

# Navigating the Efficacy of Arbitration as a Tool for Resolving Employment Disputes in Nigeria: Lessons from South Africa

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## Abstract

*Disputes are inevitable in human interactions and relationships. They occur in every aspect of life, regardless of the situation or relationship. The workplace is no exception. One well-recognised and popular dispute resolution model often adopted in the workplace, apart from litigation, is arbitration. Arbitration is preferred for its less formal nature and the benefit of having a binding and enforceable award. This article examines the nature of arbitration, the employer-employee relationship, arbitration as a dispute resolution process in Nigeria and South Africa, and the lessons learned from South Africa. It also considers the efficacy of arbitration as a mechanism for resolving disputes in Nigeria and South Africa. Additionally, it explores how arbitration can be effectively utilised and institutionalised in Nigeria's employment dispute resolution process by evaluating South Africa's experience, particularly through the activities of the Commission for Conciliation, Mediation and Arbitration (CCMA). The article employs a doctrinal research methodology. It finds that South Africa has robust provisions for arbitration that could be replicated in Nigeria. In conclusion, the article asserts that arbitration is an effective model for resolving employment disputes and serves as a viable alternative to court proceedings or litigation. It recommends the effective use of arbitration to resolve employment disputes in Nigeria.*

## Keywords

arbitration, dispute resolution, employee, employer, Nigeria, South Africa

## 1. Introduction

Disputes between employees and employers are a significant global challenge in employment and industrial relations.<sup>1</sup> Disputes make virtually every aspect of the workplace unproductive and hurt the employment relationship. Employment relationships and disputes are inseparable because disputes often arise between the employer and the employee.

1 Obidinma, EOC & Nwachukwu, TN 'Unveiling the Positives of Arbitration Clause in a Contract of Employment' (2023) *African Journal of Criminal Law and Jurisprudence* 135, 135.

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When disputes arise, efforts are made to resolve such disputes. Parties are at liberty to adopt any dispute resolution model. The most common and recognised means of resolving employment disputes is litigation. However, due to its rigidity, delays and strict adherence to procedural rules, litigation has not produced satisfactory results for disputing parties. These shortcomings have led to the need for a more flexible and binding alternative dispute resolution process. An alternative dispute resolution model often adopted by parties is arbitration, which is binding and enforceable against all parties. The origin of arbitration can be traced to the common law and the practice of merchants and traders who submitted their disputes to a specifically selected individual who helped them settle their disputes. Subsequently, laws were enacted to improve the activities of the independent and neutral individual chosen and to make the process binding with an enforceable award.<sup>2</sup>

Arbitration is a broad dispute resolution process that can be adopted to resolve employment disputes.<sup>3</sup> Arbitration is a popular mechanism for resolving disputes. It is flexible and accessible to disputing parties, irrespective of their cultural, political, and social affiliations and location. Rather than resorting to litigation, parties may agree to submit their disputes to arbitration, which has remained an effective means of resolving employment disputes across the globe.

The most important tool of arbitration is the arbitration agreement. An arbitration agreement guides the conduct of the disputing parties who have submitted to arbitration, and the employment-related dispute is no exception. The essence of arbitration is to provide a quick, fair and flexible dispute resolution process. Its affordability, speedy process, selection of experienced arbitrators and its confidentiality have contributed to the success of arbitration in settling employment disputes. Where an employee agrees to submit to arbitration, and the employee has agreed to avoid litigation where disputes arise between the employee and the employer, the employee may resort to litigation only where the parties cannot resolve their disputes and this is provided for in the arbitration agreement.<sup>4</sup> Employers may also choose to maintain the confidentiality of the employment relationship by restricting dispute resolution alternatives to arbitration only.

This study examines the nature of arbitration, the employer–employee relationship, employment disputes, the efficacy of arbitration in settling employment disputes, arbitration in South Africa and Nigeria with lessons from South Africa, and the challenges associated with resorting to arbitration to resolve employment disputes. The study considers South Africa due to its robust provisions on the adoption of arbitration in resolving employment disputes. South Africa has a well-established and effective Commission for Conciliation, Mediation and Arbitration (CCMA) under the Labour Relations Act 1995, compared to the Industrial Arbitration Panel established by Nigeria's Trade Dispute Act.<sup>5</sup> The CCMA

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2 Ubanyionwu, CJ 'Origin and Nature of Customary and Common Law Arbitration' (2023) 7(2) *African Journal of Law and Human Rights* 36, 36.

3 Chijoke, C 'The Nature of Arbitration Agreement in Nigeria: An Overview' (2013) <<https://www.researchgate.net/publication/325225778>> accessed 12 July 2024.

4 Threshold Attorneys 'Arbitration Clauses and the Employment Disputes: The Pros and Cons of Employment Arbitration Agreements in Nigeria' (2020) <<https://threshold-attorneys.com/wp-content/uploads/2020/11/DEMAND-NOTICE-3.pdf>> accessed 12 July 2024.

5 Cap T18, Laws of the Federation of Nigeria 2004.

provides for a simplified, speedy and flexible dispute resolution process to resolve employment disputes. The CCMA is also regulated by the Commission for Conciliation, Mediation and Arbitration Rules of 2023.

## 2. The nature of arbitration

Arbitration is the most popular alternative dispute resolution process. It is a voluntary process that can be used to resolve domestic and international disputes. It is often used to resolve disputes arising from commercial or contractual agreements, such as employment. Disputes are submitted by agreement to one or more arbitrators to resolve disputes through a binding and enforceable award.<sup>6</sup> Parties are at liberty to submit their dispute to arbitration and to determine the procedure to be adopted when the need arises. The submission of a dispute to arbitration by parties means that an implied authority is given to an arbitrator to assist them in resolving their dispute. It is a flexible process that allows parties to appoint the arbitrator who will preside over their dispute, to choose the procedure to be adopted, to decide on the venue of arbitration, to determine the applicable law and to apply to set aside an arbitration award if necessary.<sup>7</sup>

