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Arbitration Practice in the Communications Industry in Nigeria: A Review of Nigerian Communication's Arbitration Law and Guidelines

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Abstract
Entrepreneurs prefer to invest in States where business climate, which includes the law, is conducive to fair yields on capital whereas consumers of services need satisfactory service delivery. The Communications industry - relatively new in Nigeria – is no exception. Disputes are a common detractor; consequently an efficient dispute resolution mechanism for the communications industry is a desideratum for a developing nation such as Nigeria. The Nigerian Communications Act 2003 Cap 97 Laws of the Federation of Nigeria, 2004 which provides for settlement of communication disputes, inter alia, by means of arbitration attempts to achieve this goal. This paper examines the law and Rules, highlighting deficiencies therein, and proffers suggestions for addressing these short-comings.
Key words: arbitration, award, law, Rules, Procedure, amendment, development, judicial review, Arbitration and Conciliation Act.

1. Introduction

Arbitration as a means of resolving disputes is of great antiquity and pre-dates organized or state judiciaries. It is almost the same age with man himself. However, with the advent of state courts and consequent hostility by judges towards arbitration, its significance became blurred and almost lost. In time state courts chewed more than they could swallow and the resultant bursting of their seams, so to say, forced a return visit to be made on private methods of resolving disputes, the foremost being arbitration. Today every one acquainted with and fully aware of the contemporary scene clamours for a full restoration and use of arbitration as one of the ways of releasing contending parties from the delays, misconceptions, harshness, rigidity and high cost inherent in the Nigerian court system. Happily this has been done and this is no place to advertise arbitration further. The Nigerian Communications Commission Act provides, *inter alia,* for arbitration as a means of fast-tracking resolution of disputes in the communications industry. Stability and continuity of the industry is a *sine quanon* for development in Nigeria and so the introduction of arbitration in its scheme is welcome. This paper reviews/examines the extant law and Rules highlighting and discussing only areas of perceived serious deficiencies such as, but not limited to the arbitrator's appointment procedure, enforcement and impeachment of the Commission's award and challenge procedures. Some hiatuses, lacunas, inconsistencies and bottle-necks were detected. The provision for judicial review of the Commission's decisions in regards to arbitration was seen as a clog in the wheel of progress. Suggestions for improvement made in course of discussion are finally summarized as the conclusion.

2. Arbitration: Background

Arbitration is a judicial resolution of dispute, intensively private in nature, making little or no use of the court system, but dependent on national laws and international conventions and treaties on arbitration. John Paris speaks of arbitration as the submission of a dispute between two or more parties for decision by a third party of their choice.[1] As for Maxwell, arbitration is a private process whereby a private disinterested person called an arbitrator, chosen by the parties to a dispute . . . acting in a judicial fashion but without regards to technicalities applying either existing law or norm agreed by the parties, and acting in accordance with equity, good conscience and in perceived merit of the dispute makes an award to resolve the dispute.[2] Other text-writers have added their voices.[3] Advantageously, arbitration as a private dispute resolution method has the potency of finality and easy enforcement of its outcome - the award - through the public court system. Other schemes of

[1] John Paris, *The Law and Practice of Arbitration*, George Godwin Ltd, Great Britain, 1975, 1
[2] Fulton Maxwell, *Commercial Alternative Dispute Resolution*, The Law Book Co. Ltd, 1989, 55
[3] Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 2004, 27; Halsbury's Laws of England,18th Edition, 1999, 38. For judicial definition see *Collins v Collins*, 28 LJCH, 186; *Nigerian National Petroleum Company v Lutin Investment Ltd*. (2006) Nigerian Supreme Court Quarterly Review 77 at 112. For a critique on definitions see Ibe, C. E. *Insight on the law of Private Dispute Resolution*, El'Demark Ltd, Enugu pp 28 to 30

private dispute resolution (ADR) such as, Conciliation, Mediation and Settlement are hortatory in nature and require a post process contract or agreement so as to make their outcome binding and enforceable. Arbitration in one fell swoop achieves all these because an arbitral award is at par with a court judgment.[1]

Comparing arbitration with other ADR systems, the Chairman of New York State Mediation Board states: "mediation and arbitration have conceptionally nothing in common. The one (mediation) involves helping people to decide for themselves, the other (arbitration) involves helping people by deciding for them."[2] Developing nations such as Nigeria in her current stage of economic progress needs the sort of help that arbitration offers. The hall-mark of arbitration is party autonomy. The concept of party autonomy recognizes the need for disputants employing arbitration in resolving their differences to make input in what should be done, how it should be done, and who should do what, thus exercising control over their matter. Idornigie writes: "The trade mark of these provisions is the use of the words 'the parties are free to agree' or 'unless otherwise agreed by parties' or 'subject to any contrary agreement by the parties.' This is sometimes referred to as 'two level systems' or a 'default provision.' This is a way of drafting a provision where the first part of the article grants the parties general freedom in regulating an issue and the second part sets the default rules which apply only when no such party stipulation is made. Such default rule is usually worded thus: 'failing such an agreement.'"[3] Arbitration laws and rules address issues ranging from enforcement of arbitration agreement, procedure for appointment and challenge of arbitrator, enforcement and impeachment of awards to court's abstention in arbitral matters. Usually no provision is made for judicial review of an arbitral award. The law and rules are framed in such a way as to make it easy, cheap and simple to apply. Noteworthy is that these provisions are time-conscious, eliminating delays. Advantages of resorting to arbitration are galore. These include appointing an expert in a field as arbitrator especially in disputes of technical nature; the expert having been chosen by the parties; arbitration is relatively cheap, confidential, thus not exposing parties' privacies and business secrets; it takes into account parties' convenience which include time, venue, economic and political conditions, and it avoids rancorous disputations as is normally seen in courts. The Nigerian Arbitration and Conciliation Act[4] which governs arbitration generally, is modeled after the UNCITRAL Model Law and it captures the essence of all these. Against this background, the Nigerian Communications Act and the Commission's Guidelines (Rules) which provide for arbitration in the communications industry are examined. Although the attempt to isolate and insulate communication disputes from the courts is laudable, yet there exist a need to retouch the law and Rules, thus bringing improvement that will approximate the needs of society and thus draw further investment and investors into Nigeria.

