

REPRESENTATION AT ARBITRATION
PROCEEDINGS COMPARED TO LITIGATION –
THE RECENT TREND IN *'SHELL V FIRS'*

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Introduction

The thesis of this article is the recent developments in Nigerian case law, which are inimically influencing arbitration law and practice. Taking into account the interdependent yet dichotomous relationship between public dispute resolution system through the courts and private dispute resolution systems of which arbitration is *primus*, there is a need to analytically and appropriately position arbitration proceedings - insisting that arbitration as proceedings is '*sui generis*' of itself. It is not a mere replica of public dispute resolution systems, typical of state machinery. This article seeks to examine modern international best practice and law in arbitration, trace the current judicial trends emanating from the increasingly notorious Supreme Court decision in *Okafor v Nweke*¹ and to critique its ratio while analysing its precedential effect on the decision of the Court of Appeal in *Shell v Fed Inland Rev Service*. In the final analysis there is need for a coherent approach to parties' right to representation at arbitration and not a wholesale transplant of approach from litigation to arbitration in decisions affecting both domestic and international arbitration.

One of the principles necessary for an effective, efficient and 'safe' seat for the conduct of international arbitration is the right of parties to arbitration to representation if they so desire². This is an adjunct of one of the fundamental principles upon which arbitration best practice rests – 'party autonomy' which encompasses the freedom of parties to select representatives of their choice in arbitral proceedings.

Article 5 of the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules") 2010 made pursuant to the UNCITRAL Model Law on International Arbitration (Model Law) states that: 'Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine'.³

¹ (2007) 10 NWLR (PT. 1403) 521 @ 530 - 531

² The Chartered Institute of Arbitrators "London Centenary Principles" available at <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4> last visited on 27th October 2016 at 4:05pm.

³ <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> last visited on 27th October 2016 at 4:10pm

Freedom of choice of representation has historically been recognised as an important aspect of the arbitral process, allowing the parties to effectively present their case in a fashion they expect when agreeing to arbitration. That freedom is recognised in most national arbitration laws, and by most institutional arbitration rules. Despite this, laws in a few jurisdictions require that counsel in locally-seated arbitration be qualified to practice law within that jurisdiction. This was formerly true in Singapore and Japan but jurisdictions such as Thailand still impose some restrictions on choice of party representatives.

Comparative Overview – Nigeria and the Rest of the World

Restriction of legal practice before national courts, in whatever form it takes, is part of the legal tradition of most sovereign states. However, these restrictions have traditionally not been extended to arbitration. More so, with the increase in and sophistication of international commerce and the concomitant reliance on arbitration as the most effective means of resolving commercial and cross-border disputes, most countries have either amended their laws to make clear that those restrictions, which are intended for proceedings before national court do not apply arbitration proceedings conducted within their jurisdictions.

In Thailand, the now-repealed Alien Working Act B.E. 2521 categorically prohibited foreign nationals from providing any form of 'legal services' in Thailand. This position was amended in 2000, where an exception which allows foreign nationals to serve as arbitrators in proceedings held within Thailand was included. Additionally, the amendments to the Alien Working Act (retained in the currently in-force Alien Working Act B.E 2551) grant foreign lawyers the ability to practice as arbitration counsel in Thailand under limited circumstances, namely, (a) where the law governing the dispute is other than Thai law; or

(b) where the award will not be enforced in Thailand. Despite these amendments, in practice foreign lawyers often serve in a 'consultant' role in proceedings; advising Thai lawyers who are empowered to make submissions to the tribunal directly.⁴

Singapore has seen significant changes in its law since the establishment of the Singapore International Arbitration Centre (SIAC) in 1991 which resulted in the removal of the restriction against foreign lawyers representing parties in

⁴ <http://www.internationalarbitrationasia.com/arbitration-in-thailand-the-thai-arbitration-institute-2015/> last visited on 14th November 2016 at 1:10pm

arbitration. This is entrenched in the SIAC Rules, which provides that "Any party may be represented by legal practitioners or any other representatives"⁵. Prior to this amendment there was uncertainty as to whether foreign lawyers could appear in arbitration seated in Singapore. This uncertainty stemmed from the decision in *Turner (East Africa) Pte Ltd v Builders Federal (Hong Kong) Ltd and Anor*⁶, where the contention that foreign lawyers appearing in arbitration hearings are practicing as advocates and solicitors in contravention of the Singapore Legal Profession Act Cap. 161 was made, and not rejected by the court.⁷

