



KEYNOTE ADDRESS BY

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**AT THE 2023 ANNUAL CONFERENCE OF THE CHARTERED INSTITUTE OF
ARBITRATORS, NIGERIA BRANCH**

**HELD ON WEDNESDAY, 8TH NOVEMBER, 2023
AT THE HARBOUR POINT, VICTORIA ISLAND, LAGOS.**

PROTOCOLS:

It is my privilege to be invited to deliver a Keynote Address at the 2023 Annual International Conference of the Chartered Institute of Arbitrators, Nigeria Branch. To the very distinguished Executives and Members of this noble Institute, I say thank you for this honour and for creating this platform to facilitate broader exchanges on arbitration in Nigeria and beyond.

2. Permit me to observe that the activities of the Institute inclusive of this conference and others such as the ICC Africa Conference on International Arbitration, are very important to us as a government and as a nation, because your efforts will go a long way in achieving our desire to elevate Nigeria to the status of the arbitration capital of Africa.

3. The role of international arbitration in promoting international commerce and the affairs of States cannot be overemphasized. It is trite that where there is violation of a right, there must be a commensurate remedy. Arbitration and other ADR options thus provides the appropriate means of ventilating disputes in an economically viable manner. Arbitration and ADR provide avenues to remedy the weaknesses or deficiencies inherent in our conventional dispute resolution efforts through litigation.

4. Despite the positive and promising efforts of some African States in deepening the practice and conduct of arbitration proceedings, Africa is still playing the catch-up game in international commercial arbitration. I will make references to some positive developments across the continent to show that the disposition and viewpoint of African States to arbitration is progressive and responsive to global trends.

Arbitration and Mediation Act 2023

5. In Nigeria, a new Arbitration and Mediation Act 2023 (the “AMA 2023”) came into force on 26 May 2023. The AMA 2023 repealed the previous over-35-year-old Arbitration and Conciliation Act 1988 (the “ACA 1988”), to provide a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation. It is worthy of note that AMA 2023 clarified grey areas in ACA 1988, provided a modern legal framework and introduced innovative and laudable provisions that will ease arbitration practice in Nigeria and beyond. Some key provisions include: Accessible Electronic Communication, Third-Party Funding, Reduction in Default Number of Arbitrators, Appointment of Emergency Arbitrator, among others. I will just dwell on a few as follows:

- a) Grounds for Setting Aside of Awards: the grounds for setting aside an arbitral award in Nigeria has not only been harmonized with those obtainable under the UNCITRAL Model Law and the New York Convention, but the Applicant is required to demonstrate that the Award has caused or is likely to occasion substantial injustice. Thus, the AMA 2023 has not only limited judicial intervention in arbitration but also seeks to guarantee the finality of arbitral award.
- b) Award Review Tribunal (the “ART”) – the Act created the ART to serve as an avenue for an aggrieved party to seek a first level review of an arbitral award arising from arbitration proceedings seated in Nigeria. The ART is indeed innovative and is similar to the ad- hoc Committee under the ICSID annulment procedure provided for under Article 52 of the ICSID Convention.
- c) Promotion of Mediation - AMA 2023 right from its title accords premium to mediation, and it provided a comprehensive procedural and substantive legal framework for the recognition of mediation and settlement agreements.
- d) Consolidation of Arbitration Proceedings and Joinder of Parties: related arbitral proceedings can now be consolidated while additional or new parties can be joined to arbitral proceedings as part of the innovations brought about by AMA 2023.
- e) Enforcement of arbitration agreements – unlike the discretionary regime under ACA 1988, it is now mandatory for Nigerian courts to enforce arbitration agreements by ordering stay of proceedings in cases where parties already subscribed to an arbitration agreement.
- f) Power of Court to grant Interim Reliefs: The new legal regime empowers a court to enforce interim measures issued by an arbitral tribunal and also to issue interim measures of its own.
- g) Arbitrator’s Immunity: AMA 2023 guarantees the security of an arbitrator, an appointing authority, or an arbitral institution, to enable them act without fear of liability, by conferring them with immunity in the performance of their duties.