3. An overview of Nigerian Communications Commission's Arbitration

Basis for NCC Arbitration

Section 3 (1) and (2) of The Nigerian Communications Act[5] established the Nigerian Communication Commission (NCC) as a body Corporate with perpetual succession and empowers the Commission, *inter alia*, to do all such things as are necessary for or incidental to carrying out of its functions and duties as provided for in the Act. Among the functions of the Commission is "examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communications industry".[6] This provision is further elaborated on in part VII of the Act, wherein the Commission is empowered to resolve disputes between persons who are subject to the Act ("the parties") regarding any matter under the Act or its subsidiary legislation.[7] The Commission is equally enjoined to resolve Consumer's dispute in relation to

[1] In *Ras Pal Gazi Construction Co. v Federal Capital Development Authority* (2001) *Nigerian Weekly Law Report* (pt.722) at 561, The Supreme Court of Nigeria held that "a valid award on a voluntary reference operates between the parties as a final and conclusive judgment upon all matters referred." In *Onwu v Nka* (1996) 7 *Nigerian Monthly Appeal Cases 183* the same Court also held that the "law is well-settled that where disputes or matters in difference between two or more parties are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes . . . and a decision is duly given, it is conclusive and unimpeachable (unless and until set aside on any of the recognized grounds) as the decision of any constituted court of the land. Such a decision is consequently binding on the parties and the court in appropriate case will enforce it".

[2] Meyer, "Functions of Mediator in Collective Bargaining," cited in P. Gulliver, *Dispute and Negotiations: A cross Perspective"* New York, Academic Pres 1919, 210

[3] Idomigie P. O., "The Nigerian Arbitration and Conciliation Act and the Principle of party Autonomy" in "*Thematic Issues in Nigerian Arbitration Law and Practice*" ed. Dr. Offonze D. Amucheazi *et al,* Onitsha, Varsity Press Ltd 9, 10 citing Binder P, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London Sweet and Maxwell, 2000) pp 241-313.

[4] Cap A18 Laws of Federation Nigeria, 2004

[5] Nigerian Communications Act Cap. N97, Laws of the Federation of Nigeria, 2004

[6] *Ibid* Sec. 4 (p)

[7] *Ibid* Section 73

matters of customer service and consumer protection.[1] Clearly the Commission has power to arbitrate between service providers on the one hand and consumers on the other hand and between different service providers within the industry. In order to accomplish this, the Act empowers the Commission to use such dispute resolution methods as the Commission may determine from time to time including mediation and *arbitration*.[2]
The law further provides that subject to the objects of the Act and any guidelines issued by the Commission, the Commission may resolve a dispute in such manner including but not limited to Alternative Dispute Resolution processes and upon such terms and conditions as it may deem fit.[3] Interestingly subsection (2) thereof directs that the Commission shall be guided by the objective of establishing a sustained dispute resolution process that is fair, just, economical and effective, devoid of legal form or rules of evidence and that at all times the Commission shall act according to the ethics of justice and the merit of each case.[4] Quite apart from these, the Act provides that the Commission shall prepare a Consumer Code and such a Consumer Code shall model procedure for the handling of customer complaints and disputes including an inexpensive *arbitration process other than a court*, and procedures for the compensation of customers in case of a breach of a Consumer Code.[5]
From the foregoing, it is beyond peradventure that the NCC is not only empowered to conduct arbitration but to do so in such a manner that accords with the general recipe for arbitration.
Pursuant to powers conferred on the Commission, the Commission produced a Dispute Resolution Guidelines.[6] The Guidelines provide for three types of arbitration namely: (a) Short form Procedure for small claims Consumer Dispute, (b) Nigerian Communications Commission Arbitration Rules, (c) Nigerian Communications Commission Rules for the Arbitration of Interconnection Issues and Dispute.

4. Exclusivity

Section 88 of the Nigerian Communications Act makes it mandatory that a person aggrieved by the Commission's decision may appeal to the court for a judicial review of the decision. Section 86 shows that grievance covers such area as acts of the Commission pursuant to its subsidiary legislation and thus brings the Commission's arbitral awards within the purview of judicial review. The same section also provides that "decision" includes any action, order, report, directions and that before such a judicial review is resorted to, the aggrieved shall request in writing to the Commission for a statement of the reasons for the decision. Thereafter, if he is not satisfied, he shall apply to the Commission to review the said decision. If the Commission's review is unacceptable to the aggrieved, he is required to exhaust all other remedies provided under the Act before he applies to the court for a judicial review.[7] The requirement of exhausting all other remedies as far as it relates to arbitral award is inconsistent because as has been shown an award is conclusive and final of a remedy even as recognized in the Commission's Rules 8.4, 8.7, 13.2 of Short Form Procedure Applicable to Small Claims Consumer Dispute, Nigerian Communications Commission Arbitration Rules and Nigerian Communications Commission Rules for the Arbitration of Interconnection Issues and Disputes respectively. Quite a number of actions have been struck out for failure to comply with the requirements of this section of the law. Such actions include *Nigerian Communications Commission v MTN Nigerian Communication Ltd;*[8] *Econet Wireless Nigerian Ltd. v Nigerian Communications Commission.*[9]
Judicial review has been described as "the power of the court, in appropriate proceedings before it, to declare a governmental measure either contrary to, or in accordance with the constitution or other governing law, with the effect or rendering the measure invalid and void or vindicating its validity and so putting it beyond challenge in the future."[10] There is no provision for judicial review of an award under the Nigerian Arbitration and Conciliation Act[11] and rightly so since such would involve reopening of the issues canvassed and resolved in arbitration thus, violating the principles of court abstention in arbitral matters. Judicial pronouncements in support of this are not lacking.[12] Clearly, the effect of a judicial review is to declare valid or invalid an

