

# OBJECTION TO JURISDICTION? SPEAK NOW, OR REMAIN SILENT FOREVER!

- Kolawole Mayomi

## Introduction

Despite the increased use of arbitration as a mode of commercial dispute resolution, the delineation of the jurisdiction of an arbitral tribunal remains a knotty issue. This is because tribunal's jurisdiction (i.e. authority to adjudicate over a dispute) sustains the legality of the arbitral proceedings.

A challenge to the jurisdiction of an arbitral tribunal is usually a preliminary matter for the arbitral tribunal to determine. Section 12(3) of the Nigerian Arbitration and Conciliation Act provides that it must be raised before the arbitral panel in timely manner and cannot be raised afterwards unless the grounds for delay are justified.

In *Nigerian National Petroleum Corporation v. Klifco Nigerian Limited* [2011] 10 NWLR (Pt. 1255) 209; the Supreme Court of Nigeria considered the issue of a timely challenge to the jurisdiction of an arbitral tribunal.

## Facts

The Nigerian National Petroleum Corporation (**NNPC**) contracted with Klifco (Nigeria) Limited (**Klifco**) for the supply of twenty-four cargoes of Vacuum Gas Oil (VGO) at the rate of one cargo per month. The contract was slated for two years certain and commenced on 7<sup>th</sup> October 1994. However, as at 1999 NNPC had only supplied five cargoes of VGO. Rather than sue for breach of contract, Klifco preferred novation<sup>1</sup> and parties agreed to substitute the old contract with a new contract. The new terms of the contract substituted the supply of VGO for the supply of 19 cargoes of Low Pour Fuel Oil (LPFO) at the same rate. However, while the old contract contained an arbitration clause, the new contract did not.

As at 2000, NNPC had failed to supply any of the agreed nineteen cargoes of LPFO to Klifco, and the matter was referred to arbitration. The arbitral tribunal heard the dispute, and delivered an award in favour of Klifco. Dissatisfied, NNPC filed proceedings at the Federal High Court to set aside the arbitral award. NNPC argued that the arbitral tribunal lacked jurisdiction to entertain Klifco's claims, as the effect of contract novation did not extend to the arbitration clause. The Federal High Court accepted these arguments, and set aside the award on this basis. Klifco appealed to the Court of Appeal, which allowed the appeal and partly upheld the award. NNPC then appealed to the Supreme Court of Nigeria.

## The Appeal

One of the principal issue that was canvassed before the Supreme Court was whether the Court of Appeal was right to hold that the arbitration tribunal had jurisdiction to entertain the matter. On this point, NNPC argued that the arbitration clause in the first agreement did not extend to the new contract and as a result the arbitration clause in the old contract could not confer jurisdiction on the arbitration tribunal in respect of the new contract in the absence of the parties' agreement to

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extend the arbitration clause to the novated contract. Dissenting, Klifco argued that the modification of terms of the obligations in the original contract with new terms did not extinguish the arbitration clause and so the arbitration tribunal had jurisdiction to entertain the dispute.

## **Decision**

The Supreme Court noted that the general position of the law is that the issue of jurisdiction can be raised at any stage of the proceedings, and even on appeal to the Supreme Court for the first time. That said, the Court held that the general position of law does not apply to arbitration proceedings, considering Section 12(3) of the Arbitration and Conciliation Act which expressly provides that a plea that an arbitral tribunal lacks jurisdiction *may only be raised before the tribunal* not later than the time of submission of the points of defense. It may, however, be raised after the stipulated time if the tribunal finds that the delay was justified. The Supreme Court then pronounced that:

*“An appeal on the issue of jurisdiction can be entertained by the High Court provided there was no submission to jurisdiction. A party who did not raise the issue of jurisdiction before the arbitral panel is foreclosed from raising it for the first time in the High Court. The reason being that the foundation of jurisdiction in an arbitration is submission. In this matter, the appellant [NNPC] participated in the arbitral proceedings. At no time did he raise the issue of jurisdiction of the arbitral panel to hear the dispute. The clear interpretation of the appellant’s conduct is that it submitted to jurisdiction. It cannot raise the issue of jurisdiction on appeal.”*

## **Comment**

The decision of the Supreme Court in this case is highly commendable. The Supreme Court made a clear distinction between challenging the jurisdiction of court and challenging the jurisdiction of an arbitral tribunal. The jurisdiction of a court may be raised at any stage of the proceedings even up to the Supreme Court. This often results in a colossal waste of wasted time and efforts if a party waits for the case to climb up to the Supreme Court level before raising the joker-card of lack of jurisdiction for the first time to deliberately scuttle an adverse judgment. Whilst this ambush tactic may still hold sway in litigation, the Supreme Court has admirably outlawed this practice in arbitration proceedings.

Since the aim of opting for arbitration is to settle commercial disputes in a fast and efficient manner, a party who disputes the jurisdiction of an arbitral tribunal must take timeous steps before the arbitral tribunal, within the stipulated period, to raise such a challenge. The rule that the Supreme Court has laid down is this: a belated objection to jurisdiction would not be entertained; any party who knows of any reason why the Tribunal should not exercise jurisdiction should speak up before the Tribunal, or be foreclosed from raising such objection forever!

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