INTERNATIONAL ARBITRATION AND APPEARANCE RIGHTS OF LAWYERS: A REVIEW OF ARTICLE IV OF THE 1ST SCHEDULE TO THE ARBITRATION AND CONCILIATION ACT CAP A18 LAWS OF THE FEDERATION 2004

BY

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1. Introduction

The principal arbitration legislation in Nigeria, the Arbitration and Conciliation Act Cap A18 Laws of the Federation (LFN) 2004 ("the ACA") is a modified version of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration 1985 ("The Model Law"). The ACA incorporates the 1976 UNCITRAL Arbitration Rules as its First Schedule. Since the adoption of the Model Law by Nigeria in 1988, the Model Law was revised by UNCITRAL in 2006.[1]The UNCITRAL Arbitration Rules were revised in 2010 and 2013.[2]

Despite these various amendments, the outdated UNCITRAL Model Law 1985 remains on Nigeria's statute books. Through the work of various stakeholders in Nigeria's arbitration community, a modified version based on the UNCITRAL Model Law 1985 with the amendments as adopted in 2006 is currently before the Nigerian legislative house for adoption.

Some states in Nigeria pioneered by the Lagos State have also enacted their own arbitration legislation which is principally based on the 2006 revision to the Model Law. The Lagos State Arbitration Law ("LSAL") 2009 is to govern all arbitrations within the state except where the parties have expressly agreed that another arbitration law should apply.[3] The procedural rules for

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[1] The revised Model Law 2006 includes a revised section on the form of arbitration agreement and detailed provisions on the grant, recognition and enforcement of interim measures and preliminary orders. See United Nations General Assembly Resolution 61/33 of 18th December 2006 recommending the enactment of the 2006 revised articles of the Model Law. Amendments were made to Articles 1(2), 7 and 35(2). A new chapter IV A to replace article 17 and a new article 2 A were adopted by the UNCITRAL on 7th July 2006.

[2] Thus at present, there are three different versions of the UNCITRAL Arbitration Rules. The initial 1976 version, the 2010 revised version which includes provisions dealing with amongst others Multiple party arbitration and joinder, liability and a procedure to object to experts appointed by the arbitral tribunal and the 2013 version which incorporates the UNCITRAL Rules on transparency in treaty based investor state arbitrations with the addition of a new article 1 paragraph 4.

[3] See section 2 LSAL 2009.

arbitrations conducted under the Lagos State Arbitration Law unless otherwise agreed by the parties is the Lagos Court of Arbitration Rules.[4]

Neither the ACA nor the LSAL contain substantive provisions on the parties' right to counsel of its choice. Article IV of the Arbitration Rules in the First Schedule to the ACA and section 6 of the Lagos Court of Arbitration Rules do make reference to representation or assistance by a Legal Practitioner of the parties' choice or persons chosen by the parties.[5]

Arbitration is the preferred option for settlement of international disputes in view of the cross border nature of international relationships. The process allows parties from different jurisdictions settle their disputes outside state courts and with a key feature of empowering parties through the principle of party autonomy imbibed in the process which ought to include the liberty to have preferred counsel of choice.

Representation by counsel of choice in arbitral proceedings is of fundamental importance. As Gary Born rightly observed,[6]

> "*Parties right to select representatives of their own choosing is of fundamental significance: the quality, loyalty and vigour of a party's representative may have substantial consequences for the parties opportunities to present its case, for the outcome of the arbitral proceedings and the parties perceptions regarding the fairness and legitimacy of the process*."

The purpose of this paper is to examine global practices on the right to counsel in international arbitration proceedings irrespective of the jurisdiction in which the counsel is registered to practice, the extent to which a party in the light of article IV of the First Schedule in an arbitration seated in Nigeria has a right to appoint counsel or legal practitioner of its choice and consider whether or not the application of the provisions of Nigerian law meets global standards. Recommendations will be proffered in the interest of Nigeria's development as a preferred seat of international arbitration.

2. Global Review of the Parties' Right to Counsel in Arbitration Proceedings.

It is common for parties when involved in international arbitration to brief counsel working in international law firms. Such law firms are usually perceived as experienced in international arbitration practice and procedure even though counsel from such firms may not be licensed to practice law at the seat of the arbitration. It is noteworthy that arbitration law and practice is a specialized field and being an experienced lawyer from a particular jurisdiction does not connote having the relevant skill and experience necessary to conduct an arbitration matter. Thus, training

[4] See section 31 of the LSAL. See also section 1 of the Lagos Court of Arbitration Law No. 17 2009 and section 63 of the LSAL

[5] See article IV of the Arbitration Rules in the First Schedule to the ACA and article 6 of the Lagos Court of Arbitration Rules.

