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The Paradox of Public Policy in Nigerian Arbitration: A Protective Principle or Judicial Loophole?

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Abstract: Arbitration was anchored on party autonomy, granting parties control over procedure and outcomes. In Nigeria, however, this autonomy was constrained by the doctrine of public policy, which remained undefined under the Arbitration and Mediation Act 2023 (AMA). This ambiguity created interpretative discretion for courts, producing both flexibility and unpredictability. Public policy thus embodied a paradox: it safeguarded fundamental values such as legality, morality, and social order, yet simultaneously functioned as a judicial loophole that enabled expansive intervention, undermining arbitral finality. This article examined the domestic and international dimensions of public policy in Nigerian arbitration, analyzing judicial decisions that oscillated between broad discretion and narrow restraint. It argued that inconsistent judicial attitudes complicated the balance between autonomy and oversight, eroding confidence in Nigeria as an arbitral seat. Legislative clarification, judicial training, and institutional reform were recommended to reduce uncertainty, align with global best practice, and reinforce Nigeria's credibility as a regional arbitration hub.

Keywords: Enforcement, Judicial Oversight, Party Autonomy, Public Policy, and International Arbitration

1.0 Introduction: Party Autonomy as the Foundation of Arbitration

In recent years, international commercial arbitration has emerged as the most preferred form of alternative dispute resolution, precisely because it is a consensual process rooted in the doctrine of party autonomy. Indeed, arbitration is fundamentally a creature of party choice. One of the reasons behind this popularity is the flexibility of the arbitral process. The principle of party autonomy, in a general sense, started to develop in the nineteenth century. Party autonomy is based on the choice of law in a contract. However,

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this principle has a broader meaning in international commercial arbitration. In other words, the parties to the arbitration agreement are free not only to choose laws but also to conduct the arbitration process. A fundamental principle governing international arbitration agreements is that of party autonomy. The importance of party autonomy is established in most arbitration enactments and is indispensable, considering the fact that arbitration is a private exercise that requires the parties to the arbitration agreement to make significant input as to the arbitral procedure and some other essential aspects of the exercise. Party autonomy is a core tenet of the arbitral process, which bestows certain contractual freedoms upon the disputing parties. It stands as the central pillar of arbitral proceedings.

2.0 Public Policy: The Core Constraint on Party Autonomy

Public policy is the most critical and contentious limitation on party autonomy in commercial arbitration, yet it remains deliberately undefined in the Arbitration and Mediation Act 2023, creating significant interpretative discretion for courts.

Public policy encompasses fundamental principles of law, morality, and social order that a jurisdiction considers so essential that they cannot be derogated from by private agreement, even through the exercise of party autonomy. It represents the irreducible core of a state's legal and moral values that must be protected even at the cost of interfering with private contractual arrangements. The concept has both domestic and international dimensions, creating complexity in cross-border arbitration.

(i) Domestic Public Policy

Domestic public policy comprises the fundamental legal and moral principles of the Nigerian state that define the boundaries of acceptable conduct within its jurisdiction. The Nigerian Supreme Court in Okonkwo v. Okagbue provided the classic formulation:

Public policy is the ideal which, for the time being, prevails in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest or generally contrary to the public good.

This broad definition grants Nigerian courts significant discretion to determine what constitutes public policy violations. The Supreme Court, in Kano State Urban Development Board v. Fanz Construction Co. Ltd, provided further clarification on the scope of public policy by indicating that it encompasses situations where an award or transaction violates fundamental constitutional principles, contravenes mandatory statutory provisions enacted for the protection of the public, or is tainted by corruption, fraud, or illegality in its

formation or performance. The Court also recognised that public policy may be invoked where the conduct in question is so unconscionable as to shock the conscience of the court or where the enforcement of an arbitral award would undermine the proper administration of justice. This judicial articulation underscores the broad and discretionary nature of public policy as a ground for judicial intervention, particularly in arbitration-related matters.