Arbitration is a non-legal process that involves an impartial and independent arbitrator who makes a decision based on the evidence presented before him.<sup>8</sup> The arbitrator is often a person who is an expert with special skills in the area of dispute resolution. To make it an effective process, arbitration must involve the voluntary participation and agreement of the parties.<sup>9</sup> Arbitration proceedings are conducted in an informal setting without the application of strict rules of evidence like the adversarial process. Arbitration provides for more private and confidential proceedings in a more relaxed atmosphere. Unlike an open court that is accessible to members of the public, only parties and their representatives are allowed to be part of the proceedings and there is no specific form of proceedings or applicable law because parties determine the form that proceedings will take and the applicable law.<sup>10</sup>

Arbitration can be applied to resolve sensitive and confidential issues that cannot be discussed in an open court.<sup>11</sup> Parties may agree to resort to arbitration before or after the dispute has arisen. This demonstrates the flexibility and autonomy of the parties in arbitration. The major instrument of arbitration as an alternative dispute resolution procedure is the arbitration agreement. This instrument binds parties, authenticates arbitral proceedings, and reflects the relationship between the employer and the employee.

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6 Ibe, CE 'The Machinery for Enforcement of Domestic Arbitral Award in Nigeria – Prospects for Stay of Execution of Non-Monetary Awards: Another View' (2011) 2 *Nnamdi Azikwe University Journal of International Law and Jurisprudence* 304.

7 *Ibid.*

8 Labour Relations Agency (LRA) 'Arbitration Explained' <<https://www.Ira.org.uk/sites/default/files/2019-03/Arbitration%20Explained.pdf>> accessed 12 July 2024.

9 *Ibid.*

10 Plavec, K 'The Applicable Law to the Interpretation of Arbitration Agreements Revisited' (2020) *University of Vienna Law Review* 82, 85.

11 Alternative Dispute Resolution Law <<https://nou.edu.ng/coursewarecontent/LAW%20517.pdf>> accessed 12 July 2024.

An arbitration agreement is a contractual agreement between parties to have their disputes resolved through arbitration. It is a contract separate and distinct from the initial contract. It can take the form of an arbitration clause or a submission agreement. An arbitration clause is an agreement to have disputes resolved by arbitration before such disputes arise, while a submission agreement is an agreement to have disputes resolved by arbitration when such disputes arise. Arbitration is common in commercial transactions and employment contracts because it gives the parties involved the opportunity to resolve their disputes without resorting to court and also maintains the relationship between them.<sup>12</sup> Sometimes, employers may include a mandatory arbitration clause in the contract of employment.

Proceedings in arbitration can take the form of in-person proceedings, or a virtual process, or a hybrid process. Arbitral proceedings are in-person or physical where the arbitrators, the disputing parties, experts and witnesses must be physically present to participate in proceedings, while virtual arbitration proceedings dispense with the physical presence of parties. Virtual proceedings are also known as electronic or online arbitration.<sup>13</sup> It allows parties to take part in proceedings from the comfort of their homes, offices or wherever they choose to be. Virtual arbitration involves the use of technological innovations for service delivery. It makes use of the internet to ensure the transmission of data and electronic communications. Though under-used, it was recognised during the Covid-19 pandemic that led to global restrictions and social distancing.<sup>14</sup>

Arbitration is a private and confidential alternative dispute resolution model that helps parties to resolve their disputes and provides for a binding and enforceable arbitral award. The confidentiality of the arbitral process helps an employee or an employer who wants the dispute resolution to remain confidential, especially where it relates to a messy dispute which they do not want to make public.<sup>15</sup> Arbitration helps parties to resolve their disputes promptly and ensures that employment claims are resolved fairly without violating employment law. Arbitration gives parties considerable control over the process. Resolving employment dispute through arbitration give parties the opportunity to decide on who to appoint as an arbitrator and to express their concern about any irregularities, the procedures to be adopted during the hearing etc.<sup>16</sup> The simplified rules of evidence in arbitration as against the strict rule of evidence often adopted in litigation have contributed to its effectiveness in resolving employment-related disputes. The rules of evidence are often relaxed for easy production of evidence and prompt resolution. Case management is

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12 Shonk, K 'What is an Arbitration Agreement?' <<https://www.pon.harvard.edu/tag/arbitration-agreement/>> accessed 24 March 2025.

13 Schmitz, AJ 'Arbitration in the Age of Covid: Examining Arbitration's Move Online' (2020-2021) 22 *Cardozo Journal of Conflict Resolution* 245.

14 Labanieh, MF, Hussain, MA & Mahdzir, N 'Does E-Arbitration Provide a Suitable Response for the "New Normal" Phenomenon during the Era of Covid-19 Pandemic?' (2021) 6(22) *International Journal of Law, Government and Communication* 215, 215.

15 Frost, P & Freehills, HS 'Arbitration of Employment Disputes' <[https://www.blackstonechambers.com/documents/Arbitration\\_of\\_employment\\_disputes.pdf](https://www.blackstonechambers.com/documents/Arbitration_of_employment_disputes.pdf)> accessed 1 October 2024.

16 Scheinkman, AD 'Workplace Conflict Resolution through Mediation and Arbitration' (2023) <<https://www.namadr.com/publications-conflict-resolution-through-mediation-and-arbitration>> accessed 30 September 2024.

flexible and effective in the resolution of disputes, thus creating a line of communication between the employer and the employee as to the applicable law, the venue to be chosen for the hearing, and the appointment of the arbitrator (if necessary).<sup>17</sup> Parties may bring several issues before the tribunal without first determining the jurisdiction of the tribunal to hear or commence proceedings; Parties have access to documents and exercise their autonomous power. The likelihood of parties maintaining their relationship after disputes are resolved is greater in arbitration, compared to litigation, because, apart from the role played by arbitrators, parties can also exercise their autonomous powers.

### 3. The employer–employee relationship

An employee is someone who is engaged to work for the employer, while an employer is the person or organisation that employs the employee. An employee works for wages or a salary in return for his labour and commitment. An employee is a party who performs services in a legal relationship, or exchanges his professional activities in return for remuneration.<sup>18</sup> An employer, on the other hand, conducts business or commercial transactions with the aim of making a profit.<sup>19</sup> The employer controls the employee under an implied or express contract legally recognised by law.<sup>20</sup> This translates into a work relationship, otherwise known as an employer–employee relationship or an employment relationship.

