Anti-Arbitration Injunctions in Nigeria

Paul O. Idornigie

Enuma U. Moneke

(Published in *Arbitration*, (2016) 82(4), *The International Journal of Arbitration, Mediation and Dispute Management* 438).

1. Introduction

Arbitration is increasingly gaining acceptance across the world as an alternative to traditional litigation in the resolution of commercial disputes. It is anchored on four fundamental principles, namely, the principle of party autonomy, the principle of separability, the principle of arbitrability and the principle of judicial non-intervention (or minimal intervention). There is also the bedrock principle of the competence of the arbitral tribunal to rule on its own jurisdiction, usually referred to as the principle of *Kompetenz-Kompetenz*. The principles of judicial non-intervention and *Kompetenz-Kompetenz* are closely related and are indeed crucial to the effectiveness of the arbitral process, particularly international arbitration because they guarantee that the process can proceed in accordance with the agreement of the parties without the delays, uncertainties and other challenges concomitant with judicial review of procedural decisions[1] by national courts. Hence, these principles presuppose that by electing to resolve disputes through arbitration, the parties have made a conscious decision not to submit to the jurisdiction of the courts.[2] To this extent, the courts should only be allowed a minimal role—supportive and supervisory—in the arbitral process.

Practically speaking, for the arbitral process to be successful and achieve the desired results, it must be assisted and supported by an effective judicial system which guarantees the rule of law.[3] Nonetheless, because of the overriding need to preserve and protect the sanctity of arbitration and the arbitral process, intervention by the courts should be undertaken with utmost caution, even where the relevant statutes permit such intervention.

---

[1] Gary Born, "The Principle of Judicial Non-Interference in International Arbitral Proceedings" (2009) 30 *University of Pennsylvania Journal of International Law* 999 http://ssrn.com/abstract=1959827 [Accessed 7 October 2016].

[2] Paul O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: Panaf Press, 2014), p.316.

[3] Dominique Hascher, "The Courts as Collaborators in the International Dispute Resolution Project' (2015) 81 *International Journal of Arbitration, Mediation and Dispute Management* 443.

The rise of international commercial arbitration and the associated increase in the issue of anti-arbitration injunctions is a very topical issue which has sparked debates and comments within international arbitration circles. Thus the questions that arise for consideration are, to what extent exactly are the courts, particularly Nigerian courts, allowed to intervene in the arbitration process? Does the Nigerian Arbitration and Conciliation Act (ACA) 1988[4] (which is modelled after the United Nations Commission on International Trade Model Law on International Commercial Arbitration (UNCITRAL Model Law) 1985)[5] permit the issue of injunctions to enjoin arbitral proceedings?

The aim of this article is to discuss these issues. First, this article will examine the background of anti-arbitration injunctions and its legal foundations in the ACA 1988 and the UNCITRAL Model Law, if any. Next, it will look at the pro-arbitration stance of the Nigeria courts with specific reference to the ACA 1988 ss.12 and 34 and the Court of Appeal decisions in *Statoil Nigeria Limited v Nigerian National Petroleum Corporation*[6] and *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation.*[7] It will then examine the *ratio decidendi*, as well as the shortcomings in the divergent anti-arbitration decision of the same court in the more recent case of *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Limited* [8] Lastly, the article will consider whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 Art.II(3)[9] as incorporated in the Sch.2 to the ACA 1988 provides a basis for the issue of anti-arbitration injunctions in Nigeria.

2. The Concept of Anti-Arbitration Injunctions

An anti-arbitration injunction is an order of a court prohibiting arbitral proceedings. It may be issued to restrain a party or even an arbitral tribunal.[10] Anti-arbitration injunctions could be issued either before the commencement of arbitral proceedings to prevent the constitution of

[4] Now Cap.A18, Laws of the Federation of Nigeria, 2004, hereinafter referred to as ACA 1988.
[5] Hereinafter referred to as UNCITRAL Model Law.
[6] *Statoil Nigeria Ltd v Nigerian National Petroleum Corp* (2013) 14 NWLR (Pt. 1373) 1.
[7] *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corp* [2014] 6CLRN.
[8] *Shell Petroleum Development Co of Nigeria Ltd v Cresta Integrated Natural Resources Ltd* CA/L/331M/2015 (Unreported), judgment delivered on 21 December 2015.
[9] Hereinafter referred to as New York Convention.
[10] In *Salini Construttori S.P.A. v The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewerage Authority*, Case No.10623/AER/ACS, 21 ASA BULL. 82 (2003*)*, the Ethiopian courts granted two anti-arbitration injunctions, one against the arbitral tribunal and the other against the claimant.

the arbitral tribunal or after proceedings have commenced to stop the arbitration.[11] It may also be granted to stop a party from enforcing an arbitral award.[12] Anti-arbitration injunctions share some similarities with their sister remedy, anti-suit injunctions. However, the two procedures must never be confused because they differ in key respects. While anti-arbitration injunctions seek to prevent the initiation or continuation of arbitration proceedings, anti-suit injunctions seek to stay proceedings in court in breach of an agreement to arbitrate.[13] Further, anti-suit injunctions are issued in personam against the party who has breached the agreement to arbitrate by bringing court proceedings, whereas anti-arbitration injunctions seek to enjoin both the parties and the tribunal or either of them from commencing or continuing arbitral proceedings.[14] The impact of an anti-arbitration injunction would ultimately depend on when the injunction is sought and granted; against whom it is ordered and why it is sought.[15]

An anti-arbitration may be sought by a party either because the duty to arbitrate the dispute does not exist or because the issue in dispute is not arbitrable.[16] Hence the party seeking such injunction may claim that the parties have not agreed to submit the dispute to arbitration[17] or that the arbitration agreement is forged[18] or that the issues for determination are outside the scope of the matters validly referred to the arbitral tribunal under the arbitration agreement;

---

[11] Julian D.M. Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1094&context=auilr [Accessed 7 October 2016].

[12] Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244. http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/630/(2013)%2025%20SAcLJ%20244-295%20(Nicholas%20Poon).pdf [Accessed 7 October 2016].

[13] Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489.

[14] Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489.

[15] See ACA 1988 ss.4 and 5 on stay of court proceedings pending arbitration; see also Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244.

[16] In *Shell Nigeria Exploration and Production & Ors v Federal Inland Revenue Service and Anor* ((Unreported) Appeal No CA/A/208/2012, judgment delivered on 31 August 2016) one of the issues that came up for determination by the Nigerian Court of Appeal was the arbitrability of tax disputes. It was held that tax disputes are not arbitrable; see also *Esso Exploration and Production Nigeria Ltd and Anor v. Nigeria National Petroleum Corporation*, ((Unreported) Appeal No CA/A/507/2012, judgment delivered 22 July 2016); see also ACA s. 35(a).
see also Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244.

[17] *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620.

