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ENFORCEMENT OF VAGUE ARBITRATION AGREEMENT UNDER THE NIGERIAN LAW: LEARNING FROM THE UNITED STATES AND ENGLAND

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Abstract

This paper discusses the jurisdiction of the Nigerian courts in the enforcement of vague arbitration agreements. It identifies two broad categories of vague arbitration agreements. First, vague arbitration agreements that express the intention of the parties to arbitrate the dispute in a permissive language, such as "may" instead of "shall", which denotes an obligation. Second, vague arbitration agreements that provide for an arbitration institution or the applicable rules that no longer exist. On the one hand, the article argues that vague arbitration agreements in the former category impose an obligation on the parties and should therefore be enforceable by summary judgment procedure or even be dismissed as frivolous and an abuse of the court's process. On the other hand, the article maintains the position that vague arbitration agreements in the latter category are structurally defective, thus requiring the courts to fill in the gap by activating the default mechanism rule for the appointment of arbitrators. This is where the "rubber meets the road" in determining whether the court action is unwarranted or necessary. Despite the enforcement of vague arbitration agreements by Nigerian courts, entertaining a lawsuit in light of the first category of vague arbitration agreements can hamper efficiency in arbitration and defeat the purpose arbitration provisions in a contract. The American and the English experience in light of the second category of vague arbitration agreement demonstrate an approach to melding the relevant provisions of the law of arbitration to pragmatic litigation that promotes the principles and practice of arbitration. This is an approach that the Nigerian courts should follow.

Keywords: Vague arbitration agreements, Courts, Arbitrators, Default mechanism

1. Introduction

Sometimes, conflict or controversy may arise regarding the clarity of the intention parties to arbitrate a dispute and whether the court at all times should recognise and enforce a vague arbitration agreement.[1]To put it differently, the question is whether the effect of a vague or defective arbitration agreement ipso facto renders such agreement unenforceable. Inherently, arbitration agreements need mechanisms to guarantee their implementation and the establishment of an arbitral tribunal to give effect to the intention of the parties despite the vagueness of the arbitration agreement.

In light of the foregoing, therefore, judicial assistance may be necessary. The courts may be required to assist due to the drafting defects of the agreement to arbitrate, which otherwise may result in rendering the intention of the parties useless.[2]In any case, the availability of judicial intervention differs from country to country, and the procedural rules that permit such intervention vary in context, ranging from those that assist in the constitution of the arbitral tribunal (appointment of arbitrators) to those that impose inappropriate judicial tutorship in the arbitral process. Judicial

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[1] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration at p 25, para 1. <https://www.un.org/ruleoflaw/blog/document/uncitral-digest-of-case-law-on-the-model-law-on-international-commercial-arbitration/>accessed 18 February 2025.

[2]<https://unctad.org/system/files/official-document/edmmisc232add34_en.pdf.>accessed 11 May 2025.

intervention in the former is desirable and permissible, while it may not be presumptuous to say that an intervention not concerning a structural issue on the arbitration agreement is judicial tutorship, hence undesirable. An arbitration agreement for the purpose of this article is structurally defective[3] where such a defect could threaten the constitution of the arbitral tribunal. A common example of a structural defect in the arbitration agreement is where the parties made a choice of an appointing authority that does not exist. Choice of a non-existent appointing authority is a potential threat to the administration and the functioning of the arbitral proceedings.

This article addresses the need for a structural foundation in the enforcement of vague arbitration agreements under Nigerian law. In other words, an arbitration agreement may be successfully attacked on the ground of vagueness where there is a structural defect in the agreement to arbitrate and the other party, hitherto willing to arbitrate the dispute, waives its right to arbitrate if it does not seek judicial support in the appointment of the arbitrators. While the English and American Courts have shown a consistent pattern in enforcing vague arbitration agreements, usually where there is a structural issue specifically concerning uncertainty about the identity and authority of the arbitrator or the appointing authority, the approach in Nigeria is rather confounding and not confined within a specific procedural or structural context. What is notably lacking in Nigerian scholarship[4] and case law jurisprudence is that the issue of vagueness of arbitration agreements does not always deal with structural defects of the arbitration agreements. The decided case(s) on vague arbitration agreements dealt with scenarios that centred on doubts about whether the parties actually intended to arbitrate the dispute. This type of vague arbitration agreement typically arises when the word "may" is used instead of "shall" to express the parties' intention in the arbitration clause. Entertaining a lawsuit solely on the issue that it is unclear whether the intention of the parties to arbitrate the dispute is mandatory or permissive is regrettable. It does not show doctrinal leadership in the enforcement of the arbitration agreement based on the principle of party autonomy and decisional practice in advanced jurisdictions.

