

A NATIONAL POLICY ON ARBITRATION IN NIGERIA

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INTRODUCTION

Nigeria generates a significant volume of commercial transactions, both domestic and international with about 80 percent of these transactions originating and or terminating in Nigeria especially Lagos, Port-Harcourt, Kano etc.

Unfortunately, disputes arising from these transactions that are basically Nigerian and can be termed 'DOMESTIC' are ultimately arbitrated in foreign countries. The flow of these Domestic (i.e. purely Nigerian) arbitration cases to arbitral seats/venues outside Nigeria is unhelpful to Nigeria. It also translates to loss of revenue in billions of dollars to majority of practitioners and revenue generation for Nigeria.

In Nigeria, there is a considerable number of Arbitration Institutions such as the Nigerian Institute of chartered Arbitrators (NICArb), Chartered Institute of Arbitrators UK (Nigeria Branch), Lagos Regional Centre for

International Commercial Arbitration (LRCICA), Lagos Court of Arbitration(LCA), Lagos Chamber of Commerce International Arbitration Centre (LACIAC), and International Centre for Arbitration and Mediation Abuja (ICAMA). All these Arbitration bodies are dedicated to the common goal of promotion of arbitration in Nigeria.

There is a significant number of qualified Nigerians that are capable of being appointed as arbitrators or arbitration counsel. In the groundbreaking 2018 SOAS Arbitration in Africa Survey, which surveyed African arbitrators over a five-year period, data obtained by SOAS from the Chartered Institute of Arbitrators (UK) CIArb revealed that 2,483 of its 15,000 members are domiciled in African States, while more than half of this number - 51.3% (i.e. 1,250), are Nigerians. Undoubtedly, this figure confirms that Nigerian arbitrators are available to be appointed as members of an arbitral tribunal or arbitration counsel, either domestically or internationally.

Considering that Nigeria has capacity in relation to the good number of arbitration institutions and arbitrators, and the prominence of arbitration as a contemporary dispute resolution mechanism, it is evident that Nigeria possesses the knowledge and framework for a vibrant arbitration regime for the resolution of both international and domestic disputes with Nigeria as the seat of arbitration.

However, contrary to the expectation above, it is unfortunate that Nigeria's potential as a regional arbitration hub has not been significantly realised. Given the fact that growth in domestic arbitration will encourage investment, drive economic development and improve Arbitration practice and culture among Arbitrators and relevant professionals in Nigeria and understanding that Nigeria as a developing country requires underpinning legal frameworks in certain areas to encourage growth, we hereby propose a National Policy on Arbitration.

OBJECTIVE

The flow of purely Domestic arbitration cases to arbitral seats/venues outside Nigeria is unhelpful to investment dispute resolution, growth of arbitration practice, culture and militates against the EASE OF DOING BUSINESS in Nigeria. It also translates to loss of revenue in billions of dollars to majority of practitioners and revenue generation for the federation. It is within this context that the need for a National Policy on Arbitration is derived.

The overall goal and objective of a National Policy on Arbitration Is the growth of arbitration practice.

NATURE OF THE NATIONAL POLICY ON ARBITRATION

The National Arbitration Policy is premised upon the concept that arbitration agreements in respect of all disputes arising from contractual relationships in Nigeria, will have Nigeria as the seat of arbitration. The thrust of the policy is represented by a two-pronged approach. The first is that the policy will apply in circumstances where the transactions from domestic contractual relationship involves either only Nigerian parties or both Nigerian and foreign parties.

The second is that the policy will apply in circumstances where the transactions arising from international contractual relationships involves Nigerian parties and foreign parties, provided that there are strong connecting factors or links warranting or justifying that Nigeria should be made the seat of arbitration. The policy will be achieved by a statutory enactment providing that arbitration arising from all domestic contractual relationships and international contractual relationships, will be arbitrated in Nigeria as the seat of arbitration.

What follows below is the consideration of instances in which the proposed statutory enactment, will apply in respect of the domestic contractual relationships and international contractual relationships, for the purpose of actualizing the policy.

A.

