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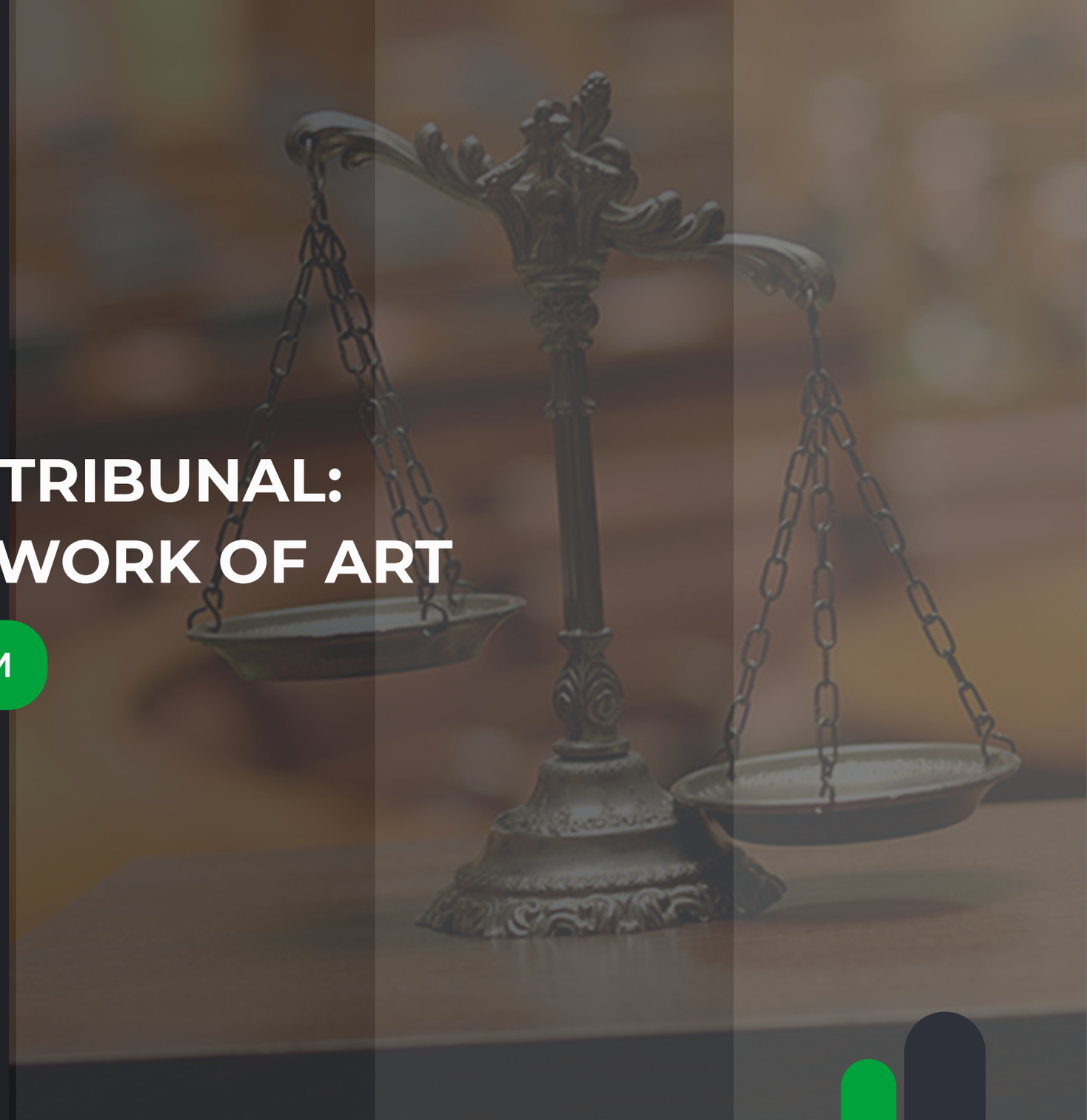
AWARD REVIEW TRIBUNAL: NOT ENTIRELY A WORK OF ART

Opemipo Omoyeni ACIArb, LLM



The Nigerian Senate passed the Arbitration and Mediation Bill, 2022 (the "Bill") ***on May 10, 2022***. As at the time of writing this paper, the Bill is yet to receive presidential assent. Among other notable features introduced in the Bill, this paper seeks to analyse the provision of the Bill introducing the "Award Review Tribunal" into the Nigerian arbitral ecosystem.