This article discusses the foregoing issues. Part 1 discusses the Nigerian perspective on the enforcement of vague arbitration agreements and argues that party autonomy provides the doctrinal underpinning for the mandatory enforceability of the arbitration agreement, even where the intention of the parties is permissively expressed by the word "may" instead of "shall". Part 2 compares the Nigerian approach with the practice in advanced jurisdictions such as the United States and the United Kingdom. Part 3 is the conclusion.

2. The Nigerian Perspective

Party autonomy is one of the most striking features of arbitration and the leitmotif of arbitration. This is the major reason equivocal or ambiguous arbitration clauses are often resolved in favour of arbitration in many jurisdictions, including Nigeria. However, no clear-cut structural context under the Nigerian case law supports the enforceability of vague or defective arbitration agreements. A recalcitrant party (usually the respondent) who does not wish to perform its obligation to arbitrate may refuse to nominate an arbitrator during the process of the constitution of the arbitral tribunal. The commonest way to carry out such mischief is to attack the arbitration agreement on the grounds of its vagueness, hoping that there will not be a basis for the arbitrators' appointment or the constitution of the arbitral tribunal. An order of specific performance of the agreement to arbitrate rather than an award of damages would be the best judicial remedy in such circumstances. This is

[3]M Frank, 'Interpretation of Pathological Arbitration Agreements: Non-existing and Inaccessible Elements' [2020] (20) (3) *Pepperdine Dispute Resolution Law Journal* 300 (describing such defects as "pathological").

[4]F Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (2nd edn, Mbeyi& Associates (Nig) Ltd 2013) 3, noting that: *In drafting an arbitration agreement, it must be clear from the wordings of that contract that the parties intend to have their disputes resolved by arbitration and not by courts. If this intention is blurred or cannot be inferred on the face and substance of the agreement, then there is a defective basis for arbitration*.

See also J N M Mbadugha, *Principles and Practice of Commercial Arbitration* (Lagos: University of Lagos Press and Bookshop Ltd 2015) 20 similarly maintains the view that arbitration agreement that is not well detailed could be regarded as defective

because determining the appropriate amount of damages to award for the refusal to participate in the constitution of the arbitral tribunal can be challenging, especially when the claim's merits remain uncontested before an arbitral tribunal or court. Even if a suitable method of granting monetary compensation for a violation of an arbitration agreement is identified, it would not accomplish the fundamental objective of resolving the dispute through arbitration.

This is why many legal systems provide court assistance in establishing the arbitral tribunal as the most suitable and effective remedy when a party violates the arbitration agreement or challenges the agreement to arbitrate on the ground of vagueness regarding the appointment of arbitrators or the appointing authority. Courts will appoint an arbitrator when one party fails to make the appointment, provided that the arbitration agreement satisfies the minimum standards of coherence, clarity, and efficacy required to qualify for judicial assistance. This is the reason why numerous legal systems, including the Nigerian Arbitration and Mediation Act (AMA) section 7, offer court assistance in the establishment of the arbitral tribunal as the most appropriate and effective remedy if a party violates the arbitration agreement.

Therefore, it is a legislative masterstroke that the drafters of various national arbitration laws envisaged a scenario where the agreement of the parties to arbitrate did not make proper provision or a common mistake in the choice of an appointing authority to administer the arbitration. Such a scenario should form the basis for a lawsuit that seeks to strike down the arbitration agreement on the ground of vagueness. However, if the party willing to arbitrate the dispute, enters into a conditional appearance for stay of proceedings and applies for the court to appoint the arbitrator under section 7 (3) of AMA, then the court is under an obligation to enforce the arbitration agreement despite the structural defect or the vagueness. Otherwise, the argument[5] or the entertainment of a lawsuit on the grounds of whether the word “may” in the parties' agreement to arbitrate invokes the discretionary instead of the mandatory jurisdiction of the court to enforce the arbitration agreement is unwarranted, as it does not promote the tenets of arbitration.