The employer–employee relationship is a contractual relationship between the employer and the employee in relation to employment terms and is important for the success of any business or organisation. The employer–employee relationship exists when the employer and the employee conclude an agreement that the employee works for the employer in return for the payment of a salary or wages. This relationship is governed by contract and extant laws such as the Nigerian Labour Act and the South African Labour Relations Act.<sup>21</sup> It may be an oral, implied or express agreement where one party agrees to employ someone willing to work as a worker.<sup>22</sup> This agreement is expected to be reduced to writing not later than three months after employment.<sup>23</sup> The contract specifies the rights and duties of the parties, which are contained in the extant laws.<sup>24</sup> These laws comprise the principal legislation that governs the relationship between employers and their employees in the labour market. However, the provisions of the Nigerian Labour Act are limited to employees who engage in manual work or clerical work in private or public establishments.<sup>25</sup> Other laws that regulate the relationship between an employer

17 Frost & Freehills (note 15).

18 Aliyu, MS, Abbas, SMS & Kachalla, D ‘The Effect of Remuneration on Employee Job Satisfaction: Descriptive Research of a Public Sector Organisation’ (2023) 2(3) *International Journal of Social Science Humanity and Management Research* 177, 178.

19 Muideen, S & Raji, A ‘Balanced Employee-Employer Relationship: A Mechanism for Industrial Development in Nigeria’ (2016) 13(2) *Bangladesh E-Journal of Sociology* 89, 92.

20 Ibid.

21 Cap T18, Laws of the Federation of Nigeria 2004; Labour Relations Act 66 of 1995.

22 Nigerian Labour Act, s 91.

23 Nigerian Labour Act, s 7.

24 Nigerian Labour Act, ss 7,11, 13-20; South African Labour Relations Act, ss 187, 188 and 197.

25 ‘Legal Perspectives of Employer-Employee Relationship in the Nigerian Labour Market’ (2023) <<https://www.harlemsolicitors.com>> accessed 19 March 2025.

and an employee in Nigeria are the Trade Union Act, the Workmen's Compensation Act 1987 (now Employees' Compensation Act 2010), the National Industrial Court Act 2006, the National Industrial Court Rules 2017 and the International Labour Organisation Conventions.

Employment relationships may be managerial relationships or market relationships. It is a managerial relationship when the employer controls the organisation's management, while it is a market relationship when the relationship focuses on labour, working hours, wages or salaries, pensions and other benefits or entitlements.<sup>26</sup> This relationship creates a link between an employee and an employer, thus creating a conducive working relationship between the parties. The relationship between an employer and employee may be for a fixed term, temporary or permanent. At the start of the relationship, there is an imbalance between the employer and the employee because the former has power while the latter has no power.<sup>27</sup> Employment relationship provides a platform for employees to recognise the rights and benefits that come with employment and labour law.<sup>28</sup> The employment relationship gives the employer the legal authority to instruct while the employee is under an obligation to obey lawful instructions relating to their employment.<sup>29</sup>

The relationship involves the voluntary exchange of promises between parties and the demonstration of willingness to work for the mutual gain of the parties.<sup>30</sup> The relationship is regulated by contract with specific reference to the rights and responsibilities that guarantee fairness, productivity, a conducive environment and a harmonious working relationship.<sup>31</sup> The contract may be oral or written, and express or implied, but it should be in writing and must be signed within three months of the start of the contractual relationship.<sup>32</sup> Employers have the right to hire and fire and to set the conditions of employment, and are responsible for paying wages, salaries and benefits; guaranteeing workplace safety and health; conforming with labour laws and resolving employment disputes.<sup>33</sup> Where the employee is a foreigner, the employer must provide language support, relocation assistance and support for dependants; promote an inclusive workplace culture and comply with immigration rules. Employees' responsibilities are to perform their duties as stated in the job description, cooperation, effective communication with colleagues, honesty, ensuring confidentiality of sensitive and private information, and professionalism, among others.<sup>34</sup>

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26 Fajana, S *Industrial Relations in Nigeria: Theories and Features* (Lafobet Publishers, 1995).

27 Emudainohwo, E 'Analyzing the Duties of Employer and Employee in the Nigerian Law' (2021) 12 *Beijing Law Review* 305, 307.

28 Ibid.

29 Ibid; See also Collins, H, Ewing, KD & Maccolgan, A *Labour Law* (Cambridge University Press, 2012) 7.

30 Science Direct 'Employment Relationship – An Overview' <<https://www.sciencedirect.com>> accessed 18 August 2024.

31 'The Rights and Responsibilities of Employers in Nigeria' <<https://www.firmusnigeria.com/the-rights-and-responsibilities-of-employers-in-nigeria>> accessed 18 August 2024.

32 Nigerian Labour Act, s 7.

33 Ibid.

34 Ibid.

#### 4. Arbitration agreements

In the absence of any collective or sole agreement on how disputes should be resolved, parties may rely on the employer's policies, such as the disciplinary codes of the human resources department of the employer. Where parties agree to arbitration for dispute resolution, the arbitration agreement discloses this consensus. An arbitration agreement exists where two or more people agree that a dispute between them is to be resolved in a legally binding way by an arbitral tribunal based on the evidence before the tribunal.<sup>35</sup> It is often in writing, and serves as the cornerstone for arbitration proceedings and dispute resolution. An arbitration agreement is an agreement by parties to submit all or certain disputes which have arisen or which may arise between parties in respect of their legally defined relationship, whether contractual or otherwise, to arbitration.<sup>36</sup> An arbitration agreement may be incorporated as a clause in the contract or in a separate agreement. There must be a subsisting contractual relationship between the parties before they can agree to submit their disputes to arbitration in terms of the arbitration agreement, and both parties must possess the legal capacity to enter into a contract and must be able to comply with the decision or award of the tribunal.<sup>37</sup> The reference to arbitration must be clear, all-encompassing and cover all the issues for resolution between the parties, and it is binding on the parties to the dispute. The Nigerian Arbitration and Mediation Act provides that an arbitration agreement, which has been consented to by parties to settle their disputes, is binding and enforceable against these parties, unless they agree otherwise or where the agreement is inoperative.<sup>38</sup>

