



**Resolving Construction Disputes  
In Nigeria - An Arbitration Approach**



## 1.0 Introduction

With Nigeria emerging as one of Africa's fastest-growing economies, particularly within the West African nations, the construction industry stands at the forefront, propelling remarkable growth. Not only does it fuel infrastructural development, but it also serves as a vital catalyst for sustainable employment opportunities. The profound impact of this sector positions it as a cornerstone for the enduring progress of the Nigerian economy. In fact, the Nigerian construction industry has surpassed numerous other sectors in recent years, showcasing remarkable resilience and projecting an ongoing growth trajectory from 2020 to 2030.<sup>2</sup>

Drawing attention to its significance, the Nigeria construction market achieved a staggering valuation of \$135.9 billion in 2022 and is poised to sustain an Annual Average Growth Rate (AAGR) exceeding 3% from 2024 to 2027.<sup>3</sup> This projected growth is propelled by both public and private investments pouring into pivotal areas such as tourism, transportation, electricity, and housing infrastructure projects, intricately woven into the National Development Plan 2021–2025. In line with the government's ambitious vision, there is a resolute commitment to bridge the housing gap by increasing the number of affordable housing units, thus amplifying the industry's potential.<sup>4</sup>

Yet, amidst the remarkable progress, it is undeniable that the construction industry is not immune to disputes that inevitably arise from contractual obligations among employers, contractors, subcontractors, and other stakeholders. Consequently, a robust and effective dispute resolution mechanism is indispensable to ensure justice prevails within this dynamic sector without adversely affecting relationships. Arbitration is a pragmatic and versatile solution that offers a pathway to resolve potential construction disputes.

This article serves as a comprehensive guide on the utilization of arbitration as a powerful dispute-resolution mechanism within the realm of construction through a careful examination of its principles, procedures, and advantages, to equip industry professionals with the knowledge needed to navigate the complexities of construction disputes and seek a fair resolution.

<sup>2</sup> Nigeria, G. (2022). 'Building and construction industry, untapped nerve for Nigerian economic growth.' The Guardian Nigeria News - Nigeria and World News. <https://guardian.ng/features/building-and-construction-industry-untapped-nerve-for-nigerian-economic-growth/>, accessed 29 May 2023.

<sup>3</sup> ShieldSquare Captcha. (n.d.-b). <https://www.globaldata.com/store/report/nigeria-construction-market-analysis-2/>, accessed 29 May 2023

<sup>4</sup> Ibid



## 2.0 Definition of Arbitration

Arbitration, as an extra-judicial dispute resolution mechanism, is deeply ingrained in Nigeria's legal fabric and has a rich historical foundation. Even before the advent of modern statutory frameworks, arbitration was already an integral part of Nigeria's indigenous customary law. The essence of customary arbitration lies in the voluntary submission of parties to the decision-making authority of arbitrators, often revered chiefs, or respected elders within their community.<sup>5</sup>

The Supreme Court of Nigeria, in the landmark case of *Ohiaeri v Akabueze*<sup>6</sup> in 1992, aptly recognized and acknowledged the significance of customary arbitration. The court described customary arbitration as a time-honored practice, rooted in the collective agreement of the parties to abide by the arbitrator's decision, while also retaining the freedom to reject an unfavourable outcome. This indigenous arbitration system fostered a sense of community, relied on local wisdom, and provided a means to resolve disputes in a manner that respected cultural norms and values.

In the case of *IKEM v. VIDAH PACKAGING LTD. & ANOR*<sup>7</sup> "Arbitration has been defined as a reference to the decision of one or more persons, either with or without an umpire of a particular matter of difference between the parties. It has also been held in decided cases that the legal basis of all arbitration is a voluntary agreement. Thus, if there is a distinct agreement to appoint an umpire to determine the differences between the parties and other conditions are present, there is arbitration." **Per AYOBODE OLUJIMI LOKULO-SODIPE, JCA (Pp 52 - 53 Paras F - A).**

The court's position aligns with the prevailing legal view that arbitration is a consensual process, wherein the parties willingly submit themselves to the jurisdiction of arbitrators to resolve their disputes. This underscores the significance of mutual consent as the legal foundation for all arbitration proceedings

## 3.0 Overview Of Construction Disputes In Nigeria

The construction industry is known for its inherent challenges, and disputes often arise due to conflicting interests and unrealistic expectations among the key parties involved. For instance, the client (owner) desires speedy completion, high-quality construction, and cost-effectiveness, while the contractor may seek more time, a reasonable level of quality, and maximum profitability. These differing objectives can lead to disagreements and misunderstandings throughout the project's life cycle. Given the complex nature of construction projects and the multiple organizational entities involved, disputes can manifest at various levels within the contractual chain. They may arise between the client and consultant, client and contractor, consultant and contractor, contractor and subcontractor, subcontractor, and subcontractor, or even between the client and subcontractor.



