Appealing the decision of the High Court on application to set aside an Arbitral Award to the Court of Appeal: An appraisal of the Nigerian law on whether leave is required

Introduction

The legal framework governing arbitration practice in virtually all jurisdictions recognises that circumstances may arise where an arbitral award may be unacceptable to a party owing to some defects considered germane to the conduct of arbitration. With reference to Nigeria, section 55 (1) & (2) of the Arbitration and Mediation Act 2023 ("AMA") confers on a party the right to apply to the court to set aside the award in such circumstances. For the purposes of this application, section 91(1) of the AMA defines "Court" to mean the High Court of a State, the High Court of the Federal Capital Territory and the Federal High Court.

The proceedings to set aside an arbitral award usually involve a review of the award by the High Court and this review is often mistaken for an appeal or the High Court sitting as a court of second instance. Based on this misconception, an appeal against the eventual decision of the High Court is usually considered a double appeal which ordinarily requires the party appealing to seek and obtain leave before the appeal to the Court of Appeal.

It is in this context that this article examines the nature and status of the proceedings of the High Court when it sits to consider an application to set aside an arbitral award. The article also

considers whether such a sitting of the High Court constitutes a second instance court (in the High Court's appellate jurisdiction) as to require leave to appeal the decision of the High Court to the Court of Appeal.

Background on the right to appeal to the Court of Appeal

It is common knowledge that the door to appealing the decisions of the High Court or other courts of coordinate jurisdiction to the Court of Appeal is not open to all and sundry. While some appeals lie as of right, others require the leave of either the High Court or the Court of Appeal before they can be commenced. For this reason, the 1999 Constitution of the Federal Republic of Nigeria, as amended, ("the 1999 Constitution") in sections 241 to 246 made comprehensive provisions on appeals from the decisions of the High Court that lie to the Court of Appeal as of right and those that only lie with leave.

To be sure, by section 241(1) of the Constitution, an appeal shall lie from the decision of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases:

(a) Final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance;
(b) Where the ground of appeal involves questions of law alone, decision in any civil or criminal proceedings;
(c) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;
(d) Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be contravened in relation to any person;
(e) Decision in any criminal proceedings in which the Federal High Court or a High Court has imposed a sentence of death;
(f) Decisions made or given by the Federal High Court or a High Court –
    (i) Where the liberty of a person or the custody of an infant is concerned,
    (ii) Where an injunction or the appointment of a receiver is granted or refused,
    (iii) In the case of a decision to determine the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect misfeasance or otherwise,
    (iv) In the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability, and
    (v) In such other cases as may be prescribed by an Act of the National Assembly.

From judicial interpretation of the above provisions, each of these conditions for appealing as of right is independent and stands alone.[1] Once any decision fulfils any of the conditions enumerated above, it is appealable as of right, whether it be final or interlocutory and whether

[1] *Ecobank (Nig.) Ltd. v Honeywell Flour Mills Plc* (2019) 2 NWLR (Pt. 1655) 55 at 77, paras. E – F (SC).

the grounds of such an appeal are of pure law alone, mixed law and facts or of fact alone. In other words, irrespective of the nature of the grounds of the appeal, an appeal from the final decisions of a High Court; Federal, State or Federal Capital Territory, sitting as a court of first instance, to the Court of Appeal, is as of right by virtue of the provisions of section 241(1)(a) of the Constitution.[2]

The Constitution equally provides in express terms the circumstances under which a decision of the High Court can be appealed only with the leave of either the High Court or the Court of Appeal. Specifically, section 242(1) of the Constitution provides that any decision of the High Court which falls outside those mentioned in section 241(1) of the Constitution can only be appealed with leave.

It is instructive to mention that it is not only the Judge who heard a matter or an appeal at the High Court in its original or appellate jurisdiction and delivered the judgment that is competent to entertain an application for leave to appeal against such a judgment where leave is required. On the contrary, leave can be given by any competent Judge of the High Court where the one who delivered the judgment to be appealed is not available.[3]

Is leave required to appeal the decision of the High Court in respect of an application to set aside an arbitral award?

Section 55(1) of AMA gives the parties to arbitral proceedings the right to challenge an arbitral award within three months, albeit on limited grounds.[4] When an arbitral award is submitted to the High Court by a dissatisfied party, the High Court is imbued with the power to review the award to see whether any of the grounds enumerated in section 55(3) of AMA exists. Where any of the grounds is found, the High Court has the option to either remit the award for reconsideration or set it aside in whole or in part.[5] Where none of the grounds is found, the application will be dismissed. As appeals from the decision of the High Court lie only to the Court of Appeal, any party dissatisfied with the decision of the High Court is entitled to appeal to the Court of Appeal.[6] The vexed issue that the parties are often confronted with is whether the decision of the High Court here is appealable as of right or with the leave of court.

