THE ARBITRABILITY OF AN ALLEGATION OF FRAUD UNDER NIGERIAN LAW

Introduction

The concept of arbitrability, the inquiry into whether a particular dispute is capable of being resolved by arbitration, occupies a foundational position in the law and practice of alternative dispute resolution. In Nigeria, the governing statutory instrument is the Arbitration and Mediation Act 2023,[1] which, as Oraegbunam and Maduakolam observe, broadly seeks to separate those issues that may be submitted to arbitration from those that may not.[2] Arbitrability may arise in two senses: subjective arbitrability, which concerns the legal capacity of the parties to conclude a binding arbitration agreement, and objective arbitrability, which relates to the character or subject matter of the dispute itself.[3] It is with objective arbitrability, and specifically the arbitrability of disputes tainted by allegations of fraud, that this article is concerned.

For most of its history, Nigerian law maintained a broadly restrictive attitude towards arbitrability, treating public policy as a wide and imprecise barrier to the referral of disputes to arbitration. Arbitration agreements in commercial contracts have become standard mechanisms for dispute resolution, yet parties frequently exploited the allegation of fraud as a tactical device to frustrate agreed arbitration clauses and force disputes into the courts. The trajectory of judicial development, from the obiter remarks of the Supreme Court in *Kano State Urban Development Board v Fanz Construction Co Ltd* to the more nuanced analysis of the Court of Appeal in *Mekwunye v Lotus Capital Ltd*, reflects an emerging, if still incomplete, realignment of Nigerian law with international best practice on this subject.[4]

The Legislative Framework and Its Gaps

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[1]Arbitration and Mediation Act 2023 (AMA).

[2]Ikenga K E Oraegbunam and Johnmary Maduakolam, 'Arbitrability in Nigeria and Some Other Jurisdictions' (2021) 3(2*) International Journal of Comparative Law and Legal Philosophy* 1, 2.

[3]S C Obi-Okoye, 'The Effect of Arbitrability on the Enforcement of Foreign Arbitral Awards in Nigeria' (2011) 8 *Unizik Law Journal* 244.

[4]Chiamaka Orabueze, 'Arbitration Agreement: The Issue of Arbitrability in Nigeria Arbitration Practice' (2018) *International Journal of Law and Society*.

The Arbitration and Mediation Act 2023 contains no express catalogue of arbitrable or non-arbitrable subject matters. It does, however, offer three oblique signals. First, section 5 empowers a court to refuse to refer a matter to arbitration where it is satisfied that a sufficient reason exists for not doing so, without defining what such a reason might be.[5] Second, section 55(b) permits a court to set aside an arbitral award where the subject matter of the dispute is not capable of settlement by arbitration under Nigerian law or where the award is against public policy. Third, section 58(2) allows a court to refuse enforcement of a foreign award on the same grounds.[6]

The reliance on "public policy" as the operative standard is problematic precisely because public policy is not defined in the Act. No Nigerian statute expressly identifies which categories of dispute fall outside the scope of arbitration. The ancient English case of *Russell v Russell*, where a court indicated it might refuse arbitration if a party faced a criminal allegation and wished to clear his name in open court, has long been invoked in Nigerian proceedings as a justification for resisting referral to arbitration wherever fraud is alleged.[7] This legislative silence has left the courts as the primary architects of arbitrability doctrine in Nigeria, producing a body of case law that is, as the following analysis demonstrates, more incoherent than certain.[8]

Judicial Development of the Arbitrability of Fraud

1. **The Fanz Foundation**

The starting point in any analysis of the arbitrability of fraud in Nigeria is *Kano State Urban Development Board v Fanz Construction Co Ltd.*[9] The case concerned a straightforward building contract dispute; no issue of fraud or arbitrability was squarely before the Supreme Court.

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[5] AMA (n 1) s 5(1).

[6] AMA (n 1) ss 55(b) and 58(2).

[7] *Russell v Russell* (1880) 14 Ch 471.

