

Understanding the Place of Islamic Arbitration within the Nigerian Law

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Abstract

Introduction to The Problem: For many years, Nigerian Muslims had long desired a wider use of Shari'ah outside its traditional usage in worship and family relations. This agitation has led to a rise in the use of Shari'ah in commercial transactions and banking and financial products lately. As the use of Shari'ah in this realm of commercial relationships increases, conflict is inevitable and this requires appropriate dispute resolution mechanisms to settle it. Not only that, Muslims in Nigerian wish to observe and be governed by Shari'ah in all aspects of their lives including their commercial dealings, they also desire a resolution of their disputes in accordance with their faiths and beliefs. Thus, the contemporary laws in Nigeria need to be merged with Islamic law principles in order to meet the demands of its citizens.

Purpose/Objective Study: This paper aimed to examine the legal status of Islamic arbitration and its awards within the Nigerian legal framework particularly in area of commercial disputes.

Design/Methodology/Approach: This paper employed doctrinal methodology of legal research. It therefore adopts descriptive and analytical methods. It involves primary sourcing materials from Quran, Sunnah, Acts and Cases. Secondary sources include journal articles, textbooks, official documents online and internet materials.

Findings: This paper revealed that the notion of a *tahkim* (arbitration) subsists and recognise in the Shari'ah law and in Nigerian legal system. However, provisions of Arbitration and Conciliation Act (ACA) 1988 do not consider the idiosyncrasies of Islamic injunctions, despite growing investors' interests in Islamic commercial transactions. ACA do not provide a Shari'ah compliant arbitration alternative for both Muslim and non-Muslim parties who are willing to arbitrate under the Islamic law. It is consequently suggested that peculiar nature of the Islamic arbitration and awards should be considered in the ACA and the relevant Sections should be amended accordingly.

Paper Type: Research Article

Keywords: Islamic Arbitration; *Tahkim*; Nigerian Law; Conciliation

Introduction

As the world's Muslim population grows, international legal mechanisms regulating commercial transactions are challenged to meet this demand. This growing population of Muslims influences the position of many Muslim States to merge their contemporary law with Islamic law in other to meet the demands of its citizens.



Surprisingly, Muslims who do not reside in States with Shari'ah-compliance policies, still wish to observe and be governed by Shari'ah in all aspects of their lives including their commercial dealings. For this reason, investors and States around the world are working timeously to facilitate Shari'ah-compliance in commercial transactions in spite of certain restrictions which Islamic law imposes on some contracts. Such important efforts have resorted, among others, in the establishment of Shari'ah compliance MasterCard that charges fees based only upon usage, with no interest charges. To also attract investors all over the world, Muslim States are amending their arbitration laws in accordance with the Shari'ah ethics with the drive to attract investors who are particular about Islamic injunctions (KLRCA i-Arbitration Rules, 2018). This is commendable as the use of alternative dispute resolution (ADR) in Shari'ah related cases need to be in accordance with Shari'ah principles (Setyowati, Islamiyati & Putra, 2020).

Fortunately, Islamic historical sources encompass a very comprehensive conceptual framework for amicable dispute resolution in commercial transaction which ofcourse, can serve as a guide for the Nigerian policymakers to come up with an appropriate dispute resolution framework that is required to enhance the industry. Islamic law contains various dispute resolution processes such as Nasihah (Counselling), Sulh (negotiation, mediation), Mushawarah (Consensus), Muhtasib (Ombudsman), Fatwa al-mufti (expert determination) and tahkim (arbitration) among others. Tahkin is the most relevant for the discussion of this paper.

Tahkim is a form of Islamic Alternative Dispute Resolution (ADR) which is known as as Sulh (Ahmad & Oseni, 2014). The legal basis for arbitration (*tahkim*) is traceable to the four main sources of Shari'ah namely: the Qur'an, the Sunnah, the Ijma' and, the Qiyas (Akram, 2021). While the Quran and the Sunnah are the primary sources, Ijma and Qiyas are secondary sources. Qur'an contains words of Allah revealed to Prophet Mohammed, through angel Jibril (Akram, 2021). Qur'an consists of 114 Surahs (also known as chapters) and 6,666 verses with about 500 verses specifically on legal matters, including arbitration issues. References to Sulh generally can be found in Quran 49:10 while specific reference to the use of arbitrator (*Hakam*) in amicable settlement of dispute (*Sulh*) can be seen in Quran 4 verse 35.

Sunnah is the acts, pronouncements and approvals of the Prophet Mohammad which is documented into what is known as the Hadith. Hence, the Sunnah is only resorted to if the Qur'an is silent on the issue (Quran chapter 4 verse 59). Ijma means consensuses of Islamic scholars which over time have gained widespread acceptance through the use of juristic reasoning (Ijtihad) (Akram, 2021). Lastly, Qiyas is legal principles arrived at by analogical deduction. To constitute Qiyas, the logic utilised must be based on the Quran or the Sunnah. It is often used to develop Islamic principles on new or emerging topics or issues; it therefore, ensures and covers new developments and innovations in a given society.