Section 56(1) of the Bill introduces the concept of the Award Review Tribunal and affords parties the opportunity to submit the review of any ensuing award from an arbitral tribunal of first instance to the Award Review Tribunal. Whilst ***not entirely a novel concept*** given the party autonomy doctrine, the Bill codifies this concept. Its practical utility for arbitrating parties is an entirely different question altogether. As will be seen in the succeeding paragraphs, this author posits that the introduction of this concept will not solve the perennial problem of delay and attendant cost implications that has plagued Nigerian seated arbitrations.

The author's critique proceeds on three different premises. First, the author queries the rationale behind the scope of the decision-making authority afforded to the Award Review Tribunal. Second, the author posits that the Award Review Tribunal does not translate to a real-life option for arbitrating parties considering the peculiarities of the Nigerian legal system. Third, the author explores and recommends the options that could have been resorted to by the drafters of the Bill.

Standards for Review: Merits or Procedural Impropriety?

Section 55(3) of the Bill enumerates exhaustive grounds for annulling an award namely (i) legal incapacity of a party to the arbitration agreement (ii) invalidity of the arbitration agreement under Nigerian law (iii) general fair hearing grounds (iv) award exceeding the scope of dispute submitted to arbitration (iv) non -compliance with arbitration agreement on the composition of the arbitral tribunal (v) arbitrability of dispute submitted to arbitration and (vi) public policy.

Section 56(1) of the Bill provides that the Award Review Tribunal's scope of review is delimited to the grounds enumerated above and as more particularly detailed in Section 55(3). This approach essentially translates that the Award Review Tribunal has a limited reference i.e., the Award Review Tribunal is to screen the award exclusively with respect to the grounds set forth in Section 55(3) in the same manner as a court.

A cursory review of the grounds set forth in Section 55(3) will reveal that the grounds for review do not border on the merits of the decision taken by an arbitral tribunal. Starting with the New York Convention, this is the ***global approach*** taken in respect of judicial review of an arbitral award. The rationale and philosophy underlying this position border on the need to respect the sanctity of the arbitral process and by extension, the all-important doctrine of party autonomy. Parties have picked the arbitrators to resolve their dispute, they should be allowed to sink and swim with the ensuing decision of their chosen arbitrators. The courts should refrain from meddling with the merits of the said decision and should only concern itself with procedural proprieties and certain jurisdictional considerations alone , without more.

As such, it is worth asking the utility of parties appointing an additional tribunal to review an award on the same grounds a court is statutorily required to especially when the parties can choose to have further recourse to the courts to fulfil the same role. In real life, the award review tribunal does not present an exciting proposition to disputing parties and practitioners in the context of the Nigerian legal system where the ***delay and inefficiency in justice administration still remains a pressing concern***. These concerns are further addressed below.

Costs and Delay

A related concern to the challenges posed above is the attendant unwanted trio consequences of unnecessary costs incurrence, delay and inconsistent/ differing decisions of both the Award Review Tribunal and the High Court in respect of which an application to set aside has been brought before. Where parties opt for inserting the Award Review Tribunal in their arbitration agreements, they have unwittingly agreed to add another layer to the process. Where parties do not dispute the outcome of an ensuing award, this may not present a problem, but this is unlikely to be so as a challenge of the award is much more likely than immediate compliance by the losing party.