[18] Sharad Bansal and Divyanshu Agrawal, "Are Anti-Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law" (2015) 31 *Arbitration International* 613.

or that the issues for determination under the arbitration agreement are res judicata;[19] or that proceedings have been initiated against a non-party to the arbitration agreement;[20] or that the arbitration violates a prior agreement to resolve the dispute through to an alternative method such as conciliation or mediation .[21] In effect, applications for the grant of anti-arbitration injunctions are usually predicated upon objections to the jurisdiction of the arbitral tribunal.[22] Generally, where the law permits the issue of anti-arbitration injunctions, a party who for one reason or the other contends that it is not subject to the jurisdiction of the arbitral tribunal may apply to the courts to grant injunctive relief in order to protect his right not to be subjected to arbitration. Presumably, such applicant must prove to the court that it is not bound to arbitrate in relation to the dispute that has arisen. If the court is satisfied that the applicant is under no such obligation, it may then issue an anti-arbitration injunction. [23]

Recently, there has been a worrisome rise in the number of anti-arbitration injunctions granted by courts [24] other than courts of the seat of arbitration. This has become common with courts of developing countries. [25] The growing trend has evoked debates and arguments within international arbitration circles as to the propriety or otherwise of such injunctions. [26] It has been argued that anti-arbitration injunctions are often aimed at sabotaging the international arbitral system and that the courts, in issuing such injunctions, involve themselves in judicial protectionism of indigenous companies and government corporations seeking such injunctions.[27] Further, misgivings about the impropriety of the grant of anti-arbitration injunctions have also been hinged on the fact that the issue of such injunctions

[19] *Compagnie Européenne de Céréales SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301.
[20] *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289.
[21] For instance, a multi-tiered dispute resolution clause may mandate parties to go for negotiation or mediation before arbitration.
[22] Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244.
[23] Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244.
[24] Doak Bishop and Spalding Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf> [Accessed 7 October 2016].
[25] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].
[26] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].
[27] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].

brazenly disregards the principle of judicial non-intervention and also encroaches on the very foundation of the bedrock principle of *Kompetenz-Kompetenz.* [28]

The principle of *Kompetenz-Kompetenz* is to the effect that the arbitral tribunal is competent to rule on its own jurisdiction. Thus where there is an objection to the jurisdiction of the arbitral tribunal, the tribunal has the capacity to rule on its jurisdiction. In essence, an arbitral tribunal has the power to rule on its own substantive jurisdiction. Thus entertaining a suit for an injunction to enjoin arbitral proceedings on the grounds that the tribunal lacks jurisdiction would only serve to divest the tribunal of its long-established powers to rule on its own jurisdiction. The rule in *Kompetenz-Kompetenz* is well entrenched in international arbitration conventions and national arbitration legislation which espouse the fundamental principle of judicial non-interference in the conduct of the arbitral proceedings. Under the UNCITRAL Model Law, where an objection is made to the jurisdiction of the arbitral tribunal, "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement".[29] These provisions are reproduced in the ACA 1988 s.12(1) and and English Arbitration Act 1996 s.30(1) respectively.[30] Such an objection may be dealt with either as a preliminary question or in an award on the merits.[31] Where it is dealt with as a preliminary question and the tribunal decides that it has jurisdiction to determine the issues in dispute, any party who is dissatisfied with the ruling may apply to the court to decide the issue of jurisdiction. In such a case the arbitral tribunal may continue with the proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.[32] Hence an anti-arbitration injunction issued by the courts in response to an objection to the jurisdiction of the arbitral tribunal would infringe on a fundamental part of the generally accepted international legal framework for the conduct of arbitration which recognises the powers of the arbitral tribunal to, first, determine its jurisdiction before judicial review by national courts. As will be demonstrated shortly, an arbitral tribunal under Nigerian law cannot be forced to rule on its jurisdiction. This is so because the ACA s.12(4) provides that "The arbitral tribunal may rule on any plea referred to

[28] Romesh Weeramantry, "Anti-Arbitration Injunctions: The Core Concepts" http://cil.nus.edu.sg/wp/wp-content/uploads/2014/06/Note-on-anti-arbitration-injunctions.pdf [Accessed 7 October 2016].
[29] UNCITRAL Model Law Art.16(1); see also UNCITRAL Arbitration Rules Art.23(1).
[30] Hereinafter referred to as English AA; see also Indian Arbitration and Conciliation Act 1996 s.16(1).
[31] ACA 1988 s.12(4); English AA s.31(4).
[32] UNCITRAL Model Law Art.16(3); See also UNCITRAL Arbitration Rules Art 23(3).

it under subsection (3) of this section either as a preliminary question or in an award on the merits; and such ruling shall be final and binding". Thus it is a discretional power of the arbitral tribunal.

It must be stressed that as arbitration is designed with the objective of avoiding the formalities and technicalities that are associated with many national judicial systems, it is the preferred dispute resolution mechanism in many cross-border disputes.[33] Therefore, undue judicial interference could prove a problem for the smooth running of the international arbitral system, if left unchecked.[34] Describing anti-arbitration injunctions as "arbitral terrorism", Bishop et al.[35] states that:

> "International arbitrators are typically given the authority by arbitral rules and laws to decide on their own jurisdiction. If they believe that a valid arbitration agreement (and thus, arbitral jurisdiction) exists, they will generally try to proceed with a case even in the face of an anti-arbitration injunction. For international commerce to flow smoothly, it is important that disputes be resolved quickly … But despite heroic efforts by arbitrators, anti-arbitration injunctions can have a momentous effect, even stopping a case—and perhaps even a major project—in its tracks."

[33] Born, "The Principle of Judicial Non-Interference in International Arbitral Proceedings" (2009) 30 *University of Pennsylvania Journal of International Law* 999.
[34] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].
[35] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].

The courts of countries such as Indonesia,[36] Bangladesh,[37] India[38] and Pakistan[39] have shown an inclination to protect state entities by the grant of anti-arbitration injunctions.[40] Such injunctions are often sought by these entities in order to frustrate arbitration proceedings commenced by a foreign entity,[41] the primary aim being to have the dispute adjudicated by its own courts. [42] Ethiopia has also been known to exhibit similar tendencies. In *Salini Construttori S.P.A. v The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewerage Authority*,[43] the Ethiopian courts enjoined ongoing arbitral proceedings in Paris at the behest of the Ethiopian government. Here, the agreed seat of the arbitration was Ethiopia, but the arbitrators decided to sit in Paris because they found it more convenient. Contending that the move was an abuse of the arbitral process, the Ethiopian government turned to its local courts which issued two injunctions, one against the arbitral tribunal and the other against the claimant, Salini Construttori. In throwing more light on the issue, Born[44] states that, "in most cases, anti-arbitration injunctions are part of deliberately obstructionist tactics, typically pursued in sympathetic local courts, aimed at disrupting the parties' agreed arbitral mechanism". In fact, according to the International Chamber of Commerce (ICC), of the 31 cases where anti-arbitration injunctions were granted in 2006, 25 were issued by the national

[36] In the infamous case of *Himpurna California Energy v Republic of Indonesia* XXV YBCA 11 (2000), an Indonesian court issued an anti-arbitration injunction to prevent a tribunal from making an award against an entity owned by the Indonesian government.
[37] In *Saipem v The People's Republic of Bangladesh*, ICSID Case No.ARB/05/07, Petrobangla, a Bangladeshi state-owned company, obtained from Bangladeshi courts an anti-arbitration injunction enjoining Saipem, an Italian company, from proceeding with arbitration.
[38] The injunction granted by the Delhi High Court in *Union of India v Dabhol Power Co*, IA No.6663/2003 Suit No.1268/2003, attracted severe criticisms.
[39] In *Hub Power Co (HUBCO) v Water & Power Development Authority of Pakistan (WAPDA) and the Federation of Pakistan* (2000) 16 Arb. Int'l 439, the Supreme Court of Pakistan granted an anti-arbitration injunction in favour of WAPDA, a Pakistani state-owned company enjoining London arbitral proceedings initiated by HUBCO in accordance with the arbitration agreement between the parties. See also *Société Générale de Surveillance S.A. (SGS) v Federation of Pakistan*, Supreme Court of Pakistan (Appellate Jurisdiction), Civ. App. Nos 459 & 460 of 2002.
[40] Bansal and Agrawal, "Are Anti-Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law" (2015) 31 *Arbitration International* 613.
[41] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].
[42] Bansal and Agrawal, "Are Anti-Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law" (2015) 31 *Arbitration International* 613.
[43] *Salini Construttori S.P.A. v The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewerage Authority* Case No.10623/AER/ACS, 21 ASA BULL 82 (2003).
[44] Born, "The Principle of Judicial Non-Interference in International Arbitral Proceedings" (2009) 30 *University of Pennsylvania Journal of International Law* 999.