[6] Gary B. Born, International Commercial Arbitration (2nd edition, Wolters Kluwer 2014) volume 2 page 2833 paragraph 21.01

and experience in arbitration law and practice should usually be regarded as a prerequisite to handling an arbitration matter as counsel. Party autonomy, the bedrock of arbitration proceedings is regarded as one of its principal benefits. Party autonomy in arbitration allows parties the freedom with respect to various contending choices including resolution of the dispute by private persons chosen by them other than the state court system, choice with respect to procedural rules, laws, juridical seat of the arbitration and venue. Right to counsel of choice should be regarded as integral to the exercise of party autonomy in arbitration and without any restriction on geographical basis in international arbitration.[7]

Three main trends may be discerned in the practice of states pertaining to the freedom of parties to counsel of their choice. The first category are those countries which impose no restriction on the rights of choice of counsel in arbitration proceedings nor fetter foreign counsel representation. The traditional preferred and leading arbitration seats fall into this category i.e. London, Paris and Geneva.[8] In these leading arbitration seats, restrictions on foreign counsel representation only apply with respect to national court proceedings.[9]

The second category are jurisdictions in which though there were initial restrictions, necessary steps were taken to remove any fetter on the right to counsel of one's choice irrespective of that counsel not being licensed to practice law in the particular jurisdiction. Such jurisdictions include Singapore, Mauritius, Japan, China, Hong Kong and the state of California in the United States of America.[10] Not surprisingly, Singapore and Mauritius have emerged as new hubs for arbitration whilst California has commenced a vital step towards the growth of the state as a hub for international commercial arbitration with the removal of the restriction on foreign qualified lawyers in arbitration. The 2018 Survey of the School of International Arbitration at Queen Mary University of London in partnership with White & Case LLP in its identification of what drives users preference on seat of arbitration identified that the most essential reasons of the parties included the formal legal infrastructure of a given seat.[11]Countries with vision took the bold step of reviewing any laws which were inimical to goals of becoming truly global hubs for arbitration activities.

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[7] Ibid

[8]See section 36 of the English Arbitration Act 1996 (c.23). For Paris, see the International Comparative Legal Guide (ICLG) France International Arbitration 2019 at 6.5. https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/france [accessed on 23rd April 2020] For Switzerland, see the ICLG Switzerland International Arbitration 2019 at 6.5. available at https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/switzerland [accessed on 23rd April 2020]

[9] See sections 12 & 13 of the English Legal Services Act 2007. See also article 7 & 8 of the Switzerland Federal Act on the Freedom of Movement for Lawyers 2002

[10] See section 35 Singapore Legal Profession Act 2009 Cap 161; Section 31 of the Mauritian Arbitration Act 2008; See Article 5.3 of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers(Act No. 128 of 2003); Article 7 of the Decision of the Government Administrative Council of the Central People's Government concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade, Section 63 Hong Kong Arbitration Ordinance Cap 609 L.N 38. of 2011, and Article 15 of the California International Commercial Arbitration and Conciliation Act (Title 9.3 of the California Code of Civil Procedure § 1297.11 et seq.)

[11]2018 International Arbitration Survey available at <arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> [accessed on 23rd April 2020]

The third category are those jurisdictions that either expressly restrict the participation of foreign counsel from representing parties in arbitrations seated in their domain or those whose laws may be interpreted as having impliedly done so. For instance, Angola expressly prohibits the participation of foreign counsel in arbitrations seated in Angola whilst some other countries including Egypt and Nigeria have provisions in their Legal Practitioners Act[12]similar to the erstwhile provisions in the Singapore Legal Profession Act.

At various times, Japan, China, Singapore, Turkey, Portugal, Thailand and the former Yugoslavia have all forbidden foreign lawyers from appearing in arbitrations sited locally even if international in nature. These restrictions were defended many times on grounds that they were aspects of local bar regulations aimed at ensuring the integrity and quality of legal advice. To Gary Born, the restrictions were largely the product of protectionist lobbies aimed at excluding competition by foreign lawyers or at disfavouring foreign or other parties and which as a result in the face of sustained international and domestic criticism the restrictions were removed.[13]

2.1 The Singapore Story: The Visionary Journey to Change

The law of Singapore by virtue of the Singapore Legal Profession Act was initially restrictive on the important right to counsel of choice in arbitration proceedings.[14]The provision of Section 29(1) and 30(1) of the Singapore Legal Profession Act was interpreted by the Singapore High Court in *Turner (East Asia) PTE Limited* v *Builders Federal (Hong Kong) Ltd and Josef Gartner & Co*[15] that the representation of foreign counsel contravened the Act. The Court in its interpretation of the Act concluded thus:

> *"that the client's common law rights to retain whomsoever (from the category of unauthorized persons) they desire or prefer for their legal services in arbitration proceedings in Singapore has…been taken away by the Act*"[16]

By that decision, the Singapore High Court excluded a well-respected New York firm from representing a longstanding client in an international arbitration seated in Singapore. This decision seriously damaged Singapore's standing as an international arbitration venue and it was perceived that

> "*as long as…foreign counsel cannot represent their client in arbitration proceedings there…Singapore is less likely to be chosen as the situs of arbitration by parties contemplating arbitration*"[17]

The Singapore Parliament swung into action with various amendments, the first of which was to permit foreign counsel though working along with local Singapore counsel in matters involving

[12] See article 19 of the Angolan Arbitration Law No.16 of 2003
[13] Born supra n.6 at page 2838
[14] Act No.57 of 1966
[15] (1988) 42 BLR 122
[16] Born, supra n.6 at page 2838,
[17] Born supra n.6 at page 2838, footnote 36

Singapore law. Subsequently, with a later amendment in 2009, the parties' full freedom to select their representatives in locally seated arbitration matters was enshrined in Singaporean legislation. The amendment to the Legal Profession Act states thus;

> *35. – (1) Sections 32 and 33 shall not extend to –*
> *(a) any arbitrator or umpire lawfully acting in any arbitration proceedings;*
> *(b) any person representing any party in arbitration proceedings; or*
> *(c) the giving of advice, preparation of documents and any other assistance in relation to or arising out of arbitration proceedings except for the right of audience in court proceedings...*
> *(2) In this section, "arbitration proceedings" means proceedings in an arbitration which –*
> *(a) is governed by the Arbitration Act (Cap. 10) or the International Arbitration Act (Cap. 143A); or*
> *(b) would have been governed by either the Arbitration Act or the International Arbitration Act had the place of arbitration been Singapore*[18]

Underscoring the importance of this amendment were the words of Singapore's then Minister of Law who stated thus:

> *"We have made good progress in promoting Singapore as an arbitration centre…To further promote this objective, we have reviewed the requirement for foreign counsel to appear jointly with a Singapore lawyer. There is no similar restriction in the laws of the UK, Hong Kong, Malaysia and Australia. It is a requirement which puts us at a disadvantage with jurisdictions that do not have it, as it may be a factor against the use of Singapore as an arbitration venue. Foreign parties are more likely to recommend or choose a place with less restrictions to be competitive in this field, we need to remove this requirement and allow foreign counsel the choice of appearing without legal counsel*[19]

Other jurisdictions that have adopted the same stance by duly amending their laws include Japan China, Mauritius and Malaysia[20]

2.2 California

[18] See section 35 Singapore Legal Profession Act 2009, cap 161

[19]Born, supra n.6 at page 2839; S. Jayakumar, Minister of Law, Second Reading Speech on Legal Profession (Amendment Bill), Singapore Parliament Report, Volume No. 78 Column No. 96 (15th June 2004)

[20]Born, supra n.6 page 2839 footnote 40 and 41 – 2014 JCAA Rules Article 10 Chinese Arbitration Law (promulgated 31 August 1994) discussed in Song, National Report for China, in J. Paulsson(ed) international Handbook on Commercial arbitration 36 (1984) and update 2009. See section 31 of the Mauritian International Arbitration Act 2008 and article 5.3 of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No.128 of 2003); See section 3 of the Malaysian Legal Profession (Amendment) Act 2013. See also the situation in India and Thailand with much more limited rights of audience to foreign counsel in arbitration proceedings.

The State of California in the United States of America deemed it fit to effect amendments in its law to permit out of state counsel and foreign counsel to represent parties in California seated arbitrations. Initially when called upon in 1998 in Birbrower[21] to interpret the provision of section 6125 of the California Business and Professional Code, the Supreme Court in deciding whether an out of state attorney not licensed to practice law in California violated section 6125 of the Code took a position that it did violate the provisions of the Code which provides that "*No person shall practice law in California unless the person is an active member of the State Bar*."

In reaction to Birbrower, California's legislature adopted a Code of Civil Procedure which permitted an attorney admitted to the Bar of any other state represent the parties in the cause of or in connection with an arbitration in the state. The California Code of Civil procedure 1282.4 however did not address the issue of participation of foreign attorney in arbitrations seated in California. The response of the international arbitration community working with the Supreme Court International Commercial Working Group was to amend the law by enacting the California International Commercial Arbitration and Conciliation Act thereby removing the prohibition against foreign counsel representing parties in a California seated arbitration.[22] The provisions of the California International Commercial Arbitration and Conciliation Act (Title 9.3 of the California Code of Civil Procedure ("Cal CCP"), § 1297.11 et seq. states thus:

> *1297.185*
> *For purposes of this article, a "qualified attorney" means an individual who is not admitted to practice law in this state but is all of the following:*
> *(a) Admitted to practice law in a state or territory of the United States or the District of Columbia or a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent.*
> *(b) Subject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction.*
> *(c) In good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.*[23]

This amendment was widely regarded as overhauling California's reputation as an arbitration hub and the commencement of the journey to becoming an arbitration hub of the Pacific Rim and Latin America.[24]

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[21] Birbrower, Montalbano, Candon & Frank P.C v. Superior Court of Santa Clara [1998] 1 Cal P2.d

[22] The law stipulates that the prohibition will not apply if any of the following conditions are met i.e. 1. The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter. 2. The services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice. 3. The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice. 4. The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice. [**or**] 5. The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.

[23] CA Civ Pro Code § 1297.185 (2019)

[24] Giorgio Sassine "Eureka! Foreign Attorneys Can Now Participate in California-seated Arbitrations" (Kluwer Arb Blog Aug 29, 2018) available at

2.3 The Role of the Court: The Egyptian Experience

Egypt for a period lingered between the approach in most developed jurisdictions - permitting representation by foreign counsel - and that in less friendly arbitration jurisdictions, where representation in arbitral proceedings was restricted to members of the local bar. There was no clear legislative nor case law on the matter though most Egyptian practitioners presumed the position to be the more arbitration friendly nonrestrictive stance.[25]It however appears that with the decision of the Cairo Court of Appeal and the Egyptian Court of Cassation on the appearance of an American lawyer in an arbitration conducted in Cairo has provided authority to the debate on whether or not foreign counsel are restricted.

Parallel proceedings arising from an Egyptian seated arbitration after the award was issued came before the Cairo Court of Appeal and the Court of Cassation.[26]The question before the court was whether foreign lawyers though normally prohibited from practicing law in Egypt except on a *prohac vice* basis may represent the parties in an arbitration conducted in Egypt. The Cairo Court of Appeal on its review of the matter upheld the decision of the Appellate Misdemeanors Court for the Central Cairo District (the Appellate Court) following a criminal trial of the claimant's foreign counsel on the charge of unauthorized practice of law. [27]Many years later, the Court of Cassation ruled on the application to set aside the partial award and final award rendered in the same arbitration in which the foreign counsel had represented the claimant. The decision of both courts was that arbitrating parties can agree to appoint foreign lawyers on their behalf in arbitration proceedings seated in Egypt. [28]In the arbitration proceedings under reference, the claimant had been represented by an American lawyer in addition to local counsel. In the proceedings, the respondent objected to the American lawyer's participation on the basis that he could not represent the party to an arbitration held in Egypt and relied on the provision of the Legal Profession Law, the law concerned with the regulation of legal services in Egypt. Article 3 of the Egyptian Legal Profession Law states as follows;

> *"Without prejudice to the provisions of the laws regulating the judicial authorities and the provisions of the Civil and Commercial Procedure Code, non-lawyers shall not be permitted to exercise the functions of a lawyer. Among the functions of a lawyer are the following activities: (1) Appearing on behalf of the parties before courts, arbitral tribunals, administrative entities exercising judicial functions, criminal and administrative interrogation authorities, and police*

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http://arbitrationblog.kluwerarbitration.com/2018/08/29/eureka-foreign-attorneys-can-now-participate-california-seated-arbitrations/ [accessed on 24th April 2020]

[25] Amr Omran "The Appearance of Foreign Counsel in International Arbitration: The Case of Egypt" (2017, Journal of International Arbitration 34(5)) available at <https://www.researchgate.net/publication/321167994_The_Appearance_of_Foreign_Counsel_in_International_Arbitration_The_Case_of_Egypt> [accessed on 23rd April 2020]. page 903, See also footnote 13.

[26] Ibid at page 904, see footnote 14

[27] Ibid at page 904; See also footnote 15

[28] Omran supra n.25 at page 904

stations; representing such parties in the cases initiated by or against them; oral advocacy; and, judicial procedures related to the foregoing"[29]

Article 3 reserves the right of appearance before an arbitral tribunal to members of the Egyptian Bar. The objection to the American lawyer's appearance was dismissed by the arbitral tribunal which went on to find on the merit in favour of the claimant. The respondent then instituted a private criminal action against the claimant's foreign counsel and an annulment application before the Cairo Court of Appeal. In the criminal matter brought before the trial court, the court was satisfied that the American counsel had violated the Legal Profession Law and was held liable to pay fines and damages.