<sup>5</sup> Tolu Aderemi LL.M (Aberdeen) Carb. (2020). *International Arbitration Law and Practice: The Practitioner's Perspective*. (Lawlexis International Limited 2020) Chapter 6, Page 104.

<sup>6</sup> *Ohiaeri V. Akabueze* (1992) 2 Nwlr, Part 221, 1 at paras 12

<sup>7</sup> (2011) LPELR-3825(CA)



These disputes can disrupt project timelines, impact productivity, strain relationships, and potentially lead to legal action if not resolved effectively.<sup>8</sup>

Disputes within the Nigerian construction industry stem from a range of factors, including political, commercial, project delivery, claims-related, and legal risks. These risks contribute to challenges and conflicts throughout the project life cycle. Commercial risks arise from issues such as a lack of regulatory expertise, unclear contractual requirements, and an improperly defined project scope. When these elements are not clearly established, it becomes difficult to align the expectations and responsibilities of the parties involved. Additionally, a combative contracting culture and a lack of sophistication within the project team can further exacerbate commercial risks, as effective communication and collaboration may be hindered.<sup>9</sup>

Also, contractual disputes in construction projects are frequently caused by a party's failure to fulfill its contractual obligations. Examples of these obligations include the contractor's failure to provide a contract bond, failure to complete a segment of the project within the timeframe, use of substandard products, and failure to provide remedial services within the warranty period provided after project delivery. It has also been stated that if either party fails to respect time, cost, and quality, a dispute may arise. Employers can also stifle work progress by depriving contractors of funds, failing to provide contractors with scheduled access to the site, or failing to provide contractors with an environment free of third-party interference.<sup>10</sup>

Failure to accurately and properly prepare construction contracts to mitigate some of the challenges stated above has resulted in disputes litigated or arbitrated before courts and tribunals worldwide. An example of a notable construction dispute in Nigeria is the dispute between Nigeria and Sunrise Power. In 2017, the Nigerian government faced an accusation from Sunrise Power and Transmission Company Limited, alleging a breach of their 2003 agreement.



The dispute arose from a contract between Sunrise Power and Transmission Company Limited (SPTCL), and the Nigerian Government for the construction of a power plant. The Federal Government terminated the contract, which was signed on May 22, 2003, but re-awarded to a Chinese firm, Messrs China Gezhouba Group Corporation/China Geo-Engineering Corporation (CGGC/CGC). Due to this, the project encountered numerous difficulties and delays, resulting in significant financial losses for Sunrise Power. The company claimed that the Nigerian Government failed to fulfill its contractual obligations, leading to disruptions in project execution and financial setbacks. As a result, Sunrise Power in 2018 took the case to arbitration, seeking an arbitration award of US\$2.3 billion from the International Chamber of Commerce (ICC) in Paris.<sup>11</sup> Sunrise withdrew the \$500 million settlement arbitration in September 2021 on the condition that the Federal Government make a financial commitment to the Project and respects its right as the exclusive local content partner, but the Federal Government failed to make any payments to the EPC contractors or the counterpart funds to China Eximbank.

<sup>8</sup> Yohanna Samuel Adamu. (2019). Construction Contracting Disputes and Use of Alternative Disputes Resolution Techniques for Sustainable Development in Anambra State. (International Journal of Innovative Research in Social Sciences and Strategic Management Techniques) Vol. 6, No. 1, <http://internationalpolicybrief.org/images/2019/DECEMBER/IJIRSSMT/ARTICLE14.pdf>, accessed 29 May 2023.

<sup>9</sup> The Construction Disputes Law Review (Nigeria Chapter) | LawPortal. (n.d.). LawPortal. <https://lawportal.com/aluko-oyebode/legal-insights/the-construction-disputes-law-review-nigeria-chapter/>, accessed 29 May 2023.

<sup>10</sup> Tolu Aderemi LL.M (Aberdeen) Carb. (2020). International Arbitration Law and Practice: The Practitioner's Perspective. (Lawlexis International Limited 2020) Chapter 5, Page 87.