These four sources of Shari'ah discussed above in one way or the other recognise, support and legalise arbitration (*tahkim*) in their respective wordings. The holy Qur'an provides:

“And if you fear a breach between the two, then engage a neutral person from his folks and another person from her side; if the two wish for settlement, Allah will effect harmony between them; surely Allah is knowing, aware (Qur'an chapter 4 verse 35).”

“You should always refer disputes to God and to His Prophet. And obey Allah and his Messenger; and fall into no disputes, lest you lose heart and your power to depart; and be patient and persevering: for Allah is with those who patiently persevere (Qur'an chapter 8 verse 46).”

Historically, Prophet practiced *tahkim* as a dispute resolution among his followers and this continued after his death (Najjar, 2017). There are a number of instances where the Prophet took the position of an arbitrator (*hakam*) and where he submitted himself to a neutral *hakam* to hear the dispute between him and another person (Daryanto, 2021). For instance, Prophet Mohammed agreed with the people of Banu Qurayza tribe to submit and resolve disputes between them to a neutral *hakam* (Libya American Oil v. Libya Arab Republic, 1978). This is to show his commitment and participation in the *tahkim* process. However, it is only of recent that the Islamic arbitration practice has received international attention, although the values and philosophies of Islamic arbitration had long been immersed in the economic antiquity of the Arabian region.

However, the legal binding force of the *tahkim* has caused and generated different views among Islamic scholars. There are two divergent opinions of Islamic scholars on this. On the first opinion, some equate *tahkim* with conciliation with no binding force. Proponents of this view justify their position with Quran 4:35 and interpreted the provision to mean that the function of a neutral person (*hakam*) is to assist couples resolve their differences, without necessarily imposing any binding decision on them (Peshkov, 2018; Omar & Mohammad 2018). Other scholars assert that *tahkim* serves as an alternative dispute mechanism that comes with a binding nature (Hamid et al., 2019). This view relies on Quran 4:58 which imposes the duty to act fairly and justly on any person who is standing-in as a *hakam* (arbitrator). The scholars contend that if parties willingly agreed to a particular *hakam* to adjudicate and determine a matter between them, that power conferred on the *hakam* comes with an implied term to honour the outcome as final and binding decision. Hence, the proponents of this second view canvass for a binding nature of *tahkim* as the agreement to settle via alternative method constitutes an agreement to obey and make the decision binding on the parties.

Interestingly, scholars from both sides have respectively revealed both the conciliatory and binding nature of arbitral awards. This leaves parties with the choice



to make the process a voluntary one, unlike any other mandatory rubrics in the Quran. This again, shows the flexible nature of Shari'ah which adapts to innovations without necessarily violating the basic rules and principles of Islamic law (Bhatti, 2020). Nevertheless, it is safe to conclude that the notion of a *tahkim* subsists and recognise in the Shari'ah law. Thus, the annotations of some Islamic scholars on the conciliatory nature of it, is widely pronounced. The issue of binding in Islamic arbitration is an open-ended debate among Islamic scholars and this will continue to generate different perceptions.

It is pertinent to note that there is no Shari'ah compliant legal framework on Islamic arbitration in the Nigerian administrative of justice system so as to operate as a sustainable means for dispute resolution in cases involving Islamic banking and finance. This is unfortunate because the Constitution of the Federal Republic of Nigeria 1999 in Section 251 confers exclusive jurisdiction on the Federal High Courts to hear and determine disputes as it relates to banking and finance in Nigeria (Nigeria Deposit Insurance Corporation v. Okem Enterprises Ltd & Others 2004). Thus the jurisdiction of the court can be delayed if a Scot-Avery Clause is inserted in the business/commercial contract between the parties (Scot v. Avery 1865). That is, parties can seek alternative resolution of their disputes base on the agreement to settle in such manner. Hence, lack of dispute resolution framework that is in compliance with Islamic faith to deal with disputes arising from such Shari'ah compliant contracts/transactions remains the major reason for low adoption of Islamic arbitration in banking and finance disputes (Umar, 2015). Such relationships are often governed by the national law agreed to by the parties in the contract. Presently, the industry is struggling to overpower the risk management practices that come alongside the conventional litigation when dispute arises. Investors in Nigeria are more willing to embrace alternative resolution strategies that are Shari'ah compliant. Hence, there is need for appropriate Islamic dispute resolution framework in the country.

Methodology

This paper employed doctrinal methodology of legal research (Coetsee & Buys, 2018). It therefore adopts descriptive and analytical methods. These two selected methods are the most accurate for achieving the aim of this paper; this is to bring out a sustainable legal approach to the lingering legal issues (Gawas, 2017). Descriptive method of research is necessary to describe and explain the current legal status of Islamic arbitration in Nigeria. It is also necessary to analyse the adequacy of the ACA as the only existing domestic law regulating Islamic arbitration in Nigeria. The primary and secondary sources of materials were utilised. These materials were subjected to evaluative, descriptive and content analysis.