The American counsel then appealed the trial court judgment. Joining her in the appeal was the office of the public prosecutor. The appellate court accepted the appeal and overturned the decision of the trial court. To the appellate court, the provisions of the arbitration law[30]stipulates the freedom of the parties to select the procedural rules the arbitral tribunal is to apply and put particular emphasis on the ability of the parties through their agreement to select governing rules of procedure which do not necessarily require representation by lawyers such as the ICC Rules 1998. The court then noted that one of the ways in which arbitral proceedings are different from court litigation is that representation by lawyers in not mandatory in arbitration. To the court, the validity of party representation before arbitral tribunals depends on satisfying the basic requirement of the law of agency for issuing a valid power of attorney. To the court, if the foregoing requirements are observed it makes no difference whether a party's representative is a lawyer or non-lawyer.[31]Following on, the appellate court noted that the validity of the representative power to appear on behalf of the principal in an arbitration is the function of the arbitral tribunal and a function which the tribunal should exercise before addressing the merits of the dispute. To the appellate court the tribunal having entertained the issue upon the respondent's objection and having concluded that the counsel's appearance in the proceedings was appropriate had fulfilled its task. The appellate court did recognize that the American counsel was a legal expert and the managing partner of the Cairo office of an international law firm. It however considered that the claimant had engaged the American counsel as a consultant rather than a lawyer in the strict sense of the Legal Profession Act. On the above considerations, the appellate court acquitted the American counsel and rejected the respondent's civil plaintiff's action for damages.

At Cassation, the judgement of the appellate court reason was upheld in full in favour of the claimant.[32]On its losing the application, the respondent had filed application to set aside the partial and final award issued by the arbitral tribunal. The applications were filed with the Commercial Arbitration Circuit of the Cairo Court of Appeal, the court exercising curial functions over the arbitration. The respondent applicant had argued that both awards should be set aside as they were vitiated by a violation of public policy being the American counsel's involvement in the arbitration, which to it constituted a crime under the Legal Profession Law. Counsel's argument

[29] Omran supra n.25 at page 905; Egyptian Legal Profession Law No. 17/1983 concerning the Legal Profession (as amended), Official Gazette, Issue No. 13 bis,31 Mar. 1983, effective as of 1 Apr. 1983.
[30] Law No. 27/1994 promulgating the Law of Arbitration in Civil and Commercial Matters (as amended), Official Gazette, Issue 16 bis, 21 Apr. 1994, effective as of 22 May 1994.
[31] Omran, supra n.25, at page 907
[32] Cairo Court of Appeal, Petition No. 42119/JY77 (Criminal Cassation), 1 Feb. 2012

was that the Legal Profession Law explicitly reserved the exercise of certain functions to members of the Egyptian Bar including party representation in arbitral proceedings. Counsel argued that the tribunal disregarded these restrictions by allowing the American counsel to make oral submissions and cross examine all the witnesses. However, the Cairo Court of Appeal rejected the respondent applicant's ground for annulment in its entirety. An application was made by the respondent applicant to the Court of Cassation challenging the Cairo Court of Appeal's decision. The Court of Cassation overturned the judgement on grounds unrelated to the question of the counsel's involvement in the arbitration.

On the second review, the Cairo Court of Appeal ruled against the respondent applicant. In arriving at its decision, the court made remarks in respect of the nature of arbitration and the binding effect of the parties' choice of arbitration rules. The Court of Appeal inter alia mentioned that the parties' choice of the ICC Rules 1998 denoted their acceptance of those rules which became an integral part of the arbitration agreement. When the matter was challenged for the second time before the Court of Cassation, the Court of Cassation rejected the application and in reaching its decision relied first and foremost on the binding effect of the parties' choice of arbitration rules. To the court, article 21(4) which permits party representation by non-lawyers does not contradict Egyptian public policy.[33]This decision of the Egyptian court has been perceived as adding to the momentum of arbitration in Egypt and said to break antiquated views which see arbitration through the prism of court adjudication. The progressive stance taken by the Egyptian court in this matter by differing to the autonomy of the parties with regards to party representation has no doubt contributed to the success of the Cairo Centre for International Commercial Arbitration and Cairo's growing reputation on the international arbitration plane. The learned author, Omran however concludes that in spite of this positive development, legislative intervention is needed to complete what the courts have started by removing party representation in arbitration from the provisions of the Legal Profession Law and including a clear reference in the Arbitration Law as to the rights of parties to appoint representatives of their choosing.[34]

3. The Position in Nigeria

Article IV of the Arbitration Rules incorporated as the First Schedule to the ACA provides that parties may be represented by legal practitioners of their choice. The article goes on to state that the names and addresses of such Legal Practitioners must be communicated in writing to the other party with such communication specifying whether the appointment is being made for purposes of representation or assistance.