In *SA & Ind Co Ltd v Ministry of Finance Incorp,*[6] the issue was whether the plaintiffs/respondents could initiate the present proceeding in violation of the arbitration clause stipulated in the contract agreement executed with the 1st defendant/appellant, without first resorting to arbitration. The respondent’s counsel argued that the trial court erred in determining that Clause 12 of the Contract Agreement entered by the parties is not mandatory due to the use of the word 'may' instead of "shall." It further argued that the trial court correctly determined that the term 'may' in Clause 12 of the Agreement allows any party the option to pursue arbitration or seek alternative remedies, including initiating legal action in a court of law. He observed that the second paragraph of Clause 12 requires no additional interpretation beyond that provided by the trial court. Thus, he concluded that Clause 12 of the Contract Agreement executed by the parties in this appeal is not mandatory.

The Court of Appeal emphasised that parties should generally not be permitted to evade an arbitration agreement, as both parties had expressed their intent in the signed contract to submit disputes to arbitration. Consequently, arbitration agreements remain enforceable despite their vagueness, provided that the parties' purpose to utilise arbitration as a definitive and binding method for resolving their dispute is clearly demonstrated. The arbitration agreement in the present appeal cannot be deemed improperly or ambiguously drafted.

Even though the *SA & Ind Co Ltd,* court enforced the parties’ agreement to arbitrate under clause 12, it should not have embarked on a detailed investigation in the enforcement of the arbitration agreement. The arbitration agreement should have been enforced as a matter of fact by way of summary procedure. If the counsel to the defendant (the party that is willing to arbitrate the dispute,

[5]ibid.
[6][2014] 10 NWLR (Pt 1416) 519.

usually the claimant in the arbitration) did not file for summary procedure, the court suo motu, can raise the issue of summary procedure, provided it allows the parties to comment on it. To engage or delve into a lawsuit to determine the enforceability of such a permissive arbitration provision would render the provision illusory and capable of being utilised by a mischievous respondent in the arbitration (the plaintiff in the litigation) to coerce the willing party in arbitration into a settlement, or in the worst-case scenario, defeat the intention of the parties to arbitrate the dispute. This suggests that there is no justification for the lengthy judicial proceedings where the issue before the court is whether the use of the word "may" in the expression of the parties' intention to arbitrate is obligatory (mandatory) or non-obligatory (discretionary). The word "may" in the arbitration provision indicates that such uncertainty would be resolved summarily in favour of arbitration to promote the principle of party autonomy.

The purpose of arbitration is not only to ensure that the system of dispute resolution is efficient in the protection of the interests of commercial parties who have expressed their intention to arbitrate the dispute, even where the intention is vaguely or permissively expressed. Arbitration further protects the authority of the arbitral tribunal to discharge the duty imposed on them by the agreement of the parties without any interference by the court. This remark is not lessened based on the argument that the agreement is vague or that the use of the "may" renders the arbitration agreement unenforceable. Whenever a duty is imposed on a private tribunal or public officer that is recognised by law, the word "may" shades into "shall" to assume a mandatory character.

The foregoing reasoning was applied in the field of public law in Nigeria in the case of *Charles v FRN*[7] where the court held it would construe the term "may" as mandatory where it is employed to impose a responsibility on a public official to be executed in a certain manner for the advantage of a private individual. Sections 15(4) and 17(2) of the Administration of Criminal Justice Act (ACJA) mandate public officials, including police officers and personnel from any law enforcement agency established by an Act of the National Assembly, such as the EFCC, to electronically record confessional statements of suspects on retrievable video compact discs or other audiovisual formats, and to obtain statements from suspects in the presence of individuals specified in section 17(2). The regulations safeguard private persons accused of crimes, ensuring that the extensive powers of police or other law enforcement organisations are not misused by intimidation or coercion during the collection of their statements. Similarly, the regulations serve an additional purpose: to safeguard law enforcement officials from unfounded allegations of coercion when obtaining statements from suspects. The term "may" in those sections is, under the circumstances, obligatory rather than optional.

