parties have agreed as to forum or place as a seat of arbitration, any proceedings outside the venue will be a nullity and void particularly where the venue is made an exclusive venue²⁹. Where however the venue is not an exclusive venue, the arbitrator or arbitral tribunal has right to change the venue provided always that adequate notice is given to the parties. In making the change, the arbitral tribunal must take into consideration the convenience of the parties and their witnesses, the residence of the parties, the law of the new venue, the place of business of the parties, the subject matter and the laws governing the transaction, the world view of the place of the arbitration and the domestic courts thereof. It is important to state that the section 32 of the Arbitration and Mediation Act 2023 has not created an exclusive seat or venue for arbitration in Nigeria.

An objection to the jurisdiction of the arbitral tribunal to entertain any matter before it can be raised at any time.³⁰ It can be raised at the time of the arbitral proceedings before the arbitral tribunal. The arbitral tribunal has jurisdiction under the principles of '*competenze*' and '*competenze*' to entertain any challenge as to its jurisdiction to hear and determine a matter before it.³¹ Any arbitral award rendered by the tribunal on the matter of jurisdiction can be a subject of impeachment before the court. The application for the challenge of jurisdiction or impeachment of arbitral award can be the subject of application before the court with the requisite jurisdiction.

²⁹ *Spiliada Maritime Corp v. Consulex Ltd.* (1986) 3 All E.R. 843. *Bank of Tokoyo Ltd. v. Karoom* (1987) AC 45. *Tendtex Trading Corp. v. Credit Suisse* (1980) 3 All E.R. 721. *Muduroglu v. T.C. Ziraat* (1986) QB 1225. *European Asian Bank AG v. Punjab & Sind Bank* (1986) Lloyd's Report 356. *Dimskal Shipping Co. S A v. International Transport Workers Federation, The Evia Luck* (1986) Lloyd's Rep 165. In all these cases, the decision is that the consent of the parties is required for the change of the arbitration venue agreed by the parties. See also the case of *Evans Marshal & Co. Ltd. v. Bertola S.A.* (1973) WLR 349 at 361. In *NNPC v. Lutin Investment & Anor* (2001) 50 WRN 81 the Supreme Court of Nigeria decided that notwithstanding the agreement of the parties as to the place and seat for arbitration proceedings, the arbitral tribunal has the right for good reason to change the venue and issue adequate notices to the parties. This is because the Arbitration and Mediation Act has not provided for any exclusive venue in its provisions.

³⁰ *Hon. Emmanuel O. Araka v. Ambrose N. Ejeagwu* (1999) 2 NWLR (Pt. 589) 107 at 110. *Barclays Bank Nigeria LTD. v. Central Bank of Nigeria* (1976) S.C. 175. *Shobogun v. Sanni* (1974) 1 All N.L.R. (Pt. 2) 311. See also *E O Araka v. Ejeagwu* (2000) 15 NWLR (Pt. 692) 684 at 719.

³¹ The Article 21(1) of the UNCITRAL Model Law provides that the arbitral tribunal shall have power to rule on the objection that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or any of the separate arbitration agreements. See also section 14(1) of the Arbitration and Mediation Act 2023.

The application for impeachment has to be filed in the court if the arbitral tribunal has rendered an award. The application may be a motion on notice or originating summons supported by an affidavit setting out the fact pursuant to which the applicant is challenging the award and seeking for its impeachment. The court before which the application is made has the right to call for oral evidence particularly where there is conflict in the affidavit evidence.³²

(d) Invalidity of Arbitration Agreement

The arbitration agreement must be valid in accordance with the law pursuant to which the parties entered into the agreement. Arbitral award rendered by the arbitral tribunal will be impeached on the successful application of a party if the arbitration agreement is legally invalid.³³ The ground of invalidity of the arbitration agreement may include among others, when the arbitration agreement is undermined by fraud, undue influence, unconscionability, duress, mistake or misrepresentation, improper procurement, and pervasiveness,³⁴

