THE RELATIONSHIP BETWEEN NATIONAL COURTS AND ARBITRAL TRIBUNALS: FORCED COHABITATION OR TRUE PARTNERSHIP?

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Abstract

This chapter examines the relationship between national courts and arbitral tribunals in the context of the principle of party autonomy. It particularly examines whether arbitration can survive without courts and if they cannot survive how courts can play supervisory, supportive and ancillary roles. This is against the backdrop of the constitutional provisions vesting judicial powers of a state in the courts.[1] Is the relationship between the national courts and arbitral tribunals that of a forced cohabitation or a true partnership? To what extent does the principle of party autonomy in arbitral proceedings undermine this constitutional provisions? To answer these questions, this chapter briefly examines the nature of arbitration, the arbitration laws in Nigeria, the principle of party autonomy, the principle of arbitrability, anti-arbitration injunctions, the role of the arbitral tribunals, the role of courts and the nature of the relationship between national courts and arbitral tribunals. The chapter contends that the relationship between national courts and arbitral tribunals is that of true partnership where the courts seem to have the upper hand but recommends that each partner should appreciate the limits of its position. The chapter concludes that for the proper dispensation of commercial disputes, resort to arbitration should be mandatory unless there are constitutional or statutory limitations.

Introduction

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[1] The Constitution of the Federal Republic of Nigeria, 1999, as amended, section 6

Arbitration is increasingly gaining acceptance across the world as an alternative to traditional litigation in the resolution of commercial disputes. It is anchored on four fundamental principles, namely, the principle of party autonomy, the principle of separability, the principle of arbitrability and the principle of judicial non-intervention (or minimal intervention). There is also the bedrock principle of the competence of the arbitral tribunal to rule on its own jurisdiction, usually referred to as *Kompetenz-Kompetenz*. The principle of judicial non-intervention and *Kompetenz-Kompetenz* are closely related and are indeed crucial to the effectiveness of the arbitral process, particularly international arbitration because they guarantee that the process can proceed in accordance with the agreement of the parties without the delays, uncertainties and other challenges concomitant with judicial review of procedural decisions[2] by national courts. Hence, these principles presuppose that by electing to resolve disputes through arbitration, the parties have made a conscious decision not to submit to the jurisdiction of the courts. To this extent, the courts should only be allowed a minimal role—supportive, supervisory and ancillary—in the arbitral process.[3] Unfortunately, the relationship has swung between forced cohabitation and true partnership.

Arbitration can be categorized in various ways: domestic and international, commercial and customary, and *ad hoc* or institutional. Depending on the nature of arbitration, the courts have always had a role to play in the settlement of disputes through arbitration. However, where arbitration is institutional, the courts rarely ever play any role before or during the arbitral proceedings except post-arbitral award roles like setting aside or recognition and enforcement of awards. Where it is a multi-door court house related arbitration (court-annexed arbitration), it is under the complete jurisdiction of the parent court.[4] Where the arbitration is *ad hoc*, and initiated under the Arbitration and Conciliation Act (ACA) of 1988,[5] the court has a role to play albeit limited.[6] The role could be supportive and supervisory, and it can occur before, during and after arbitral proceedings.[7] Irrespective of the limited role given to the courts in arbitration, the point of convergence between arbitration and the courts is that within the limited role given to it in arbitration, the court works alongside arbitral tribunals to ensure smooth and speedy dispensation of justice in commercial dispute.

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

[3] Paul O Idornigie & Enuma Moneke, 'Anti-Arbitration Injunctions in Nigeria' (2016 82(4) *The International Journal of Arbitration, Mediation and Dispute Management*, 438.

[4] Paul Obo Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (LawLords Publication 2015) 322

[5] Now Cap A18, Laws of the Federation of Nigeria, 2004 ("the ACA")

[6] Idornigie (n 4) 312

[7] Ibid

In addition to the courts, both the arbitral tribunals and parties have major roles to play in arbitration. In ascertaining the nature of the relationship between national courts and arbitral tribunals, all these roles will be examined. To achieve this objective, the chapter is broken down into nine (9) sections. Other than this introductory section, we will examine the nature of arbitration, laws regulating arbitration in Nigeria, principle of party autonomy, anti-arbitration injunctions, powers of arbitral tribunals, relationship between national courts and arbitral tribunals, principle of arbitrability, strengthening the areas of convergence and the concluding section.