[8] Kudirat Magaji W Owolabi, 'Determining the Arbitrability of the Subject Matter Dispute by the Nigerian Courts and Its Impacts on the Awards' (2023) PPLRUNLAW Review, Vol 2; published by Faculty of Law, Redeemer University, Ede <https://kwasuspace.kwasu.edu.ng/items/02f0822f-30e9-46ea-94f0-679589e230fb > accessed 18 May 2026.

[9] *Kano State Urban Development Board v Fanz Construction Co Ltd* (1990) 4 NWLR (Pt 142) 1 (SC).

Nonetheless, in the course of its judgment the Court drew copiously from Halsbury's Laws of England and made a broad statement to the effect that "an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering." This pronouncement was plainly *obiter dictum*; it did not form part of the *ratio decidendi* of the decision, as it was not responsive to any issue for determination placed before the Court by the parties.[10]

Yet, subsequent courts misread the *Fanz* pronouncement as a settled binding principle. In *Bendex Engineering Corp & Anor v Efficient Petroleum (Nig) Ltd*, the Court of Appeal declined to apply that reading and instead held, more sensibly, that at the stage of appointing an arbitrator, the court's only function was to ascertain whether a genuine dispute existed within the contemplation of the arbitration clause; it was for the arbitral tribunal itself to investigate the allegations of fraud and misrepresentation.[11]

2. **B J Export and the Blanket Exclusion**

In *B J Export & Chemical Company Ltd v Kaduna Refining & Petro-Chemical Company Ltd*, a different panel of the Court of Appeal took the position that criminal matters, including allegations of fraud, are categorically not amenable to settlement by arbitration.[12] The Court granted leave to revoke the arbitrator's authority on the basis that the claim was *prima facie* fraudulent. This decision was unchallenged on appeal to the Supreme Court and, as a result, its error was never corrected at the apex level.[13]

The *B J Export* ratio was subsequently reaffirmed in *Kano State Government & Anor v A S J Global Links (Nig) Ltd*, where the Court of Appeal stated categorically that where a contract

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[10]Oraegbunam and Maduakolam (n 2) 3.

[11]*Bendex Engineering Corp & Anor v Efficient Petroleum (Nig) Ltd* (2001) 8 NWLR (Pt 715) 333.

[12]*B J Export & Chemical Company Ltd v Kaduna Refining & Petro-Chemical Company Ltd* (2002) LPELR-12175 (CA).

[13]Oraegbunam and Maduakolam (n 2) 4.

agreement is tainted with prima facie illegality or fraud, the arbitration clause shall cease to have effect and the parties must proceed to the High Court for a determination of the dispute.[14] Neither decision, however, attempted to draw any distinction between fraud that strikes at the validity of the arbitration agreement itself and fraud that merely relates to the performance of obligations under the underlying contract, a distinction that is, as later analysis reveals, pivotal.[15]

3. Mekwunye v Lotus Capital Ltd: The Pivotal Restatement

The most important Nigerian authority on the arbitrability of fraud is *Mekwunye v Lotus Capital Ltd & Ors*, decided by the Court of Appeal in April 2018.[16] The appellant had commenced proceedings against the respondents in the Federal High Court, Lagos, alleging, with full particulars, that the 1st Respondent's Telecoms Private Equity Fund was a Ponzi scheme used to defraud investors. The respondents applied for a stay of proceedings pending arbitration pursuant to the parties' agreement. The Federal High Court granted the stay, and the appellant appealed to the Court of Appeal on the ground that the dispute was non-arbitrable by reason of the fraud alleged.

The Court of Appeal held that it was unaware of any decision of the superior courts in Nigeria where the precise question of the arbitrability of fraud had been properly raised and resolved.[17] Turning to persuasive foreign authority, the Court drew on the Indian Supreme Court's decision in *A Ayyasamy v A Paramasivam* and held that a mere allegation of fraud does not in itself render a dispute non-arbitrable.[18] The Court qualified the earlier *B J Export* position, stating that its ruling remained potent but only insofar as the allegation of fraud was directed at the arbitration

[14] *Kano State Government & Anor v A S J Global Links (Nig) Ltd* (2017) LPELR-46215 (CA), pp 43–45.

