Time within Which to Set Aside an Arbitral Award under the Nigerian Arbitration and Conciliation Act

By
Edwin Obimma Ezike*

Abstract

This article aims at examining the controversy surrounding the time limit for setting aside an arbitral award under the Arbitration and Conciliation Act of Nigeria. Judicial decisions and legal literature on this subject were carefully analyzed. It was discovered that there are conflicting decisions on whether the 3 months limitation period in section 29 of the Act will equally apply to section 30 of the same Act. The apex court has erroneously held that the time limit will be read into section 30 even though the very words of section 30 contain no time limit for application to set aside an arbitral award on grounds of arbitrator's misconduct. The implication of this state of affairs is confusion in the law of Arbitration in Nigeria whether to follow the Supreme Court's decision or the clear and unambiguous statutory provision in this regard. The paper argues that where the words of a statute are clear and unambiguous effect should be given to the ordinary meaning they convey. In this regard, the 3-month time limit in section 29 should be restricted to the said section only. Additionally, it demonstrates that the application of the rules of court is restricted to awards made from arbitration ordered by the court. Finally it views the proposed Arbitration Bill as helpful to some extent in clearing this confusion.

1. Introduction

Although in all arbitration there is a prominent feature of voluntariness, the arbitral award is binding on the parties. Thus, parties to arbitration do not have the luxury of choosing the award that binds

* Ph.D., LL.M., LL.B. (Nigeria), B.L., (Lagos), B.D., B.Phil. (Rome). Senior Lecturer and Head of Department, Department of Public and Private Law, Faculty of Law, University of Nigeria, Enugu Campus. Email: edwin.ezike@unn.edu.ng; obiegedege@yahoo.co.uk.

them. It is therefore an implied term in every arbitration agreement that parties will carry out the award.[1] The nature of an arbitral award is that parties having chosen their own judge are estopped from objecting to his final decision when the award is good on its face.[2]

However, while the right of enforcement inheres in a successful party, the law affords the other party an opportunity to challenge the award in certain circumstances by applying to the courts under the relevant provisions of our laws.[3] The mode and time for making an application for setting aside an award is very important and will be examined in the course of this work through a critical evaluation of statutory provisions and judicial decisions. Efforts will be made to proffer an acceptable interpretation of the relevant statutes placing time limitation on the application for setting aside by a party.

Also, case law authorities as well as their soundness will be critically examined, especially in the light of public policy and the doing of substantive justice. Furthermore, the Proposed Arbitration and Conciliation Bill on the floor of the National Assembly will be examined as it concerns time limitation in the challenge of an arbitral award, to know if it puts to rest the controversy.

2. Setting Aside of Arbitral Awards

Challenge and setting aside of an award are largely governed by the provisions of sections 29, 30 and 48 of the Arbitration and Conciliation Act.[4] The application for setting aside will depend on the ground for challenging the award.

Section 29 of the Act provides that:

(1) A party who is aggrieved by an arbitral award may within three months

---

1 G. Ezejiofor, *The Law of Arbitration in Nigeria,* (Lagos: Longman Nig. Plc., 1997), p. 103.

2 Per Babalakin JCA (as he then was) in *Taylor Woodrow Ltd. v GMBH* [1991] 2 NWLR (Pt. 175) 602 at 611. Also, art. 32 of the Arbitration Rules provides that the award shall be final and be binding on the parties. The parties undertake to carry out the award without delay.

3 Arbitration and Conciliation Act, Cap. A18 *Laws of the Federation of Nigeria* (*LFN) 2004*, ss. 29 and 30 provide for the mode of challenging an arbitral award.

4 *Ibid.*

(a) from the date of the award;
(b) in a case falling within section 28 of the Act, from the date the request for additional award is disposed of by the arbitral tribunal,

by way of application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

(2) The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decision on matters which are beyond the scope of the submission to arbitration so however that if the decision 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 the arbitration may be set aside.

(3) The court before which an application is brought under subsection (1) of this section may, at the request of a party, suspend proceedings for such period as it may determine to afford the arbitral tribunal the opportunity to resume its arbitral proceedings or take such other action as to eliminate the ground for setting aside the award.

Section 30 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 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.