The Nature of Arbitration

Generally the essence of arbitration is that a dispute has arisen or potential for a dispute will arise and the parties, instead of going to the conventional courts, decide to refer the dispute to a private tribunal (arbitrator[s]) for settlement in a judicial manner. The implication of that agreement is that the decision of the arbitral tribunal (called an award) will be binding on them. In order to ensure that such a method of settling disputes is effective, assistance is usually given by the ordinary machinery of law to ensure that such awards can be enforced. Arbitration can, therefore, be described as private proceedings with public consequences. Similarly, as a safeguard against impartiality and absence of due process, the court can, in certain instances, impeach an award.[8]

An International Arbitration Survey carried out by the Queen Mary University in 2015 entitled 'Improvement and Innovations in International Arbitration' indicates that 90% of respondents chose arbitration as their preferred means of dispute resolution.[9] 64% of them said one of the most valuable characteristics of arbitration is it enables them to avoid specific legal systems/national courts.[10] This came second to enforceability of awards which came first with 65% of respondents viewing it as the most valuable characteristic.[11] National Court interference was perceived as one of the worst characteristic of international arbitration by 25% of respondents.[12]

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[8] Idornigie (n 4) 1. See also Greg C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, Snaap Press Nigeria Limited, 2004) 1, Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice,* (Centre for Commercial Law Development 2009) 27, Tinuade Oyekunle and Bayo Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (LexisNexis 2018) 9 and David St John Sutton, Judith Gill QC and Matthew Grearing QC, *Russell on Arbitration* (24th edn, Sweet & Maxwell, 2015) 1

[9] Queen Mary University International Arbitration Survey 2015, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf Accessed 24/10/2019 p.5.

[10] Ibid p.6.

[11] Ibid, p.6.

[12] Ibid, p. 7

In another survey conducted in 2018, entitled 'The Evolution of International Arbitration', 97% of the respondents found arbitration to be their preferred option for settling disputes.[13] Avoiding national systems/courts again featured as one of its most valuable characteristic at 60%, second to enforceability which came first at 64%.[14] National courts' intervention also feature again as one of the worst characteristic of arbitration at 20%.[15] 99% of the respondents also indicated their willingness to recommend international arbitration as a means of resolving cross-border disputes in the future.[16]

Three things featured in both Surveys: the role and value of arbitration to dispute resolution especially the resolution of international commercial disputes cannot be over empahsised, there is huge preference for arbitration as a means of resolving transnational disputes, and there is a lack of appeal towards the use of national legal systems/courts as a means of dispute resolution in commercial business disputes. This supports the prescription of limited role for the courts in arbitration through statutes in many jurisdictions, and the need to ensure that the limited role should not be played in a way that negatively impacts on arbitration.

On the other hand, enforcement of arbitral awards featured consistently as the most valuation characteristic of arbitration in the surveys. Given that the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ensures compliance with enforcement of arbitral awards through courts, the point of convergence between arbitration and the courts is the arbitration law of a country.

Commercial Arbitration Laws in Nigeria

In Nigeria, the following laws govern arbitral proceeding:

a) The Arbitration and Conciliation Act, 1988 (the ACA)[17]
b) The Lagos State Arbitration Law, 2009
c) The Arbitration Laws of various states derived from the Arbitration Ordinance of 1914. The Arbitration Ordinance later became the

[13] Queen Mary University International Arbitration Survey 2018 http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF Accessed 24/10/2019. p.5.

[14] Ibid, at p.7.

[15] Ibid, at p.8.

[16] Ibid, at p.8.

[17] This law does not regulate trade disputes which is regulated by the Trade Disputes Act, 2004. Indeed section 35 of the ACA makes ACA inapplicable to matters governed by other laws.

Arbitration Law, Cap 13, Laws of the Federation, 1958 and Arbitration Laws of the various States.[18]

The Arbitration and Conciliation Act was influenced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.[19] In terms of enforcement of foreign arbitral awards, Nigeria is a contracting party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitration laws generally define the circumstances under which the courts can intervene in arbitration.[20]

Anti-arbitration Injunctions[21]

An anti-arbitration injunction is an order of a court prohibiting arbitral proceedings. It may be issued to restrain a party or even an arbitral tribunal.[22] Anti-arbitration injunctions could be issued either before the commencement of arbitral proceedings to prevent the constitution of the arbitral tribunal or after proceedings have commenced to stop the arbitration.[23] It may also be granted to stop a party from enforcing an arbitral award.[24] Anti-arbitration injunctions share some similarities with their sister remedy, anti-suit injunctions. However, the two procedures must never be confused because they differ in key respects. While anti-arbitration injunctions seek to prevent the initiation or continuation of arbitration proceedings, anti-suit injunctions seek to stay proceedings in court in breach of an agreement to arbitrate.[25] Further, anti-suit injunctions are issued

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[18] See the Arbitration Law of Northern Nigerian 1963, Arbitration Law of Western Nigeria 1959 and Arbitration Law of Eastern Nigeria 1963. This law is still applicable in most states in Nigeria. See Arbitration Law, Cap 10, Laws of Bendel State of Nigeria, 1976 and Arbitration Law, Cap A13, Laws of Delta State, 2006.