However, this expansive approach contrasts sharply with the reasoning in the case of Taylor Woodrow, where the court's interventionist stance effectively subordinated party autonomy to judicial oversight under the guise of safeguarding public policy. By comparison, the decision in the case of Olubunmo reflects a more restrictive and modern orientation, narrowing the scope of public policy to statutorily defined grounds and thereby aligning more closely with international arbitration practice. Taken together, these cases demonstrate that the very definition of public policy in Nigeria is contested, oscillating between broad judicial discretion and a more restrained, autonomy-respecting approach. This doctrinal inconsistency underscores the dynamic nature of the concept and highlights the challenges of predictability in Nigerian arbitration law.

(ii) International Public Policy

International public policy is a narrower subset comprising truly fundamental principles that apply even in international transactions. The International Law Association has conceptualised international public policy as comprising core principles that transcend domestic legal peculiarities and safeguard the integrity of the arbitral process. These include the prohibition of corruption, bribery, and money laundering, the prevention of fraud and misrepresentation, and the protection of fundamental human rights. The ILA further emphasises the need for compliance with international sanctions and embargo regimes, as well as strict adherence to fundamental standards of procedural justice, such as the right to a fair hearing (audi alteram partem) and the impartiality and independence of the arbitral tribunal. Collectively, these elements frame international public policy as a narrowly construed but essential safeguard aimed at preserving legitimacy, fairness, and justice in international arbitration.

The critical distinction is that international public policy is meant to be narrower and more universally accepted than domestic public policy, ensuring that awards are not refused enforcement based on purely parochial concerns. Section 55(3)(b)(ii) of the AMA 2023 permits courts to set aside an arbitral award if "the award is in conflict with the public

policy of Nigeria." Similarly, Section 58(2)(b)(ii) allows courts to refuse recognition or enforcement of foreign arbitral awards on public policy grounds.

The Act provides no definition of public policy, creating a deliberate legislative gap that grants courts interpretative power. This ambiguity serves dual and competing purposes: on one hand, it affords flexibility by enabling the law to evolve in response to shifting social, economic, and moral values, while also allowing courts to intervene in unforeseen circumstances to safeguard fundamental interests and prevent abuse of arbitral processes. On the other hand, the absence of a clear definition undermines certainty, generating unpredictability for parties who rely on autonomy in structuring their transactions and raising concerns that expansive judicial interpretations may erode the finality of arbitral awards. This tension between flexibility and certainty has significant implications for Nigeria's attractiveness as a seat of arbitration, particularly in the enforcement of awards under the new statutory regime. Nigerian courts have adopted inconsistent approaches to public policy, creating doctrinal uncertainty:

In Gov. of Ekiti State v. Olubunmo, the Supreme Court adopted a narrow view, holding that public policy should be invoked only where enforcement would violate fundamental norms or legality. The Court emphasised that mere errors of law or fact in an award do not constitute public policy violations. In Taylor Woodrow (Nig) Ltd v. S.E. GMBH (1993), the Supreme Court set aside an award on public policy grounds based on perceived conflict with domestic statutory provisions, without clearly articulating why the specific violation rose to the level of public policy. This broader approach treats public policy as encompassing compliance with any mandatory legal rule.

The central paradox is that public policy serves as both a necessary safeguard and a dangerous escape valve. As a safeguard, it protects fundamental state interests, prevents the enforcement of corrupt or fraudulent awards, and ensures adherence to basic standards of procedural justice. Yet, its deployment as an escape valve permits judicial second-guessing of arbitral determinations, enables parties to re-litigate disputes in court, and undermines the finality that arbitration is designed to achieve. This dual character underscores the tension between the legitimate need for judicial oversight and the imperative of preserving arbitration's autonomy and efficiency within the Nigerian context under the Arbitration and Mediation Act 2023.

This paradox makes public policy the primary battleground where the tension between party autonomy and judicial oversight manifests.