An arbitration agreement is a comprehensive document that must contain the number of arbitrators to be appointed (if more than one), the mode of appointment of arbitrator(s) by the parties, a clear definition of the power and authority of arbitrators, a decision on the venue of arbitration, the applicable law, the procedure for the conduct of arbitral proceedings and the language of arbitration. These are all essential for effective arbitration.<sup>39</sup> It is a written agreement that provides reference to the arbitration of any existing or future disputes.<sup>40</sup> Apart from the written requirement of the arbitration agreement, it may be by electronic communication that is accessible for subsequent references or contained in an exchange of points of claim and defence, in which the parties have agreed to.<sup>41</sup> An arbitration agreement may contain the *Scott v Avery*<sup>42</sup> clause or the *Atlantic Shipping*<sup>43</sup> clause. While the *Scott v Avery* clause makes arbitration a condition precedent to litigation, the *Atlantic Shipping* clause sets a time limit for parties to appoint arbitrators and to submit

35 *CN Onuselogu Ent Ltd v Afribank (Nig) Ltd* 2005 (1) NWLR (Pt 940) 577.

36 UNCITRAL Model Law 2006, art 7.

37 Alternative Dispute Resolution Law <<https://nou.edu.ng/coursewarecontent/LAW%20517.pdf>> accessed 12 July 2024.

38 Arbitration and Mediation Act 2023, s 1(3).

39 *Ibid.*

40 South Africa Arbitration Act of 1965.

41 Arbitration and Mediation Act, s 2(4).

42 (1855) 8 CAS 811.

43 *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus and Co* (1920) 3 Lloyd's Law Reports 108.

their dispute to arbitration; it stops parties from resorting to arbitration where the time period has elapsed.<sup>44</sup> These clauses can be inserted into an arbitration agreement for speedy dispute resolution.

Arbitration agreements can exist through an arbitration clause or a submission agreement. An arbitration clause is a clause in the contract where parties undertake to submit disputes that may arise in relation to their contractual relationship to arbitration.<sup>45</sup> An arbitration clause that forms part of a contract is often treated as an agreement that is independent of the terms of the contract, in other words, the invalidity of the contract does not affect the arbitration clause.<sup>46</sup> An arbitration clause states the rights and options of parties in situations where there are disputes in relation to the contract of employment. In most arbitration clauses, the parties agree not to resort to litigation immediately. Instead, they resolve their disputes through the arbitration process to avoid litigation. Rather than sue each other, the parties attempt to settle their differences during arbitration. To avoid any ambiguity, the arbitration clause must be specific.

In the case of a submission agreement, parties submit to arbitration when a dispute arises.<sup>47</sup> A submission agreement includes a concise description of the subject matter to be submitted to arbitration and it deals with future disputes. Sometimes some actual issues arise and the parties enter into a submission agreement notwithstanding the fact that there is an arbitration clause already in place.<sup>48</sup> In this case, the arbitration clause compels parties to sign the submission agreement and, if any of the parties refuse to sign the submission agreement, the court may intervene to supplement the content of the submission agreement with its judgment to become a submission agreement.<sup>49</sup> However, this judicial intervention affects the speed of arbitration and increases the costs of arbitration.

The enforceability of an arbitration agreement is vital to the resolution of employment disputes. Parties are said to be enforcing an arbitration agreement when they decide to settle their dispute through arbitration and as contained in the arbitration agreement. The UNCITRAL Model Law and the New York Convention give effect to the enforcement of the arbitration agreement.<sup>50</sup> Article 8 of the UNCITRAL Model Law provides:

A court which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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44 Idornigie, PO 'The Legal Regime of International Commercial Arbitration' (PhD thesis, University of Jos, 2002) 60.

45 United Nations Conference on Trade and Development (UNCTAD) 'Arbitration Agreement' <[https://www.unctad.org/system/files/official-document/edmmisc232add39\\_en.pdf](https://www.unctad.org/system/files/official-document/edmmisc232add39_en.pdf)> accessed 13 July 2024.

46 UNCITRAL Model Law, art 16(1).

47 UNCTAD 'Arbitration Agreement' (note XX).

48 Ibid.

49 Ibid.

50 Both Nigerian and South African arbitration laws are based on the UNCITRAL Model Law 2006. The countries are also signatories to the New York Convention 1958.

Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article II.1 of the New York Convention also provides:

that each contracting states shall recognise an agreement in writing under which parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

In this case, this agreement prevents the court from interfering or resolving disputes between parties, apart from disputing parties who unanimously agree to waive the arbitral process. Section 1(3) of Nigeria's Arbitration and Mediation Act also recognises the fact that it is enforceable against parties.

## 5. The meaning of an employment dispute

An employment dispute is a dispute that often arises from the employer–employee relationship. It is an official disagreement relating to the employee's rights, and it usually arises between an employer and an employee.<sup>51</sup> It arises from conflicts relating to an existing or terminated employment relationship. If left unresolved, it can destroy the harmonious working relationship and the employee's productivity. It may arise from alleged or actual discrimination, unfair dismissal, wrongful termination, workplace harassment, unfair demotion, misleading representation, breach of the employment contract, or any other matter relating to employment or the workplace.<sup>52</sup> The four major sources of employment disputes are wrongful termination, wage disputes, discrimination and harassment claims, and severance agreements.

In the case of wrongful termination of employment, an employee's employment status is affected and may lead to some form of difficulty and/or emotional damage. An employer may terminate an employee's employment at any time, but this becomes an issue where such termination is wrongful or unfair. Employees whose employers dismiss them may claim that their termination was wrongful and that their employer did not act reasonably in terminating their employment. Generally, it is wrongful when the employee is dismissed without cause, such as depriving an employee of his benefits or entitlements, or terminating his employment as a punishment for exercising his rights.<sup>53</sup>

51 Cambridge Dictionary 'Employment Dispute' <<https://www.dictionary.cambridge.org/dictionary/english/employment-dispute>> accessed 2 August 2024.

52 Law Insider 'Employment Dispute Definition' <<https://www.lawinsider.com/dictionary/employment-dispute>> accessed 2 August 2024.