[19] Hereinafter referred to as "the Model Law"). See UN General Assembly Resolution No. 40/72 of 11 December, 1985. Nigeria is a Model Law Country. See also Peter Binder *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (3rd edn, Sweet & Maxwell, 2010) pp 529-601.

[20] See Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Nigeria Plc, 1997) 15 and John Miles, Tunde Fagbohunlu SAN and Kamal Resiklat Shah, *Arbitration in Africa: A Review of Key Jurisdictions* (Sweet & Maxwell, 2016) 289

[21] See generally Idornigie & Enuma (n 3)

[22] In *Salini Construttori S.P.A. v The Federal Democratic Republic of Ethiopia Addis Ababa Water and Sewerage Authority*, Case No.10623/AER/ACS, 21 ASA BULL. 82 (2003), the Ethiopian courts granted two anti-arbitration injunctions, one against the arbitral tribunal and the other against the claimant.

[23] Julian D.M. Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1094&context=auilr [Accessed 7 October 2019].

[24] Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 *Singapore Academy of Law Journal* 244. http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/630/(2013)%2025%20SAcLJ%20244-295%20(Nicholas%20Poon).pdf [Accessed 7 October 2019].

[25] Lew, "Does National Court Involvement Undermine the International Arbitration Processes?" (2009) 24 *American University International Law Review* 489. See also the ACA, sections 4 and 5.

in personam against the party who has breached the agreement to arbitrate by bringing court proceedings, whereas anti-arbitration injunctions seek to enjoin both the parties and the tribunal or either of them from commencing or continuing arbitral proceedings.[26] The impact of an anti-arbitration injunction would ultimately depend on when the injunction is sought and granted; against whom it is ordered and why it is sought.[27]

Thus one other way in which the courts intervene in arbitral proceedings is in issuing anti-arbitration injunctions in exercise of their powers under the laws establishing them and section 34 of the ACA. Section 13 of the Federal High Court Act (FHCA)[28] provides thus:

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

Similarly section 15 of the Court of Appeal Act [29] confers on the Court of Appeal all the powers of the court below, which may be the Federal High Court.[30] The combined effect of these provisions is that the Federal High Court or the Court of Appeal or the Supreme Court can grant an anti-arbitration injunction. In consequence, the relationship between arbitration and the courts had not always been a flawless one. It had been characterised sometimes by harmony, and other times by judicial interventions that display both pro- and anti- arbitration attitudes by the courts. For instance, in *Statoil v NNPC*,[31] where the NNPC challenged the jurisdiction of arbitral tribunal on arbitrability grounds, NNPC applied to stay the proceedings at the tribunal and the application for stay was denied. NNPC then went to the Federal High Court *ex parte* and got an interim injunction restraining proceedings at the tribunal. Statoil appealed against the decision. On appeal, the Court of Appeal reversed the decision of the Federal High Court on the grounds that under section 34 of the ACA, Nigerian Courts have no power to issue an injunction to restrain arbitral proceedings.[32] In *AGIP v*

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[26] ibid

[27] See ACA ss.4 and 5 on stay of court proceedings pending arbitration.

[28] Cap.134, Laws of the Federation of Nigeria, 1990, hereinafter referred to as FHCA.

[29] Cap.75, Laws of the Federation of Nigeria, 1990, hereinafter referred to as CAA.

[30] *Okoya v Santili* (1990) 2NWLR (Pt 130) 172; see the Supreme Court Act s.22, Cap.424, Laws of the Federation of Nigeria, 1990, which extends these powers to the Nigerian Supreme Court.

[31] 2013, 7 CLRN, 72.

[32] Edward Turgbor., *Overview of the Disposition of Courts Towards Arbitration in Africa*, in Onyema, E., RETHINKING THE ROLE OF AFRICAN NATIONAL COURTS IN ARBITRATION, (Netherlands, Kluwer Law International) 2018. p. 46.

NNPC,[33] the NNPC challenged a partial award made by the tribunal and went to Federal High Court to seek an interlocutory injunction to stay the arbitration, the injunction was granted. AGIP appealed, and the Court of Appeal held that the domestic court was not in a position to issue anti-arbitration injunctions.

