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CHAPTER 9

Attitude of Nigerian Courts Towards Arbitration

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Introduction

This chapter discusses the attitude of Nigerian courts towards arbitration, whether supportive or interventionist. Our discussion is divided into five sections. Section 9.01 provides some context with a brief description of Nigeria's legal system. The relevant arbitration laws in Nigeria are set out in section 9.02; and the courts with jurisdiction over arbitration matters in section 9.03. In section 9.04 we analyse of some important arbitration related decisions of the Nigerian courts; and in section 9.05 we analyse the attitude of the Nigerian courts towards arbitration, and conclude.

9.01 The Nigerian Legal System

Nigeria is a constitutional democracy and federation with thirty-six states and a Federal Capital Territory.[1] The current constitution operational in Nigeria is the 1999 Constitution (as amended).[2] As is conventional in a federation, legislative powers are shared between the federal government and the federating states. Accordingly, Section 4(1) of the Constitution vests federal legislative powers in the bicameral National Assembly, consisting of a Senate and a House of Representatives. Likewise, Section 4(7) of the Constitution vests the legislative powers of a state in a unicameral State House of Assembly. Thus the National Assembly has exclusive legislative competence over matters listed in the Exclusive Legislative List,[3] whilst the National Assembly and the respective State Houses of Assembly have concurrent legislative competence over matters listed in the Concurrent Legislative List.[4] As it concerns matters of shared legislative competence, where a State House of Assembly enacts a Law inconsistent with an Act of the National Assembly, the latter will prevail and the

[1] Section 3 of the Constitution of the Federal Republic of Nigeria, 1999, as amended ("the Constitution")

[2] There have been three amendments to the Constitution of the Federal Republic of Nigeria 1999. The amendments were enacted into law by the Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010; Constitution of the Federal Republic of Nigeria (Second Alteration) Act 2010; and the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.

[3] Subsections (2) and (3) of section 4 and Part I of the Second Schedule of the Constitution

[4] Subsections (4) and (5) of section 4 and Part II of the Second Schedule of the Constitution

State's Law will be void to the extent of the inconsistency.[5] In Nigeria, it is unsettled whether arbitration is an item on the exclusive or concurrent list. On the one hand, the National Assembly is competent to legislate on trade and commerce between Nigeria and other countries, and between the federating states.[6] Insofar as arbitration is an incidence of trade and commerce, we believe that the National Assembly may enact laws on international arbitration and inter-state arbitration.[7] Similarly, the National Assembly[8] and a State House of Assembly[9] may make laws for, amongst other things, the commercial development of a state. To the extent that arbitration assists the development of commerce, we believe that both the federal and state legislatures may enact laws to govern arbitration within a state. Any inconsistency between the federal law and a state law will trigger the operation of Section 4(5) of the 1999 Constitution.[10]

Nigeria also belongs to a mixed family of laws – common law, sharia law and customary law. Whilst each of these laws have their own variants of arbitration,[11] sharia and customary arbitration are more prevalent than common law arbitration. For the rest of this chapter, the focus will be on statutory arbitration.

9.02 Arbitration Laws in Nigeria

Arising from the nature of the legislative powers of the federation and the states comprising Nigeria, commercial arbitration in Nigeria is regulated under three statutory instruments: the Arbitration and Conciliation Act[12] (the ACA), the Lagos State Arbitration Law 2009,[13] and the 1914 Arbitration Law[14]. The 1914 law is still applicable in the remaining thirty-five states in Nigeria.

[5] Section 4(5) of the 1999 Constitution.
[6] Item 62(a) of the Exclusive Legislative List shown in Part I of the First Schedule to the 1999 Constitution.
[7] Item 68 of the Exclusive Legislative List allows the National Assembly to legislate on any matter incidental or supplementary to any matter mentioned elsewhere on the said list.
[8] By virtue of Item 18 of the Concurrent Legislative List shown in Part II of the First Schedule to the 1999 Constitution.
[9] By virtue of Item 19 of the Concurrent Legislative List.
[10] See footnote N° 5 above. The federal law will prevail and the state law will be void to the extent of the inconsistency.
[11] As distinct from statutory arbitration.
[12] Formerly Decree No. 11 of 14 March, 1988; Cap 18, Laws of the Federation of Nigeria, 1990; and now Cap A18, Laws of the Federation of Nigeria, 2004.
[13] Lagos State Arbitration Law No. 18 of 2009.
[14] Later Arbitration Act, Cap 13, Laws of the Federation of Nigeria, 1958.

The ACA is modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (The UNCITRAL Model Law).[15] Nigeria was the first African country to adopt the UNCITRAL Model Law when it promulgated the Arbitration and Conciliation Decree No. 11 of 14 March 1988 (the 1988 Decree). Prior to this promulgation, Nigeria operated the Arbitration Act of 1914 (the 1914 Act), which was identical to the English Arbitration Act of 1889.

In 1914, Nigeria was a unitary State. The 1914 Act, therefore, applied throughout the country. However, when Nigeria became a federation in 1954, this enactment became the Arbitration Act for the Federal Capital Territory and the Arbitration Laws of the various Regions (now states).[16]

Section 58(2) of the 1988 Decree repealed the Arbitration Act, Cap 13, Laws of the Federation of Nigeria 1958. The Decree, by virtue of its subsection (1), applied throughout the Federation. Being a legislative instrument promulgated under a military dispensation, the Decree was superior to all other laws, including the 1979 Constitution in existence at the material time.[17] With the return to democracy on May 29, 1999 and the coming into force of the 1999 Constitution, the 1988 Decree was treated as an existing law and became the ACA, applicable to domestic and international commercial arbitration.[18]

9.03 Courts with Jurisdiction over arbitration related Matters

[15] See General Assembly Resolution 40/72 of 11 December, 1985 available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.htm> (accessed 20 June, 2017).
[16] The origin of statutory arbitration in Nigeria can be traced to the 1889 English Arbitration Act. On the amalgamation of Nigeria in 1914, the Arbitration Act 1889 became the Arbitration Ordinance 1914. Subsequently, this Ordinance became the Arbitration Act, Cap 13, Laws of the Federation of Nigeria, 1958, applicable to the Federal Capital Territory. In the Regions, we had the Arbitration Law, Cap 8, Laws of Western Nigeria, 1959; Arbitration Law, Cap 7, Laws of Northern Nigeria, 1963; and Arbitration Law, Cap 10, Laws of Eastern Nigeria, 1963. The States that were created out of these former Regions adopted the Arbitration Laws applicable in their respective regions before their creation.
[17] Professor Itse Sagay, 'The Constitution, The Courts and the Rule of Law' <http://www.profitsesagay.com/pdf/THE%20CONSTITUTION.pdf> accessed 29 August 2017.
[18] J. Olakunle Orojo and M. Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Myebi & Associates 1999) 3.

As it relates to courts, there are federal courts and state courts in Nigeria. Section 6 of the Constitution delimits the judicial powers of these courts.[19] The said courts are listed in Table A below.[20]

Federal Courts	**State Courts**
Supreme Court	High Court
Court of Appeal	Sharia Court of Appeal
Federal High Court	Customary Court of Appeal
High Court of the Federal Capital Territory	
Sharia Court of Appeal of the Federal Capital Territory	
Customary Court of Appeal of the Federal capital Territory	

Table A - Federal and State Superior Courts of Record in Nigeria[21]

The judicial powers vested in the courts extends to all inherent powers and sanctions of a court of law and to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[22]

On the interface between arbitration and the courts, Section 34 of the ACA, following the UNCITRAL Model Law requirement, provides that in matters governed by the Act, the courts cannot intervene except as provided by the Act.[23] Section 59 of the Lagos State Arbitration

[19] Section 6(5)(j) of the Constitution empowers the National assembly to establish other courts whose jurisdiction must be confined to matters over which the National Assembly may legislate, while section 6(5)(k) makes similar provision as it relates to States Houses of Assembly.
[20] The Constitution also creates Election Tribunals (section 285) and a Code of Conduct Tribunal (Item 15, First Schedule, Part 1).
[21]Chapter VII of the Constitution relating to the Judicature provides for the establishment, appointment, jurisdiction and powers of these Courts. In addition, there are other statutes that deal with these courts For example, the Supreme Court Act, Cap S15, Laws of the Federation of Nigeria, 2004; the Court of Appeal Act, Cap C36, Laws of the Federation of Nigeria, 2004; the Federal High Court Act, among others.
[22] Subsection (6) of section 6 of the Constitution.
[23] Art 5 of the UNCITRAL Model Law

Law (LSAL) also adopts similar language. Thus, in matters governed by the ACA, Nigerian courts cannot intervene except as provided in the law.[24]

On what constitutes a court, Section 2 of the 1914 Act[25], defines 'court' as a High Court.[26] We mentioned earlier that Nigeria operated a unitary system of government from 1914 until 1954, when the country became a federation with three Regions. There were, therefore, at that period, no states or a Federal Capital Territory for which courts were created. However, since 1954, the Arbitration Laws of the various Regions (which later became states) define 'court' as the High Court of the respective States.

Under Section 63(1) of the Lagos State Arbitration Law, 'court' means the High Court of Lagos State. With the constitutional provisions in Sections 235 and 240 of the Constitution, appeals from all High Courts in the country lie to the Court of Appeal and from that court to the Supreme Court.[27]

At the Federal level, the ACA refers to, 'court' in various provisions in the enactment.[28] Section 57(1) of the ACA defines 'court' as the High Court of a State, the High Court of the Federal Capital Territory or the Federal High Court. Ordinarily, these are the courts that prosecute arbitration related matters in Nigeria. In commenting on the provisions in Sections 34 and 57 of the ACA, Olatawura argued:

> (a)ll is not well with the current arbitration regime's policies and practice. Most advantages associated with arbitration are proving illusionary, primarily due to

[24] The courts can intervene in the following instances, sections 2 (revocation of an arbitration agreement), 4 and 5 (stay of proceedings), 7 (appointment of arbitrators), 23 (assistance in taking evidence), 29, 30 and 48 (setting aside an arbitral award), 31, 32, 51 and 52 (recognition and enforcement of an arbitral award, or refusal of recognition and enforcement).

[25] Which is the same as Arbitration Act, Cap 13, Laws of the Federation, 1958; Arbitration Law, Cap 10, Laws of Bendel (now Edo) State, 1976 and Arbitration Law, Cap A13, Laws of Delta, 2006 and the Arbitration Laws of the other states of Nigeria other than Lagos State.

[26] The Arbitration Act, 1914 does not have the equivalent of section 34 of the Arbitration and Conciliation Act, 2004 or section 59 of the Lagos State Arbitration Law. However, the Arbitration Act, 1914 provides that the High Court can intervene in the following instances, sections 3 (revocation of an arbitration agreement), 5 (stay of proceedings) 6(2) (appointment of an arbitrator), 7(2) (settin aside the appointment of an arbitrator), 10 (power to enlarge time for making an award), 11 (power to remit an award), 12 (power to set aside an award), 13 (enforcing an award), 14 (assistance in taking evidence), 15 (statement of case pending arbitration), and 17 (power to make rules pursuant to the Act).