[15] Emmanuel Abasiubong Bassey (S P A Ajibade & Co), 'Judicial Attitude to the Arbitrability of Contracts Tainted with Fraud' (Mondaq) <Judicial Attitude To The Arbitrability Of Contracts Tainted With Fraud - Arbitration & Dispute Resolution - Nigeria> accessed 18 May 2026.

[16] *Mekwunye v Lotus Capital Ltd & Ors* (2018) LPELR-45546 (CA).

[17] Oliver Omoredia, 'When Allegations of Fraud is an Arbitrable Matter: Recent Court of Appeal Decision in Charles Mukwenye v Lotus Capital Limited & Ors' (TheNigeriaLawyer, 19 November 2018) <When Allegations Of Fraud Is An Arbitrable Matter: Recent Court Of Appeal Decision In Charles Mukwenye V. Lotus Capital Limited & Ors - TheNigeriaLawyer> accessed 18 May 2026.

[18] *A Ayyasamy v A Paramasivam & Ors* (CA Nos 8245–8246 of 2016) Supreme Court of India.

agreement itself: "to accept the Appellant's contention to the effect that arbitration should be shut out merely on the basis of allegation of fraud, which has not been subject to proof, would undoubtedly destroy the very purpose for which the parties had agreed by contract to submit to arbitration."[19]

The Court thus articulated a two-part test: an allegation of fraud is non-arbitrable only where

(a) it raises serious questions of fraud going to the validity of the contract itself, or

(b) the fraud alleged is directed at the arbitration agreement, thereby impeaching its existence or validity. Where the fraud relates solely to the performance of obligations under the contract, rather than its formation or the conclusion of the arbitration clause, an arbitral tribunal retains full jurisdiction.[20]

The Doctrine of Separability and the Validity Test

The governing principle implicit in *Mekwunye* is rooted in the internationally recognised doctrine of separability, the principle that an arbitration clause within a contract is treated as a legally distinct agreement from the underlying contract in which it is contained. This doctrine was most authoritatively stated by the House of Lords in *Fiona Trust & Holding Corp v Privalov*, where the court held that parties contracting for arbitration intend that all disputes arising from their relationship, including disputes about the validity of the contract itself, should be determined by the same tribunal, unless the language of the agreement clearly excludes certain matters.[21]

The critical consequence of separability is that the invalidity or non-existence of the main agreement, even if induced by fraud, does not automatically render the arbitration clause invalid. The arbitration clause has to be independently tainted before it will be displaced. As the English Court of Appeal confirmed in *Nigel Peter Albon v Naza Motor Trading SDNBHD*, it is only where there is a good arguable case that the arbitration clause itself, for example, a party's

[19] *Mekwunye v Lotus Capital Ltd* (n 15).

[20] Bassey (n 10).

[21] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

signature on the agreement containing the clause, was forged or fraudulently induced that a national court rather than the arbitral tribunal should determine the question.[22]

The Nigerian courts have not yet expressly adopted separability as a named doctrine, but the analytical framework in *Mekwunye* is functionally equivalent to it. The distinction the Court draws between fraud affecting "the arbitration agreement and/or the substantive contract" on the one hand, and fraud relating to "the performance of obligations under the contract" on the other, mirrors the separability analysis applied in England and India.[23]

The practical test is therefore: does the allegation of fraud, if proved, render the agreement to arbitrate itself void or voidable? If yes, the matter belongs before the courts. If the arbitration clause would survive a finding of fraud, the arbitral tribunal has jurisdiction to determine the fraud allegation as part of the broader dispute.

A Comparative Perspective and the Limits

The trajectory of Nigerian law in *Mekwunye* broadly aligns with international developments, but important criticisms remain. The Court of Appeal based its analysis substantially on the Indian decision of *Ayyasamy*, which distinguished between "serious" or "complicated" fraud and fraud *simpliciter*. As Oraegbunam and Maduakolam note, *Ayyasamy* has since been superseded in India by the more liberal authority of *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd*, which adopted the "public flavour" standard and held that neither fraud nor complicated fraud constitutes an absolute bar to arbitrability, so long as the alleged fraud is a civil matter between the parties without public ramifications.[24][25]

This international development exposes the provisional nature of the *Mekwunye* framework. By grounding Nigerian law in a persuasive Indian authority that is no longer good law in its home

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[22]*Nigel Peter Albon v Naza Motor Trading SDNBHD & Ors* [2007] EWCA Civ 1124.