53 'Employment Disputes – A Guide for Employers' (2023) <<https://www.lawbites.co.uk/resources/blog/employment-dispute>> accessed 2 August 2024. This guide gives a general overview of employment disputes.

There might be a wage dispute, with an allegation of improper compensation for work done, or the employer might deny overtime pay or regular breaks.<sup>54</sup> Other issues that may lead to wage disputes are wrongfully classifying a worker as an independent contractor, tax issues, workers' benefits, and other entitlements. Employers' unlawful wage or salary deductions without the consent of employees can lead to conflict between them. Where deductions do not comply with the employment contract and labour laws, this will lead to a dispute between the employer and the employees.<sup>55</sup> An employer's refusal to pay minimum wages, failure to pay bonuses, or miscalculation of bonuses may lead to conflict in the employment sector.<sup>56</sup>

Discrimination and harassment claims, such as unfair treatment on the grounds of age, disability, gender identity, sex, religious beliefs, and the denial of certain benefits are common workplace issues that often lead to disputes between employers and employees. Discrimination may also arise from an employee's treatment. There might be issues relating to discrimination against an employee where such an employee is not treated fairly or where there is a hostile or offensive behaviour in the workplace.<sup>57</sup> In addition, an unsafe work environment may lead to unfair treatment and expose employees to hazards, injuries and accidents.

The severance agreement between the employer and its employee may also lead to conflict. A severance agreement is a legal document that stipulates the conditions for termination of employment. It states the conditions that both the employer and the employee must meet during the subsistence of the employment relationship.<sup>58</sup> It can also be regarded as a waiver of liability signed by an employee to protect the employer from legal claims.<sup>59</sup> It details the rights and responsibilities of the employer and the employee during or upon employment termination. It is a contract that relieves the employer of all claims by the employee in exchange for the payment of money (severance pay) or other benefits.<sup>60</sup> Therefore, a breach of any of the conditions in the severance agreement may lead to a dispute between the parties. The parties may resort to litigation, arbitration, or any other alternative dispute resolution process to resolve these disputes.

## 6. The resolution of employment disputes through arbitration in Nigeria

The history of trade dispute legislation in Nigeria can be traced to the Trade Disputes (Arbitration and Inquiry) (Lagos) Ordinance of 1941, the main legislation that encourages

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54 Gimbel, Reilly, Guerin and Brown (LLP) '4 Common Types of Employment Disputes' <<https://www.grgblaw.com/wisconsin-trial-lawyers/4-common-types-of-employment-dispute>> accessed 2 August 2024.

55 'Employment Disputes – A Guide for Employers' (note XX).

56 Ibid.

57 Ibid.

58 'A Guide to Severance Agreements' <<https://www.indeed.com/career-advice-development/severance-agreement>> accessed 2 October 2024.

59 Ahn, R 'How to Craft a Severance Agreement' <<https://www.careerminds.com/blog/severance-agreement-template>> accessed 2 October 2024.

60 'Severance Agreement and Release of Claims' <<https://www.legalaidatwork.org/factsheet/severance-agreement-and-release-of-claims-fact-sheet/>> accessed 2 August 2024. The employer is often under no obligation to make a severance payment unless it is in exchange for the release of claims.

alternative dispute resolution, such as arbitration in employment disputes. Under this Ordinance, the government could intervene in trade or employment disputes only when it was invited to do so, or when the parties consented to such intervention. Stakeholders in the employment relationship were responsible for resolving disputes using alternative means.<sup>61</sup> Subsequently, the Trade Dispute Decree 7 of 1976 that established the National Industrial Court Act was passed. This decree later became the Trade Dispute Act of 1976.<sup>62</sup>

The Trade Dispute Act provides for alternative dispute resolution in situations where there is a prior agreement on the model of dispute and where there is no such agreement.<sup>63</sup> Where there is a prior agreement on the mode to be adopted in resolving disputes, each party must honour such an agreement. Where no such agreement exists, the parties must appoint a neutral party within seven days to assist them in resolving their dispute. However, where disputes are not settled, they must be reported in writing to the Minister of Labour.<sup>64</sup> The Minister of Labour may also determine steps that can help the parties to resolve their disputes.<sup>65</sup> The Minister may refer the dispute to a conciliator;<sup>66</sup> where this fails, an arbitration tribunal will be recommended,<sup>67</sup> and where arbitration fails, the parties will be referred to the National Industrial Court<sup>68</sup> and a board of inquiry, respectively,<sup>69</sup> if necessary. The parties may be referred to an Industrial Arbitration Panel where the conciliator is unable to resolve the dispute between the parties. The Trade Dispute Act establishes the Industrial Arbitration Panel. The Industrial Arbitration Panel (also known as the Panel) consists of a chairman, a vice-chairman and other members who must not be less than ten in number, including two representatives of the employer and two representatives of the workers or employees.<sup>70</sup> The Panel plays an important role in industrial arbitration and dispute resolution. It offers an informal setting for resolving employment disputes, ensuring that technicalities are minimised and focusing on an equitable outcome.<sup>71</sup>

In settling disputes between parties, the Industrial Arbitration Panel establishes an arbitration tribunal consisting of one or more arbitrators nominated by workers and the employer and presided over by the chairman or vice-chairman of the Panel.<sup>72</sup> The Panel

61 Agomo, CK *Nigeria Employment and Labour Relations Law and Practice* (Concept Publication Ltd, 2011) 310).

62 Trade Dispute Act Cap. T8 Laws of the Federation 2004 (the 2004 update).

63 Trade Dispute Act, s 7; Akintola, *J Nigerian Investment Laws and Business Regulations* (Learned Publications Ltd, 2002) 339.

64 Trade Dispute Act, s 6. This report is also known as declaration of disputes.

65 Trade Dispute Act, s 7.

66 Trade Dispute Act, s 8.

67 Trade Dispute Act, s 9.

68 Trade Dispute Act, s 14.

69 Trade Dispute Act, s 33.

70 Trade Dispute Act, s 9(2).

71 Ogbu, FC 'The Role of Industrial Arbitration in Resolving Labour Disputes in Nigeria: An Analysis of the National Industrial Courts' Jurisdiction and Effectiveness' (2024) <<https://www.ssrn.com/abstract=4976395>> accessed 24 March 2025.

