



Recourse Against Arbitral Awards: Can the Right to Challenge an Arbitral Award be Waived under Nigerian Law?

Introduction

Parties engaged in international business transactions are increasingly opting for arbitration rather than traditional courtroom litigation to resolve their disputes. According to a survey by Queen Mary University of London and White & Case, an overwhelming 99% of the respondents would recommend international arbitration to resolve cross-border disputes in the future.¹ This is unsurprising, as arbitration offers parties the flexibility to customize the resolution process in a manner that aligns with the unique nature of their businesses and their global operations.

While businesses have the option of choosing between ad-hoc arbitration and institutional arbitration, a sizable number of the arbitration clauses in business contracts in Nigeria today provide for institutional arbitrations as opposed to ad hoc arbitrations.² Moreover, it is common to find clauses in the arbitration agreements that incorporate the rules of specific arbitral institutions. By doing so, the rules of the chosen arbitral institutions become an integral part of the main contract and/or arbitration clause, and would be construed as such.³ In other words, the parties will be equally bound by the provisions of the institutional rules and “cannot feign ignorance of its contents” as they would be deemed to have had actual notice of their existence at the time their contract was entered into.⁴

The rules of some prominent arbitral institutions contain waiver clauses which limit the parties’ right of recourse against arbitral awards. Notable arbitral institutions rules with such provisions include the London Court of International Arbitration Rules 2020 (the “**LCIA Rules**”), the International Chamber of Commerce Rules of Arbitration 2021 (the “**ICC Rules**”), the Singapore International Arbitration Centre Rules 2025 (the “**SIAC Rules**”) and the Hong Kong International Arbitration Centre Administered Arbitration Rules 2024 (the “**HKIAC Rules**”).⁵

For instance, Article 35(6) of the ICC Rules provides that “[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and **shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.**” (Emphasis added). Similar provisions are found in Article 26.8 of the LCIA Rules, Article 51.6 of the SIAC Rules and Article 35.2 of the HKIAC Rules. As such, by agreeing to arbitrate under the highlighted Rules, the parties automatically waive their rights to challenge the resulting award.

However, the provisions in the highlighted institutional Rules include qualifiers such as: “*insofar as such waiver can be validly made*”⁶ and “*insofar as such waiver shall not be prohibited under any applicable law.*”⁷ This raises an important question: would parties involved in a Nigerian-seated arbitration under the ICC or LCIA Rules be deemed to have **validly** waived their right to apply to set aside the resulting award?

Waiver of Statutory Rights under Nigerian Law

A waiver refers to the voluntary surrender or relinquishment, either express or implied, of a known privilege or right. It implies an abandonment by the party waiving a right or privilege which, at his

¹ Queen Mary University of London & White & Case, *International Arbitration Survey: The Evolution of International arbitration* 5 (2018) 2 <<http://www.whitecase.com/sites/whitecase/files/files/download/publications/gmul-international-arbitration-survey-2018-19.pdf>>

² The reasons for this include, among others, the fact that arbitral institutions offer structure, procedural guidance and administrative support towards the overall efficiency of the arbitration process.

³ See *Integrated Merchants Ltd v. Osun State Government & Anor* (2011) LPELR-8803(CA) Pp 23 - 24 Paras B – C.

⁴ See *Iwuoha v. N.R.C.* (1997) 4 NWLR (Pt. 500) 419 Pp. 430, paras. B-C; 434, para. D; page 434, paras. A-B

⁵ The highlighted arbitral institutions have been consistently ranked the top four most preferred arbitral institutions in the world. See Queen Mary University of London, 2021 International Arbitration Survey: *Adapting arbitration to a changing world*, *School International Arbitration* <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>

⁶ Article 35(6) of the ICC Rules, Article 51.6 of the SIAC Rules and Article 35.2 of the HKIAC Rules.

⁷ Article 26.8 of the LCIA Rules.

option, he could have insisted upon.⁸ Hence, If, having knowledge of the rights or benefits conferred upon or accruing to him by and under the law or contract, a party intentionally decides to give up all or some of them, they cannot be heard to complain afterwards that they were not permitted to exercise their rights or that they suffered as a result of not doing so. In essence, the party is estopped from raising such issue afterward.⁹

Whilst there is no doubt that a party may waive his individual or contractual right, the question arises as to whether a right conferred by statute can be waived. The Supreme Court of Nigeria has held that *“it has to be considered whether the statute confers purely private or individual rights which may be waived or whether the statutory provision confers rights of a public nature as a matter of public policy. If it is the latter, the provision of such statute cannot be waived as no one is permitted to contract out of or waive a rule of public or constitutional policy.”*¹⁰ (Emphasis added). Hence, when a right is conferred solely for the benefit of an individual, such individual is permitted to waive such right (as long as the individual was not under a legal disability that contradicts voluntary abandonment of the right in question). The right is for his benefit. He is *sui juris*. He is under no legal disability. As long as it is *“in respect of a private right for the benefit of [the] particular”* individual, he can forgo the right either completely or partially, depending on his free choice.¹¹ The only exceptions are where the statute itself forbids waiver of its statutory provisions, or the right conferred is of public nature as a matter of public policy.¹²