<sup>11</sup> Adebulu, T. (2021, June 7). Sunrise Power files \$400m lawsuit at ICC as FG reneges on \$200m 'compensation' to end Mambilla dispute. TheCable. <https://www.thecable.ng/mambilla-sunrise-power-files-fresh-400m-compensation-claim-against-nigeria>, accessed 29 May 2023.



While the Federal Government has been unable to defend its failure to honour its agreements with Sunrise, it has asked the ICC to order "that Sunrise produce certain information showing its true legal and beneficial ownership." On October 13, 2022, the International Court of Arbitration administered by the International Chamber of Commerce (ICC), Paris, France, affirmed Sunrise Power and Transmission Company Limited (SPTCL)'s legal and beneficial ownership in the \$5.8 billion Mambilla hydro-electric power project and ruled against all objections raised by the Federal Government and called for the expedited arbitration procedure to be adopted in the \$500 million settlement agreement.<sup>12</sup>

#### 4.0 Why Arbitration is Preferred in Construction Disputes

In Nigeria, the resolution of construction disputes is a critical aspect of ensuring the smooth and efficient execution of projects. Although, there is no law that specifically mandates parties to explore arbitration for the settlement of construction disputes, with the inherent complexities and challenges in the construction industry, parties involved in disputes often seek a resolution method that offers expertise, efficiency, cost savings, confidentiality, enforceability, and the preservation of relationships. In this regard, arbitration emerges as a preferred and viable alternative to litigation, providing distinct benefits that address the unique needs and considerations of construction disputes in Nigeria. By examining the key benefits of arbitration over litigation in the Nigerian context in the succeeding paragraphs, we can gain valuable insights into why this alternative dispute resolution method is gaining increasing popularity and recognition within the construction industry.

a) **Expertise and Industry Knowledge:** Construction disputes frequently involve difficult issues such as what efforts, design or construction, or both, are at stake, whose scope of work is involved, the terms of all contracts and subcontracts relating to the affected area or event, the scope and reach of regulations, building codes, or other overarching project requirements, and so on. As a result, it is a sector that necessitates industry professionals that grasp the complexities of the subject matter.<sup>13</sup>

Arbitration allows parties to present their case before arbitrators who possess specialized expertise and understanding of the construction industry. These arbitrators have in-depth knowledge of construction law, practices, and technical aspects, enabling them to make informed decisions based on industry-specific considerations. The dispute is evaluated by professionals who truly comprehend the complexities of construction projects. For Instance, in Nigeria, there is the Institute of Construction Industry Arbitrators (ICIArb), formerly known as the Society of Construction Industry Arbitrators (SCIARB), which was established in 1993 as a specialist Arbitration and Alternative Disputes Resolution (ADR) body in the Construction Industry. The Institute is known as the leading arbitral institution in the Construction Industry in Nigeria. The Institute was inaugurated on the 15th of October 1993, as a multi-disciplinary organisation with members drawn from the professions related to the Construction Industry.

By providing a specialized alternative dispute resolution (ADR) mechanism, the ICIArb serves as a centralized hub for resolving construction disputes through various methods, including arbitration, mediation, conciliation, and other forms of ADR. This specialized forum ensures that disputes are handled by experts who possess in-depth knowledge of the construction industry and its specific dynamics.



<sup>12</sup> Nigeria, G.(2022). \$5.8b Mambilla power project: Sunrise floors FG at ICC. The Guardian Nigeria News - Nigeria and World News. <https://guardian.ng/news/5-8b-mambilla-power-project-sunrise-floors-fg-at-icc/>, accessed on 29 May 2023.

<sup>13</sup> A. Holt Gwyn. (2017). Arbitration of Construction Disputes (College of Commercial Arbitrators) <https://www.ccarbitrators.org/wp-content/uploads/2021/05/Construction-Disputes.pdf>, accessed 29 May 2023.



Consequently, parties involved in construction disputes have access to professionals who understand the intricacies of the construction process and can facilitate a more efficient and tailored resolution process.

**b)Efficiency and Expedited Resolution:** Unlike court proceedings, which can be time-consuming and protracted, Arbitration offers a more efficient, faster, and streamlined resolution process. Parties have the flexibility to choose the rules, procedures, and language of arbitration, enabling them to tailor the process to suit the unique needs of the construction dispute. The ability to select arbitrators with relevant expertise further expedites the proceedings, leading to a faster resolution, and ensuring minimal disruption of ongoing construction projects, compared to lengthy court litigation.