72 Trade Dispute Act, s 9(4). Where a sole arbitrator is to be appointed, the chairman of the Industrial Arbitration Panel makes the appointment.

must render an award within 21 days, and the Minister of Labour may extend it as needed.<sup>73</sup> The award is sent to the Minister of Labour, who may confirm it and communicate this to the parties or return it to the tribunal for reconsideration.<sup>74</sup> However, the Minister of Labour cannot nullify or set aside an award made by the Panel,<sup>75</sup> but parties can raise objections to the award. Where there is no objection, the Minister of Labour has the power to publish a notice confirming the binding nature of the award in the Federal Gazette.<sup>76</sup> Where an objection is made, the Minister of Labour refers the dispute to the National Industrial Court.

The National Industrial Court was established by the National Industrial Court (NICN) Act.<sup>77</sup> This Act emphasises the power, rights and control of the employer in the employment relationship. The Act establishes the National Industrial Court for the resolution of employment disputes and other labour or industrial matters. The court has original jurisdiction to deal with labour matters and disputes such as the wrongful termination of employment, pensions, salaries, gratuities and discrimination in the workplace, among others.<sup>78</sup> The National Industrial Court Act establishes an Alternative Dispute Resolution (ADR) Centre to encourage reconciliation and to promote prompt dispute resolution between parties.<sup>79</sup> The ADR Centre offers only mediation and conciliation services to disputing parties. However, this does not preclude parties from using arbitration where they believe it is the best option or where they have agreed to resolve their disputes through arbitration. Notwithstanding the provisions of the National Industrial Court Act, the arbitral award remains binding on the parties. The provisions of the National Industrial Court Act on alternative dispute resolution create a relaxed atmosphere for dispute resolution, promote industrial relationships and consistency, rather than confusion resulting from conflicting decisions of the court.<sup>80</sup>

## 7. The resolution of employment disputes through arbitration in South Africa

Arbitration is a recognised dispute resolution mechanism in South Africa that offers a flexible and cost-effective dispute resolution process. It became more popular with the enactment of the International Arbitration Act of 2017. This Act integrated the UNCITRAL Model Law into South African law and it led to a huge increase in international arbitration in South Africa.<sup>81</sup> The history of arbitration in South Africa can be traced back to the South African traditional system of dispute resolution which was interrupted by British colonialism. Colonialism introduced Roman-Dutch law.<sup>82</sup> This law was based on a peaceful

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73 Trade Dispute Act, s 13(1) and (2).

74 Trade Dispute Act, s 13(3).

75 *Abdul-Raheem & Ors v Oloruntoba-Ojo* 2006 (15) NWLR (Pt. 1003) 581.

76 Trade Dispute Act, s 13(4).

77 National Industrial Court Act of 2006.

78 Iyam, UI & Ugwu, D 'Overhauling the National Industrial Court Act: A Pathway to Effective Labour Dispute Settlement in Nigeria' (2010) 9(1) *Global Journal of Social Science* 63, 63.

79 National Industrial Court Act, s 20.

80 Iyam & Ugwu (note XX) 64.

81 'Perspectives on Dispute Resolution in South Africa' <<https://www.ciarb.org/news-listing/perspectives-on-dispute-resolution-from-south-africa/>> accessed 21 February 2025.

82 Rantsane, DP 'The Origin of Arbitration Law in South Africa' (2020) 23(1) *Potchefstroom Electronic Law Journal* 1, 5-7.

and non-violent method of dispute resolution known as arbitration. Arbitration offered a more flexible, speedy and cost-effective dispute resolution process than litigation. Under Roman law, arbitration award was final and there was no right of appeal, arbitration was practically made an alternative to litigation and not a forerunner to litigation. Arbitration was otherwise known as *compromissium*. It operated independently and as an alternative to litigation.<sup>83</sup> When parties opted for arbitration, they were allowed to appoint their arbitrator(s), who could not be slaves, deaf, dumb, women and children under the age of 18. Under Roman law, these people could not perform public functions.<sup>84</sup> Roman law later developed into Roman-Dutch law. Roman-Dutch law involved arbiters and arbitrators who were regarded as elected judges; they dealt with matters referred to them with the consent of the disputing parties.<sup>85</sup> Arbiters resolved disputes within the powers given to them and in accordance with the law and custom, while arbitrators had more expertise and were more friendly than arbiters. Roman-Dutch law was introduced into South Africa in 1652 by the European settlers. Despite introducing the Roman-Dutch law, there was no developed arbitration system. This challenge led to the enactment of the arbitration law.<sup>86</sup> Prior to the introduction of arbitration, disputes were resolved through adversarial means which was expensive and delayed, with a very low settlement rate.<sup>87</sup> The effects of the adversarial process led to the need to explore arbitration as an alternative dispute resolution mechanism.

In South Africa, the Labour Relations Act of 1995 regulates dispute resolution. Prior to the enactment of the Labour Relations Act, the Wiehahn Commission of Inquiry was established in 1979 to investigate labour situations and make recommendations. This led to the recommendation on the extension of freedom of association to all persons irrespective of their sex or race, and allowed black workers to rely on the provisions of the Labour Relations Act of 1956.<sup>88</sup> The Labour Relations Act has made the settlement of employment disputes between employers and employees easier and gives parties the opportunity to have their disputes resolved promptly without the need for a trial. Like the Industrial Arbitration Panel in the case of Nigeria, the Labour Relations Act makes provision for the Commission for Conciliation, Mediation and Arbitration (CCMA) to assist parties in resolving their disputes.<sup>89</sup>

In 1994, the interim Constitution was passed, and new labour relations legislation was enacted.<sup>90</sup> The Labour Relations Act of 1995 came into effect in 1996. The CCMA

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83 Ibid.

84 Ibid.

85 Ibid.

86 Ibid.

87 'Alternative Dispute Resolution in the Work Place: South Africa Experience' <<https://www.accord.org.za/ajcr-issues/alternative-dispute-resolution-adr-in-the-workplace/>> accessed 21 February 2025.