courts of one of the parties.[45] For this reason, it has been argued that an entity that has willingly consented to arbitration as the preferred dispute resolution mechanism in an international commercial agreement should not be allowed to turn to its local court to rewrite the agreement.[46] This line of reasoning has indeed been upheld by jurisdictions such as Switzerland, France and Sweden. In the Swiss case of *Air (PTY) Ltd v International Air Transport Association* (*IATA) and C. SA in Liquidation*, a Geneva Court of first instance ruled inter alia that anti-arbitration injunctions negate the principle of *Kompetenz–Kompetenz*, and as Swiss law incorporates the principle, there is no basis for the grant of an anti-arbitration injunction by the Swiss courts. Similarly, in France and Sweden[47] the courts will not normally decide the existence or validity of the arbitration agreement until the arbitral tribunal has ruled on it.[48] The United Kingdom previously toed the same line of reasoning until the decision in *Weissfisch v Anthony Julius*,[49] where it was observed that in exceptional cases arbitral proceedings could be enjoined. [50] Thus according to Lew, [51] "there can be no basis for any court to grant an injunction on grounds of comity, balance of convenience, or even whether an arbitration appears to be vexatious or oppressive. Instead, the only concern of the court must be the validity of the arbitration agreement itself".

For the Nigerian courts, the rulings have always been against anti-arbitration injunctions until the Court of Appeal in the 2015 case *Shell Petroleum Development Company of Nigeria*

[45] Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489.
[46] Bishop and Houston, "Combatting Arbitral Terrorism: Anti-Arbitration Injunctions Increasingly Threaten to Frustrate the International Arbitral System" http://www.kslaw.com/library/pdf/bishop7.pdf [Accessed 7 October 2016].
[47] The Swedish approach to judicial non-intervention in the arbitral process accords with its philosophy that arbitration is built upon party autonomy and recognition of the advantages of a privately administered dispute settlement mechanism. However, like the French courts, it would only intervene in cases of invalidity of the arbitration agreement; see Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489537.
[48] However, they would only intervene where the arbitration agreement is manifestly null and void. See French New Code of Civil Procedure ("NCPC") Art.1458; see also New York Convention 1958 Art.II(3).
[49] *Weissfisch v Anthony Julius* [2006] EWCA Civ 218; cf. *Elektrim S.A. v Vivendi S.A* [2007] EWHC (Comm) 571 (Eng.), where it was held that anti-arbitration injunctions can only be granted in instances permitted by the English Arbitration Act.
[50] See also *J. Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC (TCC) 1262, [19] (Eng.).
[51] Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489.

Limited v Cresta Integrated Natural Resources Limited[52] made an unprecedented decision enjoining arbitral proceedings in London, United Kingdom, contrary to the ACA 1988 s.34 and its previous decisions in *Statoil Nigeria Limited* and *Nigerian Agip Exploration Limited.* At this point, it is apposite to examine the position of the Nigerian law on anti-arbitration injunctions and the approaches of the courts to this issue.

3. The Nigerian Law on Anti-Arbitration Injunctions

The law on anti-arbitration injunctions is derived from a combination of laws, namely civil procedure, conflict of law rules and arbitration. These laws are in turn mainly influenced by national law and private international law and, therefore, vary from jurisdiction to jurisdiction.[53] For Nigeria, the position of the law on anti-arbitration injunctions can be gathered from two statutory provisions: the Federal High Court Act (FHCA)[54] s.13 and the ACA 1988 s.34.

The Federal High Court Act s.13

The FHCA s.13 provides in pertinent part that: "

1) The court may grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.
2) Any such order may be made either conditionally or on such terms and conditions as the court thinks just."

In effect, the Federal High Court has the powers to grant injunctions in circumstances where it deems it fit to do so. Such powers are extended to the Court of Appeal by virtue of the Court of Appeal Act [55] s.15 which confers on the Court of Appeal all the powers of the court below, which may be the Federal High Court.[56] So even though these courts are generally

[52] *Shell Petroleum Development Co of Nigeria Ltd v Cresta Integrated Natural Resources Ltd* CA/L/331M/2015.
[53] Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244.
[54] Cap.134, Laws of the Federation of Nigeria, 1990, hereinafter referred to as FHCA.
[55] Cap.75, Laws of the Federation of Nigeria, 1990, hereinafter referred to as CAA.
[56] *Okoya v Santili* (1990) 2NWLR (Pt 130) 172; see the Supreme Court Act s.22, Cap.424, Laws of the Federation of Nigeria, 1990, which extends these powers to the Nigerian Supreme Court.

empowered to grant injunctions can they do so in the context of an arbitration governed by the ACA 1988 which is the current legal framework for arbitration in Nigeria?

The Arbitration and Conciliation Act 1988 s.34

The ACA 1988 was modelled after the UNCITRAL Model Law which sets out rules for the conduct of both domestic and international arbitration. The UNCITRAL Model Law was established to advance the progressive synchronisation and unification of international trade law.[57] Part I of the ACA covers arbitrations generally; Pt II deals with conciliation; Pt III makes additional provisions in relation to international arbitrations while Pt IV covers miscellaneous matters. The UNCITRAL Rules and the New York Convention are incorporated in the ACA 1988 Schs 1 and 2, respectively.

The ACA 1988 s.34 provides for intervention by the courts in matters governed by the Act in very limited circumstances. The section provides as follows: "a court shall not intervene in any matter governed by this Act except where so provided in the Act". In essence, intervention by the courts in arbitral proceedings would only be allowed in instances specified in the ACA 1988. Under the Act, the courts are only allowed to intervene where an application is brought before it to: revoke an arbitration agreement;[58] stay court proceedings;[59] appoint an arbitrator;[60] challenge the appointment of an arbitrator;[61] order interim measures of protection;[62] order the attendance of a witness; [63]remove an arbitrator on grounds of misconduct;[64] set aside an arbitral award;[65] remit an award;[66] recognise and

[57] United Nations Resolution 2205 (XXI) of 17 December 1966.
[58] ACA 1988 s.2.
[59] ACA 1988 ss.4 and 5; *Obembe v Wemabod Estate Ltd* (1977) 11 NSCC 264; *KSDUB v Fanz Construction Co Ltd* [1990] 4NWLR (Pt.142) 1; *Sino-Afric Agricultural & Ind. Co Ltd v Ministry of Finance Incorporated* (2014) 10 NWLR (Pt.1416) 515; *Benedict Mbeledogu v John Aneto* (1996) 2 NWLR (Pt.429) 157.
[60] ACA 1988 s.7; ACA 1988 Arbitration Rules Art.6; *Bendex Engineering v Efficient Petroleum Nigeria Ltd* (2001) 8 NWLR (Pt.715) 333; *CG De Geo-Physique v Etuk* (2004) 1 NWLR (Pt.853) 220; *Kano State Oil & Allied Products Ltd v Kofa Trading Co Ltd* (1996) 3 NWLR (Pt.436) 244; *Magbagbeola v Sanni* (2002) 4 NWLR (Pt.756) 193; *Ogunwale v Syrian Arab Republic* (2002) 9 NWLR (Pt.711).
[61] ACA 1988 s.9.
[62] ACA 1988 Arbitration Rules Art 26(3); ACA 1988 s.13.
[63] ACA 1988 s.23.
[64] ACA 1988 s.30(2).
[65] ACA 1988 ss.29 and 30(1); *KSUDB v Fanz Construction Co Ltd* [1990] 4 NWLR (Pt.142) 1; *Adwork Ltd v Nigerian Airways Ltd* (2000) 2 NWLR (Pt.645) 415; *Arbico (Nig) Ltd v Nigerian Machine Tools Ltd* (2002) 15 NWLR (Pt.789) 7; *Mutual Life & General Insurance Ltd v Kodi Iheme* (2014) 1 NWLR (Pt.1389) 670.
[66] ACA 1988 s.29(3).