DOMESTIC CONTRACTUAL RELATIONSHIP UNDER NATIONAL ARBITRATION POLICY

There are two crucial forms of transactions that creates domestic contractual relationships in Nigeria. These transactions are private commercial transactions and government contracts/transactions that are to be solely performed in Nigeria. These forms of domestic transactions will be considered in light of the National Arbitration Policy.

Domestic Private Commercial Transactions

Domestic private commercial transactions largely stem from the contractual relationships arising between Nigerian parties or Nigerian parties and foreign parties. These private commercial transactions or contracts are termed domestic because they are originated and largely executed in Nigeria, irrespective of the nationality of the parties.

Nigeria generates a significant volume of domestic private commercial transactions. Unfortunately, a significant number of disputes arising from these transactions are ultimately arbitrated in foreign jurisdictions.

Undoubtedly, the flight of domestic arbitration cases to arbitral venues outside Nigeria is unhelpful to our economic development as a country, and also to arbitration practitioners. This misnomer accounts for the loss of revenue on both levels and requires a national arbitration policy to reverse the trend.



Consequently, there is a need to be proactive in respect of the National Arbitration Policy by ensuring that its roots are embedded in Nigeria's domestic commercial relationships and dealings with foreign entities. This will require statutory intervention of the established principle of arbitration that parties can mutually choose the seat and venue of their arbitration.

This proposed statutory intervention will be represented by the enactment of a law that will expressly provide that arbitration in respect of private commercial transactions originating from Nigeria shall be determined in Nigerian institutions of arbitration.

Ultimately, parties involved in any contractual agreements arising from any transaction performed in Nigeria will be bound to ensure that any arbitration provision in their agreements must comply with the proposed statute. This will require amending the Arbitration and Conciliation Act (Repeal and Re-Enactment) Bill 2019 currently undergoing consideration at the House of Representatives, to incorporate provisions that will promote the National Arbitration Policy.

Federal and State Government Contracts and Transactions

Federal and State government contracts or transactions largely stem from commercial relationships that arise between the Federal and State Governments of Nigeria or their agencies and private entities. The numbers of these government contracts or transactions are usually very significant, which means that the success of the National Arbitration Policy will obviously depend upon the ability to bring such contracts or transactions within the scope of the policy.

Consequently, in giving full effect to the national arbitration policy, it is expected that the policy will be promoted in respect of government contracts, such that arbitration agreements in respect of all disputes arising from governmental contracts, especially with foreign entities will have Nigeria as the seat of arbitration. Consequently, Federal and State government agencies will need to adopt a policy to be applied to all agencies, which will encourage domestic arbitration and curtail the flight of arbitration to other countries.

From a larger perspective, all Federal and State government agencies will require to incorporate include in their arbitration clauses in agreements, a specification that the arbitral seat of such arbitration would be Nigeria. It is hoped that when this policy is implemented, the practice of arbitration in Nigeria will be significantly improved for greater economic development.

B. INTERNATIONAL CONTRACTUAL RELATIONSHIPS UNDER NATIONAL ARBITRATION POLICY

There are two notable forms of International Contractual relationships in Nigeria. The first are international private commercial transactions involving a Nigerian based party and a party based in a foreign country. The second is represented by the commercial transactions entered into between the Federal government of Nigeria and other foreign countries or the nationals of such foreign countries, which are generally regarded as Bilateral Investment Treaties (BITs). Given that these transactions permeate the Nigerian economy, there is a crucial need to consider their position in respect of the National Arbitration Policy.

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International Private Commercial Transactions

A notable feature of international private commercial transactions is that such transactions usually involve the performance or execution of a part of the transaction outside Nigeria. For instance, in a contract of carriage by sea to deliver certain goods to Nigeria, the shipping process will entail the loading of the cargo in a port of departure, which will be discharged upon arrival at a Nigerian port.

In such cases where the whole of the contract or transaction will not be performed in Nigeria as identified above, the National Arbitration Policy represented by the statutory intervention will still be applicable as long as a significant aspect of the contract will be executed in Nigeria. If the connecting factors in relation to the contract shows that it is closely connected to Nigeria, then it is logical to say that any arbitration by the parties should be conducted in Nigeria as the seat.