88 Bhoola, U 'National Labour Law Profile: South Africa' <<https://www.ilo.org>> accessed 14 December 2024.

89 Labour Relations Act, s 112. The Act established the CCMA as an independent body whose members are approved by the National Economic Development and Labour Council.

90 Ibid.

is responsible for mediating and arbitrating industrial disputes in South Africa; its major functions are conciliating, mediating, and arbitrating employment disputes.<sup>91</sup> The Commission regulates it for the Conciliation, Mediation and Arbitration Rules of 2023. The CCMA does not have jurisdiction over disputes relating to independent contractors or disputes not within the scope of the Labour Relations Act and the Employment Equity Act. Where disputes relating to the dismissal of employees over alleged misconduct,<sup>92</sup> intolerable employment<sup>93</sup> and unfair labour practices<sup>94</sup> are not resolved through conciliation, they are referred to arbitration, where the CCMA acts as the arbitrator.<sup>95</sup> In other words, where disputes are not resolved through conciliation, either of the parties may request the CCMA to resolve such dispute through arbitration.<sup>96</sup> Disputes are referred to the Labour Court for adjudication where they cannot be resolved by conciliation, mediation and arbitration.<sup>97</sup>

A party may request the CCMA to arbitrate employment disputes by tendering documents as an annexure. Form 7.13 must be duly completed by the party making the request and may be submitted through the CCMA electronic referral portal or by any other means.<sup>98</sup> The parties or a third party may make the request and must serve it on the other party. Where the request to refer dispute to arbitration is served out of time, an application for condonation must be attached to the request. Upon service of the request for arbitration, the CCMA has the discretionary power to either accept or refuse the request for arbitration. Where there is an arbitral hearing, the CCMA is expected to notify the disputing parties in writing of such a hearing. This notice must be given at least 21 days before the scheduled date of the hearing.<sup>99</sup> The number of days may be shortened based on the agreement of the parties or the circumstances of the case. An additional seven days will be required when the notice is sent by registered mail.<sup>100</sup> The party making the request is expected to submit a statement of his case (containing material facts and legal issues arising from the material facts) while the other party submits an answer or affidavit to the statement served on him.<sup>101</sup> Suppose one party decides not to comply with the directives of the CCMA. In that case, the CCMA has the discretion to continue with proceedings, but may note such non-compliance when considering costs after the arbitral proceedings.<sup>102</sup> However, scheduled arbitration proceedings may be postponed by the agreement of both parties or on the application of any of the parties or where the parties do not appear on the

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91 'What is the Role of CCMA in Helping to Settle Labour Disputes?' <<https://www.hrfuture.net/workplace-culture/strategy/legal/what-is-the-role-of-the-ccma-in-helping-to-settle-labour-disputes/>> accessed 14 December 2024.

92 Labour Relations Act, s 191(5)(a)(i).

93 Labour Relations Act, s 191(5)(a)(ii).

94 Labour Relations Act, s 191(5)(a)(iv).

95 *Numsa v Bader Bop (Pty) Ltd and Minister of Labour* Case No. CCT/12/02 (Constitutional Court).

96 Labour Relations Act, s 74(4).

97 Labour Relations Act, s 191(6).

98 CCMA Rules of 2023, Rule 18.

99 *Ibid*, Rule 21.

100 *Ibid*.

101 *Ibid*, Rule 19(1).

102 *Ibid*, Rule 19(3).

scheduled date.<sup>103</sup> The notice or application for postponement must be sent to the CCMA not later than seven days before the scheduled date of the hearing.<sup>104</sup> Non-compliance with the rules for the postponement of the scheduled date is not a ground to reject an application for postponement. The reason for non-compliance must be stated and must be compelling. The CCMA must also consider whether the other party will suffer any irreparable loss or harm if the scheduled date is postponed.<sup>105</sup>

Before the commencement of proceedings, the parties are expected to undergo a mandatory pre-arbitration conference to reach consensus and deal with matters such as the means of settling the dispute, the facts agreed by the parties, the issues to be decided by the CCMA, relief sought, the calculation of compensation, the exchange of relevant documents, the preparation of documents, the arrangement and numbering of documents, how documentary evidence will be dealt with, how affidavits will be admitted in evidence, on-site inspections (if needed), provision for the attendance of witness, the resolution of preliminary issues, the exchange of witness statements, determining the necessity or otherwise of expert evidence, discussing how arbitration can be expedited, the estimated period required for the hearing, representation, if an interpreter will be needed and the language of the interpreter.<sup>106</sup> At the end of the pre-arbitration conference, parties are expected to draw up and sign a pre-hearing agreement setting out the facts to which they have agreed or not. The pre-hearing minute must be sent to the CCMA seven days before the scheduled date of the hearing. The content of the minute will determine whether a directive will be issued to the parties to hold a further pre-hearing conference or on the conduct of the arbitration proceeding or on the postponement of the scheduled arbitration.<sup>107</sup> The place of hearing is the region where the course of action arose, or the employer's principal place of business, or a place determined by a Senior Commissioner in the CCMA's head office.<sup>108</sup>

CCMA awards are final and cannot be appealed against, except in the case of an arbitration award on the interpretation of agency shop agreements,<sup>109</sup> and an award in respect of unfair discrimination on the ground of sexual harassment or any discrimination dispute where the employee earns below the threshold amount stipulated in section 3 of the Basic Conditions of Employment Act.<sup>110</sup> However, the Labour Court may set aside an allegedly defective award. An award is defective if the CCMA committed misconduct in relation to its duties as an arbitrator, if it commits gross irregularity in the conduct of arbitration proceedings, if it exceeds its powers or if the award was improperly obtained.<sup>111</sup> Where any of these grounds has been established, a party may apply to the Labour Court to review an arbitration award or ruling of the CCMA.

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103 Ibid, Rule 23.

104 Ibid.

105 *Erasmus NO v Commission for Conciliation, Mediation and Arbitration* (2012) 3 ILJ 1670 (LC).