In light of the foregoing, where a duty is imposed on the arbitral tribunal by virtue of the agreement of the parties and that duty is for the benefit of the private citizens, the word "may" ought to be interpreted as mandatory. In contrast with the practice in advanced jurisdictions, the enforcement of vague arbitration agreements is not just underpinned by the need to promote party autonomy to arbitrate the dispute, but most importantly to address a structural defect in the agreement, such as where a non-existent appointing authority or arbitral institution is mentioned in the arbitration agreement. To that end, judicial assistance is required in the constitution of the arbitral tribunal.
Advanced jurisdictions almost always dealt with issues of vagueness of the arbitration agreement, where a structural defect is in issue. The following jurisdictional perspectives are therefore important as they may serve as a model for Nigeria.

[7](2018) 13 NWLR (Pt. 1635) 50

3. Jurisdictional Perspectives

3.1 American Perspective

If parties who have chosen America as their seat of arbitration make the mistake in designating a nonexistent authority with the power to appoint arbitrators, the American court has always enforced such an agreement on the sole basis that the parties' intention to arbitrate should be paramount and ought to supersede any procedural means of achieving such purpose.[8] American jurisprudence has shown great bias for arbitration in this regard, primarily because of the Federal Arbitration Act (FAA) and specifically by the default mechanism under section 5 of the FAA, which provides in relevant parts that if the agreement specifies a method for naming or appointing an arbitrator or arbitrators, that method shall be adhered to. However, if no method is specified, if a party fails to utilise the provided method, or if there is any other reason for a delay in appointing an arbitrator or umpire, either party may petition the court to designate and appoint an arbitrator or arbitrators or umpire, who shall operate under the agreement with the same authority as if they had been explicitly named. Unless the agreement states otherwise, arbitration shall be conducted by a single arbitrator. Accordingly, case law in America indicates that American courts have on several occasions shown an inclination to fill the gap by designating an appropriate authority to appoint the arbitrator(s) where this is wrongly stated in the arbitration agreement, so long as the parties' intention to arbitrate is not in doubt. In *Laboratories Grossman SA v Forest Labs Inc*[9] an American and Mexican party entered into an arbitration agreement which provides that in the event of a dispute, arbitration shall be held following the rules and procedures of the Pan-American Arbitration Association. Unfortunately, the organisation in question does not exist. The American party (the respondent) contended that what they meant or intended was for arbitration to be conducted under the procedural rules of the Inter-American Commercial Arbitration Commission. The Mexican party (the appellant) countered the respondent's position and maintained that what they intended was to arbitrate their dispute in Mexico. Meanwhile, it appears the arbitration organisation intended by the parties has facilities for arbitration in Mexico, but the appellant nevertheless insisted that the arbitration be held elsewhere. In holding that a hearing is important to determine the true intention of the parties, the court stated in general that nothing more needs to be decided if it turns out that the parties truly meant to arbitrate under the Inter-American Commercial Arbitration Commission's rules.[10] In such a case, arbitration before that tribunal should be ordered.[11]

According to the court, the question to be answered, however, is whether the primary goal of the agreement was to resolve disputes through arbitration rather than the method by which arbitration should be carried out, should it be found that the parties did not agree in this way.[12] If the agreement does not specify a viable organisation that would facilitate arbitration, the court may order arbitration to take place before a tribunal it deems most suitable for the situation.[13] However, if it turns out that the parties intended to arbitrate only in Mexico, the court could order arbitration to take place either in line with the Inter-American Commercial Arbitration Commission's rules, with the condition that the Commission mandate that the proceedings take place in Mexico, or before any other organisation the court chooses, as long as the proceedings are held in Mexico.[14]

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[8] Frank (n 3) 309-314.

[9] 295 NYS 2d 756,757 (NY App Div 1968). See also *Astra Footwear Indus v Harwyn Int'l, Inc,* 442 F Supp 907,910-11 (SDNY 11 Jan 1978); *Travelport Glob Distrib Sys BV v Bellview Airlines Ltd,* 2012 WL 3925856 at 1 (SDNY 12 Sept 2012); *Warnes SA v Harvic Int'l Ltd,* 1993 WL 228028 (SDNY 22 June 1993). Hong Kong cases of *Lucky-Goldstar Int'l (HK)Ltd v Ng Moo Kee Eng'g Ltd* [1993] 1 HKC 404,404 (HK); *Guangdong Agriculture Company Ltd v Conagra International* (Far East) Ltd [1993] 1 HKLR (HC);

[10] *Laboratories Grossman SA*(n 9) ibid.