**c)Cost Savings:** Unlike court litigation, which frequently includes protracted legal fights, arbitration allows the parties to adjust the procedure to their specific objectives. The option to appoint arbitrators with industry expertise guarantees that construction conflicts are resolved in a targeted and fast manner thereby reducing cost. These arbitrators have a thorough awareness of the technical and contractual components of construction projects, allowing for a more efficient assessment of the issues at hand. Arbitration minimises the overall legal costs connected with dispute resolution by eliminating the need for significant legal discovery and complex courtroom procedures.

Construction projects have a short timeline, and delays in settling disputes can result in severe financial losses. Arbitration allows parties to skip the long court proceedings that can last many years. Arbitration's flexibility and accelerated nature allow for faster settlement, ensuring that building projects may resume on time. This not only saves time but also avoids the accumulation of additional expenditures due to project interruptions and prolonged schedules.

**d)Confidentiality:** Arbitration in construction disputes provides a substantial advantage in terms of confidentiality. Sensitive information, such as proprietary designs, financial details, and trade secrets, is frequently involved in construction projects. Arbitral proceedings are often kept private, ensuring that the parties' confidential information is kept private and not made public. This aids in the preservation of intellectual property, commercial relationships, and the reputations of the people concerned. Another practical component of confidentiality in arbitration is the absence of public court records. Court filings, pleadings, judgments, and other court documents become part of the public record and are accessible to anyone in traditional litigation. This may reveal secret information to competitors, the media, or other parties with an interest in the dispute. In arbitration, however, there are no public records, reducing the risk of sensitive information being publicly disclosed.

**e)Enforceability of Awards:** Arbitral awards are final, conclusive, binding, and enforceable by parties at the conclusion of proceedings, which is a significant advantage of arbitration over litigation in construction disputes.<sup>14</sup> Furthermore, under international conventions such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards are widely recognised and enforced globally.<sup>15</sup> This global enforceability provides parties with the assurance that the arbitration award can be enforced in multiple jurisdictions. In contrast, court judgments may face challenges and lengthy procedures for cross-border enforcement. The enforceability of arbitration awards enhances the certainty and finality of the resolution process.



<sup>14</sup> By virtue of Section 57 of the Arbitration and Mediation Act 2023, arbitral awards shall irrespective of the country or state it was made, be recognised as binding.

<sup>15</sup> Nigeria became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in March 17, 1970 and the New York Convention rules are domesticated by S.60 of the Arbitration and Mediation Act 2023.



In Nigeria, the Arbitration and Mediation Act of 2023 introduced a significant development in the enforcement process.<sup>16</sup> Under this Act, parties to an arbitration agreement have the option to include a provision in their agreement for an application to review an arbitral award. This provision allows parties to agree on the procedure to be followed by an Award Review Tribunal, which is tasked with reviewing the award. The Award Review Tribunal must render its decision in the form of an award within 60 days.<sup>17</sup>

This mechanism offers several advantages to disputants in construction disputes. Firstly, it provides an avenue for parties to seek a review of the award if they are dissatisfied with the outcome. This flexibility allows for a comprehensive evaluation of the award, ensuring that any errors or issues can be addressed through a transparent and structured process. Compared to litigation, where the process of filing an appeal against the decision of a lower court can be time-consuming and burdensome, the option for award review in arbitration allows for a more streamlined approach. Disputants can address any concerns or perceived shortcomings in the award promptly, enabling a faster resolution and minimizing delays in the construction project.

Furthermore, the availability of an Award Review Tribunal reinforces the enforceability of arbitral awards. The review process provides an additional layer of confidence in the finality and integrity of the award, enhancing its enforceability. This is particularly important in construction disputes, where parties may have vested interests in the timely execution of projects and the enforcement of awards to ensure that the construction project proceeds smoothly.



## 5.0 Pre-arbitration Considerations

Resolving construction disputes through arbitration requires careful preparation and consideration before initiating formal proceedings. The construction industry is notorious for its complex and multifaceted nature, often giving rise to disputes due to conflicting interests, technical complexities, and contractual intricacies. In order to streamline the arbitration process and increase the likelihood of a successful resolution, parties involved in construction disputes must undertake several important pre-arbitration considerations. Parties can manage the complexity of construction disputes and maximise the possibility of a satisfying resolution while minimising costs, time, and potential delays to ongoing construction projects by following these recommendations.