It may be argued that the provisions of the First Schedule to the Act cannot be read in isolation but with all extant laws in Nigeria including the Legal Practitioners Act 2004 ("LPA").[35] The LPA expressly restricts persons entitled to practice as barristers and solicitors in Nigeria to those whose names are on the roll.[36]As provided by the Act, exceptions may be made to the restriction by an application to the Chief Justice by or on behalf of any person appearing to him to be entitled to

[33]Omran supra n.25 at page 910; see also footnote 39
[34] Omran, supra n.25, at page 919
[35]LPA Cap L11 LFN 2004
[36] See section 2 of the LPA

practice as an advocate in any country where the legal system is similar to that of Nigeria.[37]The provision restricting the right of audience to local registered lawyers is similar to the provisions in other jurisdictions where the provisions of the regulatory law were amended.

The section of the LPA restricting right of audience to lawyers on the roll does not specifically refer to arbitration proceedings however it stands to reason that the coverage of the LPA applies to all legal practitioners irrespective of whether the particular proceeding is an arbitral or court proceeding. It is noteworthy that the Act refers to arbitral proceedings in the provisions on the right of audience and precedence of legal practitioners.[38]Section 8(4) of the LPA provides that legal practitioners appearing before any court, tribunal or person exercising jurisdiction conferred by law to hear and determine any matter (including an arbitrator) shall take precedence among themselves according to the table of precedence set out in the First Schedule to the Act. It may therefore be argued that the intendment of the law is not to exempt foreign counsel appearing in arbitration proceedings from the provisions of the Legal Practitioners Act therefore requiring their prior registration on the roll. In Okafor v Nweke,[39]Honourable Justice Onnoghen JSC on the meaning of Legal Practitioner as defined under the Act stated thus;

> *"From the above provision, it is clear that the person who is entitled to practice as a legal practitioner must have had his name on the roll…For a person to be qualified as a legal practitioner he must have had his name on the roll otherwise he cannot engage in any form of legal practice in Nigeria"*

The question of who is a legal practitioner for purposes of the LPA has come up before Nigerian courts. In Shell v FIRS[40] the competency of the claimant to commence arbitration proceedings came up before the Nigerian Court of Appeal. The Respondent argued that the law firms that signed the Notice of Arbitration not being recognized or licensed to practice law in Nigeria or sign legal processes as legal practitioners in the Federal Republic of Nigeria rendered the proceeding incompetent. In upholding the argument of the Respondents, the Honourable Justice Yahaya of the Nigerian Court of Appeal stated thus;

> *"It is correct, that Article 3 (3) of the 1st Schedule to the Arbitration Act lists what the Notice of Arbitration shall contain. Article 4 of the 1st Schedule thereto, gives the parties the right to be represented or assisted by Legal Practitioners of their choice and the names and address of such legal practitioners must be communicated to the other party. By the provision of sections 2 (1) and 24 of the*

[37] Section 2b of the LPA. See also Adedoyin Rhodes-Vivour "Commercial Arbitration Law and Practice in Nigeria through the Cases" (LexisNexis Africa, 2016) paragraph 16.3.2 "In such a situation, if the Chief Justice is of the opinion that it is expedient to permit that person to practice as a barrister for the purposes of proceedings described in the application, the Chief Justice may by warrant under his hand authorise that person on payment to the registrar of such fee not exceeding N50 as may be specified in the warrant to practice as a barrister for the purpose of those proceedings and of any appeal brought in connection with those proceedings.

[38] Ibid

[39] [2007] 10 NWLR (Pt 1043) 521, 531

[40] Shell Nigeria Exploration and Production. Ltd & 3 Ors v Federal Inland Revenue Service & Anor (Unreported. Appeal No. CA/A/208/2012)

> *Legal Practitioners Act 2004, a legal practitioner is that person entitled to act as barrister and solicitor as his name is on the roll of such practitioners in Nigeria. The appellant's decided to be represented by legal practitioners at the Tribunal. It behoves them, not only to communicate the names and addresses of the legal practitioners, but to have them sign the processes, as their representatives since they did not sign same, themselves. So, for the Notice of Arbitration and consequently, the claim to be competent, recourse must be made to the Legal Practitioners Act 2004. Are CLIFFORD CHANCE LLP and AELEX 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 before the Tribunal, which no doubt, is a legal proceeding.* ***OKETADE VS ADEWUNMI (SUPRA) @ PAGE 70****. Once the initiating process was invalid, null and void, the Tribunal had no jurisdiction to act on it. All proceedings before it are a nullity, and are hereby struck out. "*