[1] *Ibid* Section 105
[2] *Ibid* emphasis supplied
[3] *Ibid* Section 76 (1)
[4] *Ibid* Section76 (2)
[5] *Ibid* Section 106 (1), (3) (b), emphasis supplied
[6] *Ibid* Sec. 70
[7] *Ibid* Sec. 88 (3)
[8] (2008) 7 NWLR (pt 1086) 229
[9] (2004) 1 TLR 43
[10] Nwabueze B. O., *Judicialism in Commonwealth Africa,* London, C. Hoost and Company, 1981 p.229
[11] Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004
[12] In *Hodgkinson v Fernie* (3CBSN) 202, the Court held that parties having chosen their tribunal are bound by the arbitrator's decision, the only exceptions to that rule are cases where the award is the result of corruption or fraud and one other which, though it is to be regretted is now, I think, firmly established, namely, where the question of law necessarily arises on the face of the award upon some papers accompanying and forming part of the award. See also *Tulip Nig. Ltd v Noleggioe Transport Maritime SAS* (2011) 7 WRN 110,

administrative/executive act. The party affected, in our context, will then institute another action to procure his remedy if the act of the administrative/executive body is declared void. The net result of all these is delay and unnecessary expenses. In our context what is required is a once and for all decision enabling the arbitration to be commenced, continued, concluded or the award set aside or enforced as the case may require. Therefore, judicial review is inappropriate in the circumstances of the Nigerian Communications Commission's Arbitration.

5. Pre-requisites for Arbitration under the Nigerian Communications Commission Act

Before invoking the powers of the Commission to arbitrate, an aggrieved party must ensure compliance with the following:

(i) An attempt shall first be made by the aggrieved parties to resolve the dispute between them through negotiation.[1] This, of course, means that the claimant shall first exhaust amicable and non judicial or administrate forms of settlement. It may be surmised that the parties may at this stage involve a third party to assist them in negotiation. This is so because negotiation, as has been shown earlier, is merely hortatory in nature and may be truncated midway. The decision may even be jettisoned by a party. This is further buttressed by the fact that the Commission has not pursuant to powers conferred on it under Section 76 of the Act provided for other types of ADR except mediation. Therefore, an aggrieved party may choose to resolve the dispute as required without involving the Commission using any of the modes of non-judicial method earlier elaborated on in this work.

(ii) If one of the parties to the dispute has provided an undertaking that is relevant to the subject matter of the dispute and the Commission has registered the undertaking the party may first adopt the conditions of the undertaking for the purposes of resolving the Dispute.[2] Under Section 81 of the Act, a person may provide an undertaking to the Commission regarding any matter for which the Act makes express provision. Such an undertaking shall set out the terms and conditions of the undertaking which may include the effective date of the undertaking and of its expiry.[3] Thus the claimant, if he exercises his option in this respect, should be sure that first the undertaking he intends to rely on is one that is current and that such an undertaking is registered with the Commission in accordance with the Rules of undertaking approved by the Commission.[4] This of course, implies that the undertaking is subsisting. If the undertaking has been effectively withdrawn, the claimant cannot rely on that.[5]

(iii) The Guidelines provide that, a would-be claimant must have exhausted all the dispute resolution procedure laid down by the service provider without resolving the complaint.[6] Therefore the claimant shall be sure that administrative means of resolving the dispute as contained in the service provider's package has been complied with without success.

The above applies to all the arbitration procedures established under the Commission's Guidelines for Dispute Resolution.

These Rules are briefly discussed hereunder:

6. Short Form Procedure

(a) Subject matter

The subject matter of arbitration under this procedure must not exceed N1,000,000.00 (one million naira).[7] The parties in this instance are deemed to agree to the non-disclosure of the proceedings' award, and reasons for the award to any stranger to the proceedings unless it is necessary to do so in order to enforce the award. This, of course, is verbiage because an application to enforce an award implies that the award debtor has failed to abide by the terms of an award and there is no way the applicant would succeed without disclosing the award. Issues handled under this procedure must not be complicated needing more formal oral hearing and evidence.[8] The Commission, rather than the claimant, decides when a claim can be properly made using this procedure.[9]

(b) Nature of Proceedings

The procedure is "document only" and must be concluded within 60 days from date of commencement.[10] The exception to "document only" seems to cancel off whatever was intended by this