[23]Bassey (n 10).

[24]*Avitel Post Studioz Ltd & Ors v HSBC PI Holdings (Mauritius) Ltd* (Civil Appeal No 5158 of 2016) Supreme Court of India.

[25]Oraegbunam and Maduakolam (n 2) 7.

jurisdiction, the Court of Appeal inadvertently created a precedent that may require revision. The difficulty, as the academic literature highlights, is that public policy is intrinsically context-dependent; what is regarded as an appropriate standard in India may not map cleanly onto the economic and institutional realities of Nigeria.[26]

Jurisdictions such as Zimbabwe and Ghana have sought to address this uncertainty through legislative prescription. Zimbabwe's Arbitration Act 1996 sets out, in section 4, a clear list of matters that are not capable of determination by arbitration, including criminal cases, matrimonial causes, and matters affecting minors, while leaving all other disputes open to the parties' agreement. Ghana's Alternative Dispute Resolution Act 2010 similarly delimits the scope of non-arbitrable matters by reference to national or public interest, environmental matters, and constitutional interpretation. In Singapore, the third most popular seat of international arbitration globally, the law goes furthest, permitting virtually all civil disputes to be arbitrated unless contrary to public policy, and even providing expressly for the compounding of offences.[27]

Nigeria's narrow judicial construction of arbitrability, which, as Owolabi demonstrates, restricts arbitrable disputes primarily to those of a contractual or commercial character, has had a further adverse consequence: it hinders the recognition and enforcement of foreign arbitral awards rendered in jurisdictions operating with a more liberal arbitrability framework. Where a foreign tribunal has exercised jurisdiction over a fraud claim that a Nigerian court would treat as non-arbitrable, the award may be refused enforcement under section 58(2) of the AMA on grounds of public policy, producing a chilling effect on Nigeria's attractiveness as a seat of international arbitration.[28]

Conclusion

The arbitrability of fraud allegations under Nigerian law has evolved from an era of blanket exclusion, rooted in the misapplication of an *obiter dictum* in *Fanz* and the categorical ruling in

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[26]Orabueze (n 4).

[27]Oraegbunam and Maduakolam (n 2) 11–12.

[28]AMA (n 1) ss 34 and 57; Owolabi (n 27).

B J Export, to a more nuanced position established by the Court of Appeal in *Mekwunye v Lotus Capital Ltd*. The current position is that fraud is arbitrable unless the allegation of fraud is directed at the arbitration agreement itself, thereby impeaching its validity.[29]

This development, while commendable, remains precarious. It rests on a persuasive foreign authority that has since been overtaken in its own jurisdiction, has not been confirmed by the Supreme Court, and is susceptible to reversal or inconsistent application by different panels of the Court of Appeal. Furthermore, the lack of any statutory definition of what is or is not arbitrable leaves the law hostage to the subjective public policy perceptions of individual judicial panels, a situation wholly inimical to the commercial certainty that arbitration is meant to provide.

Two pathways exist for reform. Nigeria may follow the prescriptive approach of Zimbabwe and Ghana, enacting a statutory list of non-arbitrable matters and leaving all others open. Alternatively, it may follow the more liberal path of India and Singapore, presuming that all civil disputes are arbitrable unless they carry a genuinely public dimension. Either course requires legislation. The Arbitration and Mediation Act 2023 has replaced the Arbitration and Conciliation Act but has not yet enacted a clear arbitrability framework. Until such legislation is passed, the uncertainty surrounding the arbitrability of fraud in Nigeria will continue to undermine the integrity of commercial arbitration agreements and Nigeria's standing as a modern arbitration-friendly jurisdiction.

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[29]Bassey (n 10); Omoredia (n 17).

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