[27] www.supremecourt.gov.ng.

[28] See sections 2, 4, 5, 7, 23, 29, 30, 31, 48, 51 and 52 of the ACA

> parties' frequent recourse to courts. There is presently the rampant pursuit of appeals up to the Supreme Court. …
> Furthermore, and perhaps most significant is the provision of section 57(1) which reflects the provision in Article 6, UNCITRAL MAL 1985, that: "court means the High Court of a State or the High Court of the Federal Capital Territory or the Federal High Court." It is obvious from the literary or plain meaning of these provisions that only courts mentioned in the Act, being High Courts, can assume jurisdiction. Their decisions would therefore be final and binding on the parties. It should then be apparent that Nigeria's appellate courts, namely, the Court of Appeal and the Supreme Court lack jurisdictional competence over commercial arbitration related issues.[29]

Olatawura's argument, though facilitative of the finality of arbitral awards, overlooks the hierarchical structure of courts in Nigeria. In this hierarchy, particularly at the Federal level, the High Court is a court of first instance. There are constitutionally guaranteed rights of appeal first from the High Court (as a court of first instance) to the Court of Appeal, then ultimately to the Supreme Court. Accordingly, Section 240 of the Constitution provides:

Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of the Federation Capital Territory, Abuja, High Court of a state, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a state, Customary Court of Appeal of a state and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.[30]

Furthermore, Section 241(1)(a) of the Constitution provides:

> An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases – …
> final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance.

[29] Ola O Olatawura, 'Nigeria's Appellate Courts, Arbitration and Extra Legal Jurisdiction – Facts, Problems and Solutions in *Arbitration International*, Vol 28, Issue No 1, 2012 63 at 65-67.
[30] See also section 14 of the Court of Appeal Act, Cap C36, Laws of the Federation of Nigeria, 2004 conferring appellate jurisdiction on the Court of Appeal on matters arising from the High Court.

Similarly, under Section 233(1) and (2) of the Constitution:

> The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.
> An appeal shall lie form decisions of the Court of Appeal to the Supreme Court as of right in the following cases -
>
> where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;[31]

There is therefore no provision in the Constitution that confers finality on the decisions of any of the High Courts and the Court of Appeal in matters relating to arbitration or any other matter. Finally, Section 235 of the Constitution recognises the Supreme Court as the final arbiter. It provides:

> Without prejudice to the powers of the President or of the Governor of a state with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.

In response to Olatawura's argument, Idornigie notes:

> The combined effect of the provisions of the Constitution and statutes is that both the Court of Appeal and Supreme Court have jurisdiction to hear and determine appeals from the first instance courts, namely, the Federal High Court and the State High Courts conferred in section 57(1) of Cap A18. The Courts referred to in section 57(1) of Cap A18 do not exist in the abstract. They are creatures of the Constitution and statutes with their jurisdictions clearly prescribed.[32]

[31] See also section 21 of the Supreme Court Act, Cap S15, Laws of the Federation of Nigeria, 2004 conferring appellate jurisdiction on the Supreme Court on matters arising from the Court of Appeal.
[32] Paul Obo Idornigie, 'Nigeria's appellate courts, arbitration and extra-legal jurisdiction – facts, problems and solutions: A rejoinder' in *Arbitration International*, Vol 31, No 1, 2015 171 at 176.

In commenting on the issue as to which courts in Nigeria have jurisdiction over arbitration-related matters, Onyema added:

> The High Courts or Federal High Courts, depending on the nature of the subject matter of the dispute, have jurisdiction over arbitration-related court proceedings. Judgements can be appealed to the Court of Appeal with the final determination made by the Supreme Court.[33]

Idornigie and Onyema's views are reinforced by the recent decision of the Supreme Court in Skye Bank v Iwu[34] where, in determining whether the National Industrial Court has finality in labour matters, Eko, JSC held:

> The Constitution does not favour the first instance decision of any judicial body final and conclusive. The right to appeal against the decision of a first instance Court or tribunal is a basic Constitutional right. An appeal is a resort to a superior Court to review the decision of an inferior Court and find out whether on the facts placed before it, and applying the relevant and applicable law the inferior Court came to a right or wrong decision.
>
> In our view, the correct position under Nigerian law is that a statutory provision in the ACA cannot override a constitutional provision. Indeed, under Section 1(3) of the Constitution, any conflict between the Constitution and the ACA would render the latter void to the extent of the inconsistency.

Consequently, a High Court of a State, the High Court of the Federal Capital Territory and the Federal High Court have first instance jurisdiction over arbitration related matters in Nigeria. The Court of Appeal and Supreme Court have appellate jurisdictional competence over the said matters.

9.04 Arbitration Related Judgements from Nigerian Courts

[33] Emilia Onyema, 'Nigeria' in Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International 2013) 163 at 165
[34] (2017) LPELR-42595 (SC)

Having established the courts with jurisdiction over arbitration related matters in Nigeria, in this section we examine some decisions of the various courts on key aspects of the arbitration process and enforcement and annulment of awards.

The success of any particular jurisdiction, as it concerns international commercial arbitration, depends on the quality and qualities of its courts.[35] We recognize that with court support and minimal intervention, arbitration has the potential to flourish in Nigeria. If the balance is struck differently, however, parties will avoid choosing Nigeria as the seat for international arbitration references, and arbitration will also become less attractive to domestic parties.

There is additional support for our view from the results of the 2015 Queen Mary International Arbitration Survey.[36] Respondents to the survey identified enforceability of awards (65%) and avoiding specific legal systems/national courts (64%) as the two most valuable characteristics of Arbitration. In the preferred seats, respondents identified the five most preferred and widely used seats as: London, Paris, Hong Kong, Singapore and Geneva. When asked the reasons why they prefer certain seats to others, the three paramount factors relate to the formal legal infrastructure of the seat. These are: neutrality and impartiality of the local legal system; national arbitration law; and track record of enforcing agreements to arbitrate and arbitral awards. Empirical data, therefore, confirms a direct correlation between the formal legal infrastructure of a seat, and the selection of that seat to host international arbitration references. The courts, either as supervising courts at the seat or as enforcing courts, are therefore a critical component of the favourable arbitral architecture of any jurisdiction.

Chief Justice James Allsop of the Federal Court of Australia aptly identified that the desired qualities of such courts can be taken from the description of the subject matter: international; commercial; and arbitration.[37] The following is a summary of Chief Justice Allsop's views:

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[35] James Allsop, 'National Courts and Arbitration: Collaboration or Competition?' <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allsop-ao-(australia).pdf?sfvrsn=0> accessed 29 August 2017.

[36] Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 15 June 2016.

[37] James Allsop, 'National Courts and Arbitration: Collaboration or Competition?' <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allsop-ao-(australia).pdf?sfvrsn=0> accessed 29 August 2017.

First, the court must be *international* in focus and approach. This requires an attitude or state of mind of judges, of court administrators and officers, and of practitioners to welcome and encourage foreign commercial parties to the jurisdiction. This international focus of the judiciary should be reflected in an arbitration law (written and unwritten) that is internationally focused and "arbitration-friendly".

Secondly, the Court must be *commercial* in its focus, skills and approach. This requires that the judges handling arbitral proceedings (whether support, supervision or enforcement) understand the commerce involved in the substantive dispute.

Thirdly, the court must understand *arbitration*. This is not merely quantitative; it is not simply knowing about arbitration law and practice. But it is also qualitative; it involves understanding the perspective and approach that facilitates the smooth working of the arbitral system. This "cultural perspective" comes from experience, judicial education and professional collaboration with the arbitral community.

In summary, the ideal court (and, by extension, the ideal Judge) is international in outlook, commercial in skill and sympathetic to arbitration. We shall apply this test to assess the attitude of Nigerian Courts and Judges towards arbitration-related proceedings.

Under Nigerian law, the courts will usually become involved with arbitration either before, during and after arbitral proceedings have been concluded. Such occasions will arise where one party seeks to enforce the agreement to arbitrate a dispute while the other aims to litigate it; where there is default in appointing the arbitrators; where one party challenges an arbitrator; where a party seeks interim measures of protection; where a party seeks to set aside an award or seeks the recognition or enforcement of an arbitral award.

[A] Upholding Arbitration Agreements

Section 1 of the ACA sets out the formal and substantive requirements of an arbitration agreement. It provides:

1) Every arbitration agreement shall be in writing contained-

2) Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contact is in writing and the reference is such as to make that clause part of the contract.

   (a) in a document signed by the parties; or
   (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or
   (c) in an exchange of points of claim an of defence in which the existence of an arbitration agreement is alleged by one party and denied by another.

The arbitration agreement is a critical element of the arbitral process, laying down the foundation of a binding and enforceable arbitral award. Being contractual in nature, a supportive approach would see the Courts giving effect to the parties' commercial intent – to submit to arbitration all disputes arising out of or relating to their contractual relationship.

In Kano State Urban Development Board v. Fanz Construction Ltd,[38] the dispute here arose from a construction agreement between the parties. *Fanz* initially issued court proceedings against the Kano State Urban Development Board (*KUSDB*), but subsequently applied for the case to be referred to a sole arbitrator under Section 5 of the Arbitration Law of Northern Nigeria.The arbitrator published an award in favour of *Fanz. KUSDB* applied to have the award set aside on the ground, amongst others, that, having taken a step in the court proceedings, the trial judge was obliged to determine the parties' dispute and was, therefore, without jurisdiction to stay proceedings and refer the dispute to arbitration.

The Supreme Court disagreed with this argument. The Court held that Section 5 of the Arbitration Law conferred the Trial court with jurisdiction to either grant or refuse an application for stay of proceedings. Insofar as the court was entitled to make this choice, its jurisdiction was not removed by the fact that it may have arrived at the wrong decision. The Supreme Court held further:

[38] (1990) 4 NWLR (Pt. 142) 1

> … the defendant having allowed the arbitrator to embark on the whole reference, having regard to the agreement of reference between the parties to this case and without any objection, it is now no longer open to him to challenge the authority of the arbitrate to take the reference**.**

The Supreme Court reached a similar conclusion in the more recent case of *NNPC v. Klifco Nigeria Limited***.**[39] NNPC's contention was that the arbitration clause in an oil contract between the parties did not survive its novation. Accordingly, the arbitral Tribunal acted without jurisdiction. *Klifco* argued that the modification of the terms of the old contract did not extinguish the arbitration agreement, and that since *NNPC* voluntarily submitted to arbitration, it was too late to rely on a jurisdictional plea.