[1] Nigerian Communications Act Section 74 (1)
[2] *Ibid* Section 74 (2)
[3] *Ibid* Section 81 (2)
[4] *Ibid Sec. 82 and 83*
[5] *Ibid Sec. 84*
[6] Rule 2.1 NCC Short Form Procedure Rules
[7] Explanatory Notes to the NCC Dispute Resolution Guideline page 1
[8] *Ibid*
[9] *Ibid*
[10] Short Form Procedure Applicable for Small Claim Consumer Dispute ("hereinafter short Form Procedure") Rule 1.5 and

means to ensure cost effectiveness and timely resolution of the dispute when it makes provision for additional evidence and oral hearing at the discretion of the arbitrator with the consent of parties.[1] Rule 4.1 should also be criticized because it detracts from timely resolution of these small claim disputes by providing that the arbitrator with the consent of parties can jettison the entire document only procedure. It is interesting that the arbitrator is enjoined to resolve the dispute in a just, speedy, economical and final manner in accordance with natural justice and without any need to comply with the provision of the evidence Act. Further along this line he shall not be bound by rules or requirement in respect of the law relating to admissibly of evidence.[2] This provision clearly rules out the application of technicalities which in the circumstance is time-wasting. The additional evidence provision can be a basis for a floodgate of disputation issues if we take into account the meaning of evidence and the mentality of Nigerians. Thus here, evidence may include inviting persons to testify and of course a necessary collorary is cross-examination to test the veracity and credibility of the evidence. All these take their toll on time and finance. Although, to some, these provisions may seem innocuous but it is a potential invitation for needless expenses and time-wasting giving the nature and value of claim in the circumstances. However, the qualification that such procedure should not only be at the discretion of the arbitrator but with the consent of the parties may seem mollifying. Notwithstanding this, it is our view that the words "additional evidence" be replaced with "additional documents." This is because much of disputes envisaged under this procedure dealing with small claims against service providers can be resolved by use of documents only. We cannot think of a dispute between consumer and a consumer capable of reference to arbitration within the ambit of the Act.

(c) Constituting the Arbitral Panel

The parties must choose as their arbitrator, one person from the Commission's panel of arbitrators. The Guidelines call them experienced arbitrators.[3] This is a limitation imposed on party autonomy earlier discussed because both parties are not allowed to choose arbitrators outside the Commission's pool of arbitrator. The Commission's Rules though providing for Code of Conduct for Arbitrators and Guidelines for good practice, do not state the professional qualification required of members of its pool of Arbitrators. How would a party determine who to choose from the pool in the absence of prior acquaintance or knowledge of the capabilities and short-comings of the NCC arbitrators? Nigerian Communications Commission is not an institutional arbitration body like those already established and well-known the world over.

Both parties are required to agree on the choice of the sole arbitrator who evidently they do not know beforehand. Where the parties fail to appoint such an arbitrator within 35 days of the commencement of proceeding, the Commission shall appoint the arbitrator.[4] This provision is difficult to interpret if not anachronistic, because of the inexactitude of the expression "the commencement of proceeding used in Rule 3.2". Proceedings simpliciter in arbitration cannot commence before the appointment of Arbitrator. Proceeding, in our context, means any procedural means for seeking redress from a tribunal or agency.[5] Procedure is defined as a specific method or course of action. In our case, the Agency is NCC. Rule 2. 4 states that arbitration commences when the Commission confirms in writing that it has received the original application form as signed by both parties and has accepted the arbitration request. One is left at quandary as to the precise action which qualifies as commencement of proceeding in this regard. The nagging questions are:

(i) Should the 35 days begin to run from the date the claimant receives the Commission's confirmation? or

(ii) Should the 35 days be counted from the date the Respondent receives the Commission's confirmation, if not the same date with that of the claimant? or

(iii)Should the 35 days run from the date the commission confirms in writing that it has received the original application form as signed by both parties and has accepted the arbitration request even if the confirmation is unknown to the parties or known to only one of them?

This problem does not arise where parties have entered into an arbitration agreement prior to the dispute. In that case arbitration commences when the Respondent receives the Notice of Arbitration.[6] Whereas the Rules provide for replacement by the Commission of a Commission appointed arbitrator, who has failed to act for any reason,[7] the Rules are silent in respect of parties' appointed arbitrator who is unable to act. Presumably the parties in the

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[1] *Ibid* Rules 1.5
[2] *Ibid* Rule 5.1
[3] *Ibid* Rule 3.1
[4] *Ibid* Rule 3.2
[5] Byran A. Garner, Black's Law Dictionary, 8th Edition, P, 1241
[6] *Ibid* Rule 2.9
[7] *Ibid* Rule 3.3

circumstances appoint a new arbitrator to replace the inactive arbitrator.

From the foregoing it does not require a genius to figure out that the practical effect of Rule 3 in its entirety is that parties are denied the freedom to choose their arbitrator since they are not permitted to choose outside the Commission's pool of Arbitrators. This is so because it would be almost impossible for parties during "hostility" to calmly agree on an arbitrator they knew nothing of ahead of the dispute.

d. Independence and challenge of Arbitrator

The Arbitrator shall not permit outside pressure, fear of criticism or any form of self-interest to affect his decisions, and shall decide all issues submitted for determination after careful deliberation and the exercise of his own impartial judgment[1] This is buttressed in Rule 3.4 whereof the arbitrator shall be and remain at all times independent of any of the parties and the Commission and shall determine the dispute in an impartial and timely manner. The Arbitrator's independence from the Commission flies in the face of the general provision that decisions or acts of the Commission which, of course, includes the awards rendered by the Commission's Arbitrators cannot be enforced in a court of law except the Commission has issued a certificate for leave to proceed to the Court for the enforcement of the award.[2]

There is no provision for challenge of an arbitrator on any grounds whatsoever whereas it is not inconceivable that an arbitrator, whether appointed from the Commission's pool or otherwise may become corrupt, biased, or even loose his independence or lack the necessary qualification. In regards to this lacuna the parties are expected to apply for judicial review.[3] However, the Arbitration Act provides that an arbitrator may be challenged (a) if circumstances exist that give raise to justifiable doubts as to his impartiality or independence (b) if he does not possess the qualifications agreed by the parties.[4] The parties decide on the challenge procedure and where there is no prior agreement of parties on this and the other party does not agree and the challenged arbitrator does not withdraw, the arbitral tribunal decides.[5]