Thus in Shell v FIRS, the court applied the definition in the LPA in deciding the question of who is a legal practitioner in Nigeria in relation to an arbitral proceeding. This issue of the competency of a foreign lawyer to represent a party in an arbitration proceeding seated in Nigeria has also come up in an arbitration proceeding. In that matter an objection was raised by respondent counsel that a foreign registered lawyer could not represent the claimant as the counsel. The arbitral tribunal came to the conclusion that the foreign lawyer who was not on the roll of the Legal Practitioners of Nigeria could not represent the respondent as this will contravene the provisions of the Legal Practitioners Act.[41]

4. Institutional Arbitration Rules on Representation Rights of Parties

The Arbitration Rules in the First Schedule to the ACA is applicable in domestic arbitrations.[42] The rules are not mandatory in international commercial arbitration even if seated in Nigeria by virtue of section 53, Part III of the Arbitration and Conciliation Act which provides as follows:

> "*Notwithstanding the provisions of this Act, the Parties to an International Commercial Agreement may agree in writing that the dispute in relation to the agreement shall be referred to arbitration in accordance with the Arbitration*

[41] See Kolawole Mayomi "Foreign Counsel in Nigerian Arbitrations: How Far Can They Go?" (SPA Ajibade & Co, 2016) available at http://www.spaajibade.com/resources/wp-content/uploads/2016/11/FOREIGN-COUNSEL-IN-NIGERIAN-ARBITRATIONS-HOW-FAR-CAN-THEY-GO.pdf [accessed on 24th April 2020] See also Oghogho Akpata and Adewale Atake "Domestic Arbitration in Nigeria: Can Foreign Counsel Still Run the Race?" (Templars, Dispute Resolution Practice Group, Newsletter, 2012) available at https://www.templars-law.com/wp-content/uploads/2015/05/DOMESTIC-ARBITRATION-IN-NIGERIA-CAN-FOREIGN-COUNSEL-STILL-RUN-THE-RACE.pdf [accessed on 24th April 2020]

[42] See section 15(1) of the ACA

Rules set out in the First Schedule to this Act, or the UNICITRAL Arbitration Rules, or any other International Arbitration Rules acceptable to the Parties."[43]

Arguments have been advanced that by designating the arbitration international and adopting International Arbitration Rules which do not fetter the right to counsel, the restrictions in the Legal Practitioners Act may be circumvented.[44] Indeed, most leading institutional rules expressly or impliedly recognize the parties' right to counsel of their choice. Some of these rules, mainly refer to the right to counsel without the express wide stipulation in relation to choice though the common law principle of a person's right to counsel of choice is universally recognized. The ICC Arbitration Rules provides that:

"The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers."[45]

The LCIA Rules provides in similar terms that a party may be represented in the arbitration by one or more authorized legal representatives appearing by name before the Arbitral Tribunal.[46] The 2018 Hong Kong International Arbitration Rules provides that parties may be represented by persons of their choice.[47] Some of these rules do fetter the right to counsel of choice for instance the Rules of Arbitral Procedure of the Indonesian Board of Arbitration require Parties to appoint Indonesian counsel in addition to foreign counsel if an arbitration involves questions of Indonesian Law.[48] The rules of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures 2013 recognise that the provisions of the applicable law may fetter a party's right to counsel of its choice. The applicable rule 26 provides as follows;

"Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

Thus, it cannot simply be stated that reliance on rules that permit representation by counsel of choice without any fetter would override the provisions of applicable laws containing fetters. Should a party rely solely on the agreed arbitration rules, and disregard any express fetter in the

[43] See also section 57 (2) of the ACA which stipulates what will be considered as international arbitration under the Act.
[44] See Akpata and Atake supra n. 41. See also Fikayo Taiwo "Nigeria's Rules on Party Representation in Arbitration Proceedings: A Clog in the Wheel to Attraction?" (Kluwer Arbitration Blog, 2019) available at http://arbitrationblog.kluwerarbitration.com/2019/08/22/nigerias-rules-on-party-representation-in-arbitration-proceedings-a-clog-in-the-wheel-to-attraction/ [accessed on 24th April 2020]
[45] Article 26(4) of the ICC Rules of Arbitration 2017
[46] Article 18 of the London Court of International Arbitration Rules 2014
[47] Article 13(6)
[48] See article 5 of the BANI Arbitration Rules and Procedure 2018

substantive law of the seat of the Arbitration there may be adverse consequences as an Arbitral Tribunal is obliged to comply with the mandatory norms of the law of the seat. Redfern and Hunter[49] refers to the seat of an arbitration as the legal center of gravity and restates the worldwide recognized principle that an arbitral tribunal must respect the laws of the seat. The concept that an Arbitration is governed by the law of the place where it is held i.e. the seat or forum or *locus arbitri* is well established in both the theory and practice of Arbitration.[50] It therefore appears that any legal provision as may be contained in the laws of the locus despite the application of any international arbitration rules ought to be respected.