[11] ibid

[12] ibid

[13] ibid

[14] ibid

In re HZI Research Ctr v Sun Instrument Japan Co[15] an American medical equipment developer and a Japanese distributor agreed on the following dispute resolution procedure: "each party shall appoint an arbitrator, and the two arbitrators shall appoint a third arbitrator, all of whom must be members of the American or Japanese Arbitrator Society, to adjudicate the dispute." Unlike the "American Arbitration Association" (AAA) and the "Japan Commercial Arbitration Association" (JCAA), the two aforementioned organisations were nonexistent. The American party asserted institutional arbitration under the AAA, which the Japanese party disputed. The U.S. court, which first cited the government policy, determined that the mention of non-existent organisations does not obstruct the enforcement of the arbitration agreement. The primary objective of the parties, explicitly articulated in their contract, was to settle conflicts through arbitration. If the parties inadequately or inaccurately specify the means by which arbitration should occur, the court will uphold the contract by establishing a suitable designation.

Even where an American court finds vitiating elements such as fraud or misrepresentation regarding the choice of seat or arbitral institution in a particular arbitration agreement, the court would nevertheless apply the severability doctrine by striking down the purported chosen seat and replacing it with one that would ordinarily suit the intention of the parties. By so doing, the court saves the intention of the parties to arbitrate, as it would not allow a mistake[16] or an unconscionable action of a party, particularly concerning the choice of seat or physical venue, to negatively affect the entire arbitration agreement.[17]

3.2 The English Perspective

There is no basis for assuming that the English courts will take a fundamentally different approach than that reflected in case law from America. The arbitration agreement will not be unenforceable just because reference is made to the procedural Rules of an arbitration institution that no longer exists, or where the arbitral institution and the applicable Rule chosen by the parties have changed or metamorphosed. The English courts usually ruled that in such cases of impossibility, the court will have to determine the legal consequences by trying to avoid imputing the parties an intention to do the impossible.

In *China Agribusiness Development Corp v Balli Trading*[18], an agreement between foreign entities stipulated that disagreements "shall subsequently be referred to arbitration at the [FETAC] in accordance with the Provisional Rules of Procedure of the [FETAC]. FETAC existed, but the issue was whether arbitration should occur under the specified "Provisional Rules," which were outdated before the contract was formed, or under the prevailing Rules at that time. Following the conclusion of the contract and before the dispute arose, FETAC was renamed CIETAC; yet, it was undisputed in the case that CIETAC remained the appropriate arbitration institution. CIETAC arbitration in China was conducted in accordance with CIETAC's applicable rules. In the enforcement proceedings in England, the English party asserted that the arbitration proceedings did not adhere to the parties' agreement, citing that the parties had agreed to arbitration under the FETAC rules (old provisional rules) and that if that agreement could not be fulfilled, there was no arbitration agreement. The court held that the arbitration agreement is enforceable and the CIETAC Rules shall be the applicable rules.

Further, the English Court, under section 18 of the English Arbitration Act (EAA) provides that if parties fail to appoint an arbitrator or designate an appointing authority that the court can make the appointment as if it were one made by the parties themselves. The English Court relies on both the provision of section 18 and section 2 (4) (a) (b) of EAA in deserving circumstances. The respective import of those provisions is that where the parties fail to designate arbitrator(s) or appointing authority in their agreement and the contract in question has a connection with England, the court may make the

[15] 1995 WL 562181, at *2 (S.D.N.Y. Sept. 20, 1995).
[16] *Control Screening LLC v Tech Application & Prod Co* 687 F 3d 163, 166 (3d Cir 2012)
[17] *Great Earth Cos, Inc v Simons* 288 F 3d 878 (6th Cir 2002); *Vegter v Forecast Financial Corp* 2007 WL 4178947 at 5 (WD Mich 20 Nov 2007)
[18] [1998] 2 Lloyd's Law Rep 76 (English High Court).