Furthermore, Article 36 (1) of the UNCITRAL Model Law states the grounds for refusal of enforcement and recognition of an arbitral award. Each state can carry out the process of arbitration according to its country's law, as each state has the right to implement full and permanent sovereignty. Refusal of recognition and enforcement is also stated in Article V of the New York Convention, which indicates that refusal can be made when "the subject matter of the difference is not capable of settlement by arbitration under the law of that country" or when the award is contrary to the public policy of that country. As public policy can be determined by the socio-economic and cultural status of each country, it differs in every country. The arbitrators have internationally stated that the award is likely to be enforced by countries that interpret public policy. The parties, when making any agreement, should confer powers on the arbitral tribunal to carry out any act that would be contrary to the public policy of the country where the arbitration is taking place, and it shall be unenforceable if it has exceeded the offending provision and any act that cannot function according to the purports of the arbitral tribunal.

Public policy is highly context-dependent, varying with the social, economic, and cultural conditions of each country. Hence, an issue that is within the scope of public policy in one country may not be a public policy issue for another country. It serves as a significant ground for refusing the recognition and enforcement of an award. The Soleimany v Soleimany case vividly illustrates this: an English court refused to enforce an arbitral award based on an illegal contract (smuggling), deeming it contrary to English public policy, despite its validity under the Jewish law applied by the arbitral tribunal. This demonstrates that public policy is a critical non-derogable limitation; even if parties freely choose a law and obtain an award, the enforcement state's fundamental public policy can invalidate that choice and refuse enforcement.

In this case, a father and a son smuggled some carpets out of Iran under a contract. This smuggling was unlawful according to Iranian revenue laws. A dispute arose between them, and they decided to resolve this dispute through arbitration. They submitted their dispute before the Beth Din, which applied Jewish Law. According to Jewish Law, even if the contract was illegal, it had no effect on the rights of the parties. After the award was made, one of the parties applied to the English Court of Appeal in order to obtain the enforcement of the award. However, the English Court of Appeal refused this application on the grounds of public policy, and the Court stated that public policy did not allow the enforcement of an illegal contract.

The decision in The Federal Republic of Nigeria (FRN) v Process & Industrial Developments Limited (P&ID) ("FRN v P&ID") is very apt as it relates to the doctrine of public policy and is the most recent authority involving Nigeria on the international commercial arbitration scene. The decision on appeal by the London Court of International Arbitration (LCIA) uncovers the valuable lessons learned, insights gained from this precedent-setting legal battle, and a deeper understanding of future contractual agreements, arbitration, foreign investments, and the fight against corruption.

A brief background of the case is necessary to set the tone as it relates to public policy. On 11 January 2010, in a contractual agreement, one party was the Federal Government of Nigeria, and the other was a British company called Process & Industrial Developments Limited (P&ID). The agreement was titled "Gas Supply and Processing Agreement for Accelerated Gas Development" (GSPA). The contract was entered into and meant to address Nigeria's shortage of electricity by using gas from the recovery of oil instead of flaring it, which caused pollution.

According to Nigeria, after signing the GSPA, neither party fulfilled their obligations. This led to a dispute and eventually an arbitration process. In 2017, the arbitration tribunal ruled that Nigeria owed P&ID Six Billion, Six Hundred Million Dollars (£6,600,000,000.00), which is a significant amount of money for Nigeria's federal budget. With interest, the amount has now exceeded Eleven Billion United States Dollars (£11,000,000,000.00).

P&ID is a company registered in the British Virgin Islands and was co-founded by two Irish businessmen. The GSPA was supposed to last for twenty (20) years, during which Nigeria would supply gas to be processed by P&ID for power generation. However, Nigeria did not supply any gas, and P&ID did not construct any gas processing facility. In the third year of the GSPA, P&ID initiated arbitration against Nigeria based on the arbitration clause in the agreement. The arbitral tribunal found that Nigeria had breached the GSPA and terminated it, holding Nigeria liable for damages. The tribunal issued a final award requiring Nigeria to pay P&ID £6.6 billion, plus interest, as already stated earlier herein.