Section 55(1) of the Arbitration and Mediation Act, 2023 (the **“AMA”**), which states that *“[r]ecourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (3) and (4),”* recognises the right of a party who is aggrieved by an award to challenge the said award before the court. This right is purely personal, private and solely for the benefit of the aggrieved party. It is not shared by members of the public or the public at large and as such, it can arguably be waived. Moreover, the AMA does not prohibit the waiver of the right to apply to set aside an award.

Further, the right of an aggrieved party to apply to set aside an award is analogous to the right to appeal against a judgment within the court system.¹³ In this regard, the Supreme Court has held that *“the right of appeal is a personal one conferred on a party by law for the sole benefit of the party [though] the right is not such as to be open ended or at large for which the party is free to exercise it whenever the fancy takes him no matter how long.... The right to appeal being personal, nobody or institution can force a party to exercise his right of appeal and in like manner a party is at liberty to release, abandon, relinquish or waive his right of appeal since it is his choice. A reiteration of the position on this matter of appeal is that the constitutional right to appeal being personal is for the sole benefit of the appellant and no statute which forbids or controls how the respondents may use their rights and the effect of that is that the right is capable of being waived or abandoned or released”*¹⁴ (Emphasis added.) This reinforces the view that parties to an arbitration can indeed waive

⁸ *Adeniyi v. Gov. Council, Yabatech* (1991) 6 NWLR (Pt. 300) 426 P.462, paras. C-D; *Arinze v. First Bank (Nig.) Ltd.* (2000) 1 NWLR (Pt. 639) 78 Pp. 92, paras. A- B; *Eze v. Okechukwu & Ors* (2002) LPELR-1194(SC) Pp 15 - 16 Paras B – B.

⁹ *Ariori & Ors v. Elemo & Ors* (1983) LPELR-552(SC) Pp 20 - 21 Paras A – A.

¹⁰ *Menakaya v Menakaya* (2001) LPELR-1859(SC) Pp 60 - 61 Paras G – F. See also *Ariori & Ors v. Elemo & Ors* (Supra); *Odu’a investment Co. Ltd v. Talabi* (1997) LPELR-2232(SC) Pp 82 - 82 Paras B – D; A.-G.; *Plateau State v. Goyol* (2007) 16 NWLR (Pt. 1059) 57 P. 96, paras. C-E; *Ediru v. F.R.S.C.* (2016) 4 NWLR (Pt. 1502) 209 Pp. 233-234, paras. G-A.

¹¹ *Fasade v. Babalola* (2003) 11 NWLR (Pt. 830) 26 Pp. 47-48, paras. F-C; Pp.48-49, paras. H-F; 49-50, paras.H-A. See also *Ntung v. Longkwang* (2021) 8 NWLR (Pt. 1779) 431 P. 492, paras. E-G.

¹² *Ibid.* See also *Adejumo v. David Hughes Co. Ltd.* (1989) 5 NWLR (Pt. 120) 146 P.158, para. G; *Chime v. Chime* (1995) 6 NWLR (Pt. 404) 734 P. 750, para. B; *Ariori & Ors v. Elemo & Ors* (Supra).

¹³ Although, it may be argued that the right to apply to set aside brings the matter before a court of first instance (thus, touching on a party’s right of access to the court to determine and/or enforce his right), while a right to appeal simply requires a decision to be reconsidered by an appellate court. Hence, if a party decides to waive his right to appeal, it suggests he has accepted the trial court’s decision as final and simply refused to question it in appeal.

¹⁴ *County & City Bricks Development Co. Ltd v. Hon. Minister of Environment Housing & Urban Development & Anor* (2019) LPELR-46548(SC) Pp 30 - 35 Paras C – E. See also *Longterm Global Capital Ltd & Anor v. Stanbic IBTC Bank Plc & Anor* (2022) LPELR-59027(SC) Pp 49 - 50 Paras A – C.

their right to apply to set aside an award, as it is a private and personal right for the sole benefit of the parties involved.

Finally, under Nigerian law, parties are bound by the provisions of the contract they voluntarily enter into. A party cannot simply resile from a contract because it later found that the conditions of the contract are unfavourable to it.¹⁵ More so, public policy in Nigeria reinforces the principle that parties should be made to honour obligations entered into voluntarily between themselves.¹⁶

Potential Concerns or Risks associated with the Annulment Waiver

It is essential to consider some of the potential concerns or arguments that opponents to the waiver of right to apply to set aside an arbitral award (also referred to as “annulment waiver”) might raise, particularly within the context of Nigerian law.

