THE ARBITRABILITY OF CORPORATE DISPUTES WITHIN THE AMBIT OF CASE LAW PRINCIPLES IN NIGERIA*

Abstract
Corporate disputes are encompassed in different areas of law. They are usually settled through litigation but presently can also be resolved through Alternative dispute resolution, of which arbitration is one of it. Arbitrability of disputes has gained attention globally. Not all disputes are arbitrable, especially when it is a matter of public policy or contrary to a statutory provision. Different jurisdictions take different approaches as to whether or not corporate disputes are arbitrable. The U.S. has a liberal approach; Germany pursues a case-by-case approach. Eastern European states such as Russia and Ukraine deem corporate disputes to be non-arbitrable. In India the Supreme Court gave a detailed principle on arbitrability of disputes. As of today, the arbitrability of corporate disputes remains a highly disputed legal topic. In some countries the arbitrability of corporate disputes is based on jurisdictional angle, while in others it is hinged on the agreement of parties to submit to arbitration. In Nigeria, the issue of arbitrability of corporate disputes is primarily based on the interpretation of the Courts, since there is no detailed legislative provision. The essence of this research is to analyse the corporate disputes that are amenable to arbitration in Nigeria while considering other jurisdictions and the case laws that have exposed the true position in Nigeria.

Keywords: Arbitrability, Disputes, Arbitration, Corporate, Jurisdiction

1. Introduction

In order to understand arbitrability of disputes, certain things need to be considered for a dispute to be deemed arbitrable. Firstly, the subject matter must be amenable to settlement, and second, the dispute must not be under the exclusive jurisdiction of the court. Some jurisdictions allow the arbitrability of claims involving economic interests, others allow the arbitrability of claims relating to matters of which the parties have free disposal, and finally, some allow the arbitrability of claims that may be settled through an agreement.[1] Arbitrability is fundamental in arbitration[2], which sheds light on whether or not a matter can be arbitrated. Therefore, arbitrability refers to the quality of being capable of resolution through arbitration. As a principle of arbitration, arbitrability is employed to exempt some classes of disputes from arbitral proceedings, thereby giving national courts or proceedings the opportunity to adjudicate on such matters.[3] To Nwakoby, Aduaka and Orabueze, arbitrability bothers on the competence of the arbiter(s) to engage in arbitration with regards to any issue directed to them. Simply put, arbitrability can also be seen as a jurisdictional issue which considers whether or not arbitrators have the requisite authority to decide or preside over a dispute.[4]

2. Arbitrability or Otherwise of Disputes

Arbitration has always been of particular use as a mechanism for resolving disputes relating principally to commercial transaction. Thus, arbitration may not be appropriate in disputes such as matters of public interest, matters involving a number of issues, disputes arising out of an illegal contract and disputes leading to change of status. One recurrent issue that comes to limelight when treating arbitration is the issue of arbitrability. If the dispute is not arbitrable, the arbitral tribunal is limited in its jurisdiction and the claim must instead be submitted to domestic courts. The arbitrability of a dispute may vary from one country to another, firstly, due to different policy considerations and, secondly, depending on how open the State is to arbitration. The general trend in national laws is towards a broader approach of allowing submission to arbitration of matters that have been traditionally outside of its scope. The concept of arbitrability is classified into two perspectives, objectivity and subjectivity arbitrability.[5] The subjective arbitrability is that which deals with the capacity of parties to go into an arbitration agreement. The connotation of this is that parties must have the lawful capacity to do so, forming a part of the legal validity of the agreement. By subjective arbitrability, the parties in the arbitral agreement must be eligible to go into an arbitral agreement.[6] On the other hand, the objective arbitrability, which is otherwise known as the non-arbitrability doctrine, deals with the

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[1] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* 289 (2007).
[2] P O Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords 2015).
[3] V Anusornsena, 'Arbitrability and Public Policy in regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia' (Scientiae Juridicae Doctor thesis, Golden Gate University 2012)
[4] G C Nwakoby, C E Aduaka and C I Orabueze, 'Arbitration Agreement: The Issue of Arbitrability in Nigeria Arbitration Practice' (2018) 1 *International Journal of Law and Society* 92.
[5] C Mrotzek, 'The Development of concept of Arbitrability: An International Comparison' (LLM thesis, University of Cape Town 2017).
[6] New York Convention, Art 5(1) (a).

eligibility of the subject matter to be referred to arbitration. In this sense, arbitrability means that some disputes house delicate matters which are only considered to be addressed completely by the judicial authority of a state.[7]

In Nigeria, the Arbitration and Mediation Act[8], as well as judicial pronouncements determine issues of arbitrability. This was clearly reiterated in the case of *Kano State Urban Development Board v Fanz Construction Co*[9] where, relying on Halsbury's law of England, the court settled the issue of arbitrability, by stating that parties to an arbitration agreement must ensure that the matter which they refer to arbitration are justiciable issue triable civilly. This was also revealed in the Indian case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd*[10] where the court held that 'Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication'.