Nigeria challenged the award in the Commercial Court in London, alleging bribery, corruption, and perjury. These allegations extend to the entire arbitral process, from the agreement to the final award.

A pertinent objection that the FRN raised is that under section 68(2)(g) of the Arbitration Act 1996, the award was obtained by fraud, or how it was procured was

contrary to public policy. It was this objection that determined the appeal in Nigeria's favour.

The Court decided that the said section is crucial to the integrity of the arbitration process. The plain meaning of section 68(2)(g) should be applied, as no policy of arbitration law calls for a different interpretation. An award obtained through fraud, contrary to public policy, or procured in a way that goes against public policy, and which causes or will cause significant injustice, is not what the parties agreed to when they chose arbitration. Supporting such an award under the guise of supporting the arbitration process achieves the opposite effect. Unless the right to object is lost due to finality (as per section 73), and subject to the procedural restrictions in section 70(2) and (3), there is no refuge.

The crux of the case was the issue of bribery of Mrs. Grace Taiga during the formation of the Gas Supply and Processing Agreement (GSPA). Mr. Michael Quinn falsely concealed this bribery in his witness statement, and further attempts were made to suppress the bribery or corrupt payments. P&ID monitored this (among other things) by retaining Nigeria's Internal Legal Documents. P&ID argues that any perjury that occurred did not cause substantial injustice as defined in section 68, as it did not lead to the Awards. However, the Court disagreed. The Awards were the outcome of the Arbitration, and the Arbitration would have been significantly different and more favourable to Nigeria if the bribery of Mrs. Grace Taiga had been known to the Tribunal. The issue of whether the GSPA was procured through fraud and, therefore, voidable would have been raised. The discovery of the concealment would have completely changed the Tribunal's approach to Mr. Michael Quinn's evidence.

Thus, Nigeria unquestionably suffered substantial injustice under Section 68. This is true even before considering what P&ID did with Nigeria's internal legal documents.

Section 68 not only considers whether the award was obtained through fraud but also how the award was procured in a manner contrary to public policy. The focus here was on the process by which the award was achieved. P&ID obtained the awards only by engaging in severe abuses of the arbitral process. As a result, Nigeria had a "right to object" under section 68(2)(g) of the Arbitration Act 1996.

The Court acknowledged that it was true that there were other factors contributing to the Awards, including incompetence and negligence on the part of Nigeria throughout the Arbitration (through various individuals). However, the presence of these factors did not

diminish the effects of P&ID's abusive conduct. If this were a fight, it was not a fair one and could not result in a just outcome.

Under section 73, Nigeria has demonstrated that at the time it participated in or continued to participate in the Arbitration, it did not know and could not have reasonably discovered the grounds for its objection under section 68(2)(g). Therefore, Nigeria did not lose its right to object under section 68(2)(g). The arbitral award against Nigeria was set aside.

The significance of the case of FRN v P&ID in the context of Nigeria's legal system is that it reaffirmed the fundamental principle that awards obtained by fraud or contrary to public policy are not enforceable. The Nigerian cases of Ogbuneke Sons and Company Ltd v E.D. & F Man. Nigeria Ltd & Ors and ECOBANK v Admiral Environmental Care Ltd & Ors are relevant herein. The case also highlights the importance of legal professional privilege and the right to a fair trial. Vide: Akanbi v Alao, Abubakar v Chuks, Nigerian Bar Association v Lanre Mabawonku, Esq.; Agetu v C.O.P.

Section 68(2)(g) of the Arbitration Act 1996, which Nigeria relied on, gave the Court the power to set aside an arbitration award if it was obtained by fraud or if its procurement was contrary to public policy. In this case, the Court found that P&ID had obtained the arbitration award by fraud and bribery. The Court also found that P&ID had breached Nigeria's legal professional privilege by retaining Nigeria's internal legal documents.