The afore-cited provisions, which have been reproduced verbatim, appear to be clear and unambiguous and should therefore be devoid of controversy. This is however not the case as there has been ample academic discourse[5] and judicial pronouncements[6] on it,

---

[5] G. Ezejiofor, "Time Within Which to Set Aside an Arbitral Award" in I. A. Umezulike & C. C. Nweze (eds.) *Perspectives in Law and Justice,* (Enugu: FDP, 1996), pp. 153 – 171; J. F. Olorunfemi, "Time to Apply to Set Aside an Arbitral Award: A Review of *Araka v Ejeagwu*", *The Appellate Review*, Vol. I No. 2 (2009/2010) pp. 203-219.

especially as it relates to the time for setting aside an award. Despite this, the controversy still rages, with much criticism directed at our courts' interpretation of the provisions.[7] However, despite the raging controversy, on the authority of our laws,[8] the conclusion that there are two broad grounds for the challenge of an award is inescapable.

Under section 29 of the Act, an award may be set aside where it contains decisions on matters beyond the scope of the submission. According to Russell, this right to challenge recognises that the tribunal's jurisdiction derives from the arbitration agreement and that the award should not be enforceable ... if the tribunal has determined disputes that are beyond the scope of that agreement or submission to arbitration.[9] Here, the award will be set aside only if the aggrieved party furnishes satisfactory proof that the impinged award contains decisions on matters outside the scope of submission.[10]

The other ground for the challenge of an arbitral award, which is provided under section 30 of the Act, is misconduct on the part of the arbitrator or improper procurement of an award. Misconduct in this context possesses a technical meaning and does not refer to the arbitrator's personal character. It does not necessarily involve moral turpitude on the part of the arbitrator, but means such mishandling of the arbitration as is likely to lead to substantial miscarriage of justice.[11]

The mishandling or misconduct referred to may take numerous forms. It may be irregularity in the conduct of the proceedings which could include failure to notify the parties of the venue and time of

---

6 *UNIC Co. Ltd. v Leandro Stocco* (1973) 1 All NLR 178; *Taylor Woodrow v GmBH* above note 2.

7 See e.g. Ezejiofor, above note 1, pp. 109 – 111; G. C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria*, (Enugu: Iyke Ventures Production, 2004), pp. 136 – 143; Ezejiofor, above note 5, pp. 161 – 163.

8 The Arbitration and Conciliation Act, especially in ss. 29 and 30.

9 See D. St. John Sutton and J. Gill, *Russell on Arbitration,* (22nd edn., London: Sweet & Maxwell Ltd., 2003), para. 8-041.

10 Ezejiofor, above note 1, p. 104.

11 Per Atkin J. in *Williams v Wallis & Cox* (1914) 2 KB 478 at 485. This definition has been adopted by Nigerian courts. See for example *Araka v Ejeagwu* [2000] 15 NWLR (Pt. 692) 684 at 720 per Ayoola JSC (as he then was).

meeting,[12] refusal by the tribunal to hear evidence on a material issue,[13] taking affidavit evidence where oral evidence is required,[14] failure of the tribunal to act together,[15] hearing of a witness in the other party's absence,[16] refusal to hear the evidence of a party after hearing that of the other.[17]

Misconduct may take other forms besides irregularity in the arbitral proceedings such as: where the arbitrator accepts a party's hospitality in return for a favourable verdict;[18] or refusal by the tribunal to deal with some of the issues referred to it;[19] or where the arbitrators take bribe to pervert the cause of justice;[20] or where there is an error of law on the face of the award[21], to mention just a few.

However, since the thrust of this work lies on the time for setting aside, especially whether the three months stipulated in section 29 applies to setting aside under section 30, a more detailed discourse on the grounds for setting aside an award does seem unnecessary.

3. Time Limitation for an Application to Set Aside an Arbitral Award: Case Law Evaluation

Where impeachment of an award is possible, a party contemplating to do so must act timeously. The time for bringing the application for setting aside an award has been the subject of judicial pronouncement. The question before the court most time was whether the three months stipulation prescribed under section 29(1) of the Act applied to applications brought under section 30. A review of case law authorities will now follow.

---

12 *Oswald v Grey* (1855) 24 LJQB 69.
13 *William v Wallis & Cox* above note 11.
14 *Kano State Urban Development Board v Fanz Construction Co. Ltd.* [1990] 4 NWLR (Pt. 141) 1.
15 *UK v Newston* (1896) 1 QB 107.
16 *Cache v Ballingham* (1894) 1 QB 107.
17 *Oswald v Grey* above note 12.
18 *Mosley v Simpson* (1893) LR 16 Eq. 226.
19 *Re O'Connor and Witlaw's Arbitration* (1919) 88 L.J.K.B 1242.
20 *Re Whitely & Roberts Arbitration* (1891) 1 Ch. 558.
21 *Bhara v Jivra* (1923) 1 AC 480 p. 487; *United Nigeria Insurance v Karimu* (1969) 3 ALR Comm. 135.