In the United Arab Emirates (UAE), there are no restrictions on qualified lawyers from jurisdictions outside the UAE representing a party in arbitral proceedings seated in the UAE. Therefore, foreign counsel can and do regularly act as counsel or arbitrators in arbitrations seated in the UAE and the Dubai International Financial Centre (DIFC). While not a strict requirement under UAE law, best practice in the UAE dictates that lawyers appearing in arbitration seated in the UAE produce a valid power of attorney explicitly authorising them to represent the party in arbitration proceedings. In order to exercise rights of audience before the DIFC Courts, it is necessary to apply to the Registrar of the DIFC Courts to be entered into the relevant Register. Outside of the requirement to be entered into the Register, there are no restrictions applicable to arbitration proceedings seated in the DIFC.⁸

Similar provisions in favour of unrestricted choice of representation are contained in arbitration rules in some African countries such as Egypt, Mauritius and South Africa.

Article 5 of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration⁹ provides:

"Each party may be represented or assisted by one or more persons chosen by it..."

Similarly, Article 16 of the Rules of the Arbitration Foundation of Southern Africa provides that:

16.1 Any party may-

16.1.1 in the case of a natural person, represent himself or be represented by any other person or persons authorised by him;

⁵ Rule 20.1 of Singapore International Arbitration Centre Rules 2016, available at <http://www.siac.org.sg/our-rules/rules/siac-rules-2016>, last visited on 27th October 2016 at 4:30pm

⁶ [1988] SCH 28

⁷ http://www.aseanlawassociation.org/docs/w4_singl.pdf

⁸ <http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/33/united-arab-emirates/> and <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/united-arab-emirates> last visited on 27th October 2016 at 5:10pm

⁹ http://crica.org.eg/rules/arbitration/2011/cr_arb_rules_en.pdf. see also Article 24 of Kigali International Arbitration Centre Rules 2012 last visited on 27th October 2016 at 5:10pm

16.1.2 *in the case of a juristic person or a representative litigant, be represented by any person or persons authorised by it or him.*

Clause 27 of the International Arbitration Act 2008 (Mauritian IAA) goes one step further by expressly permitting foreign lawyers to act as counsel. It provides as follows:

"Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not be qualified to practise law in Mauritius or in any other jurisdiction."

Arbitration is not *Legal Practice* - but a Private Dispute Resolution System

It has also been argued that the Nigerian Arbitration Rules (the Rules"¹⁰), limits the freedom of choice of representation. Article 4 of the Rules provides as follows:

The parties may be represented or assisted by legal practitioners of their choice...

Of note is the proposition that legal representation in domestic arbitration be restricted only to legal practitioners qualified to practice in Nigeria. According to its advocates, this should be the case particularly at the initiation of arbitration proceedings in a location where the prevailing law (*lex arbitri*) is Nigerian law. The reasoning upon which this proposition is predicated is the definition of a 'Legal Practitioner' in the Nigerian Legal Practitioners Act (LPA). The LPA defines a 'Legal Practitioner' as someone *entitled to practice Law* as a barrister and solicitor in Nigeria.

This narrow interpretation was followed in an arbitration conducted in Nigeria under the Arbitration and Conciliation Act (ACA) where the arbitral tribunal, after considering the provisions of Article 4 of the Rules in light of Nigerian decisional authorities¹¹ on how to interpret the term 'legal practitioner', concluded that the foreign counsel was precluded from participating in the proceedings as counsel to the party who retained him. It is the view of this writer, as would be seen anon, that this position is a grave misconception of law, which is inimical to party autonomy, which is one of the bedrocks and conceptual underpinnings of arbitration as a dispute resolution mechanism.