Understanding and applying the following lessons learnt from the FRN v P&ID case is of paramount importance for Nigeria's legal system:

1. Legal Precedent: The FRN v P&ID case has set a crucial legal precedent in Nigeria. It establishes how the country's legal system deals with complex international arbitration disputes. These legal precedents guide future cases, ensuring consistency and predictability in legal outcomes.

2. International Arbitration Expertise: This case highlighted the need for Nigeria to enhance its expertise in international arbitration. Understanding the intricacies of international arbitration law is vital for effectively representing the nation's interests in global business and trade matters.

3. Contractual Obligations: The case underscored the importance of meticulously scrutinising and negotiating contracts, especially those with significant

financial implications for the country. Legal professionals and government officials must be vigilant in protecting Nigeria's interests during contract negotiations.

4. Judicial Independence: The case highlighted the need for a strong and independent judiciary, as was decided in Allied Peoples' Movement v INEC & Ors. Upholding the principles of justice and impartiality is essential to maintain trust in the legal system, both domestically and internationally.

5. Public policy and fraud prevention: The lessons from this case can inform the development and enforcement of laws and regulations aimed at preventing fraud and ensuring that public policy considerations are upheld in international contracts and arbitration proceedings.

On this note, the FRN v P&ID case stands as a pivotal moment in the country's legal history. It has not only provided valuable lessons in international arbitration and contract scrutiny but has also emphasised the critical importance of a strong and knowledgeable legal system. As Nigeria continues to engage in international trade and commerce, these lessons will serve as guideposts to navigate the complexities of global legal matters. It is incumbent upon legal professionals, policymakers, and stakeholders to heed these lessons, ensuring that Nigeria's legal system remains robust, transparent, and resilient in upholding the nation's interests, both domestically and on the international stage.

Finally, it is essential that arbitrators consider the public policy of "all interested nations," not just the enforcement country, to proactively manage potential challenges and ensure the award's enforceability. Invariably, public policy is a ground for refusing the recognition and enforcement of the award.

3.0 Legal Barriers and Judicial Attitudes

The historical movement from a more interventionist to a more deferential judicial stance is clear as day, but with inconsistency across time and courts. In Taylor Woodrow Nig Ltd v S.E. GMBH, the Supreme Court set aside an award on public policy grounds without a clear articulation of what public policy required in the specific case. This reflected a broad view of public policy and a readiness to reopen the merits under that label.

In Kano State Urban Development Board v Fanz Construction Co. Ltd, the Court listed broad public policy heads such as violation of constitutional principles, breach of mandatory statutes, fraud, corruption, and unconscionable conduct. This gave some structure but still left wide discretion.

Later decisions, especially IPCO Nigeria Ltd v NNPC and Gov. of Ekiti State v Olubunmo, adopt a narrower understanding. They stress that public policy should apply only to fundamental illegality or serious injustice, and that mere errors of law or fact are not enough. MV Lupex v NOC and Sonnar v Nordwind confirm respect for party choice on procedure and foreign law, subject to public policy.

This discourse further explains that lower courts do not always follow the narrower line. Some decisions still rely on public policy or "interest of justice" language to justify interference with awards or agreed procedures where there is no clear breach of statutory or constitutional standards. This creates uncertainty for users and practitioners.

The AMA 2023 did not attempt to define public policy or provide a detailed arbitrability schedule. The Act therefore enters a case law environment where the text is pro-autonomy, but judicial practice is uneven. The success of the Act will depend on whether courts align their approach with the narrower, Model Law-type understanding of public policy or continue to rely on broad domestic conceptions.

The doctrine of public policy appears in section 55(3)(b)(ii) and section 58(2)(b)(ii) of the AMA without definition. The Supreme Court has described it in broad terms in Okonkwo v Okagbue as the community's sense of what serves its welfare and fundamental interests. Kano State Urban Development Board v Fanz Construction adds specific heads of public policy. The case of Olubunmo then attempts to confine public policy to serious violations and rejects reliance on mere errors.