enforce an award;[67] or refuse to recognise and enforce an award.[68] Any other involvement not envisaged by the Act would amount to a "hijack" of the arbitral proceedings by the courts. Therefore the courts cannot entertain an application to enjoin arbitral proceedings initiated on the grounds that the tribunal lacks jurisdiction because the powers to grant anti-arbitration injunctions are clearly not provided for by the ACA 1988, and by virtue of s.34 the courts can only intervene in arbitral proceedings in the instances provided for in the Act.[69]

In practice, where an objection is raised as to the jurisdiction of the arbitral tribunal, there are two options available to the tribunal. It may decide to rule on the preliminary objection and issue an interim award or it may deal with the objection together with the merits of the case and then render a final award which will include both the decisions on jurisdiction and the substantive issues in dispute. If the tribunal rules that it has no jurisdiction, then the entire proceedings will terminate. However, if it finds that it has jurisdiction and the respondent is dissatisfied with the ruling, he may refuse to participate in the proceedings and seek to set aside or challenge the ensuing award on grounds of lack of jurisdiction in the courts or he may continue with the proceedings and impeach the award that would result from it.[70] In effect, in Nigerian law, an arbitral tribunal has the power to rule on its own jurisdiction based on the principle of *Kompetenz-Kompetenz* as incorporated in the ACA 1988 s.12(1). So where questions are raised as to the jurisdiction of an arbitral tribunal the party's first resort must be to the tribunal and then to the courts if unhappy with the decision of the tribunal. If the party, in defiance of the rule in *Kompetenz-Kompetenz*, applies to the courts to enjoin proceedings, the courts would be unable to entertain such application by virtue of the ACA 1988 s.34. In *Federal Inland Revenue Service v Nigerian National Petroleum Corporation*,[71] the Federal High Court had to consider an application brought before it to prohibit arbitral proceedings on the grounds that tax disputes were not arbitrable. The court held that "*it is*

[67] ACA 1988 ss.31 and 51; *Araka v Ejeagwu* (2000) 15 NWLR (Pt.692) 684; *Ghassan Halaoui v Grosvenor Casinos Ltd* (2002) 17 NWLR (Pt.795) 28.
[68] ACA 1988 ss.32 and 52.
[69] Cf. the English Arbitration Act s.72(1), which empowers courts to intervene to enjoin arbitral proceedings where a party who did not take part in the proceedings raises questions as to the jurisdiction of the tribunal. However, the English courts will only award anti-arbitration injunctions in exceptional circumstances, particularly where it is obvious that the arbitration proceedings were wrongly brought. In *J. Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] BLR 439, the court refused to enjoin arbitration proceedings which were brought on the grounds that concurrent proceedings which may result in inconsistent findings would be in place because such grounds did not constitute exceptional circumstances.
[70] Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (2014), p.217.
[71] *Federal Inland Revenue Service v Nigerian National Petroleum Corp* FHC/ABJ/CS/774/2011.

*plain from this provision [*section *34] that a court shall not intervene in any matter governed by the Act i.e. arbitral proceedings*". [72] In other words, since the ACA 1988 s.12(1) conferred jurisdiction on the arbitral tribunal to rule on its own jurisdiction, the courts would not intervene to do so, unless by way of judicial review of the tribunal's decision.

The current status of the law on judicial non-intervention should be contrasted with the position under the Arbitration Act 1914 s.15[73] which allowed general intervention by the courts in arbitral proceedings. The section conferred extensive powers on the courts, including the powers to direct an arbitral tribunal, "to state in the form of a special case for the opinion of the court any question of law arising in the course of the reference". The import of such general powers of intervention, which could be exercised at any stage of the reference, was that it occasioned delays in the arbitral process[74] and so downplayed party autonomy, neutrality, speed and certainty which are some of the hallmarks of arbitration. It was also thought that such powers had the potential to impact negatively on international arbitration[75] as parties would not want to be subjected to the adjudication of courts of a legal system that was alien to them. And so it became necessary to replace powers of general intervention with specific intervention which is what forms the law today as is seen in ACA 1988 s.34.

It must be noted that the ACA 1988 s.34 is based on the provisions of the UNCITRAL Model Law Art.5, which provides: "in matters governed by this Law, no court shall intervene except where so provided in this Law". The significance of this provision is that any court involvement in arbitral proceedings which is not listed in the UNCITRAL Model Law as one of the instances in which the courts can intervene would not be allowed. [76] So, by specifying the instances, it becomes simpler to ascertain the exact extent to which courts are permitted interference in arbitral proceedings. Accordingly, in elucidating the rationale behind the

---

[72] Emphasis added.
[73] Cap.13, Laws of the Federation of Nigeria, 1958. The Act was the first arbitration legislation in Nigeria. It came into force on 31 December 1914 as Arbitration Ordinance 1914 and was applicable throughout Nigeria. The Act was based on the provisions of the English Arbitration Act 1889. It is now repealed by the ACA 1988 s.58(2).
[74] J. Olakunle Orojo and M. Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates Nigeria Ltd, 1999), p.313.
[75] Orojo and Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (1999) p.313.
[76] Analytical Commentary on draft text of a Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law Eighteenth Session Vienna 3–21 June 1985, United Nations document A/CN.9/264, Art.5, para.2, p.18 https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement [Accessed 7 October 2016].

inclusion of Art.5 in the UNCITRAL Model Law, the Report of the UNCITRAL Model Law[77] states that:

> "Resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse. The purpose of article 5 was to achieve a certainty as to the maximum extent of judicial intervention, including assistance in international commercial arbitration, by compelling the drafters to list in the model law on international commercial arbitration all instances of court intervention."

The foregoing is indicative of the significance of Art.5 in the arbitral process. The UNCITRAL Commission urges states to adopt the UNCITRAL Model Law as it aims, amongst other things, to limit judicial intervention in the arbitral process as much as possible in order to ensure neutrality and certainty, especially in the conduct of international commercial arbitration. In support of this, Idornigie[78] submits that:

> "In addition to the advantage of providing clarity of law, which is particularly important for businessmen especially foreign investors, the provision is meant to accelerate the arbitral process in allowing less of a chance for delay caused by dilatory court proceedings."

Even though Art.5 clearly suggests the preclusion of anti-arbitration injunctions, it must be noted that there have been contrary interpretations of the intention of the model provision on the basis of which it has been argued that it permits court intervention in matters not provided for by the UNCITRAL Model Law. We will discuss these in the next section.

4. The Approach of the Nigerian Courts to Anti-Arbitration Injunctions

[77] Report of the United Nations Commission on International Trade Law on the work of its eighteenth session 3–21 June 1985, General Assembly Official Records: Fortieth Session Supplement No.17 (A/40/17) United Nations document A/40/17, para.63 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N85/325/11/PDF/N8532511.pdf?OpenElement [Accessed 7 October 2016].

