

INSOLVENCY AND ARBITRATION – NOT EASY BEDFELLOWS



By:

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Introduction



- The recession has led to an increase in the number of insolvent entities. Insolvent Defendants are more and more common.
- The use of arbitration rather than litigation as a preferred means of dispute resolution has seen a remarkable increase in recent times.
- With this trend, many parties now find themselves contemplating claims (based on contracts with arbitration agreements) against insolvent entities or in dispute with a party who becomes insolvent.



- “**Insolvency**” simply means the state of being insolvent; inability to pay one’s debts.
- The Insolvency regime in Nigeria is governed primarily by the provisions of the Companies and Allied Matters Act Cap C20 LFN 2004.
- Section 409 of CAMA defines when a company is deemed unable to pay its debt. i.e. a statutory demand has been served under the hand of the creditor requiring a payment of a sum exceeding ₦2000 and the amount has remained unpaid for a period of over three (3) weeks.
- BOFIA and the Nigeria Deposit Insurance Corporation Act (NDIC) stipulates the parameters to determine when Banks or Financial Institutions are insolvent.

ARBITRATION



- “**Arbitration**” simply means the use of an Arbitrator to settle a dispute.
- An “**Arbitrator**” is an independent person or body officially appointed to settle a dispute.
- Arbitration proceedings in Nigeria are creatures of contract arising between parties to refer their disputes to arbitration.

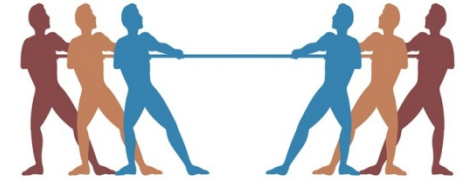


- Arbitration is primarily governed by the Arbitration and Conciliation Act Cap A18 LFN 2004

BENEFITS OF ARBITRATION



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Insolvency Policy Objectives advance:

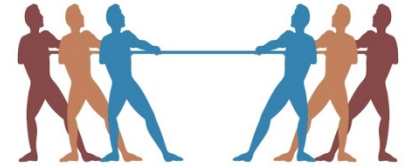
- the equality of creditors.
- centralization of claims
- rescue of insolvent party
- a high degree of state control
- a transparent and accountable process
- a coordinated distribution of assets
- authority usually derived from statute.

“Due to competing policy objectives, Insolvency and Arbitration are not easy bedfellows.”

Arbitration Policy Objectives advance:

- party autonomy
- certainty in commercial transactions
- autonomy from the state
- proceedings are private and confidential
- authority derived from the contractual relationship of the parties.

HOW DO INSOLVENCY REGULATIONS IMPACT ON ARBITRATION PROCEEDINGS:



- They generally limit the category of disputes that are arbitrable.
- Provisions in CAMA, BOFIA and the NDIC Act give the Federal High Court exclusive jurisdiction.
- **Mandatory stay of all other proceedings in favour of the insolvency proceedings (generate the most obvious impact of insolvency on arbitration)**
- **An Excellent example is Francis Atoju v. Triumph Bank Plc. & Anor (2016) 5 NWLR (pt. 1505) 252** which was determined by the Court of Appeal, Lagos Division.

FRANCIS ATOJU V. TRIUMPH BANK PLC. & ANOR (2016) 5 NWLR (PT. 1505) 252

BACKGROUND

- By a Service Agreement between **Francis Atoju** (“**Atoju**”) and **Triumph Bank Plc.** (“**Triumph**”) **Atoju** was employed as the Managing Director of **Triumph**.
- In 2004 a dispute arose and **Atoju** commenced arbitration against **Triumph**.
- **Atoju** claimed a number of declaratory and monetary reliefs and **Triumph** also counterclaimed against **Atoju**.
- Prior to the delivery of the Award, **Triumph**’s operating license was revoked by the Central Bank of Nigeria and NDIC, by operation of law became the Statutory Receiver/Manager of **Triumph**.

FRANCIS ATOJU V. TRIUMPH BANK PLC. & ANOR (2016) 5 NWLR (PT. 1505) 252

- By an application by **Triumph**, NDIC was joined as the 2nd Respondent/Counter-Claimant in the Arbitral proceedings.
- On the 12th of July 2006, the Arbitral Tribunal gave an Award dismissing **Atoju's** claims in its entirety and granted all **Triumph's** counterclaim except the claim for general damages.
- **Atoju** approached the Federal High Court to set aside the Award but the FHC refused to set aside the Award.
- **Atoju** then appealed to the Court of Appeal.

What was the primary legal issue the Court of Appeal had to decide?

Whether the Award should be set aside on the ground that the Arbitrators lacked the jurisdiction to make the Award in view of the provisions of:

Section 41 of the Banks and Other Financial Institutions Act Cap B3 LFN 2004
Section 417 of the Companies and Allied Matters Act Cap C20 LFN 2004.

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Section 41 of the Banks and Other Financial institutions Act (BOFIA) Cap B3 LFN 2004 provides:

“(1) Notwithstanding anything to the contrary contained in any law or enactment, no suit shall be instituted against a bank whose control has been assumed by the Corporation.”

“(2) If any such proceeding is instituted in any court or tribunal against the bank it shall abate, cease or be discontinued without further assurance other than this Act.”

Section 417 of the Companies and Allied Matters Act (CAMA) also provides that:

“If a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose.”

FRANCIS ATOJU V. TRIUMPH BANK PLC. & ANOR (2016) 5 NWLR (PT. 1505) 252



In a judgment delivered on the 1st of November 2013, Chinwe Eugenia Iyizobia J.C.A. held thus:

“..... The arbitral tribunal lacked the jurisdiction to continue with the proceedings after the license of the 1st Respondent was withdrawn and its affairs taken over by NDIC.”