The Supreme Court relied on the doctrine of separability to find that an arbitration clause survives novation agreements. As to the timing of jurisdictional pleas, the Court held that under Section 12(3) of the ACA, a party who did not raise the issue of jurisdiction before the arbitral tribunal could not raise it for the first time before the court.

In C.N. Onuselogu Enterprises Ltd. v. Afribank Nigeria Limited,[40] the appellant company was a customer of the respondent bank. It had an N18 million fixed deposit with the bank, which it utilised as collateral for an overdraft facility. There was a disagreement as to the state of the appellant's account. The bank issued court proceedings and obtained judgment against the appellant company. The appellant company was dissatisfied with the judgment and appealed to the Court of Appeal. It contended that the trial court lacked jurisdiction because the parties had concluded an arbitration agreement.

Whilst the Court of Appeal found that there was no valid arbitration agreement between the parties, it emphasised that **"**Arbitral proceedings should not be taken lightly by both counsel and the parties**"** because **"**they are recognised means of resolving disputes**."** The Court of Appeal also agreed that:

[39] (2011) 10 NWLR (Pt. 1255) 209
[40] (2005) 12 NWLR (Pt. 940) 577

> To constitute an arbitration agreement in the sense of an agreement to refer future disputes to arbitration, it is sufficient (though not desirable) so say merely "dispute to be settled by arbitration …

The Commerce Assurance Ltd. v Alli[41] concerned proceedings to enforce an arbitral award. Following the appellants contention that the arbitrator lacked jurisdiction in the absence in the absence of written terms between the parties, the Supreme Court gave succinct guidance as to the requirements for a valid and binding arbitration agreement. In finding the parties agreement may incorporate arbitration provisions set out in other documents, the Court held:

> It has been argued on behalf of the appellant that there cannot be a valid arbitration in the absence of some terms of reference subscribed to by both parties… On behalf of the respondent, however, it was submitted that as by clause 8 of the Policy of Insurance between the parties they agreed to refer any dispute as to a claim by the plaintiff on the defendant/company to arbitration …
> In my view, the contention on behalf of the appellant on this point is misconceived. For although it is the law that to constitute a proper arbitration agreement which the courts can enforce there must be an agreement to submit the matter to arbitration, it is equally true that a policy of insurance constitutes a contract between the insurer and the insured. A clause in such a policy … which provides that any dispute as to a claim by the insured against the insurers shall be referred to arbitration is a sufficient agreement to submit the dispute to arbitration, and any award by an arbitrator so appointed shall be binding on the parties thereto.

In Imoukhuede v. Mekwuenye & 2 Ors,[42] a dispute arose out of a tenancy agreement between the parties, which contained an arbitration clause to the effect that disputes were to be referred to a sole arbitrator to be appointed by the President of the "Chartered Institute of Arbitration (London) Nigerian Chapter". *Mekwuenye* issued a notice of arbitration and wrote to the Nigerian Branch of the Chartered Institute of Arbitrators (CIArb) requesting the appointment of a sole arbitrator. The CIArb complied with the request and appointed an arbitrator. The arbitral proceedings continued, and a final award was issued.

[41] (1992) 3 NWLR (Pt. 232) 710
[42] (2015) 1 CLRN 30

Imoukhuede challenged the award at the High Court of Lagos State on the ground, amongst others, that there was no valid arbitration agreement between the parties. The contention was that ***"****there is no body/organization known as THE CHARTERED INSTITUTE OF ARBITRATION (LONDON) NIGERIAN CHAPTER and as such, there cannot be a referral for arbitration to a non-existent body.****"*** The High Court dismissed the challenge. It found that the Parties' intention was to refer their disputes to arbitration and that the intended appointing authority was the Chairman of the Chartered Institute of Arbitrators, Nigeria Branch.

On further appeal, the Court of Appeal disagreed. It held:

> There is nothing from the processes before the lower court to support the conclusion reached by the lower court that the Chairman of the Chartered Institute of Arbitrators (United Kingdom) Nigeria Branch is the same person as the president of the chartered institute of arbitrators London - Nigeria Chapter when the words used, in the agreement are clear and 'do not in my view admit of any ambiguity. The duty of the courts inclusive of the lower court where the language of an agreement is clear and unambiguous is to make a pronouncement on the clear and unambiguous agreement and concur with same.
>
> …
>
> If the parties in this appeal really intended that any other person other than the President of the Chartered Institute of Arbitrators London Nigeria Chapter should be the appointing authority as canvassed by learned counsel for the 1st respondent, surely same would have been explicitly stated in Exhibit B.
>
> …
>
> It follows therefore that since there is in effect no body/organization known as the Chartered Institute of Arbitration (London) Nigerian chapter, the clause itself is unenforceable.

It is our view that the Court of Appeal decision was wrong and the court did not demonstrate an understanding of the arbitral process, specifically, the interpretation of pathological arbitration clauses.

The Singapore Court of Appeal demonstrated, in our view, the correct approach in Insigma

Technology Co. Ltd. v. Alstom Technology Ltd.[43] It upheld an arbitration clause which provided that all disputes should be resolved "by arbitration before the Singapore International Arbitration Centre (SIAC) in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC). Insigma applied to set aside the award, contending that the SIAC could not administer an arbitration under the ICC Rules, given that the ICC Rules specify steps to be taken by "the Court", which is a reference to the ICC's International Court of Arbitration.

In rejecting Insigma's contention, the Singapore Court of Appeal set out a number of general principles to be applied in such cases, including the following:

- where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to that intention even if certain aspects of the agreement are ambiguous, inconsistent or incomplete;

- where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective;

- a defect in an arbitration clause does not necessarily render it unworkable, since it may often be cured by the assistance of the courts.

The decision is questionable for a number of reasons. *First*, while Nigerian law enjoins the Courts not to rewrite a contract for the parties, where a term of the contract is open to more than one interpretation, it is appropriate to adopt the interpretation that is most consistent with business common sense.[44] *Secondly*, the commercial intention of the parties was to submit any dispute arising out of the tenancy agreement to binding arbitration. A mistake in the name of an appointing authority does not derogate from that intention. The clause should have been interpreted to give congruent application to this intention. In any event, Nigerian Courts have applied the 'blue pencil' rule to invalidate only the offending portion of a contractual provision.[45]*Thirdly*, Nigerian Courts recognise that arbitration clauses are to be respected and

[43] [2009] SGCA 24.
[44] *Texaco Overseas (Nig.) Pet. Co. Unltd. v. Rangk Ltd.* (2009) All FWLR (Pt. 494) 1520.
[45] *Idika v. Uzoukwu* (2008) 9 NWLR (Pt. 1091) 34.

should be read, and thus construed, as liberally as possible. For example, in Fidelity Bank Plc. v. Jimmy Rose Co. Limited[46], the same Division of the Court of Appeal (though presided over by a different panel of Justices) held:

> The position of the law is that whether or not the arbitration agreement is a document signed by the parties as envisaged by Section 1(1)(a) of the Arbitration and Conciliation Act … or discoverable from their correspondences as per Section 1(1)(b) thereof, the essential prerequisite is that it must be precise and unequivocal. *The court will hold such an agreement to be unequivocal if the word used is neither permissive nor discretionary.* (Emphasis added.)

In similar manner, in Frontier Oil Limited v. Mai Epo Manu Oil Nigeria Limited,[47] the High Court of Lagos State affirmed:

> Courts of law have inherent jurisdiction to decide disputes between parties, but *where the parties by their own agreement opt for arbitration the courts will always respect such agreements and decline jurisdiction.*[48]
> …
> For courts to accept and recognise an agreement as an arbitration agreement it must be precise and mandatory… *The Agreement will be held to be mandatory and unequivocal if it contains the mandatory word "shall" and not the permissive and discretionary "may".* (Emphasis added.)

Furthermore, in Sino-Africa Agricultural & Ind. Co. Ltd. v. Ministry of Finance Incorporated,[49] the Court of Appeal admonished that, **"**the law is generally keen to uphold the validity of arbitration clauses even where they lack the normal formal language associated with legal contracts.**"** In a strong policy statement in favour of arbitration, the Court continued:

[46] (2012) 6 CLRN 82.
[47] (2005) 2 CLRN 148.
[48] The Court here referred to Obi Obembe v Wemabod Estates Ltd (1977) 5 SC 131.
[49] (2014) 10 NWLR (Pt. 1416) 515

> It needs to be echoed that parties generally should not be encouraged to circumvent arbitration agreements since both parties manifested their respective intention in the contract … to refer the matter to arbitration … Therefore, arbitration agreements are enforceable even if vague, so long as the parties' intention to arbitrative … is evinced therein.

We commend the rationale of the respective courts in *Sino-Africa Agricultural, Fidelity Bank* and *Frontier Oil*. The primary focus of the court should be to determine whether the parties have a real intention to submit their dispute to arbitration. That intention crystallises where the reference to arbitration is mandatory.

To paraphrase the UK House of Lords in Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others ("Fiona Trust"),[50] where the parties make provision for an arbitration clause, the interpretation of the said clause should begin with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their contractual relationship to be decided by an arbitral tribunal.

In Stabilini Visioni Ltd. v. Mallinson & Partners Ltd,[51] *Stabilini*, by two Local Purchase Orders (LPOs), ordered iron rods for construction works from *Mallinson*. Both LPOs contained arbitration clauses. The first order was for 210 tons of Y10mm rods (valued at N33,600,000) and the second order was for 60 tons of Y25mm rods (valued at N9,600.000). A dispute arose when *Stabilini* failed to effect payments. Following arbitral proceedings, the arbitrator published an award in favour of *Mallinson. Mallinson* applied to enforce the award and *Stabilini* applied to have the award set aside. In determining the dispute, the Court of Appeal endorsed a modern approach to interpreting arbitration clauses, based on commercial common sense. It held:

> In Celtel Nigeria BV v. Econet Wireless Limited & 7 Ors. CA/895/2012 (unreported) delivered on 13th February 2014, Ikyegh, JCA in defining arbitration held at page 55 thus:

[50] (2007) UKHL 40
[51] (2014) 12 NWLR (Pt. 1420) 134

> Arbitral proceedings are therefore treated with a broad liberal/open mind leaning on the side of dynamism, commercial sense, latitude and commonsense. In other words … suffice it to say that the object of [the] arbitral tribunal is to ensure that at the end of the day the arbitrators reached a practical, sensible, just and fair decision on the face of it …

The above statement is apt in this case, there is nothing in the conduct or on the face of the award to compel this court to set aside the award.

[B] Stay of Proceedings

The ACA sets out contradictory provisions relating to stay of proceedings. On the one hand, section 4 provides that the courts *shall* stay proceedings if requested by a party not later than when submitting his first statement on the substance of the dispute. On the other hand, section 5 provides that the court *may* stay proceedings upon the applicant satisfying certain conditions (discussed in greater detail below). Nevertheless, a supportive approach would entail the court's recognition that section 4 and 5 represent protective barriers between arbitral proceedings and the courts. Therefore, once the party making the application satisfies the statutory conditions for stay, the court should refer the parties to arbitration. The court should not place onerous barriers as conditions for stay.