[78] Paul O. Idornigie, "The Significance of Section 34 of the Arbitration and Conciliation Act on the Extent of Courts Intervention in 'Matters' Governed by the Act" in O.O. Omole (ed), *Reflections on Nigerian Law: Commemorative Essays in Honour of Professor Jadesola Akande*, Vol.2 (Lagos: Speakers Promotions Ltd, 2009).

In line with the provisions of the ACA 1988 s.34, the Nigerian courts have upheld the principle of judicial non-intervention. This is evident from the decisions of the Nigerian Court of Appeal in the 2013 and 2014 cases of *Statoil Nigeria Limited v Nigerian National Petroleum Corporation*[79] and *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation*, [80] respectively. Curiously enough, the Court of Appeal overruled itself and departed from the long-established principle in the more recent case of *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Limited*[81] where it issued an injunction to enjoin a London arbitration.

In *Statoil Nigeria Limited v Nigerian National Petroleum Corporation,* the Court of Appeal discharged an injunction to restrain proceedings under an arbitration agreement contained in an oil-production-sharing contract between the parties. In this case, a dispute arose following which the appellant commenced arbitration proceedings against the respondent. On receipt of the appellant's statement of claim, the respondent filed a preliminary objection and statement of defence objecting to the jurisdiction of the arbitral tribunal on the grounds that tax disputes were not arbitrable. Further, the respondent also filed a counterclaim. At the Preliminary Meeting, the tribunal asked the parties whether they wanted the arbitral proceedings to be bifurcated, that is, whether they wanted the tribunal to rule on jurisdiction before the hearing of the case on its merit or whether they wanted an award on the merit. The parties opted for the latter following which a date was fixed for hearing. In breach of the agreement to deal with the objection by way of an award on the merit, the respondent requested the arbitral tribunal to rule on the issue of jurisdiction and stay the arbitral proceedings. The arbitral tribunal, however, exercised its powers under the ACA 1988 s.12(4) and refused to rule on the jurisdictional challenge. The respondent then filed an application at the Federal High Court, Lagos seeking an ex parte order of interim injunction to enjoin the arbitral proceedings. The court granted the relief sought. Dissatisfied, the appellant appealed.

At the Court of Appeal, one of the issues formulated for determination was whether given the provisions of the ACA 1988 s.34 the lower court could intervene in the arbitral proceedings by granting an ex parte interim injunction to restrain the arbitration. The appellant contended that by virtue of s.34, the Federal High Court lacked the powers to intervene in the arbitral

[79] *Statoil Nigeria Ltd v Nigerian National Petroleum Corp* (2013) 14 NWLR (Pt.1373) 1.
[80] *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corp* CA/A/628/2011; [2014] 6 CLRN.
[81] *Shell Petroleum Development Co of Nigeria Ltd v Cresta Integrated Natural Resources Ltd* CA/L/331M/2015.

proceedings between the parties. In trying to draw a distinction between the general powers of the court in relation to arbitration and the specific powers of the court to issue injunctive orders, the respondent argued that its ex parte application for interim injunction was made on the strength of the FHCA s.13(1) which confers on the lower court wide powers to grant an injunction "in all cases" in which it appears to be just and convenient. The respondent further contended that although s.34 stated instances where a court might interfere in an arbitration, it does not operate to prevent the court from intervening in circumstances other than the limited instances provided for in the ACA 1988, where for instance it is necessary to do so to assist the arbitral process or to ensure fairness and justice.

Overruling the lower court, the Court of Appeal held that there was no provision in the ACA for the premature determination of the proceedings of an arbitral tribunal by a court. To further buttress this point the appellate court proclaimed that:

> "The intention of the legislature in making the provision in section 34 of the Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria, 2004 is to protect the mechanism of arbitration and to prevent the courts from having direct control over arbitral proceedings or to prevent the courts from intervening in arbitral proceedings outside the circumstances specified in the Act. In other words, the intention of the legislature is to make arbitral proceedings an alternative to adjudication before the courts, and not an extension of court proceedings. In this case, the issuance of an ex parte order of interim injunction was not permitted under the Arbitration and Conciliation Act. In the circumstance, the trial court erred when it made the order sought by the 1st respondent."

The limits of curial intervention in arbitral proceedings was re-affirmed by the Court of Appeal in *Nigeria Agip Exploration Limited v Nigerian National Petroleum Corporation*, where it was held that courts could exercise jurisdiction in arbitral causes only in circumstances permitted by the Act. In this case the appellant and the respondent were parties to a production-sharing contract with respect to an oil mining lease. The contract contained a crude oil-sharing formula as well as an arbitration clause. A dispute arose in relation to the performance of the contract and the parties sought the interpretation of the contract by reference to arbitration. The tribunal issued a partial award which resolved questions of liability, amongst other things, substantially in favour of Nigeria Agip Exploration Limited. The respondents then filed an originating motion at the Federal High Court seeking an order

to stay the arbitral proceedings, amongst other things. The court granted the relief sought in the originating motion. Dissatisfied, the appellants appealed. In upholding the principle of judicial non-intervention as espoused in the ACA 1988, the Court of Appeal stated thus:

> "I have scanned the entire pages of the ACA but I am unable to find the section that provides for the Federal High Court to exercise the powers of entertaining and granting ex parte interim or interlocutory injunctions as the case may be to restrain arbitral proceedings from taking place or continuing to finality. The Federal High Court or any High Court for that matter is not to exercise jurisdiction in arbitral causes and matters …except where so provided for in the Act according to the provision of section 34 of the Act."

It is indeed obvious from the decisions in these two cases that the principle of judicial non-intervention, as captured in s.34, is "premised on the postulation that the essence of arbitration is to have an alternative dispute resolution mechanism not unduly under the whims and caprices of the regular courts".[82] Hence, the section serves to limit curial intervention and so, aptly protects the mechanism of arbitration. Surprisingly, however, the Court of Appeal adopted a seemingly irreconcilable stance in *Shell Petroleum Development Company of Nigeria Limited* which comes right on the heels of *Nigeria Agip Exploration Limited*.

In *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Limited*, the respondent and the applicant, who were both Nigerian companies, were parties to a Share Purchase Agreement (SPA) for the purchase of shares. Clause 25 of the SPA provided that any disputes would be resolved by arbitration. The clause also provided that the place of arbitration was London and that the arbitration agreement would be construed in accordance with English law. This agreement is consistent with the ACA 1988 s.57(2)(d) to the effect that "An arbitration is international if the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration". During the course of the transaction, a dispute arose and the respondent sought to refer the dispute to arbitration in accordance with the terms of the SPA. However, the applicant applied to the Federal High Court in Lagos challenging the legality of the arbitration proceedings in London on the grounds that it was contrary to public

[82] *Statoil Nigeria Ltd v Nigerian National Petroleum Corp* (2013) 14 NWLR (Pt.1373) 1.

policy of the Federal Government of Nigeria on the oil and gas industry. The respondent, by way of a motion on notice, challenged the jurisdiction of the Federal High Court to enjoin arbitration proceedings. The Federal High Court dismissed the motion challenging the jurisdiction of the court. The respondent then appealed to the Court of Appeal, following which the applicant brought an application for an injunction to restrain Shell from taking any further steps in the arbitral proceedings.