The Supreme Court of India in the case of *Vidya Drolia v Durga Trading Corporation*[11] analysed in detail the principles that will determine when a dispute can be considered non-arbitrable:

i) the cause of action pertains to rights in rem, which does not include subordinate rights in personam arising out of the rights in rem;
ii) the cause of action affects third-party rights and is capable of creating an *erga omnes* effect;
iii) the cause of action relates to inalienable public and sovereign functions of the state; and
iv) the subject matter of the dispute is expressly, or by necessary implication, non-arbitrable under mandatory statutory enactments.

However, the Supreme Court of India cautioned that the test, though instructive, does not provide watertight criteria for the arbitrability of disputes. That being said, it remains an illuminating guide in determining the arbitrability of various kinds of disputes, including corporate disputes. It is undisputed that before a matter can be referred to arbitration, same must first be seen to be arbitrable. The dispute must not relate or cover matters which by law, are not permitted to be settled by other dispute resolution mechanisms other than in Court, the Arbitration and Mediation Act[12], does not demarcate between disputes that are arbitrable or otherwise, it has however been judicially recognized as a matter of public policy that matters relating to crime, matrimonial causes, winding up of a company or bankruptcy are of such nature that cannot be settled by arbitration.[13]

The Nigerian Supreme Court has given clarity in order to determine matters that are not arbitrable. Some of such matters will include: issues leading to a change of status such as divorce petition, bankruptcy proceedings, and winding up a company; gaming and wagering; matters arising from an illegal contract, indictment for an offence of a public nature; and any arbitral arrangement that authorizes the arbiter to offer a verdict in property, fraud, matters under section 251 of the constitution.[14] The court in the case of *Nigerian National Petroleum Corporation v Stat Oil*[15] concluded that the tribunal erred in law and exceeded its jurisdiction when it failed to follow an established Nigerian law and precedent on tax matters. This implies that tax matters are beyond the jurisdiction of an arbitration panel and under the exclusive jurisdiction of the Federal high court. Also, the court in the case of *Stanbic IBTC Holdings PLC v Financial Reporting Council of Nigeria & Anor*[16] stated that tax matters are not arbitrable.

According to the USA system, arbitrability is, after all, a matter of jurisdiction because if a dispute is not arbitrable, the tribunal does not have jurisdiction to rule on the substantive issues of the case but it will rule on its own jurisdiction. Also, if arbitrability is a limitation imposed by law, again, the tribunal has no power to decide the grievance brought to them. Arbitrability can be a barrier to arbitration and this issue is either raised as a challenge to the tribunal's jurisdiction during the referral stage or as a challenge to the award during the enforcement stage.[17] The USA method follows a specific legal reasoning employed to analyse arbitrability as it involves questions of jurisdiction, as well as the subject matter being capable of settlement by arbitration. The situation is not the same in England.[18] An understanding of the concept in England is not firm but also dwells on jurisdictional approach and what is reasonable.

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[7] JDM Lew, LA Mistelis and SM Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2001).
[8] Section 55(3) (b) AMA 2023
[9] (1990) 4 NWLR part 142, 1, *Sakamori Construction (Nig) Ltd V Lagos State Water Corporation* (2021) Lpelr-56606(Sc)
[10] (2011) 5 SCC, 532, *N N Global Mercantile Pvt Ltd vs Indo Unique Flame Ltd and Ors* (MANU/SC/0014/2021)
[11] (2021) 2 SCC 1
[12] Arbitration and Mediation Act 2023
[13] *Mekwunye v Lotus Capital Ltd & Ors* (2018) LPELR 45546 (CA) 33
[14] The Constitution of the Federal Republic of Nigeria 1999, where the Federal High Court of Nigeria has exclusive authority to accept certain disputes by virtue of section 251 of the Nigerian Constitution
[15] (2013) pt 1373 CA, 1
[16] FHC/L/CS/1596/2015
[17] Section 55 AMA 2023
[18] LV Oliveira, *The English Law Approach to Arbitrability of Disputes*,9

3. The Arbitrability of Corporate Disputes

Corporate contractual disputes typically stem from shareholders' agreements, joint-venture agreements, and share transfer agreements. Regarding the arbitrability of such disputes, no special problems arise, similar to any other dispute where parties can enter into a settlement agreement; they are arbitrable as long as the parties consent to arbitration and where issues are not illegal. In contrast, statutory disputes, due to their diverse nature, involve more complex questions in terms of arbitrability. Statutory disputes can be divided into different types, including statutory disputes between shareholders, disputes between a company and its shareholders, disputes between a company and its creditors, disputes between shareholders and boards of directors, and disputes related to the invalidity of company resolutions or company contracts. There are controversies surrounding arbitrability of corporate disputes globally. In order to understand the controversy surrounding the arbitrability of corporate disputes, first, it is important to note that questions concerning arbitrability arise with regard to only some parts of these disputes. Although the arbitrability of corporate disputes is a frequently discussed topic, there is no doubt that many corporate disputes are arbitrable.[19]