**a) Review and Confirmation of the Arbitration Agreement:** Parties should carefully review the arbitration agreement to ensure it is properly drafted, executed, and legally enforceable, in compliance with the Arbitration and Mediation Act, 2023. The obligation of the parties to ensure that the agreement to arbitrate their construction dispute is in writing cannot be overemphasized. Section 1 of the Arbitration and Mediation Act, 2023, provides for the requirement under which an agreement to arbitrate in writing is valid if the agreement is:

<sup>16</sup> Section 56, Arbitration and Mediation Act, 2023.

<sup>17</sup> Section 56(6), Arbitration and Mediation Act, 2023.



- i. By electronic communication, and the information contained in it is accessible so as to be useable for subsequent reference; and
- ii. It is contained in the claim and defence in which the existence of an arbitration agreement is alleged by one party and denied by another; and
- iii. Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.

While the Arbitration and Mediation Act requires that the agreement to arbitrate be in any form of writing that the parties deem to be binding on them, commercial realities make it rather unwise for a party to agree to a construction contract without a formal agreement that effectively addresses likely risks. When there is no written agreement or the agreement is formed solely through communication, even minor problems such as the identification of a party to the agreement might become a source of controversy.<sup>18</sup>

Also, the arbitration agreement should clearly outline the scope of disputes covered, the choice of arbitration rules, the appointment of arbitrators, the seat or location of the arbitration, and the language of the arbitration. It is crucial to ensure that the agreement reflects the specific needs and considerations of the construction industry, such as addressing construction-specific issues, technical complexities, and the selection of arbitrators with construction expertise. For instance, the agreement should include clauses that address common construction-related matters such as project delays, change orders, defective work, and cost overruns. These clauses can define the procedures and standards to be followed when resolving these issues through arbitration. By explicitly addressing these construction-specific issues in the agreement, the parties can ensure that the arbitration process is aligned with the intricacies of the construction industry and can effectively resolve disputes that arise in this context.

Furthermore, the agreement should consider the technical complexities involved in construction projects. This may involve stipulating the qualifications and expertise required of the arbitrators who will be appointed to hear the dispute. For example,

the agreement could require that arbitrators possess a background in engineering, architecture, or construction law to ensure they have the necessary understanding of the technical aspects of the dispute. By selecting arbitrators with construction expertise, the parties can benefit from their industry knowledge and their ability to make informed decisions based on the specific technical issues at hand.



<sup>18</sup> Tolu Aderemi LL.M (Aberdeen) Carb. (2020). *International Arbitration Law and Practice: The Practitioner's Perspective*. (Lawlexis International Limited 2020) Chapter 5, Page 92.





**b)Assessment of Jurisdiction and Applicable Laws:** Parties involved in a construction dispute should carefully consider the jurisdiction in which the arbitration will take place and the applicable laws that will govern the dispute. This step is particularly important in construction disputes, which often have international or multi-jurisdictional elements. By selecting a specific jurisdiction, such as Nigeria, as the forum for arbitration, the parties ensure that the laws of that jurisdiction automatically apply to the dispute.

Choosing a single forum for arbitration has several advantages in construction disputes. First, it avoids the potential for multiple actions and conflicting dispute resolution clauses that can arise when different contracts or collateral agreements have varying arbitration provisions. This helps streamline the dispute resolution process and prevents unnecessary complications.

Additionally, selecting a forum that has ratified international conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or whose national arbitration law is modeled on the UNCITRAL Model Law on International Commercial Arbitration, provides assurance that the resulting arbitral awards will be enforceable in other countries. In the case of Nigeria, Section 60 of the Arbitration and Mediation Act 2023 recognizes and allows for the enforcement of foreign arbitral awards within the country.

By establishing a clear jurisdiction and selecting a forum with enforceable arbitration laws, the parties create a solid foundation for the arbitration process. This ensures that the resulting award will have legal validity and can be effectively enforced, both domestically and internationally if necessary.

**c)Preparation of a Comprehensive Statement of Claim:** Prior to commencing arbitration, the claimant should prepare a comprehensive statement of claim outlining the factual background, legal arguments, and requested relief. In construction



disputes, this statement should address the specific issues related to the project, such as design flaws, construction delays, payment disputes, or breach of contract. A well-drafted statement of claim provides a clear and organized presentation of the case, allowing the arbitrators to understand the complexities of the construction dispute and make informed decisions.