¹⁰ Made pursuant to the First Schedule to the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 ('the ACA')

¹¹ Such as *Okafor v. Nweke*

Shell Nigeria vs. Federal Inland Revenue – Endorsement of Notice of Arbitration

In a recent and yet to be reported judgment of the Nigerian Court of Appeal delivered on 31st August, 2016¹² in - *Shell Nig. Exploration and Production & 3 Ors. v Federal Inland Revenue Service & Anor*, the Court arguably appeared to give judicial support to the proposition that legal representation in arbitration is restricted only to legal practitioners qualified to practise law in Nigeria.

In that case, a dispute arose from a Production Sharing Contract dated April 1993 between Esso Exploration & Production Nigeria (Deep Water) Ltd, Nigeria Agip Exploration Ltd, as well as Total E&P Nig. Ltd. (as “2nd to 4th Appellants”) and Nigerian National Petroleum Corporation (“NNPC”) in respect of the exploration of oil in Nigeria’s deep water acreages (the “PSC” or the “Agreement”)

Consequently, the 2nd to 4th Appellants commenced arbitration proceedings against NNPC for breach of the terms of the Agreement. The Notice of Arbitration was issued and signed on behalf of the 2nd and 4th Appellants by law firms and not natural persons who are legal practitioners.

The Federal Inland Revenue Service (“1st Respondent”) instituted an action at the trial court on grounds to wit - that the claim before the Arbitral tribunal was tax related and therefore not arbitrable. The trial court held in favour of the 1st Respondent and set aside the arbitral award against the NNPC. This led to an appeal to the Court of Appeal where in its aforementioned judgment of 31 August 2016, the trial court judgment was upheld.

It is important to note that the validity or otherwise of the Notice of Appeal and the propriety of law firms issuing the notice of arbitration signing as law firms one foreign and one Nigerian did not arise at the trial court. It was raised against objection and judicial authority by respondents notice for the first time in the appeal court.

Therefore one of the issues taken by the Court of Appeal became – *“Whether the Notice of Arbitration and Statement of Claim by which the Appellants as Claimants commenced the arbitration exercise are competent having been prepared by law firms not recognized or licensed to practice law or sign legal process as Legal Practitioners”*

In determining this issue, the Court applied the narrow interpretation of legal practitioner under the LPA as if proceedings before the arbitral tribunal qualify as legal proceedings. According to the Court, “By the provisions of Sections 2(1) and 24 of the Legal Practitioners Act 2004, a legal practitioner is a person entitled to practice as a barrister

¹² CA/A/208/2012

or as barrister and solicitor as his name is on the roll of such practitioners in Nigeria.” The court also observed that since the Appellants decided to be represented at the arbitral proceedings by legal practitioners, they had a duty “not only to communicate the names and addresses of their legal practitioners, but to have them sign the processes, as their representatives...”

The Court then held that in order for the Notice of Arbitration and Statement of Claim (the “Originating Process”) to be competent, it must be in compliance with the narrow interpretation of legal practitioner contained in the LPA. The Respondent in support of its argument challenging the validity of the Originating Processes also relied on *Okafor v Nweke*.¹³

In the instant case, the originating process were prepared and signed by the international law firm Clifford Chance LLP and the Nigerian Law firm AELEX who do not qualify as legal practitioners as contemplated by the LPA. Consequently, the Court held that all proceedings before the tribunal are a nullity as the tribunal had no jurisdiction because the originating processes are invalid. Clearly both the arbitral tribunal and the Court of Appeal were influenced by *Okafor v Nweke* to which we now turn.

The Nigerian Supreme Court in *Okafor v Nweke*¹⁴

This is one of the most controversial cases under the Nigerian legal jurisprudence. The facts of the case are as follow. On the 19th December 2005, JHC Okolo SAN filed a motion on notice before the Supreme Court of Nigeria seeking an order of extension of time within which to apply for leave to cross appeal, leave to cross appeal and extension of time within which to cross appeal would ever cause so much consternation within the legal community. Mr. Okolo SAN had signed all the papers including the applicants’ brief of arguments in the following manner “JHC Okolo SAN & Co”.