In *Araka v Ejeagwu*,[22] upon a dispute concerning the rent payable in a landed property, the arbitrator published his award on 8 September 1994. The appellant by originating summons filed on 6 February 1995, sought recognition and enforcement of the award. The respondent filed a counter affidavit on 21 April 1995 (seven months later) opposing the enforcement on the grounds that the arbitrator acted outside his jurisdiction. Four days later, the respondent filed another application under section 30 of the Act praying that the award be set aside or in the alternative be remitted to the arbitrator or another arbitrator. After hearing the submissions for and on behalf of the parties, the learned trial judge found for the respondent and remitted the matter to the arbitrator for reconsideration.

The appellant appealed contending, *inter alia,* that the learned trial judge erred in law by granting the defendant's application to set aside when it was statute barred and that the motion itself was grossly incompetent. The appeal was dismissed after the Court of Appeal had struck out the ground of the application being statute barred. The appellant appealed to the Supreme Court challenging the decision of the Court of Appeal and the striking out of a ground of his appeal.

In considering his appeal, the Supreme Court construed the provisions of sections 29 and 30 of the Act. On the time to apply to set aside an award, the Supreme Court held that: "The prescribed time within which to make an application to set aside an award is 3 months from the date of the award, **irrespective of whether the application is predicated upon section 29 or section 30**."[23]

According to Katsina- Alu JSC (as he then was): [24]

> Indeed there is only one period of limitation prescribed under the Act … Section 30 of the Act only sets out circumstances under which an application to set aside an arbitral award thereunder may be brought. This is why I think it is absurd to suggest that section 30 should stipulate a

---

[22] Above note 11.

[23] Emphasis supplied.

[24] *Araka v Ejeagwu* above note 11.

> time limit of its own for bringing an application for which section 29 has already provided a time frame.[25]

In the words of Kutigi JSC: [26]

> Both sections 29 and 30 provide for recourse against an award made by an arbitrator. And under both sections, it is an *aggrieved party* who must apply to have an award set aside ... Will it therefore be correct and proper to say that an aggrieved party under section 29 has *three* months within which to apply to set aside the award, while another *aggrieved* party has eternity under section 30, to apply to set aside an award? My answer must be in the negative and it is negative.[27]

The views expressed above by the apex court have attracted criticism from various learned authors.[28] In our view, a key factor that influenced the Supreme Court's opinion is that it is impossible to imagine that the draftsman intended an application under section 30 to be brought at any time. In the opinion of Kutigi, it is incorrect to assume that an aggrieved person under section 29 of the Act has 3 months while another aggrieved person has eternity under the Act.

The conclusion of the learned law lord is, with due respect, not to be accepted. He is hasty to conclude that if the time limit is not the three months prescribed under section 29, it must be eternity; he erroneously excludes the possibility of any middle position outside the two extremes of 3 months and eternity. The Court failed to acknowledge the possibility that "a reasonable time" or a "reasonable time before the award is enforced" could have been intended by the

---

25 *Ibid.,* p. 701 para. C.

26 *Ibid.,* at p. 703 paras. A – B.

27 *Ibid.*

28 See for instance, Nwakoby, above note 7, p. 138; J. F. Olorunfemi, "The Challenge of Arbitral Award in Nigeria," in *Thematic Issues in Nigerian Arbitration Law and Practice,* O. D. Amucheazi, and C. A. Ogbuabor, (eds.) (Onitsha: Varsity Press Limited, 2008), pp. 32 – 67; Olorunfemi, "Time to Apply to Set Aside an Arbitral Award: a Review of *Araka v Ejeagwu*" above note 5.

draftsman, or that it was intended to confer certain discretion on the court as the justice of the case permits.

Furthermore, the very primary canon of interpretation of statute - the literal rule - was conspicuously ignored by the Supreme Court. The apex court flagrantly disregarded the long established rule that once the words of a statute are clear and unambiguous, their ordinary meaning should be accorded them, without recourse to other principles of interpretation.[29] It is thus not wrong to assert that section 29 says what it means and means what it says.

The effect of the words "in accordance with subsection (2) of this section" was ignored by the Court. It goes without saying that the words do not only have the effect of distinguishing setting aside under section 29 from setting aside under section 30, but also restricting the time limit under section 29 (1) to only section 29. A careful examination of the provisions of section 30 of the Act does not reveal any link especially as it concerns the issue of the time prescription of 3 months under section 29 (1) of the Act.