- h) Timelines for arbitration proceedings: The Act provided timelines to prevent delays in the determination of arbitration-related court proceedings, including proceedings to challenge an arbitral award, which are to be concluded within 4 months and any appellate proceedings is to be concluded within 6 months.
- i) Legal representation in arbitration proceedings: The Act liberalizes representation of parties in arbitration proceedings beyond the limitation to Nigerian lawyers. This enables parties to explore the services of other professionals including foreign counsel (whether from Africa or elsewhere). This will also encourage foreign entities to agree to designating Nigeria as a seat for their arbitration.

6. From the foregoing, it is clear that the enactment of the Arbitration and Mediation Act 2023 symbolizes a big statement on the future perspectives of Nigeria to arbitration and mediation. It marks a paradigm shift in the jurisprudence of arbitration and ADR in Nigeria by underscoring the importance of party autonomy and demonstrates the commitment of Nigeria to position herself as an attractive seat of arbitration or major arbitration and mediation hub in Africa and globally. The legislative intervention is quite apposite in view of the growing involvement of the government and commercial entities in arbitration locally and globally, either ad hoc arbitrations, international commercial arbitrations or State-Investor arbitration.

7. In a most innovative and forward-looking move, the new Act enables the applicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) in the enforcement of awards in Nigeria and also adopted provisions under the UNCITRAL Model Law on International Commercial Arbitration. The foregoing reforms will strengthen Nigeria's legal and institutional framework for arbitration and meditation, with consequential benefits for the legal industry and the economy in general. The fact that our courts of law are still expected to perform critical roles pre and post arbitration proceedings mean that we must also do more in the area of administration of civil justice. It is gratifying to note that AMA 2023 has provided some timeframe for arbitration related matters before the courts to avoid undue delays.

National Policy on Arbitration and Alternative Dispute Resolution

8. At the moment and against the background of our recent experiences, the Federal Ministry of Justice in consultation with relevant stakeholders has developed a draft National Policy on Arbitration and Alternative Dispute Resolution, which will compliment compliance with the provisions of AMA 2023 and expand the frontiers of

the practice and jurisprudence of arbitration in Nigeria. The Policy will soon be presented to the Federal Executive Council for approval. Some of its key highlights are:

- i. The policy recognises the principle of party autonomy in arbitration, whether in local or international contracts, but seeks to promote or project Nigeria as the seat for arbitration in respect of contracts to be performed in Nigeria.
- ii. The Policy stipulates preference of Nigeria as the Seat and Venue of all arbitrations involving Nigerian governmental bodies and accommodates the interests of both Federal and State Institutions.
- iv. The Policy favours the appointment of Nigerian lawyers as Lead Counsel. However, where a foreign counsel is engaged on grounds of experience and expertise, the foreign Counsel is expected to partner with Nigerian counsel to enable development of local content in the legal profession.
- v. The Policy identifies critical timelines for the resolution of Judicial proceedings arising from arbitration and ADR and stipulates that such cases shall be determined by the courts within a period not exceeding 60 days. The Policy also seeks to promote Customary Arbitration system as a dispute resolution mechanism.

Arbitral Institutions in Africa

9. Africa is replete with arbitral institutions across the continent which is estimated to be over 90 in number at the moment. At the London International Disputes Week (LIDW) 2023 International Arbitration Day, which held on 15 May 2023, participants considered the changing perspectives on arbitration in Africa and noted that there was shifting attitudes towards arbitration across Sub-Saharan Africa, but that the challenges and obstacles confronting arbitration in Africa (inclusive of existing legal and judicial regimes, unfavourable State policies, etc.) are still limiting factors.

10. Despite the huge number of arbitral institutions in Africa, the ICC (International Chamber of Commerce) and the LCIA (London Court of International Arbitration) constitute the institutions dominating international arbitration in Africa. In a 2018 survey of almost 800 arbitration practitioners and users by White & Case and Queen Mary University, African respondents chose the ICC and LCIA as the top two arbitral institutions. Thankfully, the Lagos Court of Arbitration (LCA) ranked as the highest

African arbitration institution. Other arbitral institutions in Nigeria are: Regional Centre for International Commercial Arbitration – Lagos (RCICAL), Lagos Court of Arbitration (LCA), Chartered Institute of Arbitrators (CIArb) UK (Nigeria Branch), Lagos Chamber of Commerce International Arbitration Centre (LACIAC), International Centre for Arbitration and Mediation Abuja (ICAMA), etc.