In the case of *The Noordwind* (1987) All N.L.R. 54, the Supreme Court extensively considered the issue of connecting factors in relation to a failed contract that ought to have been performed in Nigeria, and came to the conclusion that it would amount to absurdity to permit the case to be litigated in a foreign country when all the factors were in favour of it being litigated in Nigeria.

Given this position, it is arguable that the rationale for the proposed statutory intervention that will designate Nigeria as the seat or arbitration can be considered in light of the principles on connecting factors as decided by the Supreme Court in the *Noordwind*.

However, it is noteworthy that the approach suggested above may raise concerns whether it is possible for the proposed National Arbitration Policy represented by statutory intervention, to compel parties in a dispute to select Nigeria as a seat of arbitration by compulsion, as it may conflict with the core arbitration principle of party autonomy i.e the choice of seat of arbitration is by consent of the parties. It is submitted that legislation can definitely be utilised in superseding or overriding established arbitration principles.

This is because statutes can generally be enacted to override established legal principles in order to achieve certain results that are premised on public policy considerations. In this regard, one can take a cue from maritime law, whereby statute represented by the Nigerian Ports Authority Act (NPAA), s 54, was enacted to render a shipowner vicariously liable for the wrongful actions of a compulsory pilot, irrespective that there is no employer-employee relationship between the parties.

This law is a clear supersession and suppression of the established common law principle that vicarious liability can only arise where such relationship exists. Following the above, the proposed statutory intervention will be in order by serving as a protectionist law to ensure the growth and advancement of arbitration in Nigeria.

Bilateral Investment Treaties

Nigeria currently has 30 Bilateral Investment Treaties signed with various foreign countries; however, only 15 of them are in force. All of these BITs explicitly afford various protection in cases of disputes and provide a right of recourse to international arbitration. The BITs with France, Germany, Korea, the Netherlands and the United Kingdom provide for exclusive ICSID arbitration.

All other BITs allow investors to pursue an arbitration claim through ICSID or adhoc arbitration in accordance with the UNCITRAL rules or any other rules mutually agreed by the parties. It is pertinent to note that these seats of arbitration are all foreign seats of arbitration.

Furthermore, it must be noted that Nigeria is bound by these provisions as the BITs have force of law by virtue of being treaties as identified under Article 2 (1) (a) of the Vienna Convention on the Law of Treaties (VCLT), to which Nigeria is a party.

There is an urgent need that these BITs and all other future BITs be reviewed and negotiated to include a dispute resolution provision encouraging Nigeria as the seat of arbitration. It is pertinent to note that some countries have already taken steps to advance their arbitration institutional framework by enacting national laws, that ensure that domestic arbitration is conducted in their countries as the seat of arbitration in respect of their BITs. For instance, South Africa has enacted its Protection of Investment Act (PIA) 2015, which has the effect of creating a framework for the resolution of investment disputes in South Africa.

In this regard, PIA 2015, s 13 deals with investment disputes by shifting the resolution of such disputes from international arbitration to two domestic remedies.

Under the domestic regime, an aggrieved investor may submit a request to the Department of Trade and Industry for a mediator to be appointed for the resolution of an investment dispute with the government.

Alternatively, the investor may approach any competent court, independent tribunal or statutory body within South Africa for the resolution of such investment dispute.

Taking a cue from the South African law identified above, and given that investment treaty arbitration is statute driven, the relevant statutes governing investment arbitration in Nigeria i.e the Nigerian Investment Promotion Commission Act (Cap N117, Laws of the Federation of Nigeria 2004) can be reviewed to accommodate the National Arbitration policy.

Specifically, section 26 of the NIPC Act, which provides that disputes between Nigeria and foreign investors shall be determined in accordance with the provisions in the BITs, which as earlier mentioned gives the investor the right of recourse to international arbitration. It is posited that such provisions on dispute resolution procedures should be amended to include a proviso that the seat of the arbitration must be Nigeria where the dispute arises between an investor and the Government of Nigeria.

Also, it is recommended that the provisions of Arbitration and Conciliation Act (Cap A18, Laws of the Federation of Nigeria 2004) (“the ACA”) which defines international arbitration in section 57(2)(b)(i) and (d) to include an arbitration that has its place in a foreign country and where the parties agree that the arbitration should be treated as an international arbitration should be amended.