While a holistic reading of both sections by the apex court is acceptable for bringing to fore the true purport of the provision, the fact that section 29 (1) circumscribes the time limit to section 29 only; and that section 30 makes no reference at all to section 29 (especially regarding the time stipulation), an importation of the three month limitation to section 30 is neither logical nor acceptable. It is like dragging it by the nose, willy-nilly into the section that the law maker never intended.

Therefore, the opinion of Katsina Alu JSC that it is absurd to suggest that section 30 should stipulate a time frame limit of its own for bringing application for which section 29 had provided a time frame, is unacceptable because both sections provide distinct grounds and are self-surviving and independent. Therefore, it is not in every case that recourse will be had to such holistic reading of a statute, especially where they are neither unclear, ambiguous or in conflict with one another.

One may argue that under the Act the fact that a party calls his ground of application misconduct when in fact it is lack of jurisdiction

---

29 *Unipetrol PLC v ESBIR* [2006] 8 NWLR (Pt. 983) 624.

takes it outside the ambit of section 29 and vice versa. This is so because what the court should concern itself with is substance and not the form, and the courts are now more inclined to do substantial, rather than technical justice. But that is as far as it goes. The quest to do substantial justice does not approve of the importation of elements not included. This is more so considering the fact that the express mention of the 3 months' time limit under section 29 has impliedly excluded its application to section 30 in line with the *exclusio uterus* rule.

The fact that the court looks not just at the grounds alleged but also at the facts surrounding such grounds before deciding under what heading the application should come, appears to be the only correct justification for holding that the three months limitation applied to the case since, from the fact, it appeared to be one in which the arbitrator acted beyond his power.

In this connection, the dictum of Kalgo JSC is instructive: [30]

> It is my considered view that the application of the respondent to set aside the award must come under section 29 (2) and not under section 30 (1) of the Act. If it is under section 29 (2) then it is caught by the three months prescribed period within which the application must be made.[31]

This author aligns himself with the view expressed in this dictum. In answering the question of what the legislature did intend, care ought to be taken not to be over analytical to the point of reading into the Act what is not in it.

In *Aye-Fenus Ent. Ltd. v Saipem Nig. Ltd.*,[32] the Court of Appeal (per Saulawa JCA) was of the view that by virtue of the provisions of section 29(1)(a) of the Arbitration and Conciliation Act, an aggrieved party may within three months from the date of the award, or in a case falling under section 28 of the Act, from the day the request for additional award is disposed of by the tribunal, by way of an application seek to set aside the award in accordance with section 29(2) . The court went further to observe that the motion was filed

---

30 *Araka v Ejeagwu* above note 11 at pp. 715-716 paras. H – A.

31 *Ibid.*

32 [2009] 2 NWLR (Pt. 1126) 483.

within time, having been filed within three months.[33] In this case the court did not make any distinction between setting aside under section 29 or 30.

Also, this 3 months limitation period for bringing an action for setting aside has been held to apply irrespective of whether the mode of challenge of the award was by a preliminary objection in an action for enforcement of an award. In *Bill Construction Co. Ltd. v Imani & Sons Ltd.*[34] the Supreme Court expressed the above view. In the case, an award was made by an arbitrator on 31 December 1996 in favour of the appellant following reference of a dispute in a contract for the building of the United States Embassy staff housing and recreational facilities in Abuja. The appellant by an originating motion on notice sought to enforce the award, having been told to put the respondent on notice in an earlier originating motion *ex parte*. On 7 July 1997, the respondent raised a preliminary objection challenging the award and its enforcement over six months after it was made. The preliminary objection was dismissed. The appellant then argued the motion and urged the court to make the award a judgement of the court. The respondent's counsel when called upon to reply to the motion applied for an adjournment to file a counter-affidavit. The court refused the application for adjournment and granted the application to enable the appellant enforce the award. Upon appeal by the respondent, the decision was upturned on the ground that the respondent's right to a fair hearing was impeached by the trial court's refusal to grant the adjournment.

The appellant appealed to the Supreme Court and the question of time for challenge of an award arose for determination, among others. Allowing the appeal and upholding the judgement of the trial court, the Court held that there was no ground for granting adjournment for the purpose of "taking steps'' as no application was filed within the three months prescribed under section 29(1) of the Act.

---

33 *Ibid.,* at p. 521 para. G.

34 [2006] 19 NWLR (Pt. 1013) 1.