appointment if it is satisfied that the circumstances deserve it. In *Chalbury MccOuat International Ltd v PG Foils Ltd*[19]the claimant, an English company with a place of business in England, engaged the services of the defendant, an Indian company operating in India. When the dispute arose, the claimant sought to serve an arbitration claim form outside the jurisdiction and also sought a remedy under section 18 of the EAA. Meanwhile, the parties' arbitration agreement provides that any contractual disagreement will be resolved through communication between the parties. However, following the current European Union legislation, the matter will be referred to arbitration if it cannot be settled even after consultations. The arbitrator's ruling, according to the agreement, is final and enforceable against both parties.

Because the agreement made no specific reference to a seat, the court first had to ascertain whether it had the power to determine the seat under section 2 (4) (a) (b) of EEA before it could appoint the arbitrator(s) under section 18. The court held that connecting factors point to English law as applicable law in the circumstances, and it consequently exercised its power under section 18 for the appointment of a sole arbitrator.

In sum, the following points underpin enforcement of vague arbitration clauses, whether the vagueness is due to failure to appoint arbitrator (s) or appointing authority, or where parties operating under mutual mistake designate a nonexistent or uncooperative arbitrator or appointing authority. First is to achieve the genuine intention of the parties, thereby promoting party autonomy regardless of the vague or defective arbitration clause. Second, referring parties to arbitration even based on unclear or vague arbitration clauses finds support from the concept of a multi-door court system, which is designed to lessen the overburdened courts' docket, thus encouraging the use of alternative means of dispute resolution.[20] Third, enforcing vague or defective arbitration agreements is a direct recognition of principles of separability and Kompetenz-Kompetenz**.** Fourth, where the issue of the vagueness of the arbitration agreement relates to the scope of what the parties agreed to arbitrate, the need to decongest the court's docket supports the enforceability of such an agreement. National courts under the New York Convention have the jurisdiction to enforce an arbitration agreement, though not expressly agreed by the parties, but one that is so intertwined with the dispute expressly agreed by the parties to be submitted to arbitration.

4. Conclusion

Arbitration agreements that are not structurally vague should be enforced summarily by the Nigerian courts. It may also not be wide of the mark to argue that the Nigerian court can dismiss an action founded on such a vague arbitration agreement on the ground of lack of merit or abuse of process of the court. The practice of entertaining a lawsuit on the mere fact that the parties' agreement to arbitrate was couched permissively by the word "may" instead of mandatorily using "shall" is regrettable. In contrast, structurally vague arbitration agreements require the court to evaluate the availability of an existing and convenient arbitration institution to serve as an alternative to the non-existent arbitral institution or the procedural rules mistakenly chosen by the parties. This is achievable through the default mechanism procedure, which national arbitration laws provide as a gap-filling rule. In light of the foregoing, entertaining a lawsuit is a pragmatic judicial approach to give true meaning to the intention of the commercial parties who have enshrined an arbitration clause in their contracts. Accordingly, jurisdictions such as the United States and England have approached the issue of structurally vague arbitration agreements by performing a gap-filling role in compliance with the default mechanism rules under the FAA and the EAA, respectively. This approach should serve as a model for the Nigerian court.

[19][2010] EWHC 2050 (TCC).

[20] If parties who ordinarily had gone to court to litigate their disputes would be encouraged to seek alternative procedure other than litigation, a fortiori vague arbitration clauses ought to be referred to arbitration in other to further promote the objectives of multi door court house which does not only aim at decongesting court's docket, but also seek to ensure that disputing parties enjoy the numerous benefits of arbitration over litigation. For statutory provisions on multi-door court system, see, Lagos State High Court Civil of Lagos State Civil Procedure Law 2004 Or 25 r (1) (2) (c). Alero Akeredolu, 'Enforceability of Alternative Dispute Resolution Agreements: What is New under the Lagos Multi Door Court House Law?' [2004] (4) (1) *UNIZIK Law Journal* 201; EO Ezike, 'Developing a Statutory Framework for ADR in Nigeria' [2011-2012] (10) *Nigerian Juridical Review* 261.