In United Bank for Africa Plc. v. Trident Consulting Limited,[52] *Trident* entered into an agreement with *United Bank for Africa (UBA)*. The material purpose of the agreement was *Trident's* implementation of a Customer Relationship Management software to complement *UBA's* banking business. The agreement contained an arbitration clause. A dispute arose between the parties as to outstanding payments due from *UBA* to *Trident*. Whilst the parties attempted to negotiate a settlement, *UBA* terminated the agreement. Trident responded by issuing proceedings against *UBA* at the High Court of Lagos State. Relying on Section 5 of the ACA, *UBA* filed an application to stay proceedings before the High Court pending reference of the dispute to arbitration.

Section 5 ACA states:

[52] (2013) 4 CLRN 119

> If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
>
> A court to which an application is made under subsection (1) of this section may, if it is satisfied-
>
> that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
> that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

The provision confers *discretion*[53] on a court to stay proceeding in favour of arbitration subject to three conditions: (a) the application must be made timeously in that the applicant must not submit to the court's substantive jurisdiction to determine the dispute;[54] (b) it must be appropriate in the circumstances to refer the dispute to arbitration; and (c) the applicant must be ready and willing to do everything necessary for the proper conduct of the arbitration.

[53] *United World Limited Inc. v. Mobile Telecommunication Services Ltd.* (1998) 10 NWLR (Pt. 586) 106. See also *Ogun State Housing Corp. v. Ogunsola* (2000) 14 NWLR (Pt. 687) 431

[54] The party applying for stay must not 'take a step' in the proceedings. Courts have found that the following constitute a "step" in the proceedings: (a) an application to file pleadings (*KUSDB v. Fanz Construction Ltd* (1990) 4 NWLR (Pt. 142) 1; (b) applications to extend time (*Obembe v. Wemabod Estate Ltd.* (1977) 5 SC 115; *NPMC Ltd. v. Compagne Noga I & I.SS* (1971) 1 NMLR 223; *Confidence Insurance Ltd. v. Trustees of O.S.C.E.* (1999) 2 NWLR (Pt. 591) 373); (c) application to strike out a case so that the matter proceeds to arbitration (*Achonu v. National Employers Mutual & General Insurance* (1971) 1971 1 ALR Comm. 449); and (d) where a defendant initially defends a suit but subsequently challenges the plaintiff's right to commence the action (*Union Merchants (Overseas) Ltd. v. Odeh Trading Co.* (1962) WNLR 229; *Hastings v. Nigeria Railway Corp.* (1966) LLR 135; *Chemia Products (UK) Ltd. v. Idowu* (1963) 2 All NLR 249. It should, however, be noted that the majority of these cases is based on an interpretation of section 5 of the Arbitration Act 1914. Whilst section 5 of the 1914 Act is the same as section 5 of the ACA, the ACA embodies a more supportive approach to the arbitral process, which should, in our view, inform the interpretation of its provisions.

This sets a more onerous standard for the grant of stay of proceedings than Section 4 of the ACA, under which a court is *obligated* to stay proceedings on a party's application,[55] unless the arbitration agreement is null and void, inoperable or incapable of being performed. Commentators such as Idornigie believe that, when put in their historical perspective, Sections 4 and 5 of the ACA govern distinct circumstances. Section 4 implements Nigeria's international obligation under the New York Convention, and applies the required *mandatory stay* standard to court proceedings brought in violation of an *international* arbitration agreement. Section 5, on the other hand, is the re-enactment of a provision that existed prior to Nigeria's ratification of the New York Convention and should, therefore, continue to be applied only in the *domestic* context.[56]

As it concerns Trident's proceedings before the High Court of Lagos State, the Trial Judge dismissed UBA's application to stay the said proceedings. The Court of Appeal affirmed the Trial Judge's decision. It held:

> Before a stay may be granted pending arbitration, the party applying for a stay must demonstrate unequivocally by documentary and/or other visible means that he is willing to arbitrate. He does it satisfactorily by notifying the other party in writing of his intention of referring the matter to arbitration and by proposing in writing an arbitrator or arbitrators for the arbitration.
>
> In the instant case, the only paragraph of the affidavit evidence of the appellant relevant to the matter deposed in paragraph 8 thereof that:
>
> I was informed by Mr. Ugochukwu Okwesili, a Legal Officer in the applicant Bank in a meeting in our office at 57 Marina, Lagos on the 13th day of May, 2009 at about 2.30 pm while reviewing this matter and I verily believe him that the parties are unable to resolve the matter amicably and that the applicant is ready to do everything necessary to the proper conduct of the Arbitration in respect of the dispute alleged to have arisen between the parties.

[55] *Kurobo v. Zach Motison Nigeria Ltd.* (1992) 5 NWLR (Pt. 239) 102. In this case, the Court of Appeal held that a court should decline jurisdiction where the arbitration clause is worded in mandatory terms (i.e. "shall").
[56] Report of the National Committee on the Reform and Harmonization of Arbitration and ADR Laws in Nigeria.

> The deposition above is not enough. There must be documentary evidence showing the applicant wrote to the respondent notifying her of the willingness to resort to arbitration over the dispute and, also, specifying in the letter or correspondence an arbitrator or arbitrators proposed to be appointed for the arbitration for the ratification or approval of the other party**.**

In reaching this decision, the Court was persuaded by its earlier decision in M.V. Panormos Bay v. Olam,[57] where it held:

> … by virtue of section 5 of the Arbitration and Conciliation Act, a party applying for stay of proceedings an action pending reference to arbitration in order to succeed must show in his affidavit evidence in support of the application by means of documentary evidence, the steps he took or intends to take for the proper conduct of the arbitration. It is not enough for him to merely depose that he is ready and willing to do all things necessary for causing the said matter to be decided by arbitration.

There is significant fallout from the Court of Appeal decisions in *United Bank for Africa* and *M.V. Panormos Bay*. It is exceedingly difficult for applicants for stay of proceedings under Section 5 of the ACA to surmount evidential hurdle set by the courts. This came to the fore in the first instance decision of the Federal High Court in Crestar Integrated Natural Resources Limited v. The Shell Petroleum Development Company of Nigeria Limited and Others,[58] where the court refused an application for stay under Section 5 of the ACA, on the basis that the defendants' correspondence to the Claimant indicating their willingness to do all things necessary for the proper conduct of the arbitration and nominating their arbitrator, was inadmissible for violating Section 83(3) of the Evidence Act. The provision precludes the admission of documents made by an interested party at a time proceedings were pending or anticipated.

In our view, the courts' interpretation of Section 5 of the ACA places too arduous a standard on applicants for stay of proceedings. Whilst we accept that the courts have discretion in applying the section, judges should approach that discretion with a strong bias in favour of

[57] (2004) 5 NWLR (Pt. 805) 1
[58] Suit No. FHC/L/CS/52/2015

maintaining the parties' bargain to submit their disputes to arbitration. We note that the requirement to be ready and willing to do all things necessary relates to both the time when the proceedings were commenced and to the time when the Court is called upon to exercise its discretion. Two important observations must be made here.

First, as Mustill and Boyd acknowledge:

> At an early stage there is little that the defendant is obliged to do in the arbitration, beyond showing a willingness to appoint an arbitrator so that there is no great opportunity for the plaintiff to show that the defendant is in default of his obligations. Unwillingness to arbitrate usually manifests itself, if at all, when the interlocutory stages of the arbitration are under way.[59]

The courts' primary concern should be to ascertain that the defendant does not intend to use arbitration to postpone or prevent the resolution of the dispute. It should, therefore, accept documentary evidence that establishes the defendant's readiness and willingness to arbitrate.

Secondly, if the Federal High Court's reasoning in *Crestar* prevails, then virtually all communication from the defendant to the claimant to show its readiness and willingness at the material time (when the action is commenced and when the court is invited to exercise its jurisdiction) would be inadmissible under Nigerian rules of evidence. This cannot be the legislative intent behind Section 5 of the ACA.

As a matter of principle, we commend the Supreme Court's decision in M.V. Lupex v. N.O.C. & S. Ltd,[60] where the Court stated:

> In the present case, the respondent had voluntarily submitted to arbitration in London pursuant to the agreement between the parties… It seems to me that the said respondent, having voluntarily submitted to arbitration as contracted by the parties, it was an abuse of the process of the court for it to institute a fresh suit in Nigeria against the appellant in respect of the same dispute during the pendency of the arbitration…

[59] Commercial Arbitration (2nd Edition, Butterworths), 474.
[60] (2003) 15 NWLR (Pt. 844) 469

> This is because prima facie the general policy of the courts in such circumstances is to hold the parties to the bargain into which they had entered although the point must be stressed that this is not an inflexible rule... In my view, the statutory discretion of the court under sections 4 and 5 of the Arbitration and Conciliation Act for the stay of court proceedings in favour of arbitration may not be exercised to refuse a stay with a view to favour the allegation of a party that litigation within jurisdiction is more convenient that arbitration as expressly agreed to by the parties. The law is also settled that the mere fact that a dispute is of a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to.

[C] Appointment of Arbitrators

Section 7 of the ACA regulates the procedure for appointing arbitrators. Subsection (1) establishes the principle of party autonomy in this context, in that parties may specify the appointment procedure. Furthermore, subsection (2) provides a mechanism for appointing a tribunal of three arbitrators or a sole arbitrator when the parties fail to agree. In cases where neither the appointment procedure agreed on by the parties nor the mechanism provided in subsection (2) result in the appointment of the arbitrator(s), subsection (4) directs the court to make the appointment.

Subsection (5) further indicates the guidelines for the court's decision in appointing an arbitrator. First, the court must have due regard to any qualifications an arbitrator should have pursuant to the parties' agreement. Secondly, the court must have regard for such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

The High Court of Hong Kong deemed it important that 'when the court is appointing on behalf of the defaulting appointing party, it should go out of its was to ensure that no sense of grievance is felt, however unreasonable that attitude might appear to others.'[61] This, in our view, entails a supportive approach.

[61] Fung Sand Trading Limited v. Kai Sun Sea Products and Food Limited [1991] 2 HKC 526.