In the wider sense, corporate disputes may be contractual or statutory. The difference between these groups lies in the legal basis of the claim: while contractual disputes arising from agreements between shareholders, statutory disputes relate to rights granted by corporate law, articles of association, and company resolutions. Statutory disputes may not be easily arbitrated on or referred to other Alternative dispute resolution Mechanisms, because of its nature. This was observed in a Canadian case. In *Tidan inc c. Trria Design inc*,[20] the Superior Court of Québec dismissed an application by the Respondent to an arbitration, Tidan inc., under article 632 of the Québec Code of Civil Procedure, C-25.01 (CCP) to find that the arbitrator had erred in concluding that he had jurisdiction to hear all the claims submitted to arbitration by the Claimant, Trria Design inc. The Respondent argued that some of the claims were unarbitrable as they were derivative claims, which must be authorized by the Superior Court pursuant to Article 445 of the Québec Business Corporations Act (BCA). The Court found that the parties' arbitration agreement was broadly drafted and gave the arbitrator the jurisdiction over, 'any dispute which might arise as to the interpretation or the application of this agreement', which included oppression remedy and derivative claims. Although in the above case, the court agreed that the Arbitrator has the power to arbitrate on such case, in the opinion of the researcher this decision cannot stand in Nigeria because it is a requirement in a recognised legislation[21] and should not be merely handed over to an Arbitral proceeding. When it involves a dispute between the company and shareholders, determining the arbitrability will depend on what the dispute is in reality. A dispute concerning erroneously removing a members' name from the register or omission, could be arbitrable because it is against the personal rights of the member. The shareholder involved may sue the company or refer to arbitration.[22] On the other hand, when it involves certain matters referred to in section 343[23] the matter cannot be arbitrable, it thereby becomes mandatory for the court to look into it. An unfairly prejudicial and oppressive conduct[24] against a member or members is arbitrable, but may not be favourable to those members except in a court of law, especially when the conduct is recurring.

On disputes between shareholders, since there is no contrary provision to it is deemed arbitrable. So long as it does not involve any form of illegality or fraud. Also, on disputes between a company and its creditors is amenable to arbitration. This decision lies with the creditor on whether to sue the company or refer the matter to arbitration. Referring the matter to arbitration can also be possible, especially in circumstances where the parties have an arbitration agreement embedded in their contract. When the dispute involves shareholders and board of directors, the Companies and Allied Matters Act[25] provides for an opportunity for members to approach the court through a derivative action. This makes it a necessary circumstance and will not be an arbitrable issue.

When it involves the dissolution of a company in Nigeria[26], the arbitrability or otherwise may depend on two issues: whether the parties involved can come to an agreement and whether it is mandatorily required by law. In the second situation[27], the issue of arbitrability becomes far-fetched or impossible. If an arbitration clause is included in the articles of association of a company, the arbitration clause or agreement will not automatically make a matter arbitrable or preclude the court from looking into it[28] if it is a statutory issue. Indian company law has seen much debate on the enforceability of shareholder covenants not incorporated in the articles of association of a company, the

[19] J Moreira, M Zhe, The Arbitrability of Corporate Disputes in Macau: Searching for Answers Under a New Law, *Contemporary Asia Arbitration Journal* 16(1) 2023, 77
[20] 2023 QCCS 1746
[21] Section 346,354 CAMA 2020
[22] Section 344 Companies and Allied Matters Act 2020
[23] CAMA 2020
[24] Section 353 CAMA 2020
[25] Section 346 CAMA 2020
[26] Section 642 CAMA 2020
[27] Section 649 CAMA 2020
[28] *Sacoil 281 (NIG) Ltd & Anor v Transnational Corporation of Nigeria Plc* LPELR 49761 (CA)2020

agreements included in the articles of association including covenants on matters of internal governance. Shareholders' agreements ('SHAs') regulate the internal management and affairs of the company.[29] Certain case laws[30] state that it is important to incorporate arbitration agreements into the articles of a company before incorporation, as this will help in easy resolution of disputes.[31]

4. Conclusion

In some jurisdictions, the issue of arbitrability is considered a jurisdictional issue while in others, it is considered beyond that and goes further to the agreement made by parties, as well as who will arbitrate on it. The ability to arbitrate corporate disputes in Nigeria is not detailed in any legislation which implies heavy reliance on interpretation of court judgements. In the U.S. and the EU, corporate disputes follow the trend to be submitted to arbitration rather than being litigated. In Nigeria a lot of corporate disputes are arbitrable, except for a few that are deemed non-arbitrable. If a matter is not arbitrable, an arbitrator is not expected to deliberate on the matter and if eventually deliberated on, can give rise to setting aside of an award.

[29] R Chilumuri & A Gambhir, Invocation of Arbitration Clauses in Shareholder Agreements for Disputes Under Articles of Association, *NUJS Law Review* 2020,5

[30] *Umesh Kumar Baveja* v. *IL&FS Transportation Network* 2013 SCC Online Del 6436.

[31] *Rahul Narang v. Danone Narang Beverages Ltd* 2014 SCC Online CLB 77