The respondent submitted that by virtue of the ACA 1988 s.12 the court could only have jurisdiction after the issue of jurisdiction had been dealt with by the tribunal. He contended that by virtue of s.34, the court lacked jurisdiction to issue an injunction to restrain arbitral proceedings. The respondent further called in aid the CAA 2004 s.15 to state that if the Federal High Court lacked jurisdiction to make an interim order or grant an injunction, it followed that the Court of Appeal also lacked jurisdiction to so grant. The applicant contended amongst other things that: first, the arbitration agreement was invalid; secondly, seeking an anti-arbitration injunction did not serve to oust the jurisdiction of the tribunal under the ACA 1988 s.12; thirdly, the decisions in *Nigeria Agip Exploration Limited* and *Statoil Nigeria Limited* could not be relied upon, in view of the peculiarity of the facts and circumstances of the present case, i.e. that the case in point was an international and not a domestic arbitration; and fourthly, the jurisdiction in domestic arbitration is different from that of international arbitration. Consequently, the court should be guided by the UNCITRAL Model Law Art.5 which has been interpreted to permit injunctions in respect of international arbitration.

The issue formulated for determination by the Court of Appeal was whether, inter alia, the court had jurisdiction to issue an anti-arbitration injunction as sought by the applicant. Rejecting the respondent's contentions, the court held that it indeed had jurisdiction to enjoin the foreign arbitral proceedings and granted an order of injunction prohibiting the same. In reaching its decision the court reasoned as follows:

Firstly, while acknowledging its previous decisions in *Statoil Nigeria Limited* and *Nigerian Agip Exploration Limited,* the court stated that the phrase "governed by the Act" as used in s.34 means that where, in any proceedings, it is found that the particular facts and circumstances fall outside the remit of the ACA 1988, s.34 would not be applicable.

Secondly, the court remarked that s.34 was applicable only in respect of arbitration within Nigeria. In reaching this conclusion, it construed the ACA 1988 s.58 which provides that "the

Act may be cited as the Arbitration and Conciliation Act and shall apply throughout the Federation" to mean that the ACA 1988 could not apply to international arbitration. To this extent, the matter before the court was outside the remit of s.34, and so the section and the interpretation thereof were not applicable to this case.

Thirdly, having found that the ACA 1988 was inapplicable in the present case and that the arbitration was an international one, the court proceeded to examine the UNCITRAL Model Law which it stated was applicable to international commercial arbitration. In construing the position of the UNCITRAL Model Law Art.5 on judicial intervention, the court considered the notes of the UNCITRAL Secretariat on the provisions of Art.5, part of which reads as follows:

> "Another important consideration in judging the impact of Article 5 is that the above necessity to list all instances of court involvement in the model law applies only to matters 'governed by this Law'. The scope of Article 5 is, thus, narrower than the substantive scope of application of the model law i.e. 'international commercial arbitration', in that, it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the model law, Article 5 would, therefore, not exclude court intervention in any matter not regulated in the model law."

It also considered Lord Mustill's position on the subject, which is that relief shall not be sought from the courts in matters governed by the UNCITRAL Model Law but where the law is silent on any matter, the courts may continue to offer all such remedies in all such circumstances as are available under existing law. Relying on the above excerpts, the court determined that even though the grant of anti-arbitration injunctions is not specifically listed in the Model Law as one of the instances in which the courts could intervene, the court could still intervene and grant such prayer because Art.5 would not disallow intervention in any matter not covered by it. The court also looked at the approach of the English courts in respect of its powers to grant anti-arbitration injunctions. It relied on some English cases[83] and also, examined the English Senior Courts Act 1981 s.37 of which is *impari materia* with the FHCA s.13 to reach the conclusion that it could grant the anti-arbitration injunction sought in the matter before it.

[83] *Excalibur Ventures LLC v. Texas Keystone Inc* [2012] 1 All ER (Comm.) 933; *Clayton Engineering Services Ltd v TXM Olajes Gazkutato KFT (No. 2)* [2011] All ER (Comm.) 128.

Fourthly, in deciding whether the grant of an anti-arbitration injunction was appropriate in the circumstances of the cases, it reasoned that it would be oppressive, vexatious and unconscionable to allow the arbitral proceedings to continue because doing so would not only subject the applicant to two parallel proceedings but also expose it to needless expenses.

The reasoning applied by the Court of Appeal in reaching its decision that it had powers to prohibit the proceedings, raises certain issues which need to be addressed.

Firstly, the reasoning that s.34 would be inapplicable where the ACA 1988 is silent on any particular matter (which may require the assistance of the courts) may be seen by scholars and practitioners in Nigeria as novel.[84] It may be surprising that the Court of Appeal would take this position, considering amongst other things, the previous decisions of the same court in a similar issue in *Statoil Nigeria Limited* and *Nigeria Agip Exploration Limited*. It must be stressed that the word "shall" in the wording of s.34 is used in the mandatory sense;[85] it connotes an imperative command; and a duty on the courts to intervene in arbitral proceedings, only, in instances specified by the Act. The import of this is that where the ACA 1988 does not provide for intervention, the courts should not interfere. The wording of the section is simple and clear and leaves no room whatsoever for misinterpretation and so it is not clear why the court misconstrued it. The intention of the legislature in incorporating s.34 is not lost as it is obvious from the construction of the section that the objective was to limit court involvement in arbitral proceedings. Accordingly, the court in *Statoil Nigeria Limited* stated that:

> "The provisions of section 34 of the Arbitration and Conciliation Act are mandatory in that the word 'shall' is one that does not accommodate a flexible interpretation of the directives being given therein … . It is very clear from the intendment of the legislature that the court cannot intervene in arbitral proceedings outside those specifically provided. Where there is no provision for intervention, this should not be done.

As noted earlier, the enactment of s.34 was partly informed by necessity to cure the mischief caused by the repealed Arbitration Act of 1914 s.15 which conferred on the courts general

[84] See p. 8, par. 2 of the Court of Appeal judgment in *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Ltd CA/L/331M/2015.*
[85] *Nigeria Agip Exploration Ltd v Nigerian National Petroleum Corporation* [2014] 6 CLRN.

powers of intervention. According to Orojo et al., "… the provision enabled the court to intervene at any stage of the proceedings. As was later shown in practice, this power could be used to delay and, indeed, obstruct and frustrate the arbitral process. This type of general intervention would make arbitration less attractive especially in international arbitration."[86] Thus, it became necessary to limit court intervention in arbitral proceedings as much as possible by enacting s.34 in the new Act.

Secondly, it is pertinent to add that English authorities have construed the UNCITRAL Model Law Art.5, which is *impari materia* with the ACA 1988 s.34, to allow room for intervention by the courts in areas not covered by the Model Law. In fact, there have been conflicting views on the proper interpretation of the provision. Redfern et al. argues that the phrase, "governed by this law" as used in the provision was intended to mean that the limitation on court intervention relates only to specific topics covered in the Model Law.[87] Similarly, Lord Mustill[88] takes the view that the intention of the UNCITRAL Commission in drafting Art.5 is that it anticipated that two entirely different regimes of judicial intervention would be in force, the second of which is that in matters not governed by the law, the courts of the enacting state may continue to offer all such remedies in all such circumstances as are available under existing law. In contrast, however, in elucidating the rationale for the inclusion of Art.5, the Analytical Commentary on the Model Law [89] states that the effect of the provision is to "exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law". Thus, essentially, the provision aims to strike a balance between the independence of the arbitral process and curial intervention by delineating the instances in which the courts can interfere in the arbitral process, because uninhibited intervention would defeat the whole essence of arbitration. According to the Report, [90] if the UNCITRAL Commission felt that it was necessary to permit intervention in

[86] Orojo and Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (1999).
[87] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 2nd edn (London: Sweet & Maxwell, 1991), p.512.
[88] As cited by the Court of Appeal in *Shell Petroleum Development Co of Nigeria Ltd v Cresta Integrated Natural Resources Ltd* CA/L/331M/2015.
[89] Analytical Commentary on a Draft Text of the UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law Eighteenth Session Vienna 3–21 June 1985, United Nations document A/CN.9/264, Art.5, para.2, p.18 https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement [Accessed 7 October 2016].
[90] Report of the United Nations Commission on International Trade Law on the work of its eighteenth session 3–21 June 1985, General Assembly Official Records: Fortieth Session Supplement No.17 (A/40/17) United Nations document A/40/17, para.63 https://documents-dds-

any instances other than those listed in the UNCITRAL Model Law, it should be expressed therein. The foregoing notwithstanding, it must be stressed that even though the ACA 1988 is largely a reflection of the UNCITRAL Model law, it (the Model Law) remains a mere model—a recommendation at best—which states are under no obligation to follow. Even where states have in fact adopted the provisions of the Model Law there is no commitment to embrace the construal of its provisions.

