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50 years of Arbitration related cases at Nigeria's Appellate Courts (3)

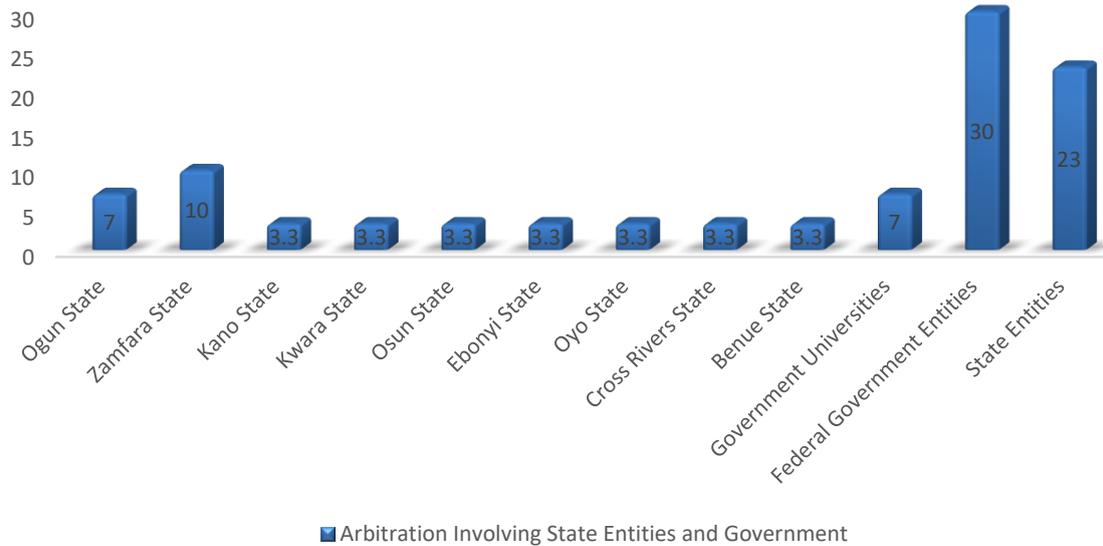
➤ DISPUTES WITH STATE GOVERNMENTS & STATE ENTITIES

In this third publication in the series, '50 Years of Arbitration-related Cases at Nigeria's Appellate Courts,' G.O. Sodipo & Co.'s dispute resolution team presents a short analysis of how Nigerian appellate courts have responded to arbitration disputes involving Nigerian state governments and state entities in the last fifty years. This exercise revealed that contrary to perceived notions, Nigerian appellate courts are not partial towards state entities who seek to set aside arbitration agreements or awards against them. The exercise demonstrates that in the main, Nigerian appellate courts enforce arbitration clauses and arbitration awards against state entities unless a party waives his right by submitting to the jurisdiction of the courts, or there are other internationally acceptable reasons such as fraud, statute bar and the like that may prevent the enforcement of arbitration clauses or awards.

This exercise has a couple of limitations. Some state entities may be missed out either because their names do not reflect that they are state entities or because they may not be corporations incorporated by statutes. Fortunately, the exercise did not miss out on the following state entities incorporated as companies with share capital like NLNG Ltd, Nigerian Airways Ltd, Wemabod Estates Ltd, Kano Oil Millers Ltd, and Abuja Investments Co Ltd that had arbitration-related litigation during the 50-year period.

Of the 145 appellate arbitration-related cases reviewed, only 21% involved state governments and state entities. They include 7% of cases involving Ogun State, 10 involving Zamfara State, 3.3% involving Kano State, and 3.3% each involving Kwara State, Osun State, Ebonyi State, Oyo State, Cross Rivers State, and Benue State. 7% of the cases involved government universities, (Obafemi Awolowo University and Bayero University), 30% involved Federal Government entities, 23% involved state entities, 29% from Lagos state and Kano state, and 14% each from Kwara state, the Federal Capital Territory, Abuja and Wemabod, a Joint Venture entity of the states constituting the old Western Region of Nigeria.

Percentage of Arbitration Cases Involving States and State Entities at the Appellate Courts



Only 27% out of the 30 were litigated up to the Supreme Court with periods of between 12 years and 22 years to obtain a Supreme Court judgment. Most of the cases litigated up to the Court of Appeal were concluded within 6 years.

In 27% of the cases, all the courts from the High Court, the Court of Appeal to the Supreme Court, affirmed the arbitration agreement or arbitral award against the state entities. In 20% of the cases, the appellate courts reversed the High Courts and enforced the arbitration clauses or the arbitration awards against the state entities. One lesson that can be drawn from this is that parties should not give up if the High Court refuses to enforce the agreement or the award given the tendency of the appellate courts to be even more objective. This means that in total 47% of the cases at the appellate courts were enforced against state entities.

PERCENTAGE OF ARBITRAL CLAUSES/AWARDS AFFIRMED AGAINST STATES AND STATE ENTITIES AT THE APPELLATE COURTS



Investors may be concerned that the courts refused to enforce the arbitration agreements in about 53% of the cases. However, a close examination of the rationale for the decisions may assuage possible apprehension of investors. Courts in most parts of the world would probably have arrived at the same decision as the Nigerian courts under review because, in 25% of these cases, the parties had taken steps in the litigation thereby waiving the arbitration agreement. 6% was not enforced because of the old age rule that admitted sums that remained unpaid did not constitute an arbitrable dispute. In 13% of the cases where the courts refused to enforce the arbitration agreement or arbitration award were cases tainted with fraud. 13% were cases caught up with the statute of limitation as the awards were not enforced timeously. 6% were set aside because the arbitrator went beyond the scope of the arbitration agreement. 6% of the cases were not enforced because the party was not privy to the arbitration agreement. 6% was not enforced because the tax issue was arguably not arbitrable.

Chart showing the Rationale behind Appellate Courts' Refusal to Enforce Arbitration Agreements and Awards Against States and State Entities