Results and Discussion

Development of Islamic Law in Nigeria

Nigeria is a nation made up of 36 states and a Federal Capital Territory. These states are further grouped into six geopolitical zones that reflect ethnic identity in most cases. The six geopolitical zones include North-East, North-West, North-Central, South-East, South-South and, South-West (Gamawa, 2018). Hence, ethnic identity of each of these geopolitical zones plays a significant role in the acceptance and spread of Islam in Nigeria. For simplicity sake and for the purpose of this paper all the three North zones as grouped geopolitically are refer to as Northern Nigeria while the South zones are Southern Nigeria.

In the pre-colonial Nigeria, Islam spread majorly through efforts of itinerant preachers (Lawal, 2016). The renowned preacher then; Sheu Uthman Fodio observed closely the parallel features that exist between Islamic practice and custom practices in the northern Nigeria. To correct this erroneous impression, Sheu Uthman Fodio made several efforts through jihad for reform and to revive the true Islamic practices (Lamim, 2016). With his efforts together with the efforts of other preachers, Islam was gradually recognised by northerner rulers and rapidly spread among the population. The Islamic law therefore became well entrenched especially in northern Nigeria so much that it became the way of life of the people (Lamim, 2016; Lawal, 2016). Regrettably, when the British colonialists came, Islamic law was seen and applied as the customary law of Muslims in the north. Some northern governments made effortsto changethis misconception within their territorial states by enacting certain laws (Lawal, 2016).

The enactments such as Native Court Law No 6 of 1956 and Muslim Court of Appeal Laws of Northern Nigeria Cap.136 of 1960 established a clear and explicit distinction between Islamic law and the customary law. Notwithstanding these stated enactments, some states that were carved out of the northern region of Nigeria were adamant with the position that Islamic Law remains part of customary law. For instance, clearly retained the position that Islamic law forms part of the customary law (Katsina State High Court Law of 1991, section 2). The position of this law was largely influenced with the ethnic pluralism of Nigeria as a country (Oba, 2011). This is expected as the pre-colonial Nigeria was occupied with not less than 250 nation states that covered 500 ethnic and linguistic groups (Olatoye & Yekini, 2019). Thus, these ethnic groups therefore feast transversely the six giant geopolitical zones of the country (Owolabi & Oniye, 2021).

In Southern Nigeria, recognition and application of Islamic law was not a smooth journey in pre-colonial era. Southern Nigeria comprises of South-West, South-East and South-South zones (Lamim 2016). In these three southern regions, the spread of Islamic law was very slow and disfavoured. It is credence that the application of Islamic law is territorial restricted to the northern Nigeria (Olatoye & Yekini, 2019). The obstinate position of the courts in *The Estate of Aminatu Alayo (deceased)*



Admintrator- General v T.A Tunwase and Others 1946 and *Asiata v Goncallo 1900* cases strongly confirmed the assertion regarding the territorial restriction of Islamic law to northern region of Nigeria. The position of the courts in these cases remain bad precedents because the decisions deprived the southern Muslims with their rightful choice to adopt Islamic law base on their faiths. The courts in the above cited cases applied the applicable customary and English laws despites overflowing evidences here and there, testifying to the fact that deceased lived, married and died as a Muslim faithful. One would have expected the courts to see and apply Islamic law as a law that greatly related to Muslims faith regardless of their locations or territories in which they find themselves.

Judges sitting on civil cases in the southern states of Nigeria have continuously maintained the position that Islamic law is not applicable in the region. The court in *Usman v Umaru* observed that the application of Islamic law is practically impossible in the southern Nigeria due to the absence of Shariah Courts to implement it and the State High Courts lack jurisdiction (Section 242 Constitution of the Federal Republic of Nigeria (CFRN), 1979). The court therefore declined jurisdiction and affirmed the rightful jurisdiction of the Shariah Courts to entertain issues pertaining to Islamic personal law in the Southwest and other Southern states of Nigeria.

After independence the public perception about Islamic law began to change gradually. In 1979, Islamic personal law received constitutional backing where the supreme law recognised Islamic personal law ([Oba & Ismael, 2020](#)). The 1979 Constitution of the Federal Republic of Nigeria authorises states of the federation to establish Shari'ah Courts with the purpose of administering matters as it relates to Islamic personal law (Section 242 CFRN, 1979). The Constitution further bestowed an appellate jurisdiction on both Court of Appeal and Supreme Court over Islamic personal law appeal matters provided certain number of justices sitting on the appeal are well informed in Islamic law (Sections 213 & 219 CFRN, 1979). Interestingly, the same position as contained in the 1979 Constitution was repeated in the current Constitution of the Federal Republic of Nigeria 1999 (Sections 237, 244, 247, 262 & 277, CFRN 1999 as amended).

Years after independence, Kano State enacted Shari'ah Penal Code Law and it abruptly provides in Section 29(3) that the Islamic laws are to be considered not as a customary law but, a statutory law on its own. Section 29(4) of the same law further provides:

“The provisions of existing laws in the state which define customary law to include Islamic or Muslim law are hereby accordingly amended and such provisions shall be deemed statutory laws wherever they occur.”