(e) Wrong Composition of Arbitral Tribunal or Arbitral Procedure

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.³⁵ Where there is no agreement as to the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.³⁶ The provisions of section 6(2) of the new Arbitration and Mediation Act contrasts with the previous section 6 of the Arbitration and Conciliation Act 2004 which provides that where the number of arbitrators for the arbitral tribunal is not provided for by the parties, the number shall be three to be appointed by the parties. The previous Act made it that each party shall appoint one arbitrator and the two arbitrators appointed by the parties shall then appoint the third one provided always that where either a party or the two arbitrators failed to appoint the second arbitrator or the third arbitrator as the case may be, the court shall appoint the arbitrator on the application of either party to the court. The provisions of the previous Act seems preferred to the provisions of the new section 6(2) of the new Act. The reason being that the previous Act provided for fairness and equity. The previous Act made it that each party shall appoint one arbitrator in a matter in which his interest is to be determined. A person shall not be precluded from acting as an arbitrator by reason of his nationality unless it is agreed by the parties.³⁷

As stated hereinbefore, the 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

³² *Azov Shipping Co. v. Baltic Shipping Co.*(1991)1All E.R 476. *Falobi v. Falobi*(1976)9-10SC1. *Olu Ibokun vOlu Ibokun*(1974)2SC 4.

³³ Section 55(3)(a)(ii) of the Arbitration and Mediation Act.

³⁴ Greg Chukwudi Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, 2ed. Snaap Press Ltd, 46.

³⁵ Section 6(1) of the Arbitration and Mediation Act 2023.

³⁶ Section 6(2) of the Arbitration and Mediation Act.

³⁷ Section 7(1) of the Arbitration and Mediation Act.

arbitrator within 30 days of a request to do so from the other party, or where the two arbitrators appointed by the parties fail 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. For the appointment of a sole arbitrator, where the parties are unable to agree on the arbitrator within 30 days after the receipt of a written communication containing a request for the dispute to be referred to arbitration by the other party or parties, the arbitrator shall be appointed, upon request of a party, by the appointing authority designated by the parties or, failing such designation, by any arbitral institution in Nigeria or by the Court. The party or parties making the request shall furnish to the designated appointing authority, arbitral institution or the court a copy of the request for the dispute to be referred to arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract.³⁸

In appointing the arbitrator(s), the appointing authority, the arbitral institution, or the court must have due regard to the qualification required of an arbitrator as specified in the arbitration agreement by the parties and must ensure the appointment of an independent and impartial arbitrator(s).³⁹ An arbitrator has a duty of disclosure of any issue or element that may affect his capacity of independence and impartiality. This duty shall arise immediately the prospective arbitrator is approached in connection with possible appointment as an arbitrator. He shall from the time appointed and throughout the arbitral proceedings, disclose to the parties any relevant circumstances not within the knowledge of the parties. This duty of independence and impartiality is extremely important in the qualification of the arbitrator and in arbitration practice generally. Unfortunately, the Act did not expressly provide the limit of the disclosure to be made. Though the Act fails to make provision for the extent of disclosure required, a person is disqualified from acting as an arbitrator if he or she has any blood relationship with either party in the arbitration, if the arbitrator is a business partner with either of the parties, and where the arbitrator has interest in the subject matter. Where the arbitrator makes the necessary disclosure as required by the Act but the parties direct him or her to go on or where the parties themselves know of the circumstance before appointing him, they shall be deemed to have waived their right to challenge the arbitrator(s) and no one shall complain thereafter.⁴⁰

It important to state that once the composition of the arbitral tribunal is wrong, the award shall 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. The question that may often arise is

³⁸ Section 7(2)(3).