At that point in time any proceeding can be continued only after leave had been obtained from the Federal High Court and against NDIC for and on behalf of the bank.

This appeal consequently has merit. It is allowed. The judgment of the lower court affirming the Award is set aside. The proceedings of the arbitral tribunal are struck out. I make no orders as to costs.”
(Emphasis mine)

INTERNATIONAL ARBITRATION AND INSOLVENCY - ELEKTRIM V. VIVENDI

The English and Swiss decisions in *Elektrim v. Vivendi* also present excellent examples of the impact of insolvency on arbitration proceedings.

The English Decision:

- In the course of the LCIA arbitration, *Elektrim* was declared bankrupt by a Warsaw District Court
- *Elektrim* contended that because of this and Polish Bankruptcy law, the arbitration agreement in the TIA had been terminated thereby revoking the Tribunal's jurisdiction to determine the dispute.
- Despite the objection, the LCIA Tribunal gave an interim award accepting jurisdiction and gave an Award in favour of *Vivendi* on the merits.
- *Elektrim* then challenged the award and argued essentially on the interpretation of "law suit pending" within Articles 4.2(f) and 15 of the EC Regulation. The High Court held (later confirmed by the Court of Appeal) that the phrase "law suit pending" was sufficiently wide to include an arbitration for the purposes of Articles 4.2(f) and 15 of the EC Regulation and declined to set aside the Award.

INTERNATIONAL ARBITRATION AND INSOLVENCY - ELEKTRIM V. VIVENDI

The significance of the English decision is that where an entity was subject to Polish insolvency proceedings but was involved in an arbitration in London, prior to those insolvency proceedings being commenced, it was the law of England (the law of the seat) that would determine the effect of the insolvency proceedings on the pending arbitration.

Furthermore, nothing in English domestic law prevented the arbitration proceedings from continuing despite the Polish Insolvency proceedings.

The Swiss Decision:

- In the second arbitration seated in Geneva, *Vivendi* contended that the law of the arbitral seat should determine whether the tribunal retained jurisdiction over the dispute regardless of *Elektrim's* bankruptcy.
- The ICC tribunal and subsequently the Swiss Supreme Court applied Article 142 of the Polish Insolvency law to the effect that once *Elektrim* had fallen bankrupt any arbitration clauses lost their effect and any pending arbitration were discontinued.

Lessons Learned

1. We must be alert to the interplay between arbitration and insolvency regulations that apply to any given situation.
2. The public policy behind arbitration as a consensual and decentralized process of resolving disputes is subordinate to the public interest of ensuring a transparent and centralized insolvency procedure.
3. Proceedings before an arbitral tribunal come within the ambit of Sections 412 and 417 of CAMA and Sections 41 of BOFIA.

Lessons Learned

4. Non-compliance with applicable insolvency regulations which stay or terminate arbitral proceedings is a ground for the challenge of an Award.
5. The Federal High Court can exercise its discretion to grant leave to continue proceedings (including arbitration) against a company in liquidation in some of the circumstances enumerated in **Abekhe v Nigerian Deposit Insurance Corporation (1995) 7 NWLR (Pt. 406) 228 @ 242-243.**
6. Some of the circumstances are:
 - (a) Where the company is a necessary party to an action against it and other persons as in this case ; or
 - (b) Where an action is the most convenient method of trying a question; or
 - (c) Where the claim is for recovery of possession.

WHAT DOES THE FUTURE PORTEND FOR INSOLVENCY AND ARBITRATION

- Where the claim is for monetary relief alone, leave is less likely to be granted by the Federal High Court under Section 417 of CAMA.
- Post-insolvency arbitration agreements should and will be honoured. See Section 425 of CAMA allows a liquidator to bring or defend any action or legal proceeding.

WHAT DOES THE FUTURE PORTEND FOR INSOLVENCY RELATED ARBITRATION

- Law reform to allow the following three kinds of insolvency related arbitration to comport with insolvency policies and meet the standards of enforceability of Awards under the New York Convention because they are (i) capable of resolution by arbitration and (ii) it should not be against public policy to enforce an arbitral award concerning them:
 - a. Claims Arbitration – Treatment of the Award will be reserved for the Federal High Court to deal with. See Section 425(2) (c) of CAMA:
 - b. Arbitration of Disputes arising in insolvency cases – the Federal High Court can authorize the liquidator and the opposing parties to agree to arbitrate. See Section 427 (5) of CAMA:
“Any person aggrieved by an act or decision of the liquidator, may apply to the court for such order in the premises as it thinks just; and the court may confirm, reverse, or modify the act or decision.”
 - c. Restructure Arbitration – Arbitration of debt restructuring issues which parties are unable to resolve. See Section 539 of CAMA.

INSOLVENCY RELATED ARBITRATION AND THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY

- The UNCITRAL Model Law on Cross-Border Insolvency as it has been enacted in several jurisdictions encourages courts and different estates in different countries to cooperate.
- The relevant courts are enjoined to harmonize and insolvency and arbitration laws and principles in the resolution of disputes.



CONCLUSION

- Our Insolvency Laws are antiquated and there is urgent need for law reform in this area.
- We need a well-articulated stand-alone Insolvency and Cross Border Insolvency Law which is in tune with modern trends and also acknowledges some of our peculiarities.



- BRIPAN continues to advance the cause for new legislation in this area.
- Arbitration no doubt has significant benefits in dispute resolution and such reforms should see a greater use of arbitration in insolvency cases where possible.

THANK YOU FOR LISTENING!