In Bendex Engineering v. Efficient Petroleum Nigeria Limited,[62] this appeal arose from the Federal High Court's decision to appoint arbitrators to determine a dispute between the parties. *Efficient Petroleum* alleged that *Bendex Engineering* had breached the parties' Joint Venture Agreement and requested *Bendex Engineering* to appoint an arbitrator within 15 days. Following *Bendex Engineering's* inaction, *Efficient Petroleum* filed an application under Section 7 of the ACA, inviting the court to appoint an arbitrator. Though *Bendex Engineering* resisted the application, the court granted the application and appointed the arbitrator. *Bendex Engineering* appealed, *inter alia*, on the ground that there was no factual or legal basis for the court to have ordered arbitration and appointed an arbitrator. In determining this issue, the Court of Appeal clearly delimited the nature and scope of its function in the appointment of arbitrators. In a strong statement in support of arbitration, the Court held:

> … in arbitration matters [such as these], the dominion of the court in original cause is over the appointment of arbitrators, in contrast with the arbitral tribunal, whose preserve is the resolution of the dispute. It follows from that division of duty that it will amount to a downright usurpation of the authority of the arbitral tribunal and acting in excess of its own jurisdiction if the court should dabble into any matter touching on the merit of the dispute, limitations which, as expected, the learned trial judge was fully aware when in his ruling he said …:
>
> "It is not for this court to decide on such conflicting evidence, rather, by the terms of [the JVA], it is the duty of the arbitrators to do so."
>
> That is perfectly in order to underscore the caution that the court … cannot take it upon itself to sift the merits of the dispute as by doing so, the court will be anticipating the prerogative of the arbitral tribunal. Thus, the strident criticism by learned Senior Advocate for the appellants of the failure of the trial Court to examine the merits of the dispute is misplaced.

The court clearly understood that its supportive role in arbitration related matters is different from its adjudicative role in exercising its original jurisdiction.

[62] (2010) 8 NWLR (Pt. 715) 333

In Backbone Connectivity Network Nigeria Limited v. Backbone Technology Network Inc.,[63] the Court of Appeal's decision is a further demonstration that Nigerian Courts will support the integrity of the arbitral process. In this case, the trial court stayed proceedings and referred the parties to arbitration. It ordered the parties to nominate their respective arbitrators. It appointed the presiding arbitrator and went further to order that the parties should inform the court of the arbitration proceedings outcome. The appellant took issue with the trial court's order and appealed to the Court of Appeal. In a unanimous decision, the Court of Appeal strengthened the principle of party autonomy and minimal court intervention in arbitration. It stated (through Ekanem, J.C.A.):

> It is my view that the lower court had no business ordering the parties to nominate arbitrators having ordered stay of proceedings. By section 6 of the Arbitration and Conciliation Act, where parties to an arbitration did not determine the number of arbitrators to be appointed under their agreement as in this case, the number of arbitrators shall be deemed to be three. Section 7(2)(a) of the Act specifies that where parties have not specified in their agreement the procedure to be followed in appointing an arbitrator, and in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators shall in turn appoint the third arbitrator. The court can only come into the scene to appoint an arbitrator if (a) a party fails to appoint one within 30 days of receipt of a request to do so by the other party or (b) if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointments. The court has no business in suo motu ordering the parties to appoint arbitrators or worse still suo motu appointing a third arbitrator. It can only act on the application of the parties or any of them. To act otherwise amounts to the court intervening in a matter governed by the Arbitration and Conciliation Act when it is not so provided, which is forbidden by section 34 of the Act…
>
> A court is [also] not permitted by law to order that the outcome of an arbitration t be reported to it…

[D] Arbitrability

[63] (2015) 14 NWLR (Pt. 1480) 511

Sections 48(b)(i) and 52(2)(b)(i) of the ACA enjoin a court to set aside or refuse recognition or enforcement of an award if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria. There is, however, no statutory definition of 'arbitrability' in Nigeria. Furthermore, unlike the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Nigerian law does not draw a line between subjective and objective arbitrability. Thus it is for courts in Nigeria to define arbitrability.

The Supreme Court's decision in *KUSDB v. Fanz*[64] sets out the criteria for disputes that are capable of settlement by arbitration under Nigerian law. Primarily, **"**The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly**."**[65]

The test here is "whether the difference can be compromised lawfully by way of accord and satisfaction."[66] Based on this test, the Court found that the following disputes are not arbitrable:

- an indictment for an offence of a public nature;
- disputes arising out of an illegal contract;
- disputes arising under agreements void as being by way of gaming and wagering;[67]
- disputes leading to change of status, such as divorce petitions;
- agreements conferring the arbitrator the right to give a judgment in *rem.*

It should, nevertheless, be noted here that the existence of issues of law will not deprive an arbitrator of jurisdiction to consider and determine a dispute.[68]

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[64] (1990) 4 NWLR (Pt. 142) 1

[65] See also *Econet Wireless Ltd. v. Bromley Investment Lts & 20 Ors.* (2005) 3 FHCLR 253.

[66] This test is preferable to that set by the Court of Appeal in *United World Ltd. v. Mobile Telecommunications Service Limited* (1998) 10 NWLR (Pt. 586) 106, where it was simply held that the subject matter must be capable of arbitration.

[67] Since the inception of the National Lottery Act in 2005, it is now possible to obtain a licence to operate any lottery business in Nigeria. The Act defines "Lottery" or "Lotteries" as includes any game, scheme, arrangement, system, plan, promotional competition or device for the distribution of prizes by lot or chance, or as a result of the exercise of skill and chance or based on the outcome of sporting events or any other device which the President may by notice in the gazette declare to be lottery and which shall be operated according to a licence.

[68] *Williams v. Williams* (2013) 3 CLRN 114.

In the cases of Esso Petroleum & Production Nigeria Ltd. & Anor. v. Nigeria National Petroleum Corporation.[69] Shell Nigeria Exploration & Production & 3 Ors. v. Federal Inland Revenue Service & Anor.,[70] the Court of Appeal decisions arose from almost identical facts. NNPC entered into Production Sharing Contracts (PSCs) with the respective International Oil Companies (IOCs), Esso and Shell. NNPC was the leaseholder and the IOCs were the Contractors under the said Agreements. The parties agreed, amongst other things, that:

- The Contractors would bear all operational costs.
- The Contractors would determine the parties' lifting allocation in accordance with the terms of the respective agreements.
- The Contractors would prepare and submit Petroleum Profit Tax (PPT) on behalf of the parties.
- The parties' lifting entitlement is shared on the basis of:
    - Cost Oil – to recover expenditure;
    - Tax Oil – to defray PPT;
    - Royalty Oil – to meet State Royalties; and
    - Profit Oil – to be taken after all outgoings.
- NNPC would lift Royalty Oil and Tax Oil, the IOCs would lift Cost Oil and the parties would share Profit Oil in accordance with the respective agreements.

Each International Oil Company (IOC) contended that NNPC breached the applicable PSC by lifting more cargoes of available crude than it was entitled to and that NNPC unilaterally altered or submitted Petroleum Profit Tax that was grossly in excess of what was stated in the returns to the Federal Inland Revenue Service. They each, therefore, commenced arbitration proceedings against NNPC.

FIRS and NNPC filed proceedings at the Federal High Court to challenge the arbitral tribunals' jurisdiction. Whereas the FIRS, not being a party to any of the arbitral proceedings, filed a fresh suit challenging the competence of the arbitral tribunal to adjudicate matters bordering on a tax dispute, the NNPC filed separate challenge proceedings to set aside an arbitral award. The basis for the challenge was that the disputes submitted to arbitration concerned tax matters and were, therefore, not arbitrable.

[69] (2016) 6 CLRN 25
[70] (2016) 11 CLRN 36.

The Federal High Court agreed in both cases. It ruled that the issues relating to taxation and government revenue are within the Federal High Court's exclusive jurisdiction and that the tribunals' proceedings were a nullity. The Court of Appeal affirmed the Federal High Courts' decisions. In *Esso v NNPC*, it held:

> It must also be stated that Section 251 (1) (b) of the Constitution of Nigeria 1999 as amended gives exclusive jurisdiction to the Federal High Court in civil causes and matters connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation…
>
> It follows from the foregoing that matters relating to Petroleum Profit tax are by implication excluded from arbitration. In other words, an arbitral tribunal has no jurisdiction over such matters and if it relates to such a dispute, its award will be liable to be set aside

The Court, nevertheless, drew a line between contractual disputes and tax disputes. It held:

> There is no doubt in my mind that the claims before the arbitral tribunal as to the Petroleum Profit Tax returns preparation and calculation of lifting allocations can be severed from the tax dispute. This is because they are strictly based on the Production Sharing Contract. The trial court therefore ought to have severed them in setting aside the arbitral award.

Accordingly, disputes based on the parties' respective obligations under the PSC were contractual and arbitrable, whereas disputes between the FIRS and a taxpayer (in these cases, NNPC) fall within the Federal High Court's exclusive jurisdiction and are, therefore, not arbitrable.

In *Shell v FIRS*, the Court of Appeal did not draw a distinction between contractual disputes and tax disputes. It simply held:

> Substantially …, the claims before the arbitral tribunal are tax matters under dispute, not contractual matters per se …

> [Section 251(1)(a) and (b) of the 1999 Constitution] is a clear spelling, that when it comes to the revenue of the Government of Nigeria or its organ and on matters pertaining to taxation of companies and other bodies carrying on business in Nigeria, it is the Federal High Court that has exclusive jurisdiction to adjudicate upon same. There is no dispute about it. Therefore, the claim filed before the tribunal, being substantially tax disputes, the tribunal would not have jurisdiction to pronounce upon them, as they are not arbitrable.

We disagree with the Court of Appeal's reasoning of a carte blanche prohibition as it concerns the relationship between the Federal High Court's exclusive jurisdiction and the jurisdiction of an arbitral tribunal.

Primarily, Section 251 of the 1999 Constitution has two objectives: to affirm, as a rule, the Federal High Court's jurisdiction in respect of matters listed therein and to avoid the fragmentation of trials concerning those matters that might result from the division of jurisdiction between the Federal High Court and State Courts. The provision is not intended to exclude arbitration. It simply identifies the court which, *within the judicial system*, would have jurisdiction to hear cases involving a particular subject matter.

Table A above lists the Courts contemplated by the 1999 Constitution. We are mindful that the Constitution empowers the Federal and State legislatures to create other courts not expressly mentioned in the said Constitution. We, nevertheless, maintain that, unlike the said courts, an arbitral tribunal is a creation of contract, not a creation of statute.

Indeed, in *Kano State Urban Development Board v. Fanz Construction Ltd*[71] and *NNPC v. Lutin Investment Limited*,[72] the Supreme Court recognised that an arbitral tribunal is not a court. In those decisions, the Court defined arbitration as the reference of a dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons *other than a court of competent jurisdiction*. Accordingly, an arbitral tribunal's jurisdiction does not compete with a court's jurisdiction to justify the application of Section 251(1) of the 1999 Constitution.

[71] (1990) 4 NWLR (Pt. 142) 1
[72] (2006) 2 NWLR (Pt. 965) 506

Secondly, if the Legislature had intended to include arbitration in the scope of Section 251, it would have clearly done so. Indeed, the language used in Section 251 of the Constitution is sufficiently general to include the procedures created by the Federal High Court Act. Section 37 of the Federal High Court Act allows the court to refer a civil case to arbitration if (amongst others): (a) all the parties agree; or (b) the matter requires any prolonged examination of documents or any scientific or local investigation that cannot be conveniently carried out by the court. It is, therefore, incongruous to say that Section 251 excludes an arbitral tribunal's jurisdiction, when a judge exercising jurisdiction pursuant to Section 251 can refer the parties to arbitration in appropriate circumstances.