The Respondent represented by GRI Egonu SAN raised an objection contending *inter alia* that the process were all void. His submissions dove-tailed into the decision of the Supreme Court. The Supreme Court found that Sections 2 and 24 of the Legal Practitioners Act [“LPA”] could only be construed to the effect that for a person to practice as a legal practitioner, he must have his name on the roll of legal practitioners; therefore JHC Okolo SAN & Co not being

¹³ *Supra* note 2

¹⁴ See Shasore, ‘Justice Sector Efficiency & the Signing of Legal Process’ op cit

so enrolled cannot be recognized as a legal practitioner at law. The Court in its lead decision referred to the “need to arrest the current embarrassing trend in legal practice where authentication or franking of legal documents, particularly processes (sic) for filing in Nigerian courts have not been receiving the serious attention they deserve from some legal practitioners”. The Court continued in rebuke of the entire community holding that “legal practice is a very serious business that is to be undertaken by serious minded practitioners particularly as both the legally trained minds and those not so trained always learn from our examples.....It is rather unfortunate that the offending processes (sic) originated from the hallowed chambers of a learned senior advocate of Nigeria who did not even see them as improper and unacceptable...” This was the unanimous decision of the Supreme Court of Nigeria in *Okafor v Nweke* whereby the Court struck out the process filed by “JHC Okolo & Co SAN” as being incompetent and in fact null and void.

In coming to this decision, the apex Court relied on Section 2(1) and 24 of the Legal Practitioners Act, which state that: Section 2 – “Subject to the provisions of this Act, a person shall be entitled to practise as a barrister and solicitor if and only if his name is on the roll”

Section 24- defines a legal practitioner as “a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor either generally or for the purpose of any particular office or proceedings”

The Court did not hold (rightly) that signing of legal process is the exclusive preserve of legal practitioners. If signing of legal process is not the exclusive preserve of legal practitioners, then it follows that “signing” does not constitute “legal practice” for the purposes of the LPA. It does appear fairly common knowledge that parties (who are not legal practitioners) do and can, in law, file process and appear in Court in their own name and behalf. This unassailable practice is confirmed by seminal case of *Fawehinmi v NBA (No.1)*¹⁵. Ordinarily, parties sign process in any manner as to identify themselves (litigants) as being the author of the process in question. It would seem somewhat incongruous to put counsel to a greater degree of compliance with respect to signing of legal processes than that which is expected of a litigant acting for himself.

It must be recalled that LPA specifically refers to practice “as a barrister and solicitor”. The endorsement of Court process having been permitted to be undertaken by non-legal practitioners as observed in the *Fawehinmi* case above can

¹⁵ (1989) 2 NWLR pt 105 494 SC

scarcely amount to “legal practice”. It follows therefore that the signing of legal process is not one of the acts that non legal practitioners cannot perform.

What then is Legal Practice in the Context of *Okafor v Nweke*?

The LPA does not define legal practice for the purposes of the law. The relevance of this consideration is the fact that the logic of *Okafor* case is to be found in the belief that once JHC Okolo SAN & Co. was not a “legal practitioner recognized by law” there not being any such person called to the bar under S. 2 LPA, JHC Okolo SAN & Co. cannot legally sign and or file any process in the Courts¹⁶ If (and this writer suggests that it is the case) private citizens can conduct their own case and can sign papers for use in court, it follows that non -“legal practitioners (not) recognized by law” can do the same. Most definitions of the term “practice of law” do not include the endorsement of court pleadings as a known area of practice nor do they refer to any exclusivity in favour of trained lawyers¹⁷.

Where is the Judicial Policy of “Substantial Justice”?

The outcome of the *Okafor* case can scarcely qualify for substantial justice. The Supreme Court for the last quarter of the last century was clear in laying down its intentional approach of substantial justice in Nigeria. In *Nishizawa v Jethwani*¹⁸, Justice Oputa declared “...having regard to the primary fundamental duty of the Courts to do substantial justice by deciding not on a mere technicality at the expense of a hearing on the merits I hold that the trial judge was entitled to look at the respondent’s statement of defence notwithstanding that it was irregularly filed...”. In line with the judicial policy to prioritise justice over form, the Supreme Court in *Nneji v Chukwu*¹⁹ echoed the age-old observations of Lord Penzance in *Combe v Edwards*²⁰ where the Court held that - “the spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to found in successfully picking a way between pitfalls of technicality. After all, the law is, or ought to be, but the handmaid of justice, and inflexibility, which is the most becoming robe of law, often serves to render justice grotesque...”