Also, section 16 of the ACA which allows the arbitral tribunal to determine the place of arbitration should be amended. It may be preferable for the Act to provide that the venue or place of the arbitration must be Nigeria unless the circumstances require otherwise.

Alternatively, in view of the fact that the adoption of this policy may require the amendment of a number of statutes, it may be expedient to enact a new statute on the National Arbitration Policy with a provision that the statute amends the relevant provisions of all other statutes on arbitration and dispute resolution in Nigeria.

THE NIGERIAN ARBITRATION COVENANT

A National Arbitration Policy now appears to be a crucial step that must be taken for Nigeria's arbitration development. It is noteworthy that Africa has already recognized the need to promote the active participation of African arbitrators in international arbitration. In this respect, the African Promise was devised by Dr Emilia Onyema (SOAS University of London), Dr Stuart Dutson (Simmons and Simmons LLP London), and Mr Kamal Shah (Stephenson Harwood LLP London), as a means of securing the signature and commitment of interested and relevant stakeholders to the African agenda.

In similar respect to the position above, there is a crucial need to secure the commitment of interested and relevant stakeholders in Nigeria to the National Arbitration Policy, in order for it to be a success.

To this end, it is important that stakeholders should reflect their commitment to the enactment of the statute that will promote the Policy, by endorsing by signature the Nigerian Arbitration Covenant, which represents the resolve to advance arbitration in Nigeria.

To this end, the Nigerian Arbitration Covenant states as follows:

THE NIGERIAN ARBITRATION COVENANT

We are persons professionally qualified to act as Arbitrators from reputable arbitral institutions in Nigeria with years of experience and are committed to improving the profile and representation of Nigerian Arbitrators in arbitral matters that are purely domestic.

We acknowledge that there is a divide in the number of professionally qualified arbitrators in Nigeria and the number that are actually appointed to preside over a dispute. We also believe that this divide is as a result of the appointment of foreign arbitrators to sit over matters that are purely domestic and also taking out such matters for resolution outside the country.

We believe that there is a system which if adopted, would ensure that domestic disputes are arbitrated by Nigerian Arbitrators and in Nigeria as the seat of arbitration, thereby growing the Nigerian Arbitration practice.

To achieve this, we propose a Nigerian Arbitration Covenant which seeks to improve arbitration practice in Nigeria by seeking support for the enactment of a statute that will ensure the arbitration of domestic disputes in Nigeria.

The Nigerian Arbitration Covenant seeks to achieve the following objectives in purely domestic disputes;

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- To put a stop to arbitration flight to other countries by enacting a statute to promote this cause;
 - To mandate parties to have the seat and venue of arbitration in Nigeria;
 - To appoint Nigerians as arbitrators in such disputes;

To achieve these objectives, we propose a National Policy on Arbitration where arbitration flight would be restricted to say that where a dispute which is domestic arises, to be submitted to arbitration, it is mandatory for its resolution to have its arbitral seat and venue in Nigeria.

We also propose that for Nigerian participants to such proceeding, their appointment of an arbitrator be restricted to the pool of highly qualified Nigerian arbitrators with expertise to handle the matter.

This National policy will, if enacted, ensure the following;

- The constitution of an arbitral tribunal, where a dispute is between Nigerians/a Nigerian and a foreigner, there would a mix of Nigerian arbitrators and foreign arbitrators;
- Nigerian arbitrators are appointed by Nigerian parties in domestic disputes, thereby growing the level of expertise of Nigerian arbitrators
- The arbitral seat and venue of domestic disputes would be Nigeria, thereby growing the Nigerian economy at large.

THE NIGERIAN ARBITRATION COVENANT

The Nigerian Arbitration Covenant is a positive step in taking back the Nigerian Arbitration practice from the hands of foreign arbitrators as it establishes a formidable plan in the form of; 'The National Policy on Arbitration' which if adopted would make for a better arbitration practice.

To affix your signature to this arbitration covenant, [click here](#)

CONCLUSION

In conclusion, the proposed national arbitration policy should be seen as presenting an opportunity for Nigeria to devise legislative transformations that will position Nigeria as the seat of arbitration in respect of disputes emanating from Nigeria's BITs and domestic private commercial transactions.

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