One concern is the possibility that an annulment waiver could exacerbate inequality in bargaining power, especially in situations where arbitration is between a frequent institutional player in international arbitration and a “one-shot” party.¹⁷ The former may have developed informal relationships with the arbitrator (which the one-shot party will not have), potentially creating an incentive for the arbitrators to find in their favour.¹⁸ Also, they have higher chance of tainting the arbitral process. Hence, they might be more inclined to waive the annulment process due to their familiarity with the arbitral process. In contrast, a one-shot party, with limited experience and understanding of the arbitral process, might be more risk-averse and prefer a regime that allows them to seek recourse through the courts to challenge or correct any perceived irregularities.¹⁹

Another concern revolves around the constitutional right of access to the courts, which opponents may argue is a fundamental right that should not be waived in an arbitration agreement. Since the decision to apply for annulment is a potential recourse to the courts, it could be viewed as an infringement on the aggrieved party’s right to access justice, which is constitutionally guaranteed in Nigeria.

However, assuming this is the case, It is important to note that while it is the law that a right conferred by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the “**Constitution**”) cannot be taken away by any other legislation or contract except by the Constitution, “*it is also the law that a right, even that provided, for and guaranteed in the Constitution can, in appropriate cases, be waived by the person or body for whose benefit it was provided.*”²⁰ (Emphasis added) This principle was highlighted in the case of *Ariori et al. v. Elemo et al.*,²¹ where the Supreme Court held that waiver is permissible with respect to “*fundamental rights that are for the sole benefit of the private individual.*” See also *County & City Bricks Development Co. Ltd v. Hon. Minister of Environment Housing & Urban Development et al.*,²² where the Supreme Court, in relation to the right to appeal, held that “*the*

¹⁵ *A.I.B. Ltd. v. I.D.S. Ltd* (2012) 17 NWLR (Pt. 1328) 1 Pp. 50, paras. D-G; See also *C.C.B. (Nig.) Ltd. v. Mbakwe* (2002) 7 NWLR (Pt. 765) 158 P. 175, paras. C-E, where the Court held that “*if the beneficiary of the statutory provisions waives his rights, or is deemed to have waived them, he cannot be heard later to complain about the violation of those rights.*” (Emphasis added)

¹⁶ *E.A. Ind. Ltd. v. NERFUND* (2009) 8 NWLR (Pt. 1144) 535 P. 592, paras. B-D. See also *W.C.C. Ltd. v. Batalha* (2006) 9 NWLR (Pt. 986) 595 p. 621, paras. E-F where the Supreme Court per Pats-Acholonu J.S.C. followed the decision in *Printing and Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq. 462, 165 where Jessel, M. R. held that “[i]t must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, **because if there is one thing which more than another public policy, requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of Justices therefore, you have this paramount public policy to consider - that you are not likely to interfere with freedom of contract.**” (Emphasis added)

¹⁷ Rudolph Cole ,2018, *Revising the FAA Permit Expanded Judicial Review of Arbitration Awards*, Nevada Law Journal, Vol. 8:214, pp. 217-218.

¹⁸ *Ibid*, p. 217.

¹⁹ *Ibid*, p. 218.

²⁰ *Oluwabukola v. A.-G., Lagos State* (2022) 2 NWLR (Pt. 1815) 499 P. 590, paras. A-C.

²¹ *Supra* Pp 32 - 33 Paras C – B.

²² *Supra*.

*constitutional right to appeal being personal is for the sole benefit of the appellant...and the effect of that is that the right is capable of being waived or abandoned or released.”*²³

From the forgoing cases, it is apparent that the key consideration for determining whether a right can be waived, even if backed by the Constitution, is whether the right is a private one solely for the benefit of the individual.²⁴ Given that the right to apply to set aside an arbitral award under Nigerian law is purely private with no broader public implications, the authors posit that such right can be waived.

However, in our opinion, there may be exceptions to this general principle, where the aggrieved party may still be permitted to challenge the award irrespective of an annulment waiver. These exceptions might include:

- a) where the aggrieved party seeks to set aside the award on the grounds in **section 55(3)(a)(i) and (ii) of AMA** which provides that the Court may set aside an arbitral award where the party furnishes proof that *“a party to an arbitration agreement was under some legal incapacity”* and *“the arbitration agreement is not valid under the law to which the parties have subjected it, or failing which indication, under the laws of Nigeria”* respectively. The basis for this position is that if a party (a) denies their capacity to enter into an arbitration agreement, and/or (b) challenges the validity of the arbitration agreement under the law, they also, by implication, deny their agreement to waive the right to annul an arbitral award, as the validity of the arbitration agreement itself is in dispute;
- b) where the aggrieved party seeks to set aside the award on the ground specified in **Section 55(3)(a)(iii) of AMA** which provides that a *“court may set aside an arbitral award, where 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.”* This is so because the said ground pertains to the *“right to fair hearing”* which is a matter of public policy with wider public implications. In *Nneji et al. v. INEC et al.*,²⁵ the Supreme Court, relying on its earlier decision in *Zideeh v. Rivers State Civil Service Commission*,²⁶ held that *“[t]he right of a person to a fair hearing is so fundamental to our concept of justice that it can neither be waived nor taken away by a statute, whether expressly or by implication.”*²⁷ (Emphasis added) Hence, Nigerian Courts may entertain an application to set aside an award on this ground, in order to afford the aggrieved party the opportunity to establish how their right to fair hearing was breached in the arbitral process (which would be a matter of fact.²⁸); and
- c) where the application to set aside the award is based on the grounds of **public policy** (particularly allegations of fraud and corruption) and **subject-matter arbitrability** under

²³ See also *Odu'a Investment Co. Ltd v. Talabi* (Supra) where the Supreme Court, relying on the Ariori decision, also held that *“when a right is conferred either by the Constitution or a Statute is solely for the benefit of an individual, he should be able to forgo the right or, in other words, waive it either completely or partially depending on his free choice...”* In *A.G Kwara State & Anor v. Adeyomo & Ors* (2016) LPELR-41147(SC) Pp 14 - 15 Paras E – C, the Supreme Court also held that *“where the right conferred by the Constitution or Statute involves an element of public policy, i.e. of interest to the public, such a right cannot be waived.”* (Emphasis added.) See also *MFA & Anor v. Inongha* (2014) LPELR-22010(SC) Pp 42 - 45 Paras A – B.

²⁴ However, it is worth noting that Nigerian Courts' position in this regard is not conclusive as the Courts have held in some cases that parties cannot contract out or waive constitutional provisions or substantive jurisdiction of courts vested by the Constitution. See *Mainstreet Bank Capital Ltd & Anor v. Nigeria Reinsurance Corporation Plc* (2018) LPELR-44905(SC) Pp 46 - 52 Paras D – D; *Zakirai v. Muhammad & Ors* (2017) LPELR-42349(SC) Pp 45 - 47 Paras D – E. See also Court of Appeal decisions in *A.-G., Ondo State v. A.-G., Ekiti State* (2001) 17 NWLR (Pt. 743) 706 P. 773, paras. B-C; *A.-G., Plateau State v. Goyol* (2007) 16 NWLR (Pt. 1059) 57 P. 96, paras. A-B; *Dimitrov v. Multichoice (Nig.) Ltd.* (2005) 13 NWLR (Pt. 943) 575 P. 598, paras. F-G.

²⁵ (2024) LPELR-63033(SC) Pp 33 - 34 Paras A – E.

²⁶ (2007) LPELR-3544 (SC).

²⁷ See also *Enigwe & Ors v. Akaigwe & Ors* (1992) LPELR-1145(SC) Pp 39 - 41 Paras C – E; *First Bank v. T.S.A. Industries Ltd* (2010) LPELR-1283(SC) Pp 72 - 74 Paras F – B; *Alimi & Ors v. Kosebinu & Ors* (2016) LPELR-42557(SC) Pp 27 - 34 Paras C – D; *Owners MT Venturer v. N.N.P.C.* (2014) 2 NWLR (Pt. 1390) 74 Pp. 104-105, paras. H-A.

²⁸ *Nneji & Anor v. INEC & Ors* (Supra).

Section 55(3)(b) of the Act. In these instances, Nigerian courts may not permit an annulment waiver to supplant public policy considerations under Nigerian law.

Therefore, from our reasoning above, it seems that Nigerian law would permit a “**restrictive or partial waiver of only certain grounds of the section 55 of the Act**” as against an absolute annulment waiver. This way, the courts could prioritize the enforcement of public policy norms and the integrity of the arbitration process.

Conclusion

Although parties may, in their arbitration agreement, agree to waive their right to set aside an arbitral award, it seems that such a waiver is permissible under Nigerian law only to the extent that it does not directly affect the validity of the arbitration agreement, fair hearing, or public policy. Therefore, a complete waiver of annulment would not be allowed.

Nonetheless, it is important for parties to pay attention to the drafting of their arbitration clauses, particularly when incorporating Institutional Rules. In such cases, it is advisable to explicitly exclude the annulment waiver provisions under the highlighted rules from the arbitration agreement to avoid potential complications and unintended consequences. While the validity of an annulment waiver under Nigerian law remains untested by the courts, this article has sought to anticipate how the courts might approach the issue if brought before them. It would be instructive to see a direct pronouncement by a Nigerian court on this point.

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