¹⁶ *Supra* note 2 at 531.

¹⁷ Interested readers may wish to refer to Blacks’ Law Dictionary; 6th Ed page 1191

¹⁸ 1984 All NLR 470

¹⁹ [1988] 3 NWLR pt 81 SC 184

²⁰ (1878) LR 3 PD 142

What was the Case Law before *Okafor v Nweke* ?

In *Registered Trustees of the Apostolic Church v Rahman*²¹ where the Supreme Court per Brett, Ag CJN considered the arguments that J .A Cole & Co was not a legal practitioner and therefore a Notice of Appeal signed with the name of the practitioner J .A Cole for JA Cole & Co was invalid and not properly before the Court. The Court held that “it is not suggested that there is any professional objection to doing this and is frequently done by solicitors in England as the law list shows. In our view the business name was correctly given as that of the legal practitioner representing the appellants. In signing the notice of appeal ...we do not accept the submission that the addition of the words “for JA Cole & Co” would invalidate the signature if a signature in a business name was not permitted”

More recently, in *Ogundele v Agiri*²² the Supreme Court carefully selected its language when considering the signature on a brief of arguments. The brief in question was signed as “Ajibola & Co”. The Court held that “A partnership or firm, unless duly registered as such, with respect, is not a legal practitioner recognized by law or a person entitled to practice as a barrister and solicitor... If learned counsel who appear before this Court, persist in this practice of signing any process of this Court as & Co without evidence of being duly registered as such, it may be obliged to disregard or discountenance, such process including briefs.” (emphasis supplied)

Comparing the decision in this case to the one reached by the same Court in the *Okafor's* case, there appears to be a softening of dictum. Certainly, there is a reservation in favour of the possibility that counsel issuing court process could have evidence of being duly registered to practice law. This will include law firms registered under Part B of the Companies Allied Matters Act.

In ***SLB Consortium v NNPC***²³ where the Supreme Court considered the endorsement of Court process by a firm of legal practitioner; “Adewale Adesokan & Co.” This time the Court was construing Order 26 of the Federal High Court (Civil Procedure Rules) 2000 as well as LPA. The Court following *Okafor* case went a step further holding that the endorsement of court process was a matter of jurisdiction for the Court and not an irregularity in procedure. In conclusion, the Court held that process endorsed by persons not enrolled as a legal practitioner renders such process incurably bad.

²¹ (1967) 1 All NLR 118

²² [2009] 18 NWLR pt 1173 SC 219

²³ (2011) 3 CLRN 1

Is there Comparative Practice to Consider?

In England, the practice has long been quite the opposite of the *Okafor* case. For instance, Civil Procedure Rules and Practice Direction for the Commercial Courts²⁴ specifically direct that a claim be signed in the name of the firm of solicitors rather than an individual solicitor or by solicitor's agents in their professional capacity as agents to solicitors. Furthermore, in the Admiralty Courts, a statement of case when signed by a litigant must be signed in his name but where solicitors issue the process, the firm should sign.

Besides these rules reflecting practical reality, it is also clear that the real desire is to fix an aggregate of persons such as a law firm with liability for process filed as opposed to an individual either for indemnity purposes or professional liability/insurance purposes. This is a protection the Nigerian public should also be entitled to.