From the foregoing, it is obvious that this lacuna which may lead to early court intervention in NCC Arbitration is not attractive and detracts seriously from the avowed objective given the attendant delay and inconvenience, not to talk of the costs implications. Under such circumstance the arbitration cannot be concluded within 60 days as required. It is suggested that rather than judicial review, a definite and specific provision be made in the Guidelines to take care of this, otherwise after a successful judicial review, the successful party still resorts to the provisions of Arbitration and Conciliation Act.

e. Commencement of Arbitration

There are two provisions for commencement of arbitration. In a situation where parties have a prior arbitration agreement, arbitration commences upon the Respondent's receipt of Notice of Arbitration (form NCC2).[6] However, the provision for commencement of arbitration where parties have not previously entered into arbitration agreement in Rule 2.4 is ambiguous. This has been discussed above. There is a need to amend Rule 2.4 to fall in line with Rule 2. 9.

f. Recognition and Enforcement of the Award

Generally an arbitral award when made is immediately recognized, binding and ready for enforcement.[7] In harmony with this, Rule 8.4 provides that awards made under the procedure are final and binding on the parties until it is set aside by a competent court of law. The Act provides that the Commission may direct a party to a dispute to abide by the decision of the Commission in that dispute.[8] This provision is superfluous. However, in regards to awards rendered by the Commission's arbitrator, a party cannot enforce the award as if the decision is a judgment of a court except the Commission has issued a certificate to the complainant for leave to proceed to the court for the enforcement of the decision.[9] For an award to be enforced in a court of law here in Nigeria under the general law, there is no requirement that a party shall procure a certificate to proceed. The law's requirement is simple and easy. All that the applicant for enforcement of an award is required to do are as follows: Supply to the court with:

(i) the duly authenticated original award or a duly certified copy thereof,
(ii) the original arbitration agreement or a duly certified copy thereof.[10]

The provision for Commission's certificate of leave to proceed to court must be criticized because it makes an

[1] *Ibid* Rule 2 Code of Ethical Conduct
[2] Sec. 78 (2) Nigerian Communications Act, Cap 97 Laws of the Federation of Nigeria, 2004
[3] *Ibid* Section 88
[4] Arbitration and Conciliation Act Cap A 18 Laws of the Federation of Nigeria, 2004 section 8 (3) (a) and (b)
[5] *Ibid* sec. 9
[6] *Ibid* Rule 2.9
[7] Sec. 31 Arbitration and Conciliation Act Cap A18 Laws of Federation Nigeria, 2004
[8] Sec. 78 (1) Nigeria Communications Act
[9] *Ibid* Section 78 (2)
[10] Section 31 Arbitration and Conciliation Act Cap A18 Laws of Federation Nigeria, 2004

award inchoate and impliedly not final and binding until the certificate is procured. Rule 8.4 is therefore inconsistent with Section 78 (2).[1] By rules of statutory interpretation the provision of the Act takes precedent over the Rules. Consequently Rule 8.4 being an affront to the spirit of Section 78 (2) is ineffective as it is the Commission's Certificate for leave to proceed to the court that lifts the award to the level of finality and makes it binding, thus enforceable. Section 78 (2) is an invitation to chaos and illegality. The pre-requisite for issuing the certificate is not provided for. The grounds upon which the Commission will refuse to issue the certificate are also not stipulated. This, therefore, gives the responsible personnel of the Commission untrammeled powers which can be exercised arbitrarily to the detriment of the award creditor. The provision is a summersault and gives room for unnecessary litigations for where the Commission fails to issue the certificate timely, an award creditor has no option than to proceed to the High Court for judicial review. The attendant inconveniences and delay can only be imagined and that in such a small claim dispute designed to deal with non complicated disputes where the procedure is declared to be simple, quick, informal and inexpensive.[2] Judicial Review here is inappropriate.

g. Recourse against an award

Neither the Act, nor the Guidelines provides for grounds upon which an award can be impeached. Rule 8.4 which of course is void for inconsistency with the Act merely states that an award is final and binding until "set aside by a competent court of law". By the law, a party seeking to impugn the Commission's award shall apply for judicial review but it would be better for the aggrieved to follow the general law which is Sections 29, 30 and 32 of the Arbitration and Conciliation Act.[3] Section 29 provides for setting aside of an award where there is proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however, that if the decisions on matters submitted to arbitration can be separated from those not submitted; only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. Section 30 provides for setting aside of an award where an arbitrator has misconducted himself or where an arbitral proceedings or award has been improperly procured. Section 32 is a sort of an *ominibus* ground because no grounds for setting aside of an award under that section is provided.

7. Nigerian Communications Commission's Arbitration Rules (NCC Arbitration Rules)

The provisions of this Rule and the Small claim Rule which has been examined above are almost identical. Therefore, in this portion, only areas of differences are examined.