4. The 15-Day Rule: A Confusion in the Law

In Nigeria, various High Court Statutes provide that the High Court may order any civil cause or suit pending before it to be referred to arbitration if the parties consent or if the cause or matter requires a prolonged examination of documents or any scientific investigation which cannot be conveniently conducted by the court, or if the dispute consists wholly or in part of accounts. The High Court Rules in turn make provisions to facilitate the conduct of arbitration pursuant to such reference by the High Court. One of such rules is that an application to set aside an award must be made within 15 days after the publication of the award.[35]

Does the above 15-day rule also apply to an application to set aside an award resulting from arbitration pursuant to the Act? The answer obviously is in the negative. But the Supreme Court has answered it in the affirmative and some courts below have answered it in the negative. It will be shown here that the 15-day rule does not apply to arbitration under the Act and that the various decisions by the courts to the contrary are erroneous. A review of the relevant judicial authorities will now follow.

The first case in which the question of time to set aside an award was considered was in *Ita v Idiok.*[36] In that case the court referred a suit before it to arbitration. Three years after the publication of the award the court was moved to set it aside. Webber J. dismissed the motion on the ground that it was filed more than 15 days after the publication of the award. The learned trial Judge did not fail to emphasize that the decision was informed by the fact that the award derived from an arbitration ordered by the court. This is correct as the award emanated from arbitration ordered by the court and the 15-day rule will apply.

---

35 See for example, Anambra State High Court Rules 2006, Order 29 Rule 13; Benue State High Court (Civil Procedure) Edict 2007, Order 19 Rule 13(2); Plateau State High Court (Civil Procedure) Rules 1987, Order 19 Rule13; High Court of the Federal Capital Territory, Abuja (Civil Procedure) Act 2004, Order 19 Rule 13(2).

36 (1923) 4 All NLR 100.

In *Passat Industries Ltd. v Royal Exchange Assurance Ltd.*[37], the applicant took out a "cash in transit" policy from the respondent. The policy contained an arbitration clause of the *Scott v Avery* type. The applicant lost some money due to the fraud of its employee and insisted that it must be reimbursed by the respondent. This was rejected by the latter. An arbitral tribunal was empaneled as stipulated by the policy. The umpire made an award and three months after the applicant sought to set it aside. The application was dismissed on the ground, *inter alia,* that it was made more than 15 days after the publication of award contrary to Order 49 Rule 12 of the Lagos High Court Rules. It is submitted with respect that this decision is erroneous as the award sought to be set aside did not emanate from court ordered arbitration where the 15-day rule will apply.

On the other hand, in *Khawam & Brothers Ltd. v Edilit Ltd.*[38] the court reached a correct decision and rightly held that the 15-day rule only applies to awards from arbitration ordered by the court. In this case an award was made pursuant to a submission by the parties. Eighteen days after the publication of the award an application was made to set it aside. The respondent contended that the application could not be entertained because it was made out of time. The contention was rejected by Caxton-Martins, J. who held that the 15-day rule applies only to awards pursuant to arbitration following the order of the court. The learned trial judge observed that the whole of Order 29 appears to have discussed only matters relating to an arbitrator appointed by the court.[39]

A critical analysis of the above cases persuades the present writer to agree with a learned author[40] that all these cases are merely of the first impression and in none of them did the trial judge attempt a critically incisive examination of the provisions of the Rules or the Act, in order to explain why the 15-day rule should or should not

---

37 (1966) 2 All NLR 224.

38 (1967) LLR 125.

39 See also *Kwabia v Odonkor* (1975) 1 ALR Comm. 306.

40 See G. Ezejiofor, "The Time Within Which to Set Aside an Arbitral Award in Nigeria", in *Perspectives in Law and Justice*, edited by I. A. Umezulike & C. C. Nweze, (Enugu: Fourth Dimension Publishing Co. Ltd., 1996), pp. 154 – 171 at p. 157.

apply to submissions not ordered by the court. It is also to be noted that the above mentioned cases ended up in the High Courts and did not get to the Supreme Court.

However, the first case on this issue to reach the Supreme Court is *the United Nigeria Insurance Co. Ltd. v Leandro Stocco*.[41] Here the plaintiff took out from the defendants a personal accident insurance cover, which contained an arbitration clause. Following an injury arising from a motorcar accident the plaintiff claimed compensation from the defendants in accordance with the policy. The parties could not reach agreement whereupon the dispute was referred to arbitration. The arbitrator published his award on 24 June 1969. About fourteen months after the publication of the award the plaintiff applied for leave to enforce it as a judgement of the court and the defendants filed a motion to set it aside. The Court per Dosunmu, J. dismissed the defendant's application and granted the plaintiff's, holding *inter alia* that the defendant's application was time-barred, since Order 49 Rule 13 of the Supreme Court (Civil Procedure) Rules[42] enjoins that such an application must be made within 15 days after the publication of the award.