The decision in the *Okafor* case by broad application of the lower Courts has the potential to radically affect the habits of legal practitioners in Nigeria. Apart from visiting untold delay on a number of matters already before the Courts, it is capable on full application of affecting the liberty presently enjoyed by counsel to use practice styles quite different from their enrolled names. Additionally, care must be taken in following any approach that leads to the conclusion and effect of the decision in *Okafor* case because *stare decisis* and judicial precedent as well as the force of judicial pronouncements at the highest Court have the potential of a true reversal to the dated era of prioritising technicalities over substance. Moreover, the *Okafor* case represents a unique example of the effect of decisions on the administration of justice and justice sector efficiency and underlies the necessity of constant practice directions and law reform to follow current best convenient and appropriate practice. As we have seen and in any event, the justice sector is better served by holding firms accountable for the conduct of cases rather than individual counsel. In summary, the endorsement and issuance of pleadings in our courts is a matter properly for the rules of civil procedure in the relevant courts and not the LPA and in truth the LPA does not support the decision in the *Okafor* case at all. This is as it should be since the signing of court process ought not to be the exclusive preserve of legal practitioners. Fortunately, the decision in the *Okafor* case itself did not void the process before the court. It merely struck it out and directed “regularization”.

²⁴ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules> last visited on 28th October 2016 at 5:08am

While the Federal High Court (Civil Procedure) Rules by its Order 13 Rule 4 (3) requires pleadings to be signed by “a legal practitioner or by the party”, the Court of Appeal and Supreme Court Rules do not. Whereas the process in *Okafor* should have been based on the Court of appeal rules not the LPA. Civil Procedure Rules Review Committees across the country should go forth and remove the requirement of signing by “legal practitioner” and replace same with “law firm”; since as has been shown above – signing process is not covered by the LPA. The SLB Consortium case above is the current and indeed most recent decision on this point. Counsel and courts alike should be guided by the rules of the Court in question is significant to the determination of such issues rather than the now rampant wholesale application of the decision in *Okafor* case. Every court is the guardian of its own records and master of its own practice, and as the Supreme Court observed in *Tukur v Government of Gongola State*²⁵, the rules of practice made for one court cannot be binding on another court either higher or lower in the judicial hierarchy.

The summary of this trend is the requirement that where a party elects to be represented by a legal practitioner in arbitral proceedings, the process filed in such proceedings must be signed by a person whose name is on the roll of legal practitioners in Nigeria. However, a restriction such as this could ultimately discourage potential foreign direct investment in Nigeria..

Thus, the view that the LPA regulates the conduct of legal practitioners qualified to practice in Nigeria and that Arbitration is legal practice ought to be rejected outright. By its nature, arbitration cannot be regulated by the LPA. This is consistent with the essential principle of party autonomy which extends to the freedom of choice of legal representation. Commendably, Article 5 of the Lagos Court of Arbitration Rules is worded in a more liberal manner and provides that “Each party may be represented or assisted by persons chosen by them...” Fortunately it does not appear that –the issue as to what constitutes ‘legal practice’ was presented to the Court in *Shell* case. The assumption is *per incuriam*. Furthermore the Court of Appeal appears to have left the main issue in the appeal for determination after declaring the Notice of Arbitration invalid. Leaving a tangle of what came for determination and what became the reasoning of the Court. If the view is taken that the arbitrability of ‘tax disputes’ was the issue for determination then surely the position taken against the Notice of Arbitration becomes *obiter dictum*. The Court of Appeal said:

“So for the Notice of Arbitration and consequently the claim to be competent recourse must be made to the Legal Practitioners Act 2004 (sic) Are Clifford Chance LLP and Aelx legal practitioners? The only way to show they are is by stating or showing that they are persons who have been enrolled. That has not been shown. They are therefore not competent to sign the initiating processes (sic) before the tribunal

²⁵ (1988) 1 NWLR Pt. 39

*which no doubt is a legal proceeding...once the initiating process was invalid null and void, the tribunal had no jurisdiction to act on it. All the proceedings before it are a nullity and are hereby struck out*²⁶

But the Court then went on to consider the preliminary objection proper that had actually spurned the appeal. It did so by stating that the Court would then hear the matter of *locus standi* as contained in the issues for determination fashioned by both sides as:

*'1. Was the learned trial judge right in finding in favour of the Plaintiff/Respondent on the issue of locus standi? 2. Are the claims submitted to the arbitration contractual matters or tax matters*²⁷

Clearly the Court of Appeal was of the opinion that these issues were still the issues for determination and not just the validity of the Notice of Arbitration. Its decision on the arbitration as legal practice in the opinion of the Court – it must have felt- did not dispose of the appeal.