Thirdly, an arbitral award is not equivalent to a judgment *in rem*. The award is authority between the parties, but is not binding on third parties who were not involved in the proceedings. If the concern is that matters listed under Section 251 are better determined before the national courts as a matter of public policy, a party aggrieved by an arbitral award may invite the court to determine whether that award conforms to the State's public policy. If it does not, the court will set aside the award.

Finally, the Court of Appeal's reasoning is not commercially sound. If accepted, it not only calls to question the arbitrability of disputes connected with or pertaining to taxation and the revenue of the Federal Government, but the arbitrability of all other subject matters listed under Section 251 of the 1999 Constitution. This includes matters typically submitted to arbitration, such as intellectual property, maritime, aviation, mines and minerals, bankruptcy and insolvency etc. It also raises the question of subjective arbitrability,[73] in that whilst the subject matter of the dispute is arbitrable, the tribunal loses jurisdiction simply because the Federal Government or any of its agencies is a party to the contract in question.

[E] Extent Court Intervention under Section 34 of the ACA

[73] The IBA Subcommittee on Recognition and Enforcement of Arbitral Awards has published a General Report on the concept of 'Arbitrability' under the New York Convention. The report, which draws a distinction between subjective and objective arbitrability, is available via: https://www.ibanet.org/Document/Default.aspx?DocumentUid=C551D35B-8CFD-4255-98D9-BBEB94974A7B (accessed 20 June 2017).

Section 34 of the ACA limits the involvement of courts in commercial arbitration governed by the Act. As it concerns matters governed by the Act, a court must not intervene except as provided in the Act. The intention is to achieve certainty as to the maximum extent of court involvement in arbitral proceedings. A support approach would entail the court's recognition that the term "intervene" it not tantamount to being disruptive. Rather, it covers court assistance (for instance, in taking evidence) and judicial intervention (for instance, in considering the merits of an application to set aside an award).

In Statoil Nigeria Limited v. Nigerian National Petroleum Corporation,[74] disputes arose between Statoil and NNPC as to the interpretation and performance of the Petroleum Sharing Contract (PSC) between the parties. NNPC challenged the arbitral tribunal's jurisdiction on the ground that the subject-matter of the dispute (which it alleged to be taxation) was not arbitrable under Nigerian law. Before the hearing of the jurisdictional challenge, NNPC applied to the arbitral tribunal for a stay of proceedings on the ground that the proceedings would be affected by the decision of the Federal High Court[75] which related to the provisions of a production sharing contract involving tax issues. The arbitral tribunal refused the application. NNPC proceeded to file an *ex parte* application at the Federal High Court (FHC) for an order of interim injunction restraining the arbitral tribunal from continuing the arbitration proceedings. The FHC granted the interim order of injunction.

In a unanimous decision, the Court of Appeal held that a court cannot issue injunctions to restrain arbitral proceedings. The Court held:

> In this instant case, the issuance of ex parte interim injunction does not fall under the exceptions to Section 34 of the Arbitration Act. *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. The learned trial judge of the lower court acted outside the jurisdiction conferred on him by granting the ex parte interim order. (Emphasis added.)

[74] (2013) 7 CLRN 72.
[75] In FIRS v Nigerian national Petroleum Corporation & 4 others, Suit No: FHC/ABJ/CS/774/11

The Court of Appeal affirmed the *Statoil* decision in Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation[76]. As with *Statoil*, the underlying dispute arose from the operation of a Production Sharing Contract between the parties. NNPC challenged a Partial Award under which the tribunal assumed jurisdiction over the substantive dispute; and sought an interlocutory injunction restraining the tribunal from continuing with the Arbitration. The Federal High Court granted the interlocutory injunction. The Court of Appeal reaffirmed that Nigerian courts did not have jurisdiction to issue anti-arbitration injunctions. Relying on Section 34 of the ACA, the Court held:

> On the import of Section 34 of A.C.A., J.O. Orojo and M.A. Ajomo the learned authors of LAWS AND PRACTICE OF ARBITRATION and CONCILIATION IN NIGERIA at p. 269 on the input of S.34 of A.C.A., stated thus –
> "The Decree provides for the intervention of the court in certain aspects of the arbitral process … Where, however, the Decree does not provide for the intervention of the court, this should not be done…"

The *Statoil* and *NAE* decisions have been celebrated as reinforcing the position that domestic courts should not intervene where parties have consented to arbitral proceedings, except to the extent that such intervention is expressly permitted by the ACA.

While we agree with the outcome of the decisions, we nevertheless question the Court's interpretation of Section 34 of the ACA. We will return to discuss the interpretation of Section 34 shortly. Having said that, the 'correct' interpretation of Section 34 ACA can yield uncertain outcomes. For example, in Shell Petroleum Development Company of Nigeria v. Crestar Integrated Natural Resources Limited,[77] the applicant (Crestar) sought an interlocutory injunction from the Court of Appeal to restrain (amongst others) SPDC from continuing with an ICC Arbitration between the parties, seated in London. SPDC relied on the *Statoil* and *NAE* decisions in inviting the Court to dismiss the application. The Court of Appeal considered it necessary to clarify that:

[76] (2014) 6 CLRN 150.
[77] Appeal No. CA/L/331M/2015

> … Section 34 of the Arbitration Act is only applicable to matters 'governed by the Act' so that if it is found in any proceeding, that the particular facts and circumstances do not come within the purview of the Act, the provisions of Section 34 cannot apply with full force.

The Court found that the ACA only applied to 'domestic' arbitral proceedings seated in Nigeria. For that reason, it considered that a Court's jurisdiction to restrain foreign arbitral proceedings is not a matter that is governed by the ACA. Relying on Section 15 of the Court of Appeal Act, the Court found that it had jurisdiction to grant the injunction, and further found that it was appropriate the grant the said injunction in the circumstances. In our opinion, the Court's interpretation of Section 34 was correct. However, we have serious concerns as to the application of Section 34 and the wider effect of the Court's decision.

First, it appears that the Court of Appeal has inadvertently declared the ACA to be inapplicable to international arbitration, even if seated in Nigeria. This is clearly incorrect. Part III of the ACA expressly makes additional provisions relating to international commercial arbitration. *Secondly*, it also seems that the decision has created two regimes. As it concerns domestic arbitration, the Courts do not have jurisdiction to issue anti-arbitration injunctions. However, in international arbitration, the jurisdiction remains intact. *Thirdly*, the Court of Appeal interfered with the Tribunal's power to determine its jurisdiction. The doctrine of "competence-competence" is one of the cornerstones of international commercial arbitration. The injunction was sought on the premise that the arbitration agreement was null and void. The tribunal did not have the opportunity to decide this question.

[F] Interim Measures of Protection

Article 26(3) of the Arbitration Rules in the First Schedule to the ACA provides that a request for interim measures addresses to a judicial authority shall not be incompatible with the agreement to arbitrate, or as a waiver to that agreement. The provision confirms that a party may seek interim measures relating to arbitrable disputes from the court, without waiving its right to enforce the arbitration agreement. However, there is no corresponding provision in the main text of the ACA. This raises the question as to whether Court ordered interim measures is a matter "governed by the Act".

A supportive approach would entail the court's recognition that an arbitration agreement does not prevent the parties from requesting interim measures from a court, not does it prevent the court from granting those measures.

In Econet Wireless Limited v. Econet Wireless Nigeria Limited,[78] a dispute arose between the parties concerning the operation of a Shareholders Agreement. Before the constitution of the arbitral tribunal, the Econet Wireless Limited (Econet) sought injunctive reliefs against Econet Wireless Nigeria Limited (Econet Nigeria) before the Lagos Division of the Federal High Court. The Court found that it had jurisdiction to entertain the application because the substantive dispute impacted on the operation of the Companies and Allied Matters Act. Having said that, the Court found that an injunction is a remedy and not a cause of action. Since there was no substantive action before the Court from which injunctive reliefs could flow, the Court adjudged the application to be incompetent.

The Court's decision may be justified by an analysis of Section 34 ACA. The contention is that, under Section 34, Courts are precluded from intervening in arbitral matters except in circumstances provided under the Arbitration Act.[79] To this end, the ACA does not contain a provision that allows a party to apply to the Court for an interim order of protection prior to the constitution of the arbitral tribunal.[80]

In our opinion, this contention is based on the erroneous proposition that the entire scope of court intervention is to be found in the ACA and nowhere else. We disagree with this position. Rather, Section 34 of the ACA envisages two distinct systems of court intervention. *In matters governed by the Act*, the ACA takes effect, and no other relief may be sought or granted except for those set out in the Act. However, in matters *not governed by the* Act, the courts may continue to offer all such remedies in all such circumstances as are available under existing law. To ascertain which of the two systems is applicable in a given case, it must be

[78] Suit No: FHC/L/CS/832/2003

[79] In *Ras Pal Gazi Construction Co. Ltd. v. Federal Capital Development Authority* (2001) 10 NWLR (P. 722) 559, the Supreme Court held that section 34 of the Arbitration and Conciliation Act is to be interpreted strictly as prohibiting court intervention in arbitral proceedings.

[80] Cf. *Owena Bank Ltd. v. Vita Construction Ltd. and Niger Consultants* (2006) 5 CLRN 85, where the Court of Appeal held that, despite a reference to arbitration, the court still retains (some) powers to entertain any application by any of the parties during the pendency of the arbitral proceedings. See also *Williams v. Williams* (2013) 3 CLRN 114.

determined whether that case is a 'matter governed by' the ACA. To "govern" a matter implies the existence in the ACA of a defined power to regulate and control a specified matter. Happily, the Courts have departed from the rationale applied in the *Econet* decision.

In Lagos State Government v. Power Holding Company of Nigeria,[81] a dispute arose between the Lagos State Government and Power Holding Company of Nigeria (PHCN) in respect of a Barge Power Purchase Agreement and Contribution Agreement. The said dispute was referred to arbitration. Lagos State Government sought interim measures of protection against PHCN and third parties that were not signatories to the arbitration agreement.