Several remarks from scholars support the position expressed as regard the status of the Islamic law in Kano State. The argument is that the Islamic law does not share the same attributes with customary law and cannot be said to have been derived from the

customs and usages indigenous to the people and to that extent, it does not qualify as a customary law (Oba, 2011; Akanbi, Lukman & Daibu, 2015). The scholars questioned this approach of classifying Islamic law as a customary law and observe that Shari'ah is a divine law which distinguishes it from the law derived from the customs and traditions of indigenous people (Alkamawa v. Bello 1998). To justify this, reference was made to the Nigerian Constitution that provides for a distinct structure for administration of Islamic law (Section 277, CFRN 1999 as amended) and customary law (Section 282, CFRN 1999 as amended) respectively. The same position was emphatically held and urged to be applied when parties adopt Islamic law in commercial transactions and in subsequent resolution of such disputes that may arise in the course of their dealings. Consequently, it will not be correct to categorise Islamic arbitration within the Nigeria legal framework from the purview of customary arbitration, even though a view has been advanced for mainstreaming Islamic arbitration into the Nigerian law through customary law (Akanbi, Lukman & Daibu, 2015).

In effect, Islamic law cannot be subjected to the strict rules of proof and validity requirements to which rules of customary law are subjected to. It therefore remains a challenge posing serious problems of understanding and approach if the enforcement of Islamic arbitral award is assessed based on the perspective of customary arbitration. An example of such challenge is seen in the view considering the same validity requirements applicable to customary arbitration in matters of enforcing the Islamic arbitration award. The relevant question is whether voluntary adoption of the Islamic law should mean automatic application of same law to resolve disputes arising therein.

Islamic Commercial Arbitration in Nigeria

Ordinarily, voluntary adoption of the Islamic law by the parties in their main contractual relationship should be taken to mean an automatic application of same law to the resolution of disputes arising from such contractual relationships. However, the available judicial authorities suggest that except for Islamic personal law matters, Islamic law would only apply in contractual or commercial relationships, agreements, finance and transactions if parties expressly so agreed (Maidara v. Halilu 2000; Agu v. Ikewibe 2002; Usman v. Umar 1992). In *Maidara v. Halilu 2000*, the court held that Islamic personal law applies to all Muslims, but when it comes to Islamic law of contract, all parties have to consent to its application. This principle is also relevant to the arbitration agreements/clauses. Thus, insertion of arbitration clause/agreement in commercial/business contracts to resolve future dispute, may not qualify as a prerequisite consent required under the Islamic law. This is because such submission of disputes would only amount to *gharar* (uncertainty) as the nature or the existence of such future dispute would be uncertain (Olayemi & Khalid, 2014). An agreement to settle through arbitration needs to be explicitly certain as regard the nature of the dispute in accordance with Islamic law. Parties are therefore required to agree after a dispute arises to settle through the use of arbitration. This will give



Muslims the opportunity to benefit from an arbitration system that is Shari'ah compliant, particularly in Islamic commercial transactions ([Ogunbado, Ahmad & Abubakar, 2017](#)).

No doubt Islamic arbitration is thriving in Nigeria and the reason for this, is the growing popularity of the Islamic banking and financial transactions lately. The Islamic banking and financial industry comprise of (1) Islamic banking, (2) *Takaful* (Islamic insurance) and (3) Islamic capital market (Sukuk, Islamic equity indices and fund management). With all these emerging new business opportunities in the country, resort to Islamic arbitration becomes necessary. The Nigerian banking industry is considered the most vivacious among its peers in Africa, and the industry has witnessed various reforms over the years, among which is the non-interest banking system ([Abdullahi, 2016](#)). Nigeria amended its laws on Banks and other Financial Institutions Act (BOFIA) to give recognition to banks that are based on profit and loss sharing and also to legalise 'specialised' banks. By provision of Sections 23 and 61, non-interest banks fit into the description of 'specialised' banks in Nigeria ([Ogunbado, Ahmad & Abubakar, 2017](#)). The Central Bank of Nigeria (CBN) for the first time in 1999 issued a license to a conventional bank, Habib Bank Plc to start the operation for non-interest banking in Nigeria. Unfortunately, the efforts of the CBN did not yield the desired result because the license was the first of its kind and there was no existing legal framework to regulate non-interest banking at that time ([Aliyu, 2013](#)). After some years, CBN established guideline rules on the operation of non-interest banking and subsequently granted approval to Jaiz International Plc to operate as a full-fledged non interest bank in Nigeria.

Also, between the year 2011-2014, Stanbic IBTC, Sterling bank and Tiraja Microfinance Islamic bank were licensed and commenced operations. In 2016, I-Care microfinance was licensed to operate. These five (5) institutions constitute the Islamic banking sub-sector in Nigeria ([Abdullahi, 2016](#)). The essential feature of non-interest banking system is the prohibition of interest and its encouragement of parties' participation on a profit and loss sharing basis; this is known as *Musharakah* and *Mudarabah* ([Ewaolisa, 2013](#)). The Islamic banking industry encourages healthier division of resources and good management control through ethical investments by prohibition of certain haram businesses ([Dandago, Muhammad & Oseni, 2013](#)). Abruptly, the main principles of the Islamic banking system are mutual consent, avoidance of prohibited elements e.g., interest, gambling and alcoholism and lawful contract objectives ([Dandago, Muhammad & Oseni 2013](#)). The presence of Islamic banking in Nigeria operate as a tool to tackle the problem of financial inclusion which happens to be the major concern to Muslims in banking industry due to it interest (usury) ([Mustapha & Idris, 2015](#)). No doubt, emergence and practise of Islamic banking is a timely response to the wishes of the Nigerian Muslims who for a lengthier time have been troubled and anticipated for its actual realisation ([Mustapha & Ibrahim, 2013](#)). Frankly, Nigeria is likely to record a massive economy growth if the

practice of Islamic banking industry is well premeditated based on the constructive outcome experience so far in the industry.