In fact the better position for the Court of Appeal to have taken would have been to recognize that arbitration proceedings (private dispute resolution) are distinct from judicial proceedings (public dispute resolution) as was effectively held in *Attorney General of the Commonwealth of Australia v R and the Boilermakers' Society of Australia*²⁸ a case relied on by the Appellants in the *Shell* case in support of their argument that the ACA does not require the Notice of Arbitration to be signed by a “legal practitioner”. A separation of this nature accords with present international best practice, with a proper interpretation of Nigerian law and is bound to boost the confidence of foreign investors who may wish to retain any manner of representation in arbitral proceedings particularly where the dispute is multi-jurisdictional and involves substantial claims²⁹.

In any event, it appears that Article 4 of the ACA does not apply where parties expressly designate their arbitration 'international' and apply the UNCITRAL Rules (or any other international rule) in their arbitration proceedings. This assertion is deducible from the combined provisions of Sections 15, 53 and 56 (2) (d) and (5) of the ACA. Reproduced below:

²⁶ Page 20 of the Shell decision

²⁷ See page 21 of the Shell Decision

²⁸ (1957) 2 All ER 45 @ 49

²⁹<http://www.mondaq.com/Nigeria/x/293850/Arbitration+Dispute+Resolution/Domestic+Arbitration+In+Nigeria+Can+Foreign+Counsel+Still+Run> last visited on 14th November 2016 at 1:55pm

Section 15 (1):

The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act...

Section 53:

Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rule acceptable to the parties.

Section 56:

(2) An arbitration is international if-

(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

(5) Where a provision of this Act-

(a) refers to the fact that parties have agreed or that they may agree; or

(b) in any other way refers to an agreement of the parties,

such agreement includes any arbitration rules referred to in the agreement.

Practitioners agree that the provisions of Section 15 of the ACA solely relate to domestic arbitration. The above provisions suggest that the applicability of the provisions of the Rules may not be derogated from in domestic arbitrations. Therefore, parties may be able to bypass the provisions of Article 4 by including a declaration in their contract that arbitrations arising thereof are international and are to be governed by any international arbitration rules of their choice.

Jurisdictions with restrictions on the parties' rights to representation run the risk of hampering efforts aimed at attracting arbitration and ensuring that disputes arising from such jurisdictions are not referred abroad for arbitration. To insist that legal representation in domestic arbitrations must be handled exclusively by local counsel could ultimately discourage potential foreign direct investors who may be more inclined to retain foreign counsel with whom they are

more conversant to represent them in arbitral proceedings, particularly where the dispute is multi-jurisdictional and involves exceptionally substantial claims.³⁰

Parties' right to representation of their choice is an important element of a seat's arbitral framework (parties do not want fetters on their choice of counsel).³¹ Fortunately, most notable arbitration rules are worded more liberally in comparison with Article 4 of the Rules. Therefore, where parties agree to incorporate liberally worded arbitration rules their right to representation will not be curtailed.

Fortunately still, the Arbitration community is supporting the reform of the Federal Arbitration Act that will amongst many other things put this unfortunate interpretation of Article 4 of the 1st Schedule to the Arbitration & Conciliation Act 1988 beyond doubt.

Conclusion

Arbitration law and practice is an integral part of our legal system as with legal systems the world over. Given that the Arbitration belongs to the private dispute resolution system and not the public dispute resolution system it is not regulated as 'legal practice'. Parties at Arbitration therefore retain the autonomous right to be represented by any person (s) whether legal practitioner or not. The legalistic trend led by *Okafor v Nweke* and now echoed in *Shell v Federal Inland Service* does not have any place in modern day Arbitration law or practice. Even though the Shell decision holds tenuously to the opposite view Nigerian case law and legislation should put the matter beyond doubt without delay.

Also published in MIYETTI Quarterly Law Review. MQLR 2017

³⁰Ibid

³¹ https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editoriai/Publications/Documents/2015-11-24-east-african-states-effective-efficient-and-safe-arbitration-seats.pdf