³⁹ Section 7 (5)(b)

⁴⁰ Section 7(4) of the Act. *Johnson v. Cheaoe* (1817)5DOW PC247. The arbitrator shall not be allowed to sit on any matter in which he has interest but where the parties to the arbitration agreement know of the disqualification but nonetheless appoint him, they shall be deemed to have waived their right and the award as made by the arbitrator(s) shall not be set aside.

whether a unanimous award could be set aside if the appointment of one of the three arbitrators was successfully challenged. The Act has made it that the improper composition of the arbitrator(s) will presumably affect the award. It is immaterial that if the two properly appointed arbitrators were reconstituted with a neutral arbitrator, the two arbitrators will still retain their majority award. The standard in evaluating the extent to which the bias of one arbitrator could affect an award is very light as the standard is not high. The fact that the award is a unanimous decision of the majority is immaterial. What is important is that an arbitrator has bias or is partial and not independent in the matter.⁴¹ It is for this reason that in appointment of arbitrators effort must be made to appoint unbiased and fair minded persons who are impartial and independent. The arbitral tribunal must also conduct their proceedings in accordance with the agreement of the parties as to arbitral procedure. Where the procedure agreed by the parties is documentary and oral evidence, the arbitral tribunal shall adopt it and no more. The arbitral tribunal shall not delegate its functions to a third party. In *Government of Niger State & Anor v. Alibishir & sons*,⁴² the court of first instance decided that the arbitrators was in error in delegation his power to a subcommittee whose findings he accepted without question and in relying on a legal adviser for a legal opinion, thereby ousting the jurisdiction of the court on question of law. On further appeal to the Court of Appeal, the court nullified the decision of the trial court mainly because there was no miscarriage of justice in the matter. It therefore reasonable to argue that if in delegating its powers, an arbitrator delegates substantial part of his powers to a subcommittee and such leads to miscarriage of justice, then the award will be impeached.

(f) Arbitrability and Public Policy

An award will be impeached if it is not arbitrable or it is contrary to the public policy of Nigeria. Section 55(3)(b)(i) provides that an award may be set aside if "subject matter of the dispute is otherwise not capable of settlement by arbitration under the laws of Nigeria, or award is against public policy of Nigeria." This section has the support of the provisions of the New York Convention.⁴³ It is not all subject matters that can be subject of arbitration. It is not all disputes that can be referred to arbitration. Only disputes affecting peoples civil rights and obligations which can be compromised by accord and satisfaction may be referred to arbitration. Where all issues in contention involve personal chattel or personal wrong, arbitration is a good plea.⁴⁴ The

⁴¹ Article v(1)(d) of the New York Convention Which provides that the recognition and enforcement at the request of the party whom it is invoked if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place."

⁴² (1985)3NWLR(Pt.13)458 at 462

⁴³ Article V(2)(a&b) of the New York Convention which provides that the recognition and enforcement of an award may be refused if "(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country." See also the provisions of the Arbitration and Conciliation Act of Nigeria Cap A18 Laws of the Federation of Nigeria 2004, section 48(b).

⁴⁴ *Baker v. Townshend* (1817)7Taunt422.

court in *United World Ltd Inc. v.M.T.S. Ltd*⁴⁵ expressly decided correctly that the dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justifiable issue triable civilly, and a fair consideration of this is whether the difference can be compromised lawfully by way of accord and satisfaction. This means that a trial of an offence of a public nature cannot be subject of an arbitration agreement nor can a dispute arising out of an illegal contract be subject to arbitration. Dissolution of marriage under the Act cannot be subject of arbitration but the sharing of jointly acquired property by a couple can be subject of arbitration. Criminal matters are not subject to arbitration as criminal matter must be handled by the court for the general wellbeing of the society and also to ensure that culprits are punished for public good by the court of competent jurisdiction and not arbitral tribunal. Professor Parker captured the situation rather very well when he stated succinctly that, “the central theme in non- arbitrability cases is a concern that society will be injured by arbitration of public claims. Courts express a fear that public law issues are too complicated for arbitrator, or that arbitrators are like foxes guarding the chicken coop, with a pro-business bias that will lead to under enforcement of laws designed to protect the public.”⁴⁶

The principle of arbitrability hangs on two very important principles. The first being that some disputes by their very nature and character fall under the exclusive determination of the courts and are not subject to arbitration agreement and proceedings. The second is that some disputes are required under some mandatory obligations of municipal laws and statutes to be triable by public institution and systems established by the State. With the present practice in Nigeria, one is seriously in doubt whether there can be any matter which cannot be referred to arbitration or ADR. This is because even in the provision of the Administration of Criminal Justice laws in Nigeria, provisions are made where the court may advert the mind of parties to ADR. We now have plea bargain in our Criminal Justice Laws. Plea bargain often start by way of negotiation which is a form of ADR. Even in the Matrimonial Cause Act, provision exists where one of the certificates to be attached is a certificate that the parties were referred to Conciliation but same did not settle the matter. In general, arbitrability of the subject matter is very necessary in determining whether to refer a matter to arbitration or not.