By preparing a well-drafted statement of claim, the claimant provides a clear and organized overview of the case to the arbitrators. This allows the arbitrators to fully grasp the complexities and nuances of the construction dispute and make informed decisions. The statement of claim should be structured in a logical manner, clearly identifying the points of contention and presenting the supporting evidence.

In order to build a strong case, the claimant should consider certain preparatory questions. These questions assist in identifying the key aspects of the dispute and help in the formulation of a compelling argument. Examples of useful preparatory questions include: What is our case? What is the opposing party's case? What are the central issues that need to be resolved in terms of both fact and law?



Who are the potential witnesses, and what are they likely to testify? What specific information do we need to obtain from each witness? What are our proposed questions to elicit the necessary evidence? What documents are available, and how do they support our case? What is the significance and impact of each document? How will each document be presented and admitted as evidence during the arbitration proceedings?<sup>19</sup>

By addressing these preparatory questions and including the corresponding information in the statement of claim, the claimant can present a compelling case that covers all relevant aspects of the construction dispute. This meticulous preparation ensures that the arbitrators have a comprehensive understanding of the issues and evidence, facilitating a fair and informed decision-making process.

**d) Gathering and Organising Supporting Evidence:** In preparation for arbitration proceedings in a construction dispute, it is crucial for parties to gather and organize all pertinent evidence that supports their respective positions. This includes documents, contracts, correspondence, and any other relevant materials that shed light on the dispute

In construction disputes, the evidence may consist of various types of documentation, such as project plans, specifications, change orders, invoices, payment records, and expert reports. Additionally, witness statements from individuals involved in the project can provide valuable insights and testimony. By compiling and organizing this evidence, parties can present a comprehensive and persuasive case during the arbitration proceedings.

One advantage of arbitration is that it offers a more flexible and less formal approach to gathering and presenting evidence compared to traditional court litigation. While court procedures often have strict rules and procedures governing the use of evidence, arbitration allows parties to adopt a more flexible approach. This flexibility allows parties to present evidence in a manner that is most effective for their case, enhancing the efficiency and effectiveness of the proceedings.<sup>20</sup>

To maximize the impact of the evidence, parties should ensure that the documentation is properly organized and presented. This includes organizing the evidence in a logical and coherent manner, clearly labeling and indexing the documents, and providing appropriate references during the proceedings. A well-organized presentation of evidence not only strengthens the party's case but also facilitates a more efficient and focused examination of the issues by the arbitrators.

## 6.0 Commencing The Arbitration Process

The arbitration process in resolving construction disputes in Nigeria involves several key stages that ensure a fair and efficient resolution. Understanding these stages is crucial for the parties involved in the dispute as they navigate through the arbitration process. It is important to note that the arbitration process offers flexibility and allows the parties to tailor the proceedings to suit their specific needs. The timelines and procedural rules can be agreed upon by the parties or may be governed by the chosen arbitral institution or the applicable arbitration law.

**a) Notice of Arbitration:** The party initiating the arbitration, known as the claimant, must serve a written notice of arbitration to the opposing party, known as the respondent. The notice should outline the details of the dispute, the relief sought, and the intention to commence arbitration.<sup>21</sup>



<sup>19</sup> C A Candide Johnson, SAN & Olasupo Shashore, SAN. (2012). *Commercial Arbitration Law and International Practice in Nigeria*. (LexisNexis 2012) Chapter 6, Page 97.

<sup>20</sup> Article 28, *Arbitration Rules, 2023*.

<sup>21</sup> Section 33, *Arbitration and Mediation Act, 2023*.



The notice to commence arbitration is a crucial step in initiating the arbitration process, where the claimant provides a written communication to the respondent, requesting the referral of the dispute to arbitration. The communication should include specific details such as the demand for arbitration, parties' names, identification of the arbitration clause or agreement, description of the dispute, the relief sought, and proposals regarding arbitrators and the seat of arbitration. The respondent must respond within 30 days, addressing the information in the notice, and may include jurisdictional objections, counterclaims, and additional details.<sup>22</sup> Any controversies regarding the notice or response will be resolved by the arbitral tribunal, ensuring a smooth progression toward the constitution of the tribunal and the arbitration proceedings.