As regards takaful (Islamic insurance), National Insurance Commission of Nigeria (NAICOM) is charged with the duty to administer and enforce provisions of the Insurance Act in Nigeria (Aliyu-Ado & Saiti, 2017). In 2013, NAAICOM launched and recorded 'Takaful Operational Guidelines' for the operation of Takaful in Nigeria although, Takaful products had been in operation as early as 2004 when for the first time in Nigeria, African Alliance Insurance Company Ltd was given license to offer takaful services to the general public. Subsequently, between the years of 2013-2015, two full-fledged takaful companies, namely Jaiz Takaful and Noor Takaful were given license to operate (Aliyu-Ado & Saiti, 2017). In 2016, two additional companies, Niger Insurance Plc and Cornerstone Insurance Plc which are both conventional insurance companies were given approval to offer Takaful as a product. Takaful contracts are founded on the Islamic principles of profit sharing (mudarabah) and agency (Wakala) contracts (Aliyu-Ado & Saiti, 2017). The industry therefore offers both general and family takaf insurance services.

As regard sukuk, Lotus capital Halal Fund and Stanbic IBTC- Iman Fund dominate the Nigerian Capita Market (sukuk). Sukuk transaction is synchronized by the Investment and Securities Act 2007 (Cap 29, LFN 2004) and other established guidelines issued by local and international institutions such as Security and Exchange Commission (SEC), CBN, Islamic Financial Services Board (IFSB) and Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI). The Osun State Government Sukuk worth \$90 million was the first sukuk to be issued in 2013, with 42 investors. Also, in 2017, the Nigerian Government launched N100billion sukuk at a yearly charge rate of 15.743% (Premium Times, 2017).

The above foregoing on the Islamic banking system, takaful and sukuk establish a considerable number of available Islamic businesses/transactions open to Muslims in Nigeria and to foreign investors. This indicates that Islamic arbitration has a great potential for growth in Nigeria because of the increase in pursuit of the Islamic banking and finance products. And more importantly, the positive attitude of the general public to Islamic transactions is fascinating. It is therefore pertinent to examine the influence of International Islamic Institutions in Nigeria to demonstrate and underscore the progressive adoption of Shari'ah in commercial transactions.

Influence of International Islamic Institutions on Islamic Transactions/Contracts/Agreements in Nigeria

Nigeria subscribes to international Islamic institutions such as Organisation of the Islamic Cooperation (OIC), Islamic Development Bank (IDB) and Accounting and Auditing Organisation for Islamic Financial Institutions (AOIFI). These institutions in some ways enhance the improvement of Islamic banking and finance products by



creating an enabling environment for the industry to flourish and also guaranteeing an equal practices standard with conventional finance.

The OIC is one of the biggest organisations with members across the four (4) continents (Walid, 2013). The Organisation was established to strengthen the relationship between member States through distribution of wealth and resources, and for the creation of employment and educational opportunities among its members (OIC Charter, Articles 1,2 & 15). OIC agreement makes provision for the settlement of disputes through arbitration or conciliation (OIC Charter, Article 17(1)). The OIC did not receive much attention until 2012 when *Hesham Talaat M. Al-Warraq v. Republic Indonesia* case came up. Here, a dispute between the parties was successfully settled via Islamic arbitration under OIC provisions. The case therefore paved way for investors who are willing to initiate Islamic arbitration with any member of host States thus, individual investors cannot initiate arbitration proceedings under OIC provisions unless a signatory State is involved (OIC Charter, Article 14).

The IDB, a sub-division of the OIC, is an international finance institution, with the objective to maintain the welfare and economic growth of its members, in a way that is Shari'ah compliant (Malik, 2017). From its charter agreement, IDB only accepts deposits and seeks financial resources through Shari'ah compliant means, although the bank charges administrative fee which are not considered as interest. The IDB therefore, generates capital through subscriptions from its members. Nigeria contributes 7.66% of the total shares in the IDB with Saudi Arabia being the highest subscriber with 23.50% (Malik, 2017). The bank invests and utilises resources generated from its member States to build infrastructural projects, provides technical assistance and enhance foreign trade to the advantage of its members. Since the time Nigeria joined IDB in 2005, it has indeed reaped immense benefits. IDB made several contributions to assist Nigerian government policies, particularly on food security and education. In 2007, the board of Executive Directors of IDB in its 242nd session approved \$446.3 million to finance trade in Nigeria and in some other Muslims States (ISBD Portal 2007). Nigeria was among the beneficiaries of \$81.00 million grants for the Zaria Water Supply Expansion Project in 2012 (ISBD Portal 2012). The same year, at the IDB Group-Nigeria Business Forum held in Abuja, IDB and the Nigerian government entered an agreement with millions of dollars to assist in bilingual education in Nigeria.