Who has the right and jurisdiction to determine arbitrability. The issue of arbitrability may arise at so many stages in arbitration. Just like the issue of jurisdiction, arbitrability issue 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 the award, the court before which the application is made will assume jurisdiction and determine the matter.

⁴⁵ (1998)10NWLR(Pt.568)106 at 110. *Absalom Ltd v. Great Western Garden Village Society Ltd.*(1933)AC 592 at 607. *Taylor v. Barnett*(1953)1W.L.R. 562.

⁴⁶ Parker, “National Law and Commercial Justice; Safeguarding Procedural Integrity in International Arbitration,”⁶³ *Tulane Law Review*, 1989,648 at 700.

On the issue of public policy reason for the impeachment of an award, Article V(2)(b) of the New York Convention provides that the recognition and enforcement of the arbitral award will be refused if the competent authority, that is, the court where the recognition and enforcement is sought finds that the recognition or enforcement of award would be contrary to the public policy of that country. Section 55(3)(b)(ii) of the Act provides that the court may impeach an award if the award is against public policy of Nigeria. It is very unfortunate that neither the Act nor the New York Convention defined public policy for the purposes of the Act or the New York Convention. That is a very serious lapse. However, the Black's Law Dictionary in its 6th Edition defined public policy to mean "community common conscience, extended and applied throughout the State to matters of public morals, health, safety, welfare and the like, it is that general and well settled public policy opinion relating to man's plain palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation."⁴⁷ In *Egerton v. Brownlow*,⁴⁸ the court described public policy to mean, "that which has a tendency to be injurious to the public or against the public good." We have both domestic and international public policy.

Generally in arbitration, public policy is interpreted narrowly so as not to set aside an award which otherwise could ordinarily be enforced. This implies that where the issue of public policy is not so clear on the face of the award, the court will not interfere. It will be most unreasonable to impeach an international arbitration award for reasons of domestic public policy. In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*⁴⁹ the Court declared that article V(2)(b) of the New York Convention must be construed narrowly. The court will not impeach an arbitral award on a minor or flimsy breach which has no serious effect on the award. Rather, the award must be so misconceived that it compels the violation of law or conduct contrary to accepted public policy.⁵⁰

(g) Error of Law

Error of law refers to any ruling, decision, or process that conflicts with the principles of the law. An error of the law implies the failure to correctly apply the law, leading to a violation of the litigants right. Error of law is a common law provision not provided in the previous Arbitration and Conciliation Act of Nigeria 2004. The 2004 Arbitration and Conciliation Act was silent on the matter hence the courts in Nigeria entertained impeachment applications of arbitral awards made pursuant to error of law. The current Arbitration and Mediation Act of Nigeria 2023 provides that, "an application for setting aside an arbitral award shall not be made on the ground

⁴⁷ *Black's Law Dictionary*, 6th ed. Centennial Edition, 1 891-1991, 1231.

⁴⁸ (1853)4HCL. 1

⁴⁹ (1974 2nd Cir)508F. 2^d 969.