**b) Appointment of Arbitrators:** The parties must agree on the appointment of arbitrators or follow the arbitration rules agreed upon by the parties for the selection process. In Nigeria, the appointment may be made by mutual agreement or through the designated arbitral institution specified in the arbitration agreement. Where the parties fail to specify in their arbitration agreement a procedure for the appointment of arbitrators, the default provision under the Arbitration and Mediation Act<sup>23</sup> in the case of a three-man tribunal is that each party must appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator. However, the court will make the appointment, on the application of any party to the arbitration, where either: one of the parties fails to appoint an arbitrator within 30 days of receipt of a request to do so by the other party or, where the two arbitrators fail to agree on a third arbitrator within 30 days of their appointment. In the case of arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the court can make the appointment, on the application of any party to the arbitration agreement made within 30 days of the disagreement.<sup>24</sup>

**c) Preliminary Meeting:** The preliminary meeting at the early stage of the commencement of the arbitration provides an opportunity for the parties involved to convene with the arbitrator(s) and address important preliminary matters specific to their construction dispute. These discussions may include determining the scope of the arbitrators' jurisdiction, establishing the preferred mode of hearing (oral or documentary), agreeing on the number and presentation of witnesses, selecting the language for conducting the arbitration, considering the need for expert opinions, and discussing the fees and remuneration of the arbitrators. This meeting allows the parties to set the framework for the arbitration proceedings.<sup>25</sup>

**d) Exchange of Pleadings:** After the appointment of arbitrators in construction disputes, the exchange of pleadings takes place as a crucial step in the arbitration process. The claimant initiates this by submitting a statement of claim, outlining their case and arguments, followed by the respondent's statement of defense presenting their case and counterarguments.

<sup>22</sup> Article 3 & 4, Arbitration Rules, 2023.

<sup>23</sup> Section 7, Arbitration and Mediation Act, 2023.

<sup>24</sup> Ibid

<sup>25</sup> Article 17(2), Arbitration Rules, 2023.



These pleadings serve as the foundation for the arbitration proceedings. The arbitral tribunal will determine whether additional written statements are necessary and set the timeframes for their submission.<sup>26</sup> According to the Arbitration Rules, the periods for communicating written statements should generally not exceed 45 days, but the tribunal may extend them if deemed justified. This exchange of pleadings allows both parties to present their respective positions and helps shape the subsequent stages of the arbitration, facilitating a fair and comprehensive resolution of the construction dispute.

e) **Hearing:** The hearing stage in construction arbitration is a pivotal moment where parties have the opportunity to present their case and evidence to the arbitrators. It allows for the examination and cross-examination of witnesses, as well as the presentation of expert reports.<sup>27</sup> This stage is crucial in clarifying any issues raised during the earlier pleadings stage and provides a platform for the parties to support their respective positions. The hearing concludes with the fixing of a date for the pronouncement of the award by the arbitrators, marking the next significant milestone in the arbitration process.

f) **Deliberation and Award:** Following the conclusion of the hearing, the arbitrators deliberate on the evidence presented and the arguments made by both parties. They then reach a decision, known as the award, which is binding on the parties. The award provides a resolution of the construction dispute and outlines any remedies or damages awarded.

Section 47 & 48 of the Arbitration and Mediation Act, 2023, provides for the making of award and termination of proceedings. The award shall be in writing and should contain the names of the parties to the dispute, the reasons for the award unless the parties earlier agreed that no reason should be given by the arbitrator, the date the award was made, and the place of the arbitration. After the final award is made and issued to the parties, the arbitral proceeding is deemed to be terminated as provided in Section 48 of the Arbitration and Mediation Act, 2023.<sup>28</sup>

## 7.0 Enforcement of Arbitral Award

Enforcing arbitral awards in Nigeria is a crucial aspect of the construction dispute resolution process. It ensures that the decisions made by the arbitral tribunal are recognized and given effect, providing parties with a final resolution to their construction disputes.

a) **Domestic Awards:** Domestic awards are recognised as binding and can be enforced by making an application to the court.<sup>29</sup> To initiate enforcement, an application must be made to the High Court of a State, the High Court of the Federal Capital Territory, Abuja, or the Federal High Court. The application should include the original or certified copy of the award, along with a statement confirming non-compliance with the award and identifying the person against whom enforcement is sought.



<sup>26</sup> Article 24, Arbitration Rules, 2023.

<sup>27</sup> Article 29, Arbitration Rules, 2023.

<sup>28</sup> Article 42, Arbitration Rules, 2023.