5. Case for Review

A legal framework guaranteeing the common law principle of a party's right to counsel of its choice and without any fetters is a *sine qua non* in international arbitration, a process involving parties from across state borders. This freedom should be considered as an inherent aspect of the arbitral process and based on each party's internationally guaranteed opportunity to present its case.[51] The learned author Gary Born observes that there are some jurisdictions where doubts still exist as regards the ambit of the right to counsel.[52] To Gary Born, denial of this right or imposing restrictions is not only inimical to a state aspiring to become a favoured seat of arbitration but also contrary to a basic objective of international arbitration being the provision of neutral dispute resolution processes, the procedures adapted to the expectation and needs of parties from different state borders.[53] Not surprisingly, the most preferred arbitration seats are those without any fetters on the right to counsel.[54]The author observed that restricting the parties' right to counsel of choice could be perceived as contrary to the provisions of Article II(1) and II(3) of the New York Convention ("NYC") aimed at guaranteeing respect for international arbitration agreements entered into between parties and considering the material element of such agreement with the various freedoms including the freedom of parties to select their legal representation.

Gary Born proposes that the NYC be interpreted as requiring recognition of the parties' agreement with regards to rights of representation by counsel of their choice in their arbitral proceedings.[55] Neither Article IV of the Arbitration Rules in the First Schedule to the ACA nor the Rules of the Lagos Court of Arbitration (applicable to arbitrations conducted under the auspices of the LSAL except the parties agree otherwise) expressly stipulate the right to counsel of choice without any restriction whatsoever. The controversy which has been brought to the fore in Nigeria in respect of the LPA's interpretation of persons who may act as Legal Practitioners in Nigeria and its application before arbitral proceedings is yet to be settled by the highest court of the land. Does the prohibition on right of audience in the LPA apply to lawyers appearing before arbitral proceedings or are such lawyers outside the ambit of the LPA? The courts of some countries for

[49] Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Matthew Hunter "Redfern and Hunter on International Arbitration (6th edition, Oxford University Press 2015) at page 173, paragraph 3.56
[50] Ibid
[51]Born supra n.6 at chapter 21, page 2833-2836
[52]Born supra n.6 at chapter 21, page 2837-2839
[53] Born supra n.6 at chapter 21
[54] Supra n.8
[55] Born supra n.6 at page 2834-2835, footnote12

instance Egypt have chosen an arbitration friendly interpretation whilst unfortunately some jurisdictions continue to forbid either expressly or impliedly foreign counsel from representing a party in international arbitrations seated in its national territory. The Chartered Institute of Arbitrators (CIArb) London Centenary Principles for an effective and efficient seat in international arbitration identified a clear right for parties to be represented at arbitration by representatives (including but not limited to legal counsel) of their choice whether from inside or outside the seat.[56]

In 2018 and 2019, the London Court of International Arbitration (LCIA) reported that none of the parties in arbitrations conducted pursuant to the LCIA Rules during the reported years, selected Nigeria as a seat.[57] Nigeria in its bid to develop into a favoured seat of arbitration needs to as a matter of urgency, guarantee the right of party representation of choice in international arbitration. Thus, steps need to be taken for an amendment of the LPA to remove any fetter whatsoever (express or implied) on the right to freedom of counsel in international arbitration. International arbitration is a specialized field and qualification and experience at the national bar does not equate to expertise in international arbitration nor a mechanism for enforcing professional standards in international arbitration. Local bar admission is rarely a parameter for suitability or expertise to act as counsel in arbitral proceedings, either domestic or international.

6. Conclusion

The right to counsel of choice is regarded as a general and fundamental principle in international arbitration. Any derogation from this principle negatively impacts on the principle of party autonomy in arbitration and can erode the parties' confidence in the proceedings. Nigeria in its quest to join the league of favoured and preferred seats of arbitration should take the necessary steps by legislative action to amend the provisions of any law including the LPA and the ACA with the view to removing any controversy as regards right of representation in international arbitration. Useful lessons can be learned from other jurisdictions in a bid to ensure a guaranteed right to counsel of choice in international arbitration proceedings seated in Nigeria.

[56] No. 5 available at <https://globalarbitrationreview.com/digital_assets/9bd26b47-c325-457a-9c1f-ca775028e2b0/London-Centenary-principles.pdf>[accessed on 23rd April 2020]

[57] Taiwo supra n. 44; LCIA 2018 Annual Casework Report available at <file:///C:/Users/doyin/Downloads/LCIA%202018%20Annual%20Casework%20Report.pdf> [accessed on 24th April 2020]; LCIA 2019 Annual Casework Report available at file:///C:/Users/doyin/AppData/Local/Temp/LCIA%202019%20Annual%20Casework%20Report.pdf [accessed on 20th May 2020]

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