They include the following:

i. Commencement of Arbitration and agreement to arbitrate
ii. Appointment and challenge of Arbitrator
iii. Procedure

a. Commencement of Arbitration

Unlike the Short Form Procedure where parties complete blanks in a form to signify agreement to refer their dispute to the Commission's arbitration, a Claimant under the instant rule serves the Respondent a Notice of arbitration which shall include information prescribed in the Rules,[4] a copy of which he shall serve on the Commission.[5] Small Claim Rules require that evidence of any witness upon whom a party relies on shall be on oath in an affidavit.[6] This does not apply to NCC Arbitration. The NCC Arbitration Rules provides that the Respondent shall serve his own statement but does not state upon whom it shall be served.[7] However, in view of Rule 2.4 which provides that within "14 days of receipt of the Respondent's statement, the claimant shall file a reply to any counter-claim" and also Rule 2.5 which states that arbitration is deemed to have commenced on the date when the Respondent receives the Notice of Arbitration, it is logical to conclude that service shall be upon the claimant. Thus, service to the Commission is excluded. This is an obvious lacuna which needs to be filled. Arbitration in this instance is deemed commenced on the date when the Respondent receives notice of arbitration in a case where there was *ab initio,* parties' agreement to arbitrate.[8] However, where parties had no prior agreement but either by themselves or with the help of the Commission they enter into a submission agreement, the arbitration commences on the date the parties entered into the submission agreement.[9]

[1] Nigeria Communications Act, Cap 97 Laws of Federation Nigeria, 2004
[2] Page 1 Nigerian Communications Dispute Resolution Guideline
[3] Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004
[4] Rule 2.1 NCC Arbitration Rules
[5] *Ibid*
[6] Small claim Rule 4. 2 (d)
[7] Rule 2.3 NCC Arbitration Rules
[8] *Ibid* Rule 2.5
[9] *Ibid* Rule 3.2

b. Submission Agreement

Rule 3 entitled Submission Agreement [1] evidently deals with agreement to arbitrate which of course is otiose. The Rules state that if the Commission is requested by a party, referred to as the initiating party, wishing to have its dispute with any other party arbitrated under the auspices of the Commission, it will approach the other party and seek to persuade it to enter into a submission agreement with the initiating party. Alternatively the initiating party may propose to the other party that the dispute be arbitrated under the auspices of the NCC arbitration guideline. Upon agreement the parties will enter into the Commission's Arbitration Submission Agreement. If we take into account that among the documents a claimant shall serve on the Respondent and the Commission are copies of the contractual document (if any) in which the arbitration agreement is contained or under which the arbitration arises,[2] it is logical to conclude that the provision for submission agreement serves the purpose of inducing parties to enter into an agreement to have their differences resolved by the Commission *where there is no subsisting agreement to arbitrate*. The requirement of the Commission approaching and persuading the other party to agree to arbitrate is beggarly. What happens where the party approached refuses to yield? This Rule should be expunged.

Rule 3.3 provides that the arbitral tribunal upon its constitution shall issue directions to the parties including that pertaining to the filing of statement of claim, defence and all supporting document.[3] The underlined portion needs to be expunged since Rule 2 comprising Rule 2.1 – 2.4 dealt in *extenso* with the filing of statement of claim, defence and reply. *Afortiori* Rule 5.2 which provides that the tribunal upon its appointment shall communicate with, and issue direction to the parties should also be expunged on grounds of verbiage in view of Rule 3.3.

c. Appointment and challenge of Arbitrator

Unlike the small claim procedure, the arbitral tribunal consists of three persons but where the circumstances and the case so warrant, a sole arbitrator may be appointed. As with small claim arbitration, the parties choose their arbitrators from the Commission's panel.[4] If the appointed arbitrator dies or is incapacitated or is otherwise incapable of acting or dealing expeditiously with the dispute, the parties appoint a substitute but from the Commission's panel of arbitrators.[5] The Rule is silent on (a) where parties fail to agree on appointment of either a sole arbitrator or a third arbitrator in a situation where three arbitrators are required and (b) How the parties would appoint the third arbitrator. However, since this is a lacuna and strictly not an act of the Commission, Section 88 of the Act does not apply. Section 7 of the general law[6] provides a solution. That section provides that where parties fail to agree on a sole arbitrator or where there is a failure to appoint a third arbitrator, any party to the arbitration agreement may request a court to make the appointment within 30 days. That section also provides that a decision of the court in the circumstance shall not be subject to appeal.[7] This section has provoked debates in legal circles and there have been some discordant decisions of the Nigerian courts on the issue.[8] Furthermore there is no challenge procedure prescribed. Suggestion on this has been made while discussing the previous rule.

d. Procedure

The procedure, unlike Small claim Arbitration, is full-fledged and not based on documents only except where the Arbitrator considers that the dispute is amendable to documents only procedure, but that shall be with the consent of the parties.[9] The provisions of the Evidence Act are not strictly applicable to this procedure.[10] The word "strictly" ought to be deleted so that the Rule shall be in tandem with section 76 (2).[11]

8. Nigerian Communications Commission Rules for the Arbitration of Interconnection issues and Dispute

This Rule is purely for resolving differences between service providers in the industry.

As with the two previous Rules the discussion in this part shall address novel provisions, and areas of

[1] *Ibid*
[2] *Ibid* Rule 2.1 (c)
[3] Emphasis mine
[4] *Ibid* Rule 4.1
[5] *Ibid* Rule 8. 4
[6] Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004
[7] *Ibid* Section 7 (4)
[8] For elucidation See Ibe, C. E, Party Autonomy and the Constitutionality of Nigerian Arbitration and Conciliation Act 1988, Sections 7 (4) and 34: Commentary on Agip Oil Co. Ltd v Kremmer and others, Chief Felix Ogunwale v Syrian Arab Republic and Bendex Engineering Ltd v Efficient Petroleum (Nig) Ltd. (2011) 28 *Journal of International Arbitration* 5, 493
[9] NCC Arbitration Rule 5.4
[10] *Ibid* Rule 8.2
[11] Nigerian Communications Act, Cap 97 Laws of the Federation of Nigeria, 2004

discrepancies and lacunas. The Rules for the Arbitration of Interconnection Issues and Disputes can be said to be *sui generius* in view of the serious technical issues and dispute envisaged. We shall examine the rule under the following heads:

(i) Commencement
(ii) Appointment and challenge of Arbitrator and of Technical Adviser
(iii) Award
(iv) Post Award Matters

Commencement

Unlike the previous Rules considered, an applicant under this rule is the Petitioner and the processes is commenced by six copies of a petition for arbitration filed with the Commission and served on all parties to the negotiating process.[1] This originating process must be filed within ninety days upon failure of negotiating process.[2] The provision for time limit within which to commence arbitration under this rule which is commendable is lacking in the two previous Rules discussed. It is humbly recommended that a time limit be inserted also in the other two Rules. This will prevent abuse of the liberty to commence arbitration which can unavoidably arise where there is an unscrupulous party. Arbitration is deemed to have commenced upon filing of the Petition with the Commission.[3] The Petitioner is further required to obtain proof of service which shall be filed at the Commission.[4] The contents of the petition are detailed in Rule 2.4. The relevant information and document shall contain, *inter alia:* (a) the details of the negotiation history including any mediation process.[5] (b) a detailed statement identifying all unresolved issues including all relevant documentation concerning those unresolved issues. (c) A statement indicating the position of each of the parties concerning the copies of all relevant documentation relied upon or pertaining to those issues.[6] (d) a statement indicating the issues (if any) which have been resolved by the parties during the negotiation process.[7]

These provisions are novel and make the arbitration under the Rule an appeal against the negotiation and mediation process. This Rule thus produces a hybrid. It may be said not to be an arbitration rules but, that of med-arb.[8] This is so because, by filing the above documents the arbitrator would necessary read the negotiation and mediation process thereby removing them from the status of privilege which makes the processes confidential.[9] The justification for this aspect of the Rule is found in section 4 (p) of the principal enactment[10] which, as has been shown, empowers the Commission to use such dispute resolution methods as the Commission may determine from time to time, and buttressed by section 76 (2) of the same enactment which authorizes the Commission to publish guidelines setting out the principles and procedures that it may take into account in resolving disputes or classes of dispute. It is suggested that the Rule be renamed Nigerian Communications Commission Rules for Med-arb. Giving credence to the view that the procedure is rather an appeal against the outcome of negotiation and mediation, the Rules provide for a written brief containing all relevant provisions of the Act and applicable NCC regulation and guidelines.[11] Brief writing is a terminology used here in Nigeria for appeal.[12]

The Respondent is allowed twenty-one days after the petition is filed to respond to the same.[13] This period is short. This is so because the Petitioner has 90 days within which to prepare his case. It is suggested that 45 days be allowed the Respondent to meet demands of justice.

Appointment and Challenge of Arbitrator and Technical Adviser

The two previous rules considered provide for party participation in the appointment of Arbitrator. Curiously the instant rule does not permit parties to make any input in the appointment of their Arbitrator.[14] There is no provision in the instant Rule for challenge of the Commission's appointed Arbitrator where there is justifiable doubt as to his independence and impartiality which is a necessary requisite of a sound arbitration. This again lends weight to the assertion that this is not arbitration simpliciter.

[1] NCC Rules for the Arbitration of Interconnection Issues and dispute (Rule for the Arbitration of Interconnection Issues), Rules 2.1 and 2.3
[2] *Ibid* Rule 2.1
[3] *Ibid* Rules 2.2
[4] *Ibid* Rule 2.3
[5] *Ibid* Rule 4 (iv)
[6] *Ibid* Rule 4 (v)
[7] *Ibid* Rule 4 (vi)
[8] This is a combination of mediation and arbitration in which process mediation is first undertaken and upon failure arbitration is resorted to as a continuous process.
[9] Rule for the Interconnection Issues, Rule 4 (vii)
[10] Nigerian Communications Commission Act
[11] Rules for the Arbitration of Interconnection Issues, Rule 2.4 (viii)
[12] Court of Appeal Rule 2011, Order 18 Rule 2.
[13] Rules for the Arbitration of Interconnection Issues, Rule 3.1
[14] *Ibid* Rule 5.1

As has been discussed, the Act provides that a person aggrieved by any decision of the Commission made pursuant to the exercise of its powers and functions under the Act or its subsidiary legislation may request in writing to the Commission for a statement of reason of the reasons for the decision.[1] The Commission shall, upon such written request by the aggrieved person provide a copy of statement of reason for the decision and any relevant information taken into account in making the decision.[2] No time limit within which to provide the statement of reason is imposed on the Commission. A time limit of 30 days is recommended. However, the aggrieved person shall not later than 30 days after he receives the Commission's response request of the Commission to review its decision specifying reasons for his request.[3] The Commission reviews its decision and informs the complainant in writing of its final decision thereon and the reasons thereof within 60 days of receipt of the request.[4] If the aggrieved is still not satisfied, he may then apply to the court for a judicial review.[5] The aggrieved is further barred access to court unless he has first exhausted all other remedies provided under the Act.[6] Meanwhile the first decision or direction of the Commission subsists and remains binding and valid until it is expressly reversed in a final judgment or order of the Court.[7] It should also be noted that the Commission in responding to the aggrieved request for reasons shall not:

(a) disclose a matter that is, in the opinion of the Commission, of a confidential character.
(b) be likely to prejudice the fair trial of a person or
(c) involve the unreasonable disclosure of personal information about any individual (including a deceased person).[8]

In the case of appointment of Technical Adviser which is done by the Commission, what is said above of appointment and challenge of Arbitrator applies.