<sup>29</sup> The enforcement of arbitral awards in Nigeria is governed by the Arbitration and Mediation Act, 2023. Specifically, under Section 57.



It is important to note that the time taken for the arbitration process is excluded when calculating the commencement of enforcement proceedings.<sup>30</sup> The court will review the award and, if satisfied, grant recognition and enforcement, treating the award as a judgment or order. This process ensures that the domestic arbitral award is recognized as binding and can be enforced through the Nigerian court system.

**b)International Awards:** Nigeria, as a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York,1958)recognizes, and enforces international arbitral awards. Pursuant to the Arbitration and Mediation Act, of 2023, an international award, regardless of the country it was made, is considered binding and can be enforced through a written application to the court. The applicant must provide the original or duly certified copy of the arbitration agreement, and if the award or agreement is not in English, a duly certified translation is required.

Additionally, Nigeria's adherence to the International Centre for Settlement of Investment Disputes (ICSID) Convention 1965 allows for the enforcement of foreign arbitral awards under the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967. Furthermore, foreign arbitral awards can also be enforced through the Reciprocal Enforcement of Judgments Act 1922 or the Foreign Judgments (Reciprocal Enforcement) Act, Cap. F35, LFN 2004. It is important to consider the applicable limitation period, which depends on the chosen enforcement procedure.

For instance, under the Foreign Judgment (Reciprocal Enforcement Act) 1990, the limitation period is six years from the date of the judgment, which includes the award. However, under the new Arbitration and Mediation Act, 2023<sup>31</sup>, the period between the commencement of the arbitration and the date of the award is excluded when calculating the time for commencing enforcement proceedings.

## 7.1 Challenging an Award

In the context of construction disputes, parties who intend to challenge an award delivered by an arbitral tribunal in Nigeria should be aware of the specific procedures and grounds for setting aside an arbitral award. While arbitral awards cannot be appealed against, they can be challenged through an application to set them aside. The party who wishes to challenge an arbitral award must demonstrate to the court that the award contains decisions on matters beyond the scope of the arbitration agreement, that an arbitrator has engaged in misconduct; that the award was fraudulently obtained; that the parties lacked the capacity to enter into the arbitration agreement; or that the award is contrary to public policy.<sup>32</sup>

To initiate the challenge, an applicant must file an originating motion supported by an affidavit, with a certified copy of the award attached thereto, and a written address within three months from the date of the award or the disposal of a request for an additional award. The respondent may file a counter-affidavit and written address to oppose the application. The court then relies on the affidavit evidence and written submissions to make its decision during the hearing of the application.

## 8.0 Conclusion

The construction industry in Nigeria has experienced remarkable growth, reflecting the nation's ambitions and development aspirations.



<sup>30</sup> Section 34(4), Arbitration and Mediation Act, 2023.

<sup>31</sup> Section 34(4), Arbitration and Mediation Act, 2023.

<sup>32</sup> Section 55(3), Arbitration and Mediation Act, 2023.



However, with growth comes the inevitable occurrence of disputes that can impede progress and hinder the industry's full potential. It is crucial for the industry to adopt an efficient and effective dispute-resolution mechanism to address these challenges. Arbitration emerges as the future of resolving construction disputes in Nigeria, offering a range of advantages that promote fairness, expertise, confidentiality, and expediency.

While arbitration presents a promising solution, the issue of enforceability has been a challenge in the past. Delays in enforcing arbitral awards have hindered the effectiveness of arbitration as a dispute resolution mechanism. However, with the recent enactment of the Arbitration and Mediation Act, Nigeria has taken a significant step toward addressing this challenge. The new Act provides a robust legal framework for the enforcement of arbitral awards, instilling confidence in parties seeking to resolve construction disputes through arbitration.

Furthermore, the Act introduces innovative mechanisms that can enhance the efficiency of construction dispute resolution. Parties now have the option to apply for an emergency arbitrator, enabling them to obtain interim relief promptly in urgent situations. The establishment of an award review tribunal offers a mechanism for reviewing awards, ensuring the correctness and fairness of the decisions rendered. Additionally, the introduction of third-party funding provides a viable solution to the high cost of construction disputes, allowing parties to access necessary resources for pursuing their claims. With the enactment of the Arbitration and Mediation Act and the introduction of innovative measures, Nigeria's construction industry is poised to thrive, fueled by a robust and reliable dispute resolution mechanism that meets the demands of a dynamic and rapidly evolving sector.

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