106 CCMA Rules of 2023, Rule 20.

107 Ibid.

108 Ibid, Rule 24.

109 Labour Relations Act, s 24(7).

110 Labour Relations Act, s 10(8).

111 Labour Relations Act, s 145.

Apart from the Labour Relations Act, which recognises arbitration as an effective dispute resolution mechanism and the importance of the CCMA, the Employment Equity Act also allows parties to resolve their disputes by exploring arbitration through the CCMA. The Employment Equity Act recognises the CCMA in arbitration proceedings and its powers to make a binding award that gives effect to the provisions of the Act. Where disputes are not resolved by conciliation, the CCMA may resolve such disputes by arbitration based on the parties' consent or if one of the parties refers the dispute to the Labour Court for adjudication.<sup>112</sup>

## 8. Lessons from South Africa

South Africa has a robust arbitration framework and institutions, and procedural efficiency that Nigeria can learn from. South Africa has adopted arbitration as an effective mechanism for resolving employment disputes and has made it part of its transformation agenda in labour relations.<sup>113</sup> This led to the establishment of the CCMA to assist with dispute resolution. The CCMA is an independent and statutory dispute resolution body that deals with disputes without necessarily involving legal experts or litigation. However, parties may elect to involve legal practitioners or experts in the dispute resolution process. The CCMA is independent of the state, trade unions, employers, employees, political parties or any association.<sup>114</sup> The CCMA operates effectively; it leaves no room for doubt and ensures impartiality in justice delivery. In Nigeria, the perception of bias and partiality often stops parties from resorting to arbitration. The CCMA promotes an accessible and user-friendly platform for dispute resolution for all categories of employers and employees (including low-income earners). Nigeria should adopt an effective process that is beneficial to all employment disputants. The CCMA has the power to make regulations relating to practice and procedure on resolving disputes through conciliation and arbitration, arbitration proceedings, the joinder of parties, the substitution of parties and other matters incidental to performing its duties.<sup>115</sup> Parties must try conciliation and arbitration before exploring other options such as strikes, lockouts and litigation.

In South Africa, the Labour Relations Act regulates dispute resolution. Like the Industrial Arbitration Panel in Nigeria, the Labour Relations Act makes provision for the CCMA to assist parties in resolving their disputes.<sup>116</sup> Before establishing the CCMA, the Independent Mediation Service of South Africa (IMSSA) assisted parties with dispute resolution.<sup>117</sup> Where disputes are not resolved through conciliation, either party may request the CCMA to resolve such disputes through arbitration.<sup>118</sup> Where conciliation fails,

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112 Employment Equity Act of 1998, s 52.

113 Accord 'Alternative Dispute Resolution (ADR) in the Work Place' <<https://www.accord.org.za/ajcr-issues/alternative-dispute-resolution-adr-in-the-workplace>> accessed 27 November 2024.

114 Labour Relations Act, s 113.

115 Labour Relations Act, s 115(2A). Any regulation made by the CCMA must be published in the *Government Gazette*.

116 Labour Relations Act, s 112.

117 Pretorius, P 'ADR: Successes and Challenges' in Centre for Applied Legal Studies 'Trends in South Africa Labour' (Selected paper from the Fourth Annual Labour Law Conference, University of Witwatersrand, 1991) 103.

118 Labour Relations Act, s 74(4).

disputes are resolved through arbitration by the CCMA. Where it is a requirement of the Act, either party or both parties may make the request.<sup>119</sup> Nigeria has no pre-arbitration dispute resolution process because dispute resolution is fragmented. Disputes are referred to the Labour Court for adjudication where they cannot be resolved through conciliation, mediation and arbitration.<sup>120</sup> Due to inadequate institutional support and uncertainties, Nigeria's Trade Disputes Act and Arbitration and Mediation Act have limited application. The operation of the CCMA reflects cost-effectiveness and speedy dispute resolution, which are lacking in Nigeria's arbitration process. The CCMA promotes efficiency by setting time limits for parties to explore conciliation and arbitration before resorting to litigation.<sup>121</sup> However, the CCMA does not settle disputes relating to independent contractors, bargaining, statutory councils, or private agreements.<sup>122</sup> As in South Africa, in Nigeria arbitration should be made the first port of call before litigation. Parties should be encouraged to have their disputes resolved via arbitration and, where it fails, they can approach the court as their last resort.

## 9. Conclusion and recommendations

This article exposes the gaps in arbitration as a dispute resolution process in Nigeria while acknowledging the effectiveness of arbitration in South Africa. Arbitration is an effective alternative to litigation, offering a more relaxed atmosphere for disputing parties. Before parties can resolve their disputes through arbitration, they must reach an agreement, either through an arbitration clause or a submission agreement, stipulating that their dispute will be settled through arbitration. Arbitration should be explored prior to litigation, which is often the last resort. The Trade Dispute Act, the Labour Relations Act, the courts, and other special courts dedicated to employment and labour disputes recommend amicable dispute resolution via any of the alternative dispute resolution methods before disputes are taken to court. This guidance has enabled parties to resolve their disputes without the technicalities associated with litigation. The CCMA in South Africa also promotes dispute resolution between employers and employees; in addition to its general functions, it has the authority to establish rules and regulations to facilitate amicable dispute resolution between disputing parties. Compared to Nigeria, South Africa has a more robust institution for resolving employment disputes. Through the CCMA, South Africa offers more efficient, cost-effective, and user-friendly dispute resolution processes, which should be implemented in Nigeria. This article advocates for adopting and effectively utilising arbitration before resorting to the courts. Legislative reform is essential to promote arbitration in Nigeria. South Africa's Labour Relations Act should serve as a model for comprehensive legislative reform in Nigeria. The article also suggests amending the Trade Disputes Act. It further recommends that provisions be made for the accreditation of private professional arbitration bodies to facilitate easy and prompt dispute resolution.

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119 Labour Relations Act, s 115(b).

120 Labour Relations Act, s 191(5).

121 Labour Relations Act, s 191(4) and (5).

122 'What is the Role of the CCMA in Helping to Settle Labour Disputes?' (note XX).

The Industrial Arbitration Panel in Nigeria should possess a robust structure and functions akin to those of South Africa's CCMA. Regulations should be enacted to govern the activities of the Industrial Arbitration Panel. Alternatively, the Industrial Arbitration Panel could be elevated to a commission.

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