The Award

The Arbitrator has power to issue an interim award where a dispute directly affects the ability of a party to continue to provide uninterrupted service to its customers but the arbitral panel shall not later than six months after the filing of the petition for arbitration, render its final award. The period may be extended by the arbitrator after consultation with the Commission.[9]

The Arbitrator must render a reasoned award dealing with all issues presented by the parties which award must meet the requirements of the Act and NCC regulation and guidelines. He should also indicate schedule for the implementation of the decision.[10]The status of the award is not final between the parties until the Commission reviews the Arbitrator's draft decision.[11] It is the reviewed decision that is final and binding on the parties until set aside by a competent court of law.[12] This provision cancels out the independence of the arbitrator from the Commission. We have earlier criticized this arrangement.

Post Award Matters

The parties are required to jointly file with the Commission a Memorandum of Understanding incorporating the decision of the arbitrator as approved by the Commission. What purpose this serves is mute. Shall an aggrieved party join in filing such a memorandum under the circumstances without coercion? Again Rule 13.2 speaks of the Arbitrator's decision as final and binding until set aside by a competent court of law. This obviously creates confusion. Is the Commission's reviewed decision final or that of the Arbitrator? It is suggested that Rules 11.1, 11.2 which provides for review of the award and 12 on memorandum of understanding be deleted.

9. Conclusion

What is to be done?

(a) The substantive Act needs to be amended as shown below:
    (i) Section 88 of the law should be amended by deleting the words 'judicial review" so that the relevant subsections will simply read "may apply to the court for remedy under the appropriate law." This will make it possible to apply the Arbitration and Conciliation Act when necessary to take

[1] Sec. 86 (1) Nigerian Communications Act. This has been partly commented on earlier in this work
[2] *Ibid* Sec. 86 (2)
[3] *Ibid* Sec. 87 (1)
[4] *Ibid* Sec. 87 (4)
[5] *Ibid* Sec. 88 (1)
[6] *Ibid* Sec. 88 (3)
[7] *Ibid* Sec. 86 (2)
[8] *Ibid* Sec. 86 (3)
[9] Rules for the Arbitration of Interconnection Issues, Rules 10.1 and 10.2.
[10] *Ibid 10.3*
[11] *Ibid* Rule 11
[12] *Ibid*

care of hiatuses and lacunas as shown in our discourse.

(ii) Section 78 (1) which in part provides that the Commission may direct a party to a dispute to abide by the decision of the Commission in a dispute should be expunged and replaced with: "and every arbitral award shall be recognized as binding and enforced in accordance with law."

(iii) Section 78 (2) requiring a party to obtain a certificate for leave to proceed to the court for the enforcement of the decision of the Commission which, of course, includes arbitral awards should be deleted.

(iv) For that matter a specific section should be added specifying that where there is no provision in the Nigerian Communications Commission Law or Guidelines in respect of arbitral matters, section 88 shall not apply but the Arbitration and Conciliation Act Cap 18 Laws of Federation Nigeria, 2004 applies.

(b) The procedural law should be amend as follows:
Short Form Procedure:

(i) The words "additional evidence" in Rule 1.5 should be amended to read "additional documents" and Rules 4.1 of the Small claim Dispute Procedure should be deleted.

(ii) Rule 3.1 of Short Form Procedure and provisions in the two other rules which does not permit of choice of arbitrator outside Nigerian Communications Commission arbitrators should be amended to allow any qualified arbitrator to be appointed by the parties not only within the Commission but from outside with the proviso that such an arbitrator must be a Nigerian not disqualified under any law, so to act. Rule 2.4 should be made to read: "arbitration commences when the parties receive confirmation in writing that the Commission has accepted the arbitration request."

(iii) Provision should be made enabling any party, in accordance with Arbitration and Conciliation Act, to appoint another arbitrator in place of his appointed arbitrator who is unable to act.

(iv) Provision should be made for challenge procedure against the arbitrator in accordance with the Arbitration and Conciliation Act.

(v) Grounds for impeachment of the award should be made to confirm with Arbitration and Conciliation Act which is comprehensive.

c. Nigerian Communications Commission Arbitration Rules

(a) Rule 2.3 should be amended to include the requirement that the Claimant shall serve to the Respondent and the Commission a statement setting out its comments as to the nature and circumstances of the dispute given rise to the claim and any counter-claim.

(b) Rule 3 which provides for the Commission to go and persuade arbitration upon request should be deleted.

(c) Rule 3.3 should be amended by deleting the expression "including that pertaining to the filing of statement of claim, defence and all supporting documents", and for the same reason given in the discourse, Rule 5.2 should be deleted.

(d) A time limit for commencement of arbitration should be prescribed under this rule and the previous rule.

(e) The Rule should provide for appointment and challenge of arbitrators in accordance with the Arbitration and Conciliation Act.

(f) The word *strictly* in Rule 8.2 should be deleted.

d. Nigerian Communications Commission Rules for the Arbitration of Interconnection issues and Dispute

(a) This rule should be renamed med-arb and a provision made in the Rules for Med-Arb.

(b) Rule 3.1 should be amended. In place of 21 days, 45 days be allowed the Respondent to react to a petition.

(c) Parties should be allowed to appoint their arbitrator under Rule 5.1.

(d) Procedure for challenge and replacement of the Arbitrator and Technical expert should be inserted.

(e) A time limit of 30 days shall be provided for the Commission to respond to request for information where applicable.

(f) Rules 11.1, 11.2, and Rule 12 should be deleted for inconsistencies.