While the decision of the High Court in respect of an arbitral award is not one of the circumstances mentioned in section 241(1) of the Constitution where an appeal can lie to the Court of Appeal as of right, the provision of section 242(1) which requires leave does not *ipso facto* become applicable either. Rather, the position of the law as can be gleaned from judicial pronouncements is that the decision of the High Court in respect of an application to set aside an arbitral award is appealable

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[2] *Ezennaka v COP, Cross River State* (2022) 18 NWLR (Pt. 1862) 369 at Pp. 412-413, paras. E-B.

[3] *Ishola v Ajiboye* (1994) 6 NWLR (Pt. 352) 506 (SC)

[4] Section 55(4) of AMA 2023.

[5] See section 55(5) of AMA 2023.

[6] Section 240 of the Constitution.

as of right based on two important points. The first is that the High Court sits in its original jurisdiction (in the first instance) and secondly, the decision on an application to set aside an arbitral award is a final decision. These points shall be discussed in some detail in the subsequent paragraphs.

The High Court sits as a court of first instance

A determination of whether a High Court sits in its original or appellate jurisdiction may sometimes pose a serious difficulty. Generally, a court sits as a court of first instance when it sits to consider an issue for the first time. A court of first instance is a court in which proceedings are initiated. Loosely, a court of first instance is a court in which a case is tried, as opposed to any court in which it may be heard on appeal.[7] On the other hand, an appeal is an invitation to a higher court to review the decision of a lower court to find out whether on proper consideration of the facts placed before it, and the applicable law, that court arrived at a correct decision.[8]

However, it is not all cases involving a review of the decision of a lower court or tribunal that are appeals. As it relates to hearing of an application to set aside arbitral award, the High Court has been held to be exercising its original jurisdiction based on reasons to be discussed hereunder.
First, the proceedings at the High Court which gives rise to the decision to be appealed to the Court of Appeal is a fresh action brought pursuant to section 55(1) of AMA. It is by no means an appeal against the arbitral award or a continuation of the proceedings that gave rise to the award. This right of action accrues when the arbitral award is published by the arbitrator or arbitral tribunal. This is why section 55(1) of AMA prescribes an application as the mode of commencement of the proceedings as against the Notice of Appeal by which appeals are generally commenced. Indeed, the application to set aside an arbitral award must be in a separate proceeding independent of the action on award.[9]

Another reason is that when considering an application to set aside an arbitral award, the High Court is not sitting as an appellate Court.[10] This position is succinctly captured in the decision of the Court of Appeal in *Baker Marine (Nig.) Limited v Chevron (Nig.) Limited*[11] to the effect that:

> *"In considering an application to set aside an arbitral award, the court is not sitting as an appellate court over the award of the arbitrator. The court is not therefore empowered to determine whether or not the findings of the arbitrator and his conclusions were wrong in law."* (Emphasis added).

[7] Oxford Reference accessed at <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095643675> on 29 July 2024.
[8] *Oredoyin v Arowolo* (1989) 4 NWLR (Pt. 114) 172 at 211, para. F. (SC)
[9] *K.S.U.D.B. v Fanz Const. Ltd.* (1990) 4 NWLR (Pt.142)1 at 42, paras. D – E (SC).
[10] *R.M.A. & F.C. v U.E.S. Limited* (2011) 9 NWLR (Pt. 1252) 379 at 421 – 422 Paras. G – A.
[11] (2000) 12 NWLR (Pt.861) 393 at 410, paras. A-B (CA).

In lending its voice to this position, the Supreme Court in *MTN Comm. v Hanson*,[12]held that in order to determine whether the jurisdiction of a court is appellate or original, it is necessary to consider what the court has power to do when called upon to set aside an arbitral award. Having this in mind, the Supreme Court took the view that the role of the High Court with regard to an application to set aside an arbitral award is not appellate as the court cannot go into the merit of the award. It can either set it aside, uphold it or remit it to the arbitrator to reconsider a particular aspect. The jurisdiction here is akin to that exercised by the High Court in respect of an application for judicial review.[13]

In arriving at this decision, the Supreme Court took into consideration the features of an application for judicial review which it sees as similar to that of an application to challenge an arbitral award. These features were reeled out in *Gov., Oyo State v Folayan*[14] as follows:

> *"(a) a judicial review is not an appeal;*
> *(b) the court must not substitute its judgment for that of the public body whose decision is being reviewed;*
> *(c) the correct focus is not upon the decision but the(c)manner in which it was reached;*
> *(d) what matters is the legality and not the correctness of the decision; and*
> *(e) the reviewing court is not concerned with the merits of a target activity."*

In concluding, the Supreme Court also x-rayed the jurisdiction of the High Court as prescribed in section 272(2) of the Constitution and opined that:

> *"From the wordings of subsection 2 of section 272 of the1999 Constitution, a State High Court has jurisdiction to deal with complaint against proceedings brought before it and in exercising such jurisdiction it can be said that it is sitting as a court of first instance and not as an appellate court. This is moreso because the word "appeal" is defined to substantially mean a complaint against a decision of a trial court."*[15]

From the foregoing, it is clear that when the High Court sits to exercise its powers under the Arbitration and Mediation Act to entertain an application challenging an arbitral award, it is exercising its original jurisdiction albeit in a supervisory capacity. The High Court therefore sits as a court of first instance.