As Islamic banking and finance industry grows, it becomes necessary to have an accounting standard for Islamic financial institutions. The existing standard did not comply with Shari'ah principles, thus creating a challenge for Islamic financial institutions who desire for application of Shari'ah compliant accounting standards. This led to the creation of Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) in 1990 (Umar & Junaidu, 2021). The objectives are to develop and publicise accounting and auditing relevant to Islamic Financial Institutions (IFIs)

(AAOIFI2022). The AAOIFI has encouraged Muslim investors to invest in member States and also enhanced the funding of infrastructure in public and private sectors (Sherif, Ade, Awwad & Mujeeb, 2023).

In 2010, International Islamic Liquidity Management Corporation (IILM) was established through joint efforts from various Central Banks from Muslims States including the apex bank in Nigeria; CBN (Ahmad, Safiai & Yosop, 2021). The main objective of IILM is to provide a Shariah compliant framework, which will address the liquidity management issue on Islamic banks and at the same time operate as an Islamic legal framework for open market operations involving Islamic financial institutions (Ahmad, Safiai & Yosop, 2021). No doubt Nigeria's membership to these Islamic institutions influences the position of investors and also serves as a means of attracting foreign businesses and investors. Interestingly, Nigeria was declared one of the fastest economies in the African continent (Umar, 2019). The prevailing commercial and contractual relationships between investors and stakeholders mean that disputes are unavoidable and these will certainly need to be resolved. Most often than not, Islamic arbitration may be the only efficient means of dispute resolution in the circumstance. This is because the national judges are not usually conversant with Shari'ah issues particularly, in finance and commerce. Specifically, the OIC agreement encourages Muslim parties to go into arbitration and further guarantees that the Islamic awards are final and enforceable upon the conclusion of the Islamic arbitration process (OIC Charter, Article 17(2)(a)-(d)). Hence, signatory States to the OIC agreement are under obligation to implement Islamic awards in its territories and it does not matter if such State is a party to the arbitration agreement or not (OIC Charter, Article 17(2)(d)).

Thus, where Islamic award is rendered and is not obeyed, identifying the country with the assets of the award-debtor is the first essential that determines the choice place for the enforcement of award. Soon now or later, Nigeria will become number one choice of the investors for the enforcement of their Islamic arbitral awards, this is because the award-debtor can have an asset in Nigeria or even be a Nigerian citizen with investments in the country (Ogunbado, Ahmad & Abubakar, 2017). At that stage, enforcement mechanism through which the award-creditor can exercise his rights of enforcement becomes an important instrument in such a circumstance. Like any other arbitral award conducted under statutory arbitration law, an award rendered through Islamic arbitration is subject to the provisions of Nigerian Arbitration and Conciliation Act (ACA) for enforcement procedure (OIC Charter, Article). International treaties such as OIC applicable to Muslims States, do not make provision for enforcement procedures, therefore, the award-creditor will be forced to depend on the existing law in the enforcing State for the enforcement order of such award.

ACA creates two principal enforcement regimes, the first can be found in the provisions of ss 51 and 52 which derived from Articles 35(1) & (2) and Article 36 of the United Nations Commission on International Trade Law on International



Commercial Arbitration 2006 (UNCITRAL Law 2006) and the second regime is provided for under Section 54 that domesticate the New York Convention 1958. Section 52 of the ACA contains grounds for refusing recognition and enforcement of foreign award in Nigeria. The aggrieved party can bring an application under Section 52 for refusal of enforcement on the following grounds: where there is incapacity of the parties, or invalid arbitration agreement, lack of due process, on jurisdictional issues; or where award contains decisions or matters which are beyond the scope of submission to arbitration, or where the composition of the tribunal or procedure not in accordance with arbitration agreement or relevant law, or the award is not yet binding or has been set aside or suspended. The courts can also refuse enforcement if finds the subject matter inarbitrable or/and where award is in conflict with public policy of Nigeria. The first set of the defences however, which can be raised by the aggrieved party are intended to safeguard the parties against private injustice, and the second set serves as an explicit catchall for the enforcement of a country's own vital interests ([Idornigie, 2015](#)).

Application of ACA provisions to the enforcement proceedings of Islamic awards posed dangerous menace to the Islamic arbitration process. Let take for instance public policy exception and, concept of arbitrability from the perspective of Islamic law. What determines public policy exception in the enforcement of Islamic arbitral award in Nigeria? This question is significant in the sense that parties who choose to arbitrate under the Islamic law will not be pleased to enforce awards that are against Islamic injunctions and principles. Most Islamic States determine public policy exception by reference to Shari'ah law in addition to other factors ([Abdelgafar, 2018](#)).