11. According to a survey conducted by the School of Oriental and African Studies (SOAS), Arbitration in Africa Survey 2020 Report, the top five arbitral centers in Africa are: the Arbitration Foundation of Southern Africa (AFSA), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Kigali International Arbitration Centre (KIAC), the Lagos Court of Arbitration (LCA), and the Nairobi Centre for International Arbitration (NCIA). Other arbitral institutions of note in Africa include: Ouagadougou Arbitration and Mediation & Conciliation Centre (OAMCC), Tanzania Institute of Arbitrators (TIArb), etc. The 2020 Survey also listed Johannesburg, Lagos, Cairo, Cape Town, and Durban as the top five cities in Africa reputed for serving as seats of arbitration proceedings.

12. The reality is that majority of arbitration matters involving African parties are still resolved outside the continent. According to available reports of the International Chamber of Commerce (ICC), 130 parties from sub-Saharan Africa accounted for about 5% of all parties before it in 2019. African States such as Nigeria was involved in 19 cases, South Africa – 13, Mauritius - 10. In the same vein, the 2019 record of the London Court of International Arbitration (LCIA) also shows that African parties were involved in over 10% of its cases. In 2019, African States were also active in investor-state arbitrations (about 15%) before the International Centre for Settlement of Investment Disputes (ICSID).

13. The situation in South Africa is also reflective of the African perspective on international commercial arbitration. The watershed in arbitration which was brought about by the enactment of the Arbitration and Mediation Act 2023 was earlier witnessed in South Africa with the enactment of the International Arbitration Act, 2017 ("IAA"), which adopted provisions of the UNCITRAL Model Law into South African law. South Africa earlier domesticated the New York Convention through its Recognition and Enforcement of Foreign Arbitral Awards Act, 1977. The impact of this enabling legal regime is deductible from the 2022 report of the Arbitration Foundation of Southern Africa ("AFSA"), South Africa's foremost arbitral institution, which reflected its major users as South Africa, Zimbabwe, Mauritius, Botswana, Australia, Jersey, and the UAE.

14. Other jurisdictions across Africa require appropriate legislative interventions to ensure that domestic arbitration legislations are modernized to reflect international best practices. This is more important because the choice of seat of arbitration is substantially influenced by the home legal system, which determines the framework for the law governing the arbitration procedure and enforcement of the arbitral award. There is also a need for improvement in African perspectives on choice of arbitrators which are currently slanted in favour of senior lawyers or retired judges while neglecting practitioners with requisite expertise and experience.

P&ID: Lessons Learned and Way Forward

15. On the sidelines of the recently concluded International Bar Association conference in Paris, I was part of a Panel of Discussion consisting of Attorneys-General from Africa on the theme "*Working with external counsel in litigations and arbitrations: perspectives of African States*". I dwelt on the challenges and experiences which Nigeria faces in the prosecution or defence of international arbitrations and litigations, especially in working with foreign law firms. Expectedly, I made reference to the recent huge victory which Nigeria recorded against Process & Industrial Developments Ltd ("P&ID") which enabled the country to avoid a whopping US\$11billion liability.

16. Let me reiterate that the victory is not just a victory for Nigeria but a significant positive impact for arbitration as a mechanism for dispute resolution as it has dispelled the notion that the secrecy of international arbitration can be used to shield corporate criminal actions from public scrutiny. Let us pause for a second and imagine that a company with no assets and that has made no investment almost walked away with USD11 billion of taxpayers' money. That is a third of Nigeria's foreign reserve, without as much as even securing the project site for the project. That would be legitimizing criminality. This would not have helped in making international arbitration more attractive, especially to States.

17. The judgment found that the award had been obtained by fraud and in a way which was contrary to public policy. In particular, the Judge concluded that P&ID obtained the award only by "practising the most severe abuses of the arbitral process". The judgement highlighted the fact that arbitrators can probably do better than they currently do in ensuring that they intervene especially when the issue of incompetent

representation is quite obvious during the proceedings. This is particularly true when States and State Entities are the Respondents, with significant taxpayers' money at stake. It should have been obvious to the arbitrators that something was wrong with the manner that Nigeria was defended in the arbitration. As a State we have also learnt a lesson that not only must we ensure that the lawyers engaged are competent and experienced but we must also ensure that they are patriotic and morally upright.