The High Court of Lagos State found that it had jurisdiction to grant the interim measures sought, even while arbitral proceedings were pending between some of the parties to the application. Also, the Court found that the provisions of the Arbitration Act did not only apply to arbitral tribunals. The jurisdiction of the High Court could also be engaged in appropriate circumstances. Finally, in Linges Aeriennes Congolaises (LAC) v. Air Atlantic Nigeria Limited,[82] the Court of Appeal held that the parties' **"**choice of arbitration does not bar resort to the court to obtain security for any eventual award.**"** The Court followed earlier decisions in the NV Scheep v. MV 'S. Araz,[83] Obembe v. Wemabod Estates[84] and K.S.U.D.B. v. Fanz Construction Ltd.[85]

[G] Setting Aside/Enforcement of Arbitral Awards

The ACA establishes that an application for setting aside an award to the High Court is the exclusive recourse against an arbitral award.[86] The Act also lays down specific grounds upon which an award may be set aside.[87] The purpose is to ensure certainty, by acquainting domestic and foreign parties of the conditions under which an award may be set aside. A supportive approach by the Courts would give congruent application to the legislative intent

[81] (2012) 7 CLRN 134.
[82] (2006) 2 NWLR (Pt. 963) 49
[83] (2000) 15 NWLR (Pt. 691) 622
[84] (1977) 5 SC 115
[85] (1990) 4 NWLR (Pt. 142) 1
[86] Sections 29 (domestic arbitration) and 48 (international arbitration).
[87] Sections 29(2) (the award contains decisions on maters which are beyond the scope of submission to arbitration), 30 (where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured), and 48(a) and (b) (which largely replicates Article 34(2) of the UNCITRAL Model Law).

to present parties a *limited* opportunity for recourse against an award. In addition, should recognise that this limited opportunity strikes a compromise between a party's desire for efficient proceedings that end in a final and binding award, and the principle of justice.

As it concerns recognition and enforcement of awards, sections 31[88] and 51[89] lay down the maximum conditions for recognising and enforcing awards published in domestic and international arbitration. A party that wishes to enforce an award only needs to make an application in writing, supplying the original award or a certified copy of it, and the original arbitration agreement or a certified copy of it. A supportive approach would entail the Courts' recognition that the conditions set out in the ACA are intended to set the maximum standards. The Courts should, therefore, not impose more onerous standards for recognition and enforcement of awards.

In Guinness Nigeria Plc. v. NIBOL Properties Ltd.,[90] Guinness issued proceedings to set aside a final award made pursuant to arbitral proceedings between the parties. NIBOL commenced separate proceedings to enforce the final award. Both applications were consolidated. The High Court of Lagos State made a number of 'arbitration friendly' pronouncements and succinctly summarised the position under Nigerian Law. It held:

> I am in total agreement … that there is a live Judicial Policy of ascribing priority to the upholding of Arbitral Awards, by the regular Courts … and that there is a narrow compass that attracts the Courts to override this Policy by setting aside an Award. This argument is valid and pivotal for a Court to keep in mind in these type of matters for reasons espoused in the Case Law …

The Court proceeded to make reference to the following decisions of the Court of Appeal:

> This principle was restated in Aye-Fenus Ent. Ltd. v. Saipem Nig. Ltd.[91], where the Court found:

[88] For domestic arbitration.
[89] For international arbitration.
[90] (2015) 5 CLRN 65
[91] (2009) 2 NWLR (Pt. 1126) 483.

> Parties to a transaction choose their Arbitrator for better or for worse to be the Judge both as to the decisions of Law and decisions of fact in dispute between them. Thus none of them can when the Award is prima facie good on the face of it, object to its decision whether upon the Law or the Facts simply because the Award is not in his favour.

This view was echoed in Arbico Nigeria Limited v. Nigeria Machine Tools Limited[92], where the court held that:

> The Court in spite of its wide power has to bear in mind that the Parties have provided in their Agreement to have their dispute or difference referred to Arbitration as against the regular Courts … and it has to show reluctance to interfere with the Arbitrator's jurisdiction as the Sole Judge of the Law and Facts unless it is compelled to do so…

And in Baker Marine Nigeria Limited. v Chevron Nigeria Limited,[93] which confirmed:

> The lower Court was not sitting as an Appellate Court over the Award of the Arbitrators.[94] The lower Court was not therefore empowered to determine whether or not the findings of the Arbitrators and their conclusions were wrong in Law. What the lower Court had to do is to look at the Award and determine whether the state of the Law as understood by them and as stated on the face of the Award the Arbitrators complied with the Law as they, themselves, rightly or wrongly perceived it. The approach here is subjective. The Court places itself in the position of the Arbitrator, not above them, and then determines on that hypothesis whether the Arbitrators followed the Law as they understood and expressed it.

Based on the foregoing decisions, the High Court of Lagos State concluded (in the *Guinness* decision):

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[92] (2002) 15 NWLR (Pt. 789) 1.

[93] (2000) 12 NWLR (Pt. 681) 391.

[94] See also *Bellview Airlines Limited. V. Aluminium City Ltd.* (2005) 7 CLRN 143, where the High Court of Lagos State reaffirmed: **"***this court is not authorized to sit on appeal over an arbitral award, but to confine itself to the limits circumscribed by the law …"*

> … I am satisfied that the evidential burden on GUINNESS must necessarily be a strident one … I agree and hold that it is a high hurdle, indeed, to be scaled, for GUINNESS to get the regular Court to ignore the contractual, consensual and Arbitral Forum elected by the Parties; elongate the more summary and timely Arbitral experience; and interfere with, subvert and substitute the Arbitrator's Jurisdiction as the Sole Judge of Law or Fact.

Though the evidential burden for applicants seeking to set aside an arbitral award is high, any benefits derived are eroded by the slow pace of the administration of justice before the Nigerian Courts. One recent example of this is in the IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation[95] litigations. *IPCO v NNPC* is an English decision, but contains very interesting information concerning the lack of efficiency of the Nigerian judicial process in setting aside/enforcing arbitral awards. At para 158 of the judgement,[96] the English Court of Appeal observed:

> The analysis set out above derives from (i) a consideration of the applications now in issue; (ii) the timescales for determination at first instance contemplated by Tomlinson J; (iii) and what has happened in fact. It is supported by the expert evidence before Field J. The Hon Justice S.M.A. Belgore, former Chief Justice of Nigeria, instructed on behalf of IPCO, agreed with the evidence of the late Justice Eso that it was "conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for twenty or thirty years or longer". I take him to be meaning another 20 or 30 years from the date of his report in 2013 rather than from that of Justice Eso in 2007 i.e., at the very lowest, an additional 6 years. Consistently with that he said that there had been no change in the delay in the administration of justice in Nigeria since Justice Eso made his first witness statement and that in fact the circumstances were "far worse" as the courts were experiencing more congestion.[97]

[95] [2015] EWCA Civ 1144
[96] ibid [para. 158].
[97] ibid.

The English Court of Appeal therefore ordered that IPCO should be able, in principle, to enforce the award, notwithstanding the existence of challenges to it in Nigeria, given the very significant delay in resolving those challenges before the Nigerian courts.[98]

In the next section, we will critically and objectively examine whether Nigerian courts are supportive or not of arbitration and where in our view, there are gaps which the Nigerian judiciary will need to plug.

9.05 Are Nigerian Courts Supportive of Arbitration?

Support by the Nigerian courts of arbitration can be categorised as the good, the bad and the ugly. Having said that, a recent statement of judicial policy from the current Chief Justice of Nigeria provides some succour that, going forward, there will be robust court support for arbitration in Nigeria.

[A] The Good

"Good" decisions are supportive of the arbitral process. They demonstrate that the Nigerian Courts understanding the perspective and approach that facilitates the smooth working of the arbitral system.

One clear take-away from the case law on arbitration in Nigeria as discussed above is that setting aside arbitration awards in Nigeria is not easy. The decision of the High Court of Lagos State in *Guinness Nigeria Plc. v NIBOL Properties Ltd* [99] confirms that there is a high evidentiary threshold to be met, and few and far between are those cases where the challenges have been successful. Likewise, the contemporary view is that Nigerian Courts have the power to grant interim relief pending arbitration as articulated in *Lagos State Government v. Power Holding Company of Nigeria*.[100]

While the Nigerian courts have broad constitutional powers to decide disputes between parties, they recognise that where the parties by their agreement opt for arbitration, the courts

[98] In IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2017] UKSC 16, the UK Supreme Court (through Lord Mance) reversed the Court of Appeal's decision referred to in footnote N° 95 above.
[99] (2015) 5 CLRN 65
[100] (2012) 7 CLRN 134

should respect such agreements and decline jurisdiction. This is supported by the decision in *Frontier Oil Limited v. Mai Epo Manu Oil Nigeria Limited*;[101] *Fidelity Bank Plc. v. Jimmy Rose Co. Limited*.[102]

Also, the principle of limited Court intervention is robust in Nigeria. The Court of Appeal decisions in *Statoil v. NNPC* [103] and *NAE v. NNPC* [104] discussed above support the position that a Court cannot issue an injunction to restrain arbitral proceedings.

[B] The Bad

"Bad" decisions are inimical to the arbitral process. They suggest that the Nigerian Courts do not adopt an arbitration friendly stance.

There is a lack of consistency in the court decisions in Nigeria. While the court lacks the jurisdiction to restrain arbitral proceedings in domestic arbitration, it appears that this prohibition does not extend to international arbitration from the *SPDC v. Crestar* [105] decision. This is because under the current judicial interpretation, the ACA does not regulate arbitral proceedings seated in other jurisdictions.

The wheels of justice can turn very slowly in the Nigerian Courts as evidenced in the *IPCO v. NNPC* [106] decisions. This negates the beneficial effect of decisions that are considered to be arbitration friendly. One possible solution would be for the Courts to introduce a multi-track docket system, where arbitration-related cases are placed on the fast track.[107]

Some decisions demonstrate a lack of understanding of the qualitative perspective and approach that facilitates the smooth working of the arbitral system as evidenced in the

[101] (2005) 2 CLRN 148.
[102] (2012) 6 CLRN 82.
[103] (2013) 7 CLRN 72.
[104] (2014) 6 CLRN 150.
[105] (2015) LPELR-40034 (CA)
[106] [2015] EWCA Civ 1144
[107] The Third Schedule of the Draft Arbitration and Conciliation Bill introduces the Arbitration Proceedings Rules, which (amongst other things) places time limits for the completion of arbitration-related matters.

decisions in *Imoukhuede v. Mekwuenye;*[108] *Econet Wireless Limited v. Econet Wireless Nigeria Limited*.[109]

An obvious solution would be the specialisation of Courts and Judges. For example, the Paris Commercial Court has 15 specialised chambers devoted to different types of commercial disputes. The specialised local courts and an arbitration-friendly legal environment are necessary for an impartial, efficient and successful arbitral process.

[C] The Ugly

"Ugly" decisions are harmful to Nigeria's reputation as an arbitral seat. These decisions discourage domestic and foreign parties from nominating a Nigerian seat and, ultimately, regress the development of arbitration law and practice in Nigeria.

A disturbing trend is emerging, which appears to suggest that cases with a nationalistic element are more likely to negatively impact the arbitral process. Examples include the first instance decisions of the Federal High Court in *NNPC v. Statoil* and *NNPC v. NAE*, where anti-arbitration injunctions were issued by the respective courts. Nevertheless, this trend is curbed by the Court of Appeal decisions in *Statoil v. NNPC* and *NAE v. NNPC*.