A good example is Article 27 UAE Civil Code (Federal Law No 11, 1992) that prohibits courts from enforcing laws, judgments or awards which are in conflict with Shari'ah principles, public order or good morals of the United Arab Emirate. Nigeria does not possess such provision in its domestic law. This is discouraging for a Muslim party who desires to implement an Islamic award given in his favour. The conception of Islamic public policy is evolved around reverence to the spirit of Shari'ah and its sources. Ordinarily, the court should decline to implement the award or have it vacated if such award involved a fragrant injustice or clashes with the principles of Shari'ah law. This explains reason the legal framework of some Muslim States is structured either partly or completely around Shari'ah rules. And courts from these States determine public policy exception by reference to Shari'ah ([Alqudah, 2017](#)).

Hence, the fundamental question of whether the award rendered with interest (*riba*) or tainted with unfair trade practices or an award rendered based on *haram* transaction can be enforced in State like Nigeria. ACA is silent on this. The term *riba* means unnecessary increase, unfair gain or, excess ([Latif, 2018](#)). Quran Chapter 2 verses 275-281, Chapter 3 verse 130, Chapter 4 verse 161 and Chapter 30 verse 39 forbid *riba*, therefore it is against Islamic injunctions to ask for additional interest. Prophet Mohammed also discouraged transactions founded with interest and warned

his followers from practicing it (Muslim Hadith number (1584)). One may therefore tempt to question the status of those awards that involves interest (*riba*) or; one which is tainted with unfair trade practices; or an award rendered based on haram dealings? Sadly, no single provisions of the ACA give certainty about the enforcement of awards that are tainted with *riba* or haram dealings. This proves that the law is not in accordance with Shari'ah principles.

Questions or issues on Islamic law are beyond the jurisdiction and competence of the High Court (Sections 262 and 277). The fact that Nigeria does not engage regulatory bodies such as Islam Arbitration Board or Council to monitor Islamic arbitration proceedings and its awards like that of Shari'ah Advisory Council (SAC) obtainable in Malaysia gives a bad image of the country. Indonesia also has a similar body known as National Shari'ah Arbitration Body which was created in 1993 by the council of *Ulamas* for the purpose of arbitrating Islamic commercial disputes (Section 55(2) Law No 48 of 2009). Thus, there is a Supreme Council for Shari'ah in Nigeria (SCSN) which ofcourse charge with the duties to oversee Shari'ah related cases hence, arbitrating banking and finance disputes is not the Council main focus. The SCSN under its Lagos chapter established an Independent Shari'ah Panel that involved retired Muslim judges who are learned in Shari'ah law ([Oseni, 2014](#)). Because Lagos State does not have Shari'ah Court, judges from the High Court often seek the advice of the Panel on Islamic law related issues. Sadly, no single case on Islamic arbitration has been referred to the Panel since its establishment. It seems the Panel is charged with the duty to determine questions on Islamic law of marriage and divorce (Madam Aishat Afinni v. President & Members of Grade 'B' Customary Court 2007). However, the jurisdiction of the Panel may be extended to cover Islamic arbitration as it relates to banking and financial disputes.

In Malaysia for instance, KLRCA i-Arbitration Rules 2018 permits the tribunal to seek advice and guidance from the Shari'ah Advisory Council (SAC) or Shari'ah expert, whenever it requires to determine questions or, form an opinion on Islamic law (KLRCA i-Arbitration Rules 2018, Rule 11). This gives parties the opportunity to use a Shari'ah expert or the advisory council to make determinations on Islamic law questions or issues that cannot be properly determined by arbitrators or courts. Oseni contended that the creation of SAC in Malaysia has enhanced the determination of Islamic legal questions and issues particularly, in Islamic banking and finance ([Oseni, 2015](#)). Consequently, SAC has helped in abridging the amount of cases going on appeal to the court where the aggrieved party was dissatisfied with the award (Mohd Alias Bin Ibrahim v. RHB bank Berhad & Anor 2009).

Hence, Indonesia and Malaysia have their respective unique resolution mechanisms for Islamic banking and finance disputes which have stood the test of time and worth emulating in Nigeria. Therefore, borrowing from the Malaysian and Indonesian practices will encourage effective Islamic arbitration proceedings and also assist in the development of a Shari'ah compliant enforcement mechanism in Nigeria.



Legal and Political Inadequacy as the Major Factors

Despite the growing yawning for Shari'ah compliant arbitration system for Economic, commercial and contractual transactions in Nigeria, the existing legal regime as pointed out above does not render enabling environment for Shari'ah arbitration to thrive. The Nigerian constitution is emphatic on the aspect of the freedom of religion and religious practices (Section 38, CFRN 1999 as amended). Needless to say that Shari'ah arbitration process for settling of appropriate disputes amongst Nigerian Muslims is a form of religious practice sanctioned by the constitution. Hence, an appropriate resolution framework is highly desirable to cater for disputes ascending from Islamic commercial transactions/contracts. Nigeria law permits disputant parties to seek alternative resolution of their disputes base on the agreement to settle in such manner. However, lack of dispute resolution framework that is in compliance with Islamic faith to deal with disputes arising from such Shari'ah compliant contracts/transactions remains the major reason for low adoption of Islamic arbitration in banking and finance disputes in Nigeria (Umar, 2015). This explains reason the Islamic arbitration process is still struggling to overpower the risk management practices that come alongside the conventional litigation. Investors in Nigeria are more willing to embrace alternative resolution strategies that are Shari'ah compliant. Having a legal framework in this respect is very crucial as Shari'ah denotes the path to guide the Muslims faithful both in term of worshiping of Allah and for other duties of life. Also, it is high time the ACA is revisited to cater for the yearning of the majority of Nigerian populace who wish to enforce the outcome of the proceedings emanate from Islamic arbitration before the court in the event of non-compliance by the award debtor.