⁵⁰ *Revere Copper & Brass Inc v. Overseas Private Investment Corporation*(1980)628 F2d81. *Wilko v. Swan* (1953)346 US 427. *Brandeis Instel Ltd. V. Calabrian Chemical Corp.* (1987)655F.Spp.160

of an error on the face of the award, or any other ground except those expressly stated in the subsection (3).⁵¹What is the implication of this provision? The simple implication of section 55(2) of the Act is that an arbitral award rendered pursuant to arbitration agreement and proceedings conducted on the provisions of Arbitration and Mediation Act **SHALL** not be impeached for reasons of error of law. The provisions of the Arbitration and Conciliation Act of Nigeria 2004 is preferred to the one of 2023 Act. This is because the 2004 Act which failed to provide for impeachment for error of law was silent on the matter unlike that of 2023 which provided expressly that arbitral award shall not be impeached for error. It is our considered opinion that the provisions of 2023 Act shall not be a barrier to the application for impeachment of an award where the error complained of, occasioned miscarriage of justice to either of the parties to the arbitration agreement. The fact that the ground of error is not provided for in section 55(3) of the Act shall not be a total barrier for impeachment of award for error of law because a party to a case or arbitration cannot suffer an injury to go without a remedy merely because section 55(3) failed to provide a remedy. The law will always provide remedy for the injured parties.

Suffice it to state that where a specific question of law is referred to an arbitrator or arbitral tribunal, the court will not interfere with its award. The reason being that the parties are aware that the arbitral tribunal is not a court in the strict sense of it hence they have to take the legal interpretation of the arbitral tribunal “for good or bad” having chosen to refer issue of law to arbitration instead of court. It is to be stated herein that where the issue of error of law resulted in course of the arbitral tribunal consideration of facts submitted to it, the court will interfere. The court is requested to be more conscious of the fact that arbitrators are not all lawyers and arbitral tribunal is not court in the strict sense. The fact that a court deciding on the same issue or matter as decided by arbitral tribunal would have reached a different decision will not be the basis for impeachment of arbitral award.⁵²

There are two types of error of law on the face of the award, which the Supreme Court of Nigeria have recognized in *Taylor Woodrow Nig. Ltd. v. S. E. W. GmbH*⁵³ The two cases of error of law on the face of the award as stated by the Supreme Court are;

Where specific question of law is submitted to the arbitrator, the court cannot interfere; and

Where a matter or matters in which a question of law becomes material are submitted, the court can and will

⁵¹ Section 55(2) of the Arbitration and Mediation Act 2023.

⁵² *R. S Harley Ltd. V. Principal Ins Co. Ltd.* (1957)1 Lloyd’s Rep 121. *Macbherson Train & Co Ltd. V. J Milhernm & Sons*(1955)Lloyd’s Rep. 59

⁵³ (1993)4 NWLR 425

interfere, if an error of law appears on the face of the award.⁵⁴

Where the ground for the application for impeachment of an arbitral award is on error of law, the applicant is required to address the court specifically on the error that has occurred as manifest on the face of the award or documents incorporated therein. The error must be a legal question which is the basis of the award and which is erroneous. For the court to hold that the error is material, the judge must be satisfied that there is more or less a strong *prima facie* case for thinking that the arbitrator or arbitral tribunal has erred on a question of law. Lord Donaldson illustrated this fact in *Ipwich Borough Council v. Fisons Plc*⁵⁵ wherein he stated thus;

It is not sufficient that he (judge) should have been in real doubt whether the arbitrator was right, nor I would add, does it matter whether the arbitrator's reasons may have been faulty, unless, this cast doubt upon his conclusion, it is always possible to arrive at the right answer for the wrong reason and in such case, ... he had at least, to be satisfied that there was a more or less strong *prima facie* for thinking that the arbitrator had erred on a question of law.

From the foregoing, the test is that of being satisfied that a strong *prima facie* case has been made that error of law has occurred, and not merely thinking that the arbitrator erred on a question of law.

(h) Misconduct

Misconduct in arbitration which is often used in its technical sense does not mean only issues of moral turpitude but irregularity in arbitration. It means legal irregularity that can occur when an arbitrator, fails to perform their duties, when an arbitrator or umpire fails to decide all the matters which were referred to him, when an arbitrator hears one party in the absence of the other or takes instruction from or talks with one party in the absence of the other or takes evidence in absence of a party. In all, an arbitrator who wrongly admits and acts on evidence which goes to the root of the question submitted to him or her is guilty of legal misconduct and his award may be impeached.