In essence, the absence of statutory guidance on public policy leaves courts with wide interpretative discretion. This discretion is the principal source of uncertainty for parties seeking to rely on autonomy under the AMA.

4.0 Recommendations

To strengthen party autonomy and public policy efficacy in Nigeria, the following is proposed:

A. Legislative Reform

A key area requiring refinement within Nigeria's arbitration framework concerns the interpretative uncertainties surrounding the scope of the "public policy" exception under the Arbitration and Mediation Act 2023 (AMA). Although the Act acknowledges public policy as a legitimate ground upon which courts may refuse enforcement or recognition of arbitral awards, the absence of precise statutory guidance leaves the doctrine vulnerable to inconsistent judicial application. This lack of clarity risks undermining the predictability

and finality of arbitration, thereby eroding confidence in Nigeria as a reliable arbitral seat. The codification of this concept within the statutory text of the AMA would not only minimise jurisdictional disputes but also reinforce Nigeria's alignment with international best practices. When viewed together, the clarification of public policy exceptions would constitute critical reforms capable of enhancing certainty, curbing judicial overreach, and consolidating Nigeria's attractiveness as a credible arbitral jurisdiction.

Furthermore, the following definition for public policy is recommended for possible codification:

An arbitral award shall be considered contrary to public policy only where its recognition or enforcement would conflict with the fundamental principles of justice, morality, or the public interest of Nigeria. Mere errors of law or fact, or procedural irregularities that do not result in substantial injustice, shall not constitute grounds of public policy.

This proposed definition of public policy bridges theory and practice by narrowing the scope of judicial intervention while preserving the state's sovereign authority. It reflects the legislative intent of Section 55 of the AMA 2023, particularly the "substantial injustice," which aims to prevent courts from reopening arbitral awards on minor grounds. At the same time, it resonates with some recent Nigerian judicial decisions, where courts have treated public policy as a high bar, reserved for cases involving fraud, corruption, or violations of fundamental legal values, rather than ordinary errors of law or fact. In addition, Nigeria would align itself with UNCITRAL Model Law jurisdictions, enhancing predictability for parties and reinforcing the country's reputation as a credible arbitral seat.

B. Judicial Capacity Building:

The effectiveness of arbitration depends on courts that support rather than obstruct arbitral processes. However, frequent judicial intervention, often due to limited familiarity with modern arbitration principles, has created uncertainty for the arbitral players. Sustained training programmes for judges at all levels are therefore critical to cultivating a pro-arbitration stance, reducing unwarranted interference, and ensuring respect for party autonomy.

The creation of specialised arbitration divisions within the judiciary. These divisions would be staffed by judges formally trained in arbitration law and practice, particularly in interpreting the AMA. Such specialisation would promote consistency in judicial decisions, minimise unnecessary court involvement, and build confidence among parties who rely on

arbitration for efficient dispute resolution. A judiciary that understands arbitration's principles is indispensable for fostering a stable and credible arbitration environment.

4.0 Conclusion

Party autonomy is the cornerstone of arbitration, granting parties control over how disputes are resolved and distinguishing it from litigation. The Arbitration and Mediation Act 2023 reinforces this principle by introducing progressive innovations that position Nigeria among arbitration-friendly jurisdictions. Yet, autonomy is inherently limited by public policy, which remains deliberately undefined in the Act and thus operates both as a safeguard of fairness, legality, and social order, and as a judicial loophole enabling broad court intervention. This paradox places the Nigerian judiciary at the centre of balancing autonomy with oversight, but inconsistent interpretations of public policy have created uncertainty and jurisdictional conflicts that undermine confidence in arbitration. To consolidate Nigeria's role as a regional hub, reforms must begin with legislative clarification and be supported by continuous judicial training, ensuring that public policy functions as a genuine protector of justice rather than a tool for judicial interference.

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