Aside the inadequacy of the legal regime, there is still lack of political will on the part of the Nigerian government towards fulfilling the dreams of most Nigerians (Mamman, 2014). The population of Muslims in the country calls for governmental attention towards ensuring their religious practices and demands especially as it regards the intermittent calls for Shari'ah compliant arbitration process in Nigeria. Records have shown that the country's national assembly especially in the recent time have been busy with arrays of legislative amendments to suit the yearning of Nigerian and the real situation on the ground (Arowosegbe, 2021) affecting both Muslims and Christians in the country. It is unfortunate that the aspect of Shari'ah compliant arbitration system has not interested those at the helms of affairs despite the reality on ground. This is not far-fetched from lack of political will towards taking a bold decision that will create enabling environment for the all important Shari'ah arbitration system. The lack of political will is the aftermath of the misconceived agenda of Islamisation in governance as campaigned by the members of other faiths (Awofeso, 2016). The situation in Nigeria is not different from what is obtainable in the clime like Malaysia or Indonesia with both Muslims and non-Muslim coexistence with smooth enabling legislation for arrays of Shari'ah practices. The mentality in Nigeria has to change to pave way for the advancement of its populace.

Conclusion

Obviously, there has been an increased interest in Islamic banking and finance transactions in Nigeria with businesses taking place between the investors from different backgrounds. Despite the show of interest in Islamic arbitration for the resolution of commercial transactions, the mechanism in terms of framework to actualise that is not in existence. This paper revealed that the notion of a *tahkim* (arbitration) subsists and recognised in the Shari'ah law and in the Nigerian legal system. The annotations of some Islamic scholars on the conciliatory nature of it, is widely pronounced.

Hence, the paper argued that it will not be correct to view Islamic arbitration from the purview of customary arbitration within the Nigeria legal framework. Thus, voluntary adoption of the Islamic law should not mean automatic application of same law to resolve disputes arising therein. The paper revealed that, Islamic personal law would only apply in contractual or commercial relationships, agreements, finance and transactions if parties expressly so agreed. An agreement to settle through arbitration needs to be explicitly certain as regard the nature of the dispute in accordance with Islamic law. Parties are therefore required to agree after a dispute arises to settle through the use of arbitration.

This paper further identified how fast Islamic arbitration is thriving in Nigeria and the reason highlighted for this, was the growing popularity of the Islamic banking and financial transactions lately. However, lack of dispute resolution framework on Islamic arbitration as a sustainable means for dispute resolution in cases involving Islamic banking and finance is a major challenge. The paper further revealed that the international Islamic institutions such as Organisation of the Islamic Cooperation (OIC), Islamic Development Bank (IDB) and Accounting and Auditing Organisation for Islamic Financial Institutions (AOIFI) play a crucial role in the development of Islamic arbitration in Nigeria despite the absence of the framework regulating the process. It was discovered that these institutions in some ways enhance the improvement of Islamic banking and finance products by creating an enabling environment for the industry to flourish and also guaranteeing an equal practices standard with conventional finance.

In addition, this paper discovered that there is no regulatory body such as Islam Arbitration Board or Council in Nigeria to monitor Islamic arbitration proceedings and its awards. The paper therefore identified the existence of a Supreme Council for Shari'ah in Nigeria (SCSN) with the duties to oversee Shari'ah related cases. Unfortunately, no single case on Islamic arbitration has been handled or referred to the SCSN since its establishment. It seems the SCSN is only charged with the duty to determine questions on Islamic law of marriage and divorce

It is noteworthy that, ACA did not provide a Shari'ah compliant arbitration alternative for both Muslim and non-Muslim parties who are willing to arbitrate under the



Islamic law. The drafters of ACA did not take consciousness and idiosyncrasy nature of Islamic arbitration when drafting the law. The paper gave possible reason for this omission that, it was only recently that investors/businessmen realised the benefits associated with Islamic arbitration despite its existence before now. Hence, the drafters of the ACA may not have expected that Islamic arbitration would grow so quickly. It is thus recommends that the peculiar nature of the Islamic arbitration and awards should be considered in the ACA and in other relevant laws in Nigeria. It is also important that the existing rules on arbitration be standardized to suit the specific nature of financial transaction and Islamic commercial transactions in Nigeria. There is need for sustainable resolution framework for dispute to regulates disputes arising from Islamic banking and finance in Nigeria. Above all, it is high time Nigeria established a dedicated Islamic Arbitration Board to attend to disputes involving banking and finance cases owing to their unique nature.

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