18. Like P&ID case, Nigeria is currently involved in other international commercial and State-Investor arbitrations which are ongoing outside Africa for transactions that occurred in Nigeria. It is not unlikely that had the P&ID arbitration being conducted in Nigeria, the outcome would have been different as some of the challenges that Nigeria faced in the proceedings might have been avoided. The Tribunal could have been requested to even conduct a visit to the *locus in quo* to ascertain if P&ID actually secured a project site at all. Our current reforms through AMA 2023 and the National Arbitration Policy will prevent Nigeria from slipping into such a *cul-de-sac* again. To drive home this point, the majority decision by Lord Hoffman and Sir Anthony Evans, awarded to P&ID the sum of US\$6.597 Billion (Six Billion, Five Hundred and Ninety-Seven Million US Dollars) plus interest at the rate of 7% from 20th March, 2013. However, Chief Bayo Ojo, SAN – the FRN appointed arbitrator, in his minority decision, awarded the sum of US\$250 Million to P&ID as fair compensation.

19. I must state that there are various lessons from the outcome of the P&ID case including issues of statutory or regulatory non-compliance, corruption, negative impact of inter-agency squabbles on state defence, etc but I have only limited the issues to those that would be of immediate relevance to this gathering and I assure you that the totality of the lessons has substantially shaped our perspective on arbitration and will serve as a guide in dealing with other cases.

Technology

20. I now consider the place of technology in arbitral proceedings. I believe that we must be proactive in envisioning and adopting the emerging technologies that will reshape arbitration globally in the coming years.

21. Already, we have seen how video-conferencing and virtual hearing rooms have enabled remote participation during the pandemic. But the metaverse and virtual reality platforms may soon allow arbitrators and parties to interact in fully immersive simulated environments. Electronically submitted pleadings and evidence can be

instantly accessed worldwide through cloud computing. Artificial intelligence could help analyze massive amounts of data to strengthen fact-finding. Blockchain has the potential to highly secure and simplify document exchanges. Machine learning can help identify patterns and predict case outcomes.

22. These innovations raise important questions about the ethics, admissibility and reliability of technologically enabled arbitration processes. As practitioners, we must be cautious yet open-minded in exploring such new tools. Their prudent adoption could widen access to arbitration and deliver faster, cheaper justice without compromising due process. This conference offers an excellent avenue for delegates to discuss how African nations can harness emerging technologies to upgrade their arbitration frameworks for the digital age. The Ministry of Justice on its part is considering and actively taking steps to adopt and encourage the use of safe and ethical technology. In addition to what we are already doing, we welcome your expert guidance on preparing for the hi-tech future of arbitration.

Conclusion

23. In concluding this address, I wish to recommend that African States (both public and private stakeholders) should be guided by the CIArb London Centenary Principles in improving their perspectives, culture, jurisprudence and operationalization of arbitration practices and procedures. The London principles comprise of ten fundamentals including:

- a. an arbitration law providing a good framework for the process, limiting court intervention, and striking the right balance between confidentiality and transparency
- b. an independent, competent and efficient judiciary
- c. an independent, competent legal profession with expertise in international arbitration
- d. a sound legal education system; the right to choose one's legal representative, local or foreign
- e. ready access to the country for witnesses and counsel and a safe environment for participants and their documents
- f. good logistical support, including transcription, hearing rooms, document handling, and translation

- g. professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel
- h. well-functioning venues for hearings and other meetings
- i. adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements
- j. immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.

24. Let me commend the Institute again for the array of salient topics outlined for discussion at this conference to x-ray the status, legal framework (practice and procedure), challenges of arbitration in Africa as well as charting a course for the future.

25. Ladies and gentlemen, I appreciate the opportunity granted to me to share my thoughts and perspectives. I wish you all fruitful deliberations as the Conference progresses.

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Wednesday, 8th November, 2023