On appeal this decision was upheld by the Supreme Court. The apex court held as follows: [43]

> We think that the learned trial judge was right in holding that the application was out of time under Order 49 rule 13 of the High Court of Lagos (Civil Procedure) Rules … We are therefore, of the opinion that the application is statute-barred and that, even when considered on its merits, the appeal must be dismissed and hereby dismissed.[44]

It is submitted that both the trial court and the Supreme Court are wrong in their decisions. Order 49 Rule 13 of the Supreme Court (Civil Procedure) Rules cited and relied upon by the courts deals only with an award in an arbitration ordered by the court in a pending suit.

---

41 (1973) NSCC 96.
42 Cap. 211 *Laws of Nigeria, 1948.*
43 Above note 41.
44 *Ibid.,* at p. 103.

It does not apply to an arbitration conducted pursuant to an arbitration agreement between the parties as it was in the present case.

In yet another case of *Home Development Ltd. v Scancilia Construction Co. Ltd.*[45], the apex court felt itself obliged to follow its erroneous decision in the *Stocco case.* In the *Home Development case,* the parties' contract contained an arbitration clause for the settlement of any disputes that might arise. A dispute arose and an award was made following an arbitration. Thirty three days after the publication of the award the appellant applied to the Kaduna State High Court to set it aside. The respondent objected that the court had no jurisdiction to entertain the application since it was made more than 15 days after the publication of the award, contrary to Order 22 Rule 12 of the Kaduna State High Court (Civil Procedure) Rules. The objection was sustained by the trial court, the Court of Appeal and the Supreme Court.

In reaching its decision, the Supreme Court besides following the *Stocco Case,* also attempted an interpretation of sections 3 and 18 of the Kaduna State Arbitration Law and found in them the basis for holding that the 15-day rule also applies to an award to a submission. Section 3 provides that "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge or by mutual consent, and shall have the same effect in all respects as if it had been made an order of court."
Section 18 prescribes as follows:

> The Law shall apply to every arbitration under any Act or Law passed before or after the commencement of this law as if the arbitration were pursuant to a submission except in so far as this law is inconsistent with the Act or law regulating the arbitration or with any rules of procedure authorised or recognised by that Act or Law.

The Supreme Court interpreted section 3 above as meaning that an arbitration under a submission is to be treated as if it were pursuant to an order of court. It also interpreted section 18 as prescribing that the provisions for arbitration under any statute, such as the Kaduna State

---

45 (1994) 9 SCNJ 87.

High Court Law, apply to arbitrations under the Arbitration Act or Law. In either case, the 15-day rule which was prescribed for arbitrations pursuant to an order of court, applies to an arbitration on a submission. Consequently the rule applies to the case in hand which deals with such an arbitration.

It has been demonstrated that the interpretation of sections 3 and 18 of the Kaduna State Arbitration Law given by the Supreme Court is wrong.[46] The correct interpretation and meaning of the two sections has been given by a very high authority. According to *Halsbury*[47], the effect of section 3 above (which is a reproduction of section 1 of the English Arbitration Act 1989) is to make an award pursuant to a submission a rule of court, in order to facilitate its enforcement. Section 18 above (which is a reproduction of section 24 of the English Arbitration Act 1989) simply means, according to *Halsbury*, that the provisions of the Arbitration Act are to be applied to arbitrations under any other Act except where those provisions are inconsistent with those in the Act pursuant to which the arbitration is being conducted.[48] It is therefore wrong to hold from these sections that the 15-day rule will apply to an arbitration conducted pursuant to an arbitration agreement between the parties as it was in the present case. It is most respectfully urged that the Supreme Court reverses these two decisions as soon as an opportunity presents itself.

5. Time for Setting Aside: The Proposed Arbitration and Conciliation Act and Public Policy Ramifications

The National Assembly has made an attempt to lay to rest the controversy regarding the scope of the 3 months limitation period prescribed in section 29 of the Act for the making of an application for setting aside. The National Assembly seeks to achieve this by having only one section dealing with setting aside of an arbitral award. The current section 30 dealing with setting aside on grounds of arbitrator's misconduct is removed while the current section 29 is retained with its

---

46 See Ezejiofor, above note 5, pp. 159 – 160.

47 *Halsbury's Laws of England*, vol. I (1st edn.), (London: Butterworths, 1907), p. 474.

48 *Halsbury's Statutes of England,* vol. I (2nd edn.), (London: Butterworths, 1948), p. 17.