Thirdly, the court failed to take into consideration the ACA 1988 Pts III and IV in reaching the conclusion that s.34 (and therefore, the provisions of the ACA) was not applicable in international commercial arbitration. The ACA 1988 Pt III is captured under the heading, "Additional Provisions relating to International Commercial Arbitration and Conciliation" and s.43, which is the introductory section to that part, provides that "the provisions of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation in addition to the other provisions of this Decree". The foregoing provision is clear and unequivocal and so leaves no doubt as to the applicability of the ACA 1988 in international arbitrations. If the draftsman did not intend the provisions of the Act to cover international arbitration, they would not have gone ahead to meticulously delineate the conditions which an arbitration must meet in order to qualify as international in the ACA Pt IV s.57(2). Unlike *Nigeria Agip Exploration Limited,* where the arbitration was governed by Nigerian law, in *Shell Petroleum Development Company of Nigeria Limited*, the parties chose London as the seat of arbitration and English Law as the applicable law and so, ACA 1988 s.34 could not have applied. Be it as it may, where parties to an international arbitration have chosen Nigeria as the seat and Nigerian law as the governing law, the ACA 1988 would apply with full force.

At this juncture, it is pertinent to note that the status of the ACA 1988 has been challenged as to its constitutionality (and therefore its applicability to the Federation of Nigeria).[91] The ACA was passed under a military regime on 14 March 1988 when Decrees[92] were superior to other laws in Nigeria—including the then Constitution of the Federal Republic of Nigeria

ny.un.org/doc/UNDOC/GEN/N85/325/11/PDF/N8532511.pdf?OpenElement [Accessed 7 October 2016].

[91] Paul Idornigie, "The 1988 Arbitration and Conciliation Act: Need for Review" (2003) *International Arbitration Law Review* 50–58; see also Paul Idornigie, "The Doctrine of Covering the Field and Arbitration Laws in Nigeria" (2000) 66 *Arbitration* 193–198.

[92] It was passed under Decree No.11 of 14 March 1988.

1979. The Decree also impliedly repealed all the Arbitration laws[93] in the various states. So by virtue of the provisions of the Decree (now Act) s.58(1), the ACA 1988 was made applicable throughout Nigeria. However, with the coming into force of the Constitution of the Federal Republic of Nigeria 1999 (as amended),[94] on 29 May 1999, there have been questions as to the constitutionality of the ACA 1988.[95] The reason for this is that under the 1999 Constitution, legislative powers are shared by the National Assembly and the State Houses of Assembly.[96] Matters on the Exclusive Legislative List are reserved for the National Assembly[97] while those on the Concurrent Legislative List are shared between the National and State Houses of Assembly[98] with a proviso that in the event of a conflict, the National Assembly prevails.[99] Strangely, neither "arbitration" nor "conciliation" is in the Exclusive Legislative List or Concurrent Legislative List. What happens in such cases is that matters that are in neither of the Lists are placed on the Residual List, which is usually reserved for the State Houses of Assembly. Consequently, it has been argued that the ACA 1988 cannot stand as an Act of the National Assembly. Nonetheless, it is conceded that by virtue of the 1999 Constitution s.315(1)(a), the ACA 1988 remains an existing law. [100] At present, there are Bills before the National Assembly to separate domestic arbitration from international arbitration. Domestic arbitration will thus be regulated by the State Houses of Assembly while international and interstate arbitration will be the exclusive preserve of the National Assembly.[101]

[93] See Arbitration Law of Western Nigeria 1959; Arbitration Law of Northern Nigeria 1963; and Arbitration Law of Eastern Nigeria 1963.
[94] Hereinafter referred to as 1999 Constitution.
[95] Idornigie, "The 1988 Arbitration and Conciliation Act: Need for Review" (2003) *International Arbitration Law Review* 50–58; Idornigie, "The Doctrine of Covering the Field and Arbitration Laws in Nigeria" (2000) 66 *Arbitration* 193–198
[96] 1999 Constitution ss.4(1) and 4(6).
[97] 1999 Constitution ss.4(2) and 4(3); see also 1999 Constitution Sch.2 Pt I.
[98] 1999 Constitution ss.4(4)(a), (b) and 4(7)(a). (b); see also 1999 Constitution Sch.2 Pt II.
[99] 1999 Constitution s.4(5).
[100] The section provides that, "an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be … an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws".
[101] See the Draft Federal Arbitration and Conciliation Bill 2007, still before the National Assembly, and the Uniform Arbitration and Conciliation Law 2007 for the States. At the moment, it is only Lagos State that has passed the Arbitration Law 2009. The other states are still relying on the Arbitration Law of 1914 and not the ACA 1988; see also the Arbitration Laws of Delta State of Nigeria 2006.

Fourthly, the court excluded the applicability of the ACA 1988 and proceeded to examine the applicable law of the arbitration—which is English law. However in reaching the decision that it had the powers to grant anti-arbitration injunctions, it relied on the UNCITRAL Model Law Art. 5 rather than the English Arbitration Act[102] which in this case should be the proper or substantive law of the contract. As indicated above, the Model Law is merely a model for states to adopt at their convenience, and not a Convention. It does not have the force of law and so should not have formed the basis of any court's decision. It must be stressed that the English Arbitration Act was influenced by the UNCITRAL Model Law though the wording of s.1(c) of the English Act on intervention by courts is different from that of the UNCITRAL Model Law. In other words, in the English Act, the word "should" is used whereas in the UNCITRAL Model Law, the word used is "shall".

Fifthly, it appears from the judgment that the issue of whether the arbitration agreement was in fact contrary to the public policy of Nigeria was never dealt with by the courts before proceeding to enjoin proceedings. The court based its decision that an injunction was appropriate in the circumstances on the hardship which it stated would be suffered by the applicant if the arbitral proceedings were to continue. According to the court, "it will be unconscionable for this court not to grant the application sought by the Applicant having regards to the facts and circumstances of the case and the oppressive situation in making the applicant face to two parallel proceedings." It is submitted that the application for injunction in this case was sought in the context of arbitration and not the usual everyday litigation and so the need to preserve the sanctity of arbitration should have been paramount. As the court attributed its power to intervene to the English law, it should have enquired into the validity or otherwise of the arbitration agreement, being the practice in the English courts. The court did not find that the agreement was indeed invalid and so the case cannot be said to be an exceptional one warranting the grant of the injunction.

Lastly and more importantly, it is thought that as the seat of arbitration was London, the suit for anti-arbitration injunction should not have been filed in the Nigerian courts because no court apart from the court at the seat of arbitration has the powers to interfere in a case of this nature.[103] The fact that the suit was filed in Nigeria as opposed to the United Kingdom

[102] See English Arbitration Act 1996 ss.1(c) and 72(1).
[103] Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489

significantly influenced the court's reasoning that the ongoing arbitral proceedings in the United Kingdom could not be governed by the Nigerian ACA 1988.