Section 55 of the Arbitration and Mediation Act 2023 failed to expressly provide for misconduct as a ground for impeachment but the Act in its section 55(3)(iii)(v)(vii) set out elements and particulars of misconduct hence it may be absolutely wrong to state that the Act did not provide for misconduct. However, it would have been better if the provisions of the 2023 Act had expressly provided for misconduct as in 2004 Act. Secondly, both the 2004 Arbitration and

⁵⁴ *ibid*

⁵⁵ (1990)Ch. 709. See also *Clark (James Brush Materials) Ltd. V. Carters Merchant Ltd.* (1944)KB 56

Conciliation Act and the 2023 Arbitration and Mediation Act of Nigeria failed to define the term misconduct. Section 30 of the Arbitration and Conciliation Act provides that;

(1) Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award has been improperly procured, the court may on the application of any party set aside the award.

(2) An arbitrator who has misconducted himself may, on the application of any party be removed by the court.⁵⁶

It is important to state herein that the provisions of the Arbitration and Conciliation Act 2004 on the issue of misconduct are preferred to the provisions of Arbitration and Mediation Act 2023 particularly when it is considered that section 55(2) of the Act provides that application for impeachment shall not be made on the ground of error on the face of the award, or any other ground except those expressly stated in subsection (3). This gives room for would be antagonists of arbitration to base their attacks on application for impeachment of arbitral award on grounds of misconduct on the fact that misconduct is not expressly provided in the Act. Such attack on application for impeachment would definitely fail seeing that section 55(3) of the Act made provisions for the particulars of misconduct.

Misconduct constitutes a ground for impeachment of arbitral award in Nigeria because judicial decisions have set out its basic elements which are also found in section 55(3). Misconduct as a term is nowhere defined in the Act hence reliance for its legal meaning and interpretation shall be based on the common law interpretation. In *Taylor Woodrow Nig. Ltd v. S.E.W.GmbH*⁵⁷ Ogundare observed that;

The word misconduct is not defined in the law nor is it stated therein what would amount to misconduct on the part of an arbitrator to necessitate the setting aside of his award. It will be necessary therefore, to fall back on the common law to determine what constitutes misconduct.

From the foregoing, it is certain that the Act did not define the term misconduct. However, the Supreme Court of Nigeria had in *A. Savoia v. A. O.Sonubi*,⁵⁸ while relying on the earlier decision of the court in *Taylor Woodrow Nig. Ltd v. S. E. W. GmbH*⁵⁹ listed some conducts which will amount to misconduct in arbitration practice within our laws. According to the court, misconduct could be said to arise –

⁵⁶ Section 30(1)(2) of the Arbitration and Conciliation Act 2004.

⁵⁷ (1993)4NWLR 127 at 141. *Arbico Nig. Ltd. V. Nigeria Machine Tools Ltd.* (2002)15 NWLR (Pt.789)1at 6-7

⁵⁸ (2000)12 NWLR (Pt. 682)539 at 547.

⁵⁹ *ibid*

- a. Where the arbitrator fails to comply with the terms express or implied, in the arbitration agreement;
- b. Where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitration makes an award which on grounds of public policy ought not to be enforced;
- c. Where the arbitrator has been bribed or corrupted;
- d. Technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct;
- e. Where the arbitrator or umpire fails to decide all the matters which were referred to him;
- f. Where the arbitrator or umpire has breached the rules of natural justice.
- g. If the arbitrator or umpire has failed to act fairly towards both parties, as for example'
 - a. By hearing one party but refusing to hear the other; or
 - b. By deciding the case on a point not put by the parties.

From the decision of the Supreme Court above, misconduct means a wide range of irregularities including but not limited to cases of breach of natural rules of justice and mishandling of the proceedings by the arbitrator.⁶⁰ In *Gregson v. Armstrong*⁶¹ the breach of the rule of *audi alteram partem* was held to amount to misconduct as the arbitrator obtain information from one party in the absence of the other. In *Walford Baker & Co v. Macfie*,⁶² the court held that it was misconduct for the arbitrator to have examined the witness in the absence of the other party and without giving the other party opportunity to cross examine the witness. In *Re Hopper*⁶³, bias and misconduct were established to have existed in a situation where before making the award, the arbitrator dined with one of the parties.