3 months' time limit but with enlarged grounds for setting aside.[49] The enlarged grounds are meant to cover both the arbitrator's lack of jurisdiction and misconduct. It is this author's view that they do not adequately cover all cases of arbitrator's misconduct. They only cover technical misconduct but not gross misconduct.

This is in section 53 of the Bill, and it provides as follows:

(1) A party who is aggrieved by an arbitral award may within three months-

(a) from the date of the award; or

(b) in a case falling within section 48 of the Act, from the date the request for additional award is disposed of by the arbitral tribunal,

by way of an application for setting aside request the court to set aside the award in accordance with subsection (2) of this section.

(2) The Court may set aside an arbitral award-

(a) if the party seeking the application furnishes proof-

(i) that a party to the arbitration agreement was under some incapacity;

(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria;

(iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case;

(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or

---

49 These grounds are slightly modified version of the current section 48 which deals with setting aside of international arbitral award. The modification is seen in introducing s. 53(2)(b) (i) and (ii) – see below. Another laudable novelty in the proposed bill is the re-introduction of the doctrine of remittance – s. 53(3)(a) – (c). The Bill interestingly and specifically provides that the court shall not set aside an arbitral award unless the said award cannot be remitted to the arbitral tribunal for reconsideration. This author is happy with this development and hopes that this will save a lot of arbitral awards when the Bill is finally passed into law. See s. 53(4) of the Proposed Arbitration and Conciliation Act reproduced below.

> (v) that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however 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; or
> (vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; or
> (vii) where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or
> (b) if the Court finds-
> (i) that the dispute arises out of an illegal contract, or
> (ii) that the dispute arises under an agreement that void [*sic*] as being by way of gaming or wagering, or
> (iii) that the subject matter of the dispute is otherwise not capable of settlement by arbitration under the laws of Nigeria; or
> (iv) that the award is against public policy of Nigeria.
> (3) If the Court is satisfied that one or more grounds set out in subsection (2) of this section 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 tribunal, in whole or in part, for reconsideration;
> (b) set the award aside in whole or in part, or
> (c) declare the award to be of no effect, in whole or in part.

The proposed Act does not seem to be one which will successfully dispense substantial justice. Even though it appears to quell the controversy surrounding the scope of the 3 months limitation for bringing an action for the setting aside of an award, its ability to do substantial justice to the parties is doubtful. This is so because it attempts to create an exhaustive list of situations that would warrant an application for setting aside. It does not anticipate the possibility of

situations where the justice of the case will warrant an action for setting aside.

Also, a rigid imposition of the 3 months limitation poses a huge threat to the well-established doctrine of public policy. This doctrine, the importance of which has been underscored by the Act[50], will be hugely jeopardised by affording the court no discretion in the interpretation of the three months period as the justice of the case may require, especially by extending the time for making the application. This has had the unfortunate effect of ousting the court's jurisdiction where the prescribed 3 months has lapsed. In situations such as the above, a defaulter may well profit from his own fraud and illegality. It is trite law that a court of law does not lend its aid to the enforcement of a contract that is fraught with fraud.[51] Also, a court has the duty to prevent a party from benefitting from his own wrong.[52]

It is also beyond doubt that vital issues such as jurisdiction, fraud, among others, are so fundamental that they can be raised at any point in proceedings, even at the Supreme Court. It is therefore a tenable contention that the draftsman, after a careful consideration of the importance of grounds of challenge contained in section 30 of the Act, decided to exclude it from the application of the prescribed 3 months contained in section 29. This contention is made more plausible by the inclusion of the words "... in accordance with subsection (2) of this section" in section 29(1) of the Act. It is therefore unacceptable to extend the 3 months limitation to section 30 after such glaring and seemingly sufficient attempt to circumscribe its scope to just section 29 by the inclusion of the phrase.

Besides the public policy implications of this absurd interpretation of extending the limitation period to cover section 30, it is also not progressive for limiting the judicial powers of the courts as

---

50 Under Section 48(b)(ii), the court may set aside an arbitral award if the court finds that the award is against public policy of Nigeria. Also under section 52(2)(b)(ii), recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

51 *Shomefun v Shade* [1999] 12 NWLR (Pt. 632) 531 at 541.

52 *Teriba v Adeyemo* [2010] 13 NWLR (Pt. 1211) 242.

constitutionally guaranteed under section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In fact it tends to oust the court's jurisdiction when it should not.

