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Post-Award Objections to the Jurisdiction of Arbitral Tribunals

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This article will examine the content and rationality of the law on the extent to which a party can raise, in court proceedings to enforce or set aside an arbitral award, an objection as to non-compliance with mandatory requirements for the commencement or conduct of arbitration. In broad terms, the law is to the effect that it will by then be too late to make such an objection. This is the effect of ss. 12(3) and 33 of the Arbitration and Conciliation Act, 1988 (the "**ACA**") and 19(3) and 58 of the Lagos State Arbitration Law, 2009 (the "**LSAL**").

Sections 12(3) of the ACA and 19(3) of the LSAL (a) forbid a party to raise an objection to the jurisdiction of an arbitral tribunal after the delivery of points of defence in the arbitration and (b) mandate a party to raise an objection as soon as the matter alleged to be beyond the scope of an arbitral tribunal's authority is raised during the arbitral proceedings. Only the arbitral tribunal before or in the course of making the award, not a court after the award has been made, can entertain a belated jurisdictional challenge, and then only "***if it considers that the delay was justified"***. The courts should not usurp the power of arbitral tribunals and must not encourage late challenges to the jurisdiction of arbitral tribunals.

Section 33 of the ACA provides that "***[a] party who knows*** *- (a) that any provision of the Act* ***from which parties may not derogate*** *or (b) that any requirement under the arbitration agreement, has not been complied with and* ***yet proceeds with the arbitration without stating his objection to such non-compliance within the time limit provided therefor shall, be deemed to have waived his right to object to the non-compliance****."* (Emphasis supplied.) (See also section 58 of the LSAL.) Thus, a party to arbitration must within the time permitted by the law object to the contravention of the law relating to mandatory requirements for initiating or conducting arbitration.

The foregoing principles have been consistently upheld by courts in Nigeria. See, *e.g., NNPC v. Klifco (Nig.) Ltd.* (2001) 10 NWLR (Pt. 1255) 209 (jurisdiction of arbitral tribunal); and *Mekwunye v. Imoukhuede* (2019) 13 NWLR (Pt. 1690) 439 (waiver of appointment of arbitrator). The principles make good sense. They ensure that (a) the parties in arbitration should show good faith and fair dealing in their conducts to each other and (b) a claimant in breach of the mandatory requirements for initiating arbitration should not be made to suffer a loss or suspension of his right to remedy the non-compliance.

We do not mean that there is a fundamental philosophical difference between litigation and arbitration on the point of speed of objection. True, it is often said that objections to jurisdiction in litigation can be made at any time, but this is only a very broad generalization. Some objections to jurisdiction in litigation must be made promptly (*e.g.* non-compliance with pre-action notice rules and objections as to service). And there are objections to jurisdiction in arbitration that cannot be waived or cured, for example, where the

dispute in issue is not arbitrable at all. In principle, each of litigation and arbitration recognizes objections that must be made early and objections that can be made at any time.

However, the ACA and LSAL provisions in point are perhaps not as sufficiently detailed as they could be. Late objections should be allowed in a number of instances that the legislation as it currently stands does not address explicitly. These include situations where (i) the facts constituting non-compliance were not known to the claimant earlier, (ii) the claimant has been misled by the respondent, (iii) a claimant early explicitly preserved its right to object later and (iv) the parties have agreed that the objection should be raised outside the statutorily-stipulated period.

Every one of these grounds should constitute a cogent and sufficient stand-alone basis for a late jurisdictional challenge: each should be sufficient for a court to consider that the delay was justified within sections 12(3) of the ACA and 19(3) of the LSAL. Amending the legislation to say so explicitly would be a welcome development.