In arriving at that decision, the court applied English case law and statute and reasoned that if the English courts were faced with the same facts they would have enjoined the arbitration proceedings. [104] Though issued by a Nigerian court, it must be stressed that the decision is certainly not representative of the position of the law on the powers of the court to grant of anti-arbitration injunctions in Nigeria generally. The court's observation that s.34 permits curial intervention in areas not provided for by the ACA 1988 is understandable considering its parity with UNCITRAL Model Law Art. 5 which, as already discussed above, has been interpreted to permit such involvement and also, considering that the English courts have been known to grant anti-arbitration injunctions even though it is not expressly provided for in the English Arbitration Act 1996 (i.e. the proper law of the arbitration in this case). It is important to reiterate that the interpretation given to a provision in the Model Law, or municipal laws of other jurisdictions for that matter, should not be willy-nilly imported into the Nigerian jurisprudence, especially where, as is the case with s.34, domestic legislation on the subject is unambiguous and requires no further clarification. Although the provisions of section 34 are not the basis upon which the court reached it decision, this observation must be treated with great caution in order to ensure that it does not one day form the actual basis of court intervention in arbitral proceedings under the ACA 1988.

Essentially, Nigerian law limits curial intervention and so does not permit the grant of anti-arbitration injunctions whether in domestic or international arbitration. In contrast, however, the Indian Arbitration and Conciliation Act of 1996,[105] expressly restricts non-intervention to domestic arbitrations only. Part I of the Indian ACA deals with domestic arbitrations while Pt II applies to arbitrations seated outside India. The judicial non-intervention provision of the Act (or Pt) is contained in s.5 which falls in Pt I as follows: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no

http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1094&context=auilr [Accessed 7 October 2016].

[104] *Excalibur Ventures LLC v. Texas Keystone Inc* [2012] 1 All ER (Comm.) 933; *Clayton Engineering Services Ltd v TXM Olajes Gazkutato KFT (No. 2)* [2011] All ER (Comm.) 128; See also English Senior Courts Act 1981 s.37 which is *impari materia* with FHCA s.13.

[105] Hereinafter referred to as "Indian ACA".

judicial authority shall intervene except where so provided in this Part." The implication of the provision is that s.5 would have no application whatsoever in international arbitrations. Further, the fact that s.16 which incorporates the principle of *Kompetenz- Kompetenz* is also contained in Pt I lends credence to the view that the Indian ACA clearly upholds judicial involvement in foreign-seated arbitrations.[106] Contrasting this with the ACA 1988, if s.34 which is contained in Pt I, had been worded a bit differently, with the word "Part" replacing "Act", then the Court of Appeal might have been able to make a case for the non-applicability of s.34 to international arbitrations, but this is not the case. The position under the Indian ACA notwithstanding, it must be noted that the Indian courts have been known to extend the applicability of s.5 to Pt II of the Indian ACA and have, on that basis, refused to prohibit foreign arbitration proceedings. In *Chaterjee Petrochem Co v Haldia Petrochemicals Ltd*, [107] an application for an injunction brought before the Indian Supreme Court to enjoin a foreign-seated arbitration on the grounds that the arbitration agreement was void was held not to be maintainable in law. Bansal and Agrawal[108] argue that the decision runs contrary to the intention of the Indian ACA because apart from extending Pt II s.5 to disallow intervention in foreign arbitration, it also completely disregarded the apparent conflict with s.45 of the Act which not only falls in Pt II the Act, but also provides that, notwithstanding the provisions of Pt I, the courts can intervene first hand where they find that the said arbitration agreement is null and void, inoperative or incapable of being performed. In *World Sport Group (Mauritius) v MSM Satellite (Singapore)*, [109] the Indian Supreme Court held that an application for an injunction to prohibit arbitral proceedings being held outside India would be governed by the Indian Act s.45.

Section 45 of the Indian ACA mirrors in pertinent part, Art.II(3) of the New York Convention which is fully operational in Nigeria by virtue of its incorporation into the ACA Sch.2. So the question raised by this decision in *World Sport Group (Mauritius)* is, assuming the court in *Shell Petroleum Development Company of Nigeria Limited* relied on s.34 and found it had no powers to grant anti-arbitration injunctions, could Art.II (3) have assisted the

[106] Bansal and Agrawal, "Are Anti-Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law" (2015) 31 *Arbitration International* 613.
[107] *Chaterjee Petrochem Co v Haldia Petrochemicals Ltd* 2013 (15) SCALE 45.
[108] Bansal and Agrawal, "Are Anti-Arbitration Injunctions a Malaise? An Analysis in the context of Indian Law" (2015) 31 *Arbitration International* 613.
[109] *World Sport Group (Mauritius) v MSM Satellite (Singapore)* AIR 2014 SC 968.

applicant in that case? Or would there have been a conflict with ss.12 and 34 the application of which arguably extends to the ACA 1988 Sch.2?

5. The New York Convention: A Viable Basis for the Issue of Anti-Arbitration Injunctions in Nigeria?

The New York Convention Art.II(3) provides that:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In effect, Art.II(3) should be pleaded where any action (which may include an application to prohibit foreign proceedings) which arises under an arbitration agreement governed by the ACA 1988 is initiated in a Nigerian court. Generally, the provision imposes a mandatory requirement on the national courts to either dismiss or stay claims that are subject to an arbitration agreement and refer the parties to arbitration. However there is no obligation to do so where the said agreement is null and void, inoperative or incapable of being performed. In all cases where intervention is sought, the court must ensure that these criteria have been met. Because Nigerian jurisprudence on anti-arbitration injunctions is still evolving, there have been no cases where Art.II(3) has been put forward as a possible basis for the prohibition of foreign arbitration because the arbitration agreement is null and void, inoperative or incapable of being performed. In *Shell Development Corporation Limited*, even though the basis of the applicant's application for an anti-arbitration injunction was that the arbitration agreement was invalid because it infringed the provisions of the Nigerian Oil and Gas Industry Content Development Act 2010, Art.II3) was never pleaded.

Whatever the case, it is submitted that where the law permits the grant of anti-arbitration injunctions and a suit of that type is brought before the courts, the need to preserve the sanctity of arbitration and the arbitral process should always be the overriding factor.[110] In other words, such powers should be sparingly exercised and only in exceptional circumstances. For instance, if there was never an agreement to arbitrate in the first place, it would be unconscionable to subject a party to the process. Thus under Nigerian law, the

New York Convention would have been a viable alternative if the agreement is null and void, inoperative or incapable of being performed. However, that is not so in this case.

6. Conclusion

The sanctity of arbitration and the arbitral process must always form the basis of the issue of anti-arbitration injunctions, where the courts have powers to do so. In fact, such powers must be exercised cautiously and with the utmost regard for the need to encourage the use of arbitration as an alternative dispute resolution mechanism, especially in international commercial transactions. In Nigeria, the grant of anti-arbitration injunctions is expressly excluded by the combined effects of the ACA s.12 and 34. As argued in this article, this position is evidenced by the pro-arbitration stance of the Nigerian courts in *Statoil Nigeria Limited* and *Nigeria Agip Exploration Limited*. The reasoning in *Shell Development Corporation Limited* is certainly based on the facts of the case and not representative of the position under Nigerian law. Consequently it must be considered with the greatest caution in future applications to the Nigerian courts for anti-arbitration injunction.