5. Implication of Successful Application for Impeachment and the Discretion of the Court

It is not always that a successful application by an applicant for the impeachment of an arbitral award will lead to setting aside of the award. The court may on a successful application for impeachment of an arbitral award, set aside the entire award, vary the award, suspend the proceedings and refer the parties back to the arbitral tribunal for a good purpose or remit the

⁶⁰ Greg C. Nwakoby, "Setting Aside of Arbitration Awards in Nigeria- A Critical Review of the Case of Alhaji Alibisir & Sons Ltd. v. B.U.K." *UNIZIK Law Journal*, 1999, 1.

⁶¹ *1894)70 LT 106. *K.S.U.D.B. v. Fanz Construction Co Ltd.* (1986)5 NWLR(Pt.39)1 at 37

⁶² (1915)84 LJ. KB 22.

⁶³ (1867)LR2QB 36. *L.S.D.P.C. v. Adold Stamm International Ltd.* (1994)7NWLR 545.

award to the arbitral tribunal, in whole or part for reconsideration. Section 55(5) of the Act provides;

Where the Court is satisfied that one or more of the grounds set out in subsection (3) has been proved and that it has caused or will cause substantial injustice to the applicant, the court may-

- (a) Remit the award to the arbitral tribunal, in whole or in part, for reconsideration;
- (b) Set the award aside in whole or in part.⁶⁴

Section 55(6) further provides that; The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take any other action which in the opinion of the arbitral tribunal will eliminate the grounds for setting aside.⁶⁵

From the provisions of section 56 of the Arbitration and Mediation Act set out above, it is obvious that it is not always that a successful application for impeachment will lead to setting aside the arbitral award. This section of the Act is a welcome development because it is lacking in our previous Arbitration and Conciliation Act 2004. However, where the application succeeds wholly and the breach complained of leads to a miscarriage of justice, the court has only one duty to perform and that is, to set aside the arbitral award and render same null and void as if nothing had happened before and the parties shall be returned to the position they were before the arbitral proceedings. The time between the commencement of the arbitration and the date of the order setting aside the award are excluded from the running of time for the computation of time limitation for action in law.⁶⁶ The setting aside of the award as a result of successful application for impeachment shall not extinguish the right of the parties to commence litigation in the matter. However, the right to commence litigation will definitely depend on the reasons and grounds for the impeachment. Where the impeachment was as a result of illegality and invalidity of agreement, lack of contractual capacity of one of the parties (minor), public policy reason,

⁶⁴ Section 55(5)(a)(b) of the Arbitration & Mediation Act 2023

⁶⁵ Section 55(6) Arbitration & Mediation Act 2023.

⁶⁶ Nwakoby Greg Chukwudi, *Law and Practice of Commercial Arbitration in Nigeria*, (Enugu, Saap Press Ltd., 2014) 2nd Ed. p. 333

improper procurement of the transactional and arbitration agreement, the right to litigation in the matter shall be deemed to have also been extinguished because the court has no jurisdiction to entertain and determine matters based on invalid and illegal contract which for all intent and purposes, is void based on the legal maxim *exturpi causa non oritur action*.⁶⁷ As hereinbefore stated, it is not always that a successful application shall lead to setting aside of the entire award. Where the court varied the award, qualified the award or where the application succeed in part, the judgment of the court will then constitute the award to be enforced.