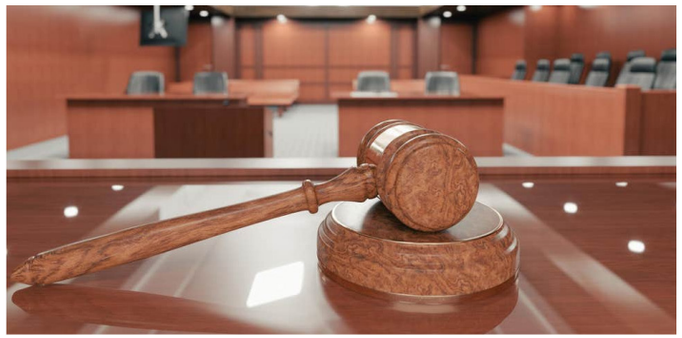
As such, where parties agree to resort to an Award Review Tribunal after the arbitral proceedings, the arbitral process starting from the initial proceedings become a five-tier process (i.e. **– Arbitral Tribunal – Award Review Tribunal – High Court – Court of Appeal – Supreme Court**) with the attendant costs and delay implications. In opting for the arbitral process, parties expect a measure of speed in the administration of justice without the delay and time wasting associated with court room litigation. The insertion of the Award Review Tribunal as part of the annulment process only complicates issues and lengthens the time for justice delivery up to the publication of the award to the enforcement of award. A practical example is pertinent to be made of possible challenges that may surface and derail the timely enforcement of an award.

A losing defendant in an arbitral proceeding where an Award Review Tribunal is opted for may:

(a) seek recourse to the Award Review Tribunal instead of going straight to the High Court

(b) choose to employ whatever dilatory tactics at the proceedings before the Award Review Tribunal by for example challenging the arbitrator on impartiality grounds and where such challenge is unsuccessful, appeal to the courts whilst bringing an application before the Court to stay the proceedings before the Award Review Tribunal on fair hearing considerations. The singular point on an arbitrator bias may be litigated up to the Supreme Court without the Award Review Tribunal having had an opportunity to review the award with attendant time and cost implications. A substantive challenge of the award in itself can also be made up to the Supreme Court.

Ergo, the introduction of the Award Review Tribunal simpliciter without other adjustments to the arbitral framework does little impact to the existing landscape and ***the issues plaguing Nigerian seated arbitrations.*** A proposed adjustment might have been to curtail the appellate process in respect of arbitral awards and making either the High Court or Court of Appeal as the court of final arbiter in respect of arbitral awards related appeals.



Conclusion – Making the Award Review Tribunal a fine piece of art: Recommendations

In view of the above concerns raised, the author proposes the following recommendations. The draftsman of the Bill may consider permitting the Award Review Tribunal to be able review an award on the merits. This thesis ensures the quality, and the integrity of the arbitral process is assured. The Arbitral Review Tribunal will sit as an appellate court of some sorts in respect of decisions of an arbitral tribunal with no limit on its review powers. The High Court or the Court of Appeal will retain its limited review powers on the grounds provided in Section 55 of the Bill.

In addition to the foregoing, as earlier alluded to above, there may be compelling argument for making the High Court or Court of Appeal a final arbiter in respect of cases in which parties agree to follow the Award Review Tribunal track. This will lessen the time spent in prosecuting arbitral awards related cases up to the Supreme Court which might take as long ***as more*** than ***ten years.***

In making the foregoing recommendation, the author is aware of the need for finality in the arbitral process and the counter arguments bordering on this principle that can be raised against this proposition. The author however considers that the tradeoff of an erstwhile five tier process for a three or four tier process (as the case may be) might be considered a much more attractive proposition than the ***status quo.*** Furthermore, since the Arbitral Review Tribunal track will not be mandatory, parties may weigh their options and indicate their preferences in their arbitration agreements.

Finally, the draftsman may also consider inserting a statutory default interest on awards as a deterrence measure to ensure that immediate satisfaction of award is encouraged. As such, the usual dilatory tactics of embarking on appeals to frustrate the arbitral process will be curbed since an appealing party will be wary of the increasing interest amounts on account of its refusal to honor the award.

Author Profile

Opemipo Omoyeni is a Nigerian Qualified Legal Practitioner called to the Nigerian Bar in 2014. He holds a LLM (summa cum laude) in International Dispute Settlement, a program jointly administered by the Graduate Institute of International and Development Studies, Geneva and the University of Geneva, Switzerland.

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