Suffice it to say that the court ought to guard jealously the adjudicatory powers conferred on it through a progressive interpretation of statute. This is more so where the legislature has not taken steps to preserve those powers even in the face of apparent limitations as is the case in some more advanced jurisdictions. In the United Kingdom (UK), for instance, with a provision limiting time generally for challenging an award, the discretionary power of the court is preserved for it to dispense justice in deserving cases outside the prescribed 28 days limitation period. A brief consideration of the relevant law in the UK will be instructive here.

In England, court control of arbitrations is limited to circumstances set out in section 67 (lack of jurisdiction), section 68 (serious irregularity) and section 69 (appeal on point of law) of the Arbitration Act 1996. One of the many factors limiting the involvement of the court in reviewing awards is the need under section 70(3) for the application to be made within 28 days of the award.[53]
Section 70 provides:

> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—
> (a) any available arbitral process of appeal or review, and
> (b) any available recourse under section 57 (correction of award or additional award).
> (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

There is thus a 28-day time limit for appealing against, or challenging, an arbitral award.
Time starts to run either:

> (a) from the date of the award ("the first limb"); or

---

53 See generally UK Arbitration Act 1996, ss. 67 to 70.

> (b) if there has been any arbitral process of appeal or review, from the date when the applicant or appellant was notified of the result of that process ("the second limb").

There is also a bar to mounting an appeal or challenge in the High Court until internal avenues of appeal or review have been exhausted. Those provisions reflect the draftsman's objectives of achieving finality; restricting the parties to the available arbitral resources so that the arbitral process can, if possible, correct itself; and limiting the intervention of the court.

However, in the face of the above provisions, the power of the court to do justice even after the expiration of the prescribed 28 days limitation period is preserved in section 80. Thus, by section 80:

> (5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.

Also, under the English Civil Procedure Rules (CPR), this power of the court is further safeguarded by Rule 62.9(1) of CPR which provides that the court may vary the time for complying with the 28-day limit.[54] However, in determining whether to extend the statutory time limit, the court should bear in mind that the Act is based on principles of party autonomy and finality of awards.

The court, in discharging this responsibility, usually would have regard to the following:

- The length of delay.
- Whether in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances.
- Whether the respondent to the application caused or contributed to the delay.

---

54 See Rule 62 of the English Civil Procedure Rules 1998.

- Whether that respondent would by reason of the delay suffer irremediable prejudice in addition to mere loss of time if the application proceeded.
- Whether the arbitration had continued during the period of delay and, if so, what impact a determination of the application might have on the progress of the arbitration or the costs incurred.
- The strength of the application.
- Whether in the broadest sense it would be unfair to the applicant to deny him the opportunity to have the application determined.[55]

6. Conclusion

As has been highlighted, the time for bringing an action to set aside an arbitral award in Nigeria is an important issue and one bedeviled by controversy. It has also been pointed out that the interpretation given to sections 29 and 30 of the Arbitration and Conciliation Act by our courts, especially as it concerns the 3 months limitation period prescribed under section 29 is less than satisfactory. The literal interpretation of the relevant sections has been advocated in this work since there exists no ambiguity in them. Also, a progressive interpretation of the sections to vest the court with power where the justice of the case so demands has been advised, pending an amendment by the legislature to reflect same statutorily. Furthermore, the public policy implications in the circumstances ought to spur the court in granting remedies where the need arises.

It was also shown that our courts are divided in their decisions about the application of the 15-day rule. While the Court of Appeal and the Supreme Court erroneously hold that it will as well apply to an application for the setting aside of an award pursuant to the Act, only the lower courts exhibit sound judgement in maintaining the right decision. It is respectfully urged that our apex court take necessary steps to tidy up the law in this regard. Unfortunately this has not happened as the Court of Appeal and the Supreme Court did not

---

55 *Kalmneft v Glencore International AG & Anor* [2001] EWHC QB 461.

specifically address the thorny issue in recent cases that came before them.[56]

---

56 The case of *Vitamalt v Abdullahi* [2006] 12 WRN 33 was an opportunity, but the Court of Appeal missed that opportunity and instead relied heavily on *Araka's case* and held that "it is also trite law that a person seeking to set aside an award must not only comply with the time limit set by the rules of court but must also come within the three month time limit prescribed in the Act." *Ibid.,* at p. 57. One would have expected the Court to discuss the nagging issue of time limit in sections 29 and 30 of the Act. In a more recent case of *T.E.S.T. Inc. v Chevron (Nig.) Ltd.* [2011] 8 NWLR (Pt. 1250) 464, although the case touched on setting aside on grounds of misconduct, the Court of Appeal did not address the issue of time limit either because it escaped their mind so to do, or that the facts of case did not disclose the issue, or that it was not brought to the notice of the Court.