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[12] (2017) 18 NWLR (Pt. 1598) 394 at 424 – 425, paras. H-A.
[13] *MTM Comm. v Hanson* (supra) at page 425, paras. F-G.
[14] (1995)8 NWLR (Pt. 413) 292 at 322-323 H - B
[15] *MTN Comm. v Hanson* (supra) at page 414, paras. A – B.

The decision of the High Court on an application to set aside an award is a final decision

This is the second of the twin conditions given in section 241(1)(a) of the Constitution. As already discussed, any *final decision* given by a court sitting as a court of first instance is appealable as of right. However, like the first condition that the court must sit in its original jurisdiction, the determination that a decision is final is also not so easy to come by in certain circumstances. This is because what amounts to a final or interlocutory decision has not been defined in any statute or rules of court but must be seen only through case law as interpreted by the court.[16]

Nevertheless, the Nigerian courts have held that the test for determining whether a decision is final or not is to consider the nature of the order made rather than the nature of the proceeding resulting in the order. Therefore, once it can be established that a decision or an order has finally determined the rights of the parties as to the particular issue disputed, it is a final order even if arising from an interlocutory application.[17]

The Court of Appeal, in *Gov. of Niger State v Albishir*,[18] faced with the issue as to whether the decision of the High Court setting aside an arbitral award was a final or interlocutory decision, held as follows:

> *"The award of the arbitrator which was a final decision was set aside by the High Court. In my view, the decision of the High Court was a final decision vis-à-vis the award of the arbitrator. In effect, one has to look beyond the decision of the High Court to that of the arbitrator to have a clear perspective of the nature of the judgment of the High Court. The judgment of the High Court being a final decision on the award of the arbitrator, our decision in respect of the High Court judgment is also final."*

Similarly, the Supreme Court in *MTN Comm. v Hanson*, toed the same line of reasoning when it held as follows: *"A decision whether or not to set aside an award is a final decision from which an aggrieved party is entitled to appeal as of right by virtue of section 241(1)(a) of the 1999 Constitution, as amended. The appellant therefore did not require leave to appeal."*[19]

Conclusion

The Nigerian Constitution has made comprehensive provisions on when an appeal can lie as of right or with leave from the decision of the High Court to the Court of Appeal. However, because the decision of the High Court with respect to an application to challenge an arbitral award usually involves a review of the arbitral award, the proceedings leading to this decision are often

[16] *Falola v U.B.N. Plc* (2005) 7 NWLR (Pt. 924) 405 at 417-418, paras. H-B (SC).
[17] *Falola v U.B.N. Plc* (supra) at page 427, paras. A – E.
[18] (1985) 3 NWLR (Pt. 13) 458 at 466 Paras. B –C
[19] *MTN Comm. v Hanson* (supra) at page 426, para. C

confused for an appeal of the arbitral award to the High Court. As a result, an aggrieved party may be in a quandary whether to seek leave to commence an appeal to the Court of Appeal.

However, the current outlook of the law on this point suggests otherwise. The challenge of an arbitral award at the High Court is not an appeal but an exercise of supervisory powers over the arbitrator or arbitral tribunal in the High Court's original jurisdiction. This is not only because of the manner in which the proceedings are begun but also because of what the High Court is empowered to do whenever it has before it an application to set aside an arbitral award. The exercise of jurisdiction by the High Court in this respect is thus similar to when it entertains an application for judicial review and is sitting in the first instance.

More importantly, the judicial pronouncements are unanimous that once the decision of the High Court on an application challenging an arbitral award is a final decision made in the first instance, it is appealable to the Court of Appeal as of right by virtue of the provisions of section 241(1)(a) of the Constitution.

The Minister of Finance recently signed the Deduction of Tax at Source (Withholding) Regulations 2024 ('WHT Regulations 2024' or 'Regulations'). The Regulations, which have not been gazetted, concern the withholding tax regime in Nigeria. This publication answers some frequently asked questions on the Regulations ranging from the meaning of WHT, the constitutionality of the WHT Regulations 2024, eligible transactions and applicable rates to obligations on small companies and individuals.

Note: This article does not constitute a legal advice. For proper legal advice or inquiries on the issues raised in this article or general inquiries relating to arbitration, please contact Aret & Bret LLP at ab@aret-bret.com. You can also reach out to the author:

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