Ultimately, this 'ugly' trend can only be remedied by a pragmatic change in judicial attitudes, to demonstrate impartiality and deference to the parties' commercial choice of arbitration.

Happily, the Nigerian Judiciary has issued a strong policy statement in favour of arbitration. In a letter dated 26 May 2017 addressed to all Heads of Court, the Chief Justice of Nigeria – Hon. Justice Walter Onnoghen – criticised the practice of courts indulging parties that issued proceedings in breach of arbitration agreements. The Chief Justice stressed that "the time saving nature of [arbitral proceedings] encourages heightened commercial and economic activities and foreign investments." As such, arbitration "needs the support and encouragement of the judiciary." The Chief Justice, therefore, requested all Heads of Courts to introduce Practice Directions in the following terms:

[108] (2015) 1 CLRN 30
[109] (2005) 3 FHCLR 253

> That no court shall entertain an action instituted to enforce a contract or claim damages arising from a breach thereof, in which the parties have, by consent, included an arbitration clause, without first ensuring that the clause is invoked and enforced. … The courts must insist on enforcement of the arbitration clause by declining jurisdiction and award substantial costs against parties engaged in the practice. … A party who institutes an action in court to enforce breach of contract containing an arbitration clause without first invoking the clause is, himself, in breach of the said contract and ought not to be encouraged by the courts.

This policy statement is a strong incentive to expect, going forward, greater judicial support for arbitration in Nigeria.

[D] Are there Gaps in the Attitude?

There appear to be gaps in the attitude of some Nigerian courts and judges to arbitration. This emanates from constitutional and statutory provisions and the unlimited jurisdiction vested in the High Courts. It seems strange to a High Court Judge that Section 34 of the ACA curtails its powers to entertain the provisions of a statute. Judges perceive this to be an ouster the jurisdiction they jealously guard.

In Nigeria, Section 4(8) of the Constitution provides:

> Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Section 34 of the ACA appears to be interpreted as ousting the jurisdiction of the court. However in Obembe v Wemabode Estates Limited,[110] the Supreme Court held:

[110] (1977) All NLR 130 or (1977) LPELR-2161(SC) 18-19, paras E-A.

> (a)ny agreement to submit a dispute to arbitration, such as the one referred to above, does not oust the jurisdiction of the court. Therefore, either party to such an agreement may, before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission.[111]

It must be borne in mind that this decision was based on the Arbitration Act, 1914 and not the ACA. The Arbitration Act, 1914 does not have the equivalent of Section 34 of the ACA. However, the decision in SCOA Nigeria Ltd v Sterling Bank Plc[112] was based on the ACA and in construing the nature of an arbitration agreement, the Court of Appeal held:

> The law is settled that parties cannot by contract oust the jurisdiction of the Court; but any person may covenant that no right shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant. Where it is expressly, directly and unequivocally agreed upon between parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there had been no such arbitration.[113] Therefore, while parties cannot by contract oust the jurisdiction of the Courts, they can agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator. Such a provision is popularly known in law as the Scott v. Avery Clause … [114]

Another view is that Section 34 of the ACA relates only to matters governed by the Act. Consequently, in matters not governed by the Act, the courts can intervene. This was the position of the Court of Appeal in Shell Petroleum Development Company of Nigeria Limited v Crestar Integrated Natural Resources Limited.[115] Obaseki-Adejumo, JCA noted:

> Furthermore, it is important to note that the provisions of Section 34 of the Arbitration Act, is only applicable to matters 'governed by the Act' so that if it is found in any

[111] The Court referred to Harris v Reynolds (1845) 7 Q.B. 71
[112] (2016) LPELR-40566 (CA)
[113] Here the court referred to A.I.D.C. v Nigeria L.N.G. Ltd (2000) 4 NWLR (Pt. 653) 494 SC; City Engineering Nigeria Ltd v Federal Housing Authority (1997) 9 NWLR (Pt. 520) 224 SC.
[114] Here the court referred to Scoot v Avery (1856) 10 ER 1121.
[115] *Shell Petroleum Development Company of Nigeria Limited v Cresta Integrated Natural Resources Limited,* (2015) LPELR-40034 (CA) *at* 9-12, Paras. F-E

> proceeding, that the particular facts and circumstances does not come within the purview of the Act, the provisions of Section 34 cannot apply with full force.

The issue whether arbitration ousts the courts' jurisdiction is compounded by Section 7(4) of the ACA, which provides that the decision taken by the court in appointing an arbitrator in default shall not be subject to appeal. Such appointment is a matter heard at first instance and, therefore, appealable to the Court of Appeal by virtue of the provisions of Section 241(1)(a) of the Constitution. On the effect of Section 7(4) of the ACA, Idornigie stated that in view of the provisions of:

> (s)ection 241 of the 1999 Constitution of the Federal Republic of Nigeria which provides for appeals as of right from the decisions of the Federal High Court or a High Court to the Court of Appeal, the decision of a court appointing an arbitrator is appealable.

Idornigie's view is supported by the Court of Appeal decision in Nigerian Agip Oil Company Limited v Kemmer & Ors[116].

The effect of this decision is that Section 7(4) of the Cap A18 is inconsistent with Section 241 of the Constitution and therefore null and void.[117]

In Bendex Engineering Corporation & Anor v Efficient Petroleum Nigeria Limited[118] the Court of Appeal interpreted Section 7(4) of the ACA thus:

> Section 7(4) of the Arbitration and Conciliation Act,1990, only renders non-appealable proceedings challenging the procedure for appointing arbitrators as specified in section 7(2) and 7(3) of the Arbitration and Conciliation Act, Laws of the

[116] (2001) 8 NWLR (Pt. 716) 506 at 525-526

[117] Idornigie (n 16) 174. See also Paul O Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (LawLords Publications 2015) 192; P O Idornigie, 'The Default Procedure in the Appointment of Arbitrators: I the Decision of the Court Appealable'? in *Arbitration, The Journal of the Chartered Institute of Arbitrators*, Vo. 68, No. 4, November, 2002, 397-403; *Statoil Nigeria Limited v Nigerian National Petroleum Corporation* (2013) 14 NWLR (Pt 1373) 1; *Nigerian Agip Exploration Limited v Nigerian National Petroleum Corporation* (2014) 6 CLRN and *Shell Petroleum Development Company of Nigeria Limited v Crestar Integrated Natural Resources Limited*, ibid.

[118] (2001) 8 NWLR (Pt. 715) 333 at 339.

> Federation of Nigeria,1990. Consequently, before the provisions of section 7(4) of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria, 1990 can be invoked, the court must first be satisfied that the grounds of appeal and issues formulated for determination from the grounds of appeal relate to the appointment procedure as laid down by section 7(2) and 7(3) of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria,1990 and not just matters that are peripheral to those specified therein.

However, in Chief Felix Ogunwale v Syrian Arab Republic,[119] the Court of Appeal was rather ambivalent when it held:

> Under and by virtue of section 7(4) of the Arbitration and Conciliation Act, a decision of the High Court relating to the appointment of an arbitrator shall not be subject to appeal. Under section 34 of the said Act, a Court shall not intervene in any matter governed by the Act unless so provided in the Act. In other words, no appeal could be made in matters where there is available process under the Act. Although it is recognised that in the interest of stability in commerce and the need to respect the wishes of parties who have opted to provide for how to sort out their problems, choose their judges and forum, the courts shall not readily intervene, in a matter relating to the appointment of an arbitrator by the court, it is only a decision strictly within section 7(2)(a) & (b) and 7(3)(a)(b) and (c) of the Arbitration and Conciliation Act that shall not be subjected to appeal. Thus, in order to determine whether a decision of court relating to the appointment of an arbitrator is appealable or not, the court must review the grounds of appeal and the issues formulated therefrom to discover the grounds upon which the appeal decision is being challenged.

In commenting on the relationship between Section 7(4) ACA and Sections 241 and 242 of the Constitution, Nwakoby notes:

[119] (2002) 9 NWLR (Pt 771) 127 at 134. See also Chukwuemeka Ibe, 'Party Autonomy and the Constitutionality of Nigerian Arbitration and Conciliation Act, 1988. Sections 7(4) and 34 – Commentary on Agip Oil Co Ltd v Kremmer and Others, Chief Felix Ogunwale v Syrian Arab Republic and Bendex Engineering Ltd v Efficient Petroleum (Nigeria) Ltd' in (2011) 28 *Journal of International Arbitration*, Issue 5, 493-499.

> (S)ection 7(4) of the Act is a ploy to restrict and limit the constitutional right of appeal as granted to litigants in sections 241 and 242 of the Constitution of the Federal Republic of Nigeria as amended. Section 7(4) is unconstitutional and should be declared void in accordance with the provisions of section 1(3) of the Constitution.[120]

Our view on this issue is that arbitration does not oust the court's jurisdiction. Consequently, advocacy is necessary so that the judges will observe the sanctity of contracts. If parties resolve to settle their disputes by arbitration, this should be respected in so far as there is no provision in the arbitration agreement expressly ousting the jurisdiction of the courts. This was alluded to in SCOA Nigeria Plc v Sterling Nigeria Plc[121] by Oseji, JCA:

> It is trite that where a clause in an agreement provides that any difference or dispute arising out of the agreement shall be referred to an arbitrator, both parties ought to honour and comply with provisions of the clause.

Conclusion

In considering the attitude of Nigerian courts towards arbitration, the fact that Nigeria is a federation with a written constitution should be taken into account. The Constitution empowers the courts to determine any question as to the civil rights and obligations of persons in Nigeria. *A priori,* this suggests that arbitral agreements oust the jurisdiction of the courts. However, it is now settled in Nigeria that arbitration does not oust the court's jurisdiction. Clearly, there are provisions in the ACA that are inconsistent with constitutional provisions. It is noteworthy that the ACA is currently under review. In the review of the ACA, all such sections have been removed to ensure that the ACA is consistent with constitutional provisions and international best practice.

As we observed above, the attitude of the Nigerian courts has been swinging between the good, the bad and ugly. Be that as it may, we hope that the advocacy embarked upon by arbitration practitioners in Nigeria to demonstrate the nature of the relationship between the

[120] Greg C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, SNAAP Press Nigeria Limited 2014) 52 and Greg C Nwakoby, "The Constitutionality of sections 7(4) & 34 of the Arbitration and Conciliation Act: Chief Felix Ogunwale v Syrian Arab Republic" in *Nigeria Bar Journal*, Vol. 1, No. 3 July, 2003 345 at 353

[121] *SCOA Nigeria Plv c Sterling Nigeria Plc, ibid* at 24, paras B-C.

courts and arbitration; and the recent directives from the Chief Justice of the Federation to Nigerian courts, will bridge any perceived gaps.