Situations exist where the application for impeachment of arbitral award may succeed but the court may decide not to vary the award or set it aside. The situations where the court may decide not to intervene notwithstanding the success of the application for impeachment include the following:

- a. Where no useful purpose would be served by the impeachment of the award as the grounds complained against did not materially affect the award.
- b. Where the party seeking to set aside the arbitral award is not in any way injured by the wrong he complains against.
- c. Where the party seeking to impeach the arbitral award on a particular ground was the one who committed the error he complained against. An example will be where a party filed his documents after the time fixed for filling document and without extending the time as required by the Act, the arbitral tribunal allowed him to defend the claim against him. The court will not allow him to rely on his own error to defeat the award made in the circumstance because the law will not allow him to approbate and reprobate at the same time.
- d. The arbitral award will not be set aside merely because a specific legal issue or a specific question of law was referred to the arbitral tribunal and the arbitrators decided it wrongly particularly if it did not occasion miscarriage of justice. The reason for this is because the parties from beginning knew that the arbitral tribunal is not court in the strict sense of it. They should take the decision of their arbitrators for better or worse as they prefer arbitrators to the court on question of law.⁶⁸
- e. The award of the arbitral tribunal shall not be impeached merely because new evidence has emerged unless it is such evidence that could not have been procured with reasonable diligence before the award was made. The onus of proving that the evidence was not available or known to either party during the proceedings is on the party seeking to impeach the award on that ground.

⁶⁷ I. E. Sagay, *Nigeria Law of Contract*, (London, Sweet & Maxwell) 1985,296.

⁶⁸ *Taylor Woodrow Nig Ltd. v. S.E.W.GmbH*(supra

Conclusion

The finality of arbitral award does not exclude the right of parties to apply for impeachment of the arbitral award if the party has good reasons for doing so. The parties who entered into arbitration agreement believe that the arbitral tribunal in handling their case will be fair, unbiased, impartial, and independent. If however either party to the agreement and arbitral proceedings has good reasons to doubt the fairness of the arbitrator(s) in handling their matter, he has a good reason to complain. The right of impeachment does not hinder or weaken arbitration practice rather it makes it strong. This is because it boasts the confidence of the parties that where any wrong occurs in the arbitral proceeding, another opportunity exists for him or them to ventilate their disaffection and dissatisfaction in the proceedings.

The grounds for impeachment in the Act includes among others, lack of jurisdiction, lack of fair hearing, invalidity of the arbitration agreement, lack of legal capacity of either of the parties, improper procurement, public policy reasons, improper composition of the arbitral tribunal, and arbitrability. The application for impeachment has to be made to the court with the proper jurisdiction to try the matter but for the arbitration agreement. This is because Arbitration and Mediation Act of Nigeria 2023 has neither varied, modified, nor added to the jurisdiction of any court as provided by the Constitution of Nigeria. The application has to be on notice supported by an affidavit setting out the grounds upon which the applicant is seeking for the impeachment of the arbitral award as made by the arbitral tribunal. It is not always that a successful application for impeachment will lead to setting aside of an award. The court has discretion to exercise in the matter. In some situations the court could set aside the award completely, and in another the court may vary or modify the award whereas in others the court may not tamper with the award if it discovers that no useful purpose would be served in setting the award aside.

The time limitation for applying for setting aside in arbitration proceedings commenced pursuant to the provisions of the Arbitration and Mediation Act 2023 is three months from the date the final award is made or from the date additional award is rendered by the arbitral tribunal. The new Arbitration and Mediation Act 2023 has introduced new area in the arbitration practice in Nigeria particularly with the issue of computation of time for making application for setting aside of arbitral award. The previous Act 2004 provided for three months limitation time with respect for jurisdictional issues but failed to stipulate time for impeachment for reasons of misconduct. In the new Act, the three months limitation period applies to both jurisdiction and misconduct. However, there is need in the new Act to expressly provide for misconduct as a ground for impeachment of arbitral award. This is because the provision on misconduct merely stated the elements of misconduct but did not expressly mention the term misconduct. The provisions of section 55(2) of the Act is most unsatisfactory because error of law constitutes a ground for impeachment of arbitral award. The section gives the impression that since misconduct is not expressly stated in section 55(3), it will not be a ground for impeaching arbitral award in Nigeria. However, the saving grace is that all the elements of misconduct exist

in section 55 and other sections of the Act. It is hoped that in future amendment of the Act and in judicial decisions, the erroneous provisions of the Act will be amended accordingly.