In *Shell v Cresatar*,[34] Crestar went to the Court of Appeal to seek an interlocutory injunction to stay an arbitral proceeding sitting in London after the application to the court of first instance was denied. The injunction was granted not under the Arbitration and Conciliation Act, but under the powers of the courts as provided for by S.15 of the Court of Appeal Act (CAA). The Court's reasoning behind doing so was that the ACA only applied to domestic arbitration and because the matter before them was international as the seat of arbitration is London, the Court only had the power to grant the injunction under S.15 CAA. What this means is that court's intervention in arbitration in Nigeria creates uncertainty because it makes it difficult to predict whether or not court intervention will have a negative or positive impact on arbitration.[35]

Some of the challenges posed by this uncertain, unpredictable approaches by the courts is attributable to the wide discretion conferred on the courts by the ACA, and how the courts apply this discretion.[36] While the uncertainty and unpredictability creates discord and tension between the courts and arbitration, their point of convergence is the ACA and role given to the courts in arbitration by the ACA with the view to ensuring a speedy disposition of arbitration. Therefore, to be able to chart a course for a more harmonious relationship between the courts and arbitration, there is the need to explore and analyse the legal regime governing arbitration in Nigeria. Hence, this chapter seeks to analyse the legal regime governing arbitration in Nigeria in order to get better insight into the harmony and point of convergence between the courts and arbitration.

The Principle of Party Autonomy[37]

In arbitral enactments modelled after the UNCITRAL Model, two sections are considered to be the most important provisions, namely, the equal treatment of the

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[33] 2014, 6 CLRN, 150.

[34] Appeal No. CA/L/331M, 2015.

[35] Ibid n.13 at p.46

[36] Paul Idornigie & Isaiah Bozimo, 'Attitude of Nigerian Courts Towards Arbitration', in Onyema, E., RETHINKING THE ROLE OF AFRICAN NATIONAL COURTS IN ARBITRATION, (Kluwer Law International 2018) p.284- 289.

[37] See generally Paul Obo Idornigie, 'The Principle of Party Autonomy in Arbitral Proceedings' in The *Arbitrator & Mediator* (2003) 22 (3) p 37. See also Paul Obo Idornigie "Anchoring Commercial Arbitration on Fundamental Principles" in *The Arbitrator & Mediator, The Journal of The Institute of Arbitrators & Mediators, Australia* (2004) 23 (1), p 65.

parties[38] and the parties rights to determine the rules of procedure[39]. These provisions are so important that they are referred to as the "Magna Carta of arbitral procedure".[40] Accordingly, Article 18 of the Model Law provides that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. This accords with the common law principle of natural justice and the constitutional principle of fair hearing[41].

In arbitral proceedings, the agreement to arbitrate is so fundamental that it is indirectly enforced by stay of proceedings if instead of arbitrating one of the parties decides to litigate.[42] The importance of the principle of party autonomy is underscored by the fact that 14 out of 36 articles of the Model Law give the parties the right to determine the "rules of the game". The trade mark of these provisions is the use of the words "the parties are free to agree" or "unless otherwise agreed by the parties" or "subject to any contrary agreement by the parties". This is sometimes referred to as "two-level system" or a "default provision".[43] This is a way of drafting a provision where the first part of the article grants the parties general freedom in regulating an issue and the second part sets the default rules which apply only when no such party stipulation is made. Such default rule is usually worded thus "failing such an agreement". This is generally where the roles of the parties and arbitral tribunal converge. In such circumstances, where the parties fail to act, the arbitral tribunal or other appointing authority will act.

Article 19 of the Model Law is an example of such provisions. It states thus

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[44]

In Nigeria, there is a distinction between domestic and international commercial arbitration while the Model Law covers international commercial arbitration only. Whereas sections 1 to 36 of the Act which are in Part I of the Act cover domestic arbitration, sections 43 to 54 of the Act which are in Part III cover international

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[38] See the Model Law, Article 18 and ACA, section 14
[39] See the Model Law, Article 19 and ACA, section 15
[40] See A/CN.9/264, Art 19, para. 1.
[41] See the 1999 Constitution, as amended section 36.
[42] See the Model Law, Article 8 and the ACA, sections 4 and 5. See also section 9 of the English Arbitration Act, 1996
[43] See Binder *(n 19)* 71
[44] See also the ACA, section 15

commercial arbitration.[45] Accordingly section 15(1) of the ACA provides thus "The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this ACA"[46] while section 53 of the ACA provides thus

> Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.

The combined effect of these provisions is that in Nigeria, under the ACA, the parties to domestic arbitration are bound to adopt the Arbitration Rules while in the case of international commercial arbitration, they have a choice of institutional rules. It is safe to assert, therefore, that in domestic arbitration, the principle of party autonomy as it relates to the choice of the applicable rules is circumscribed. This was alluded to by Orojo and Ajomo thus

> The effects of these provisions are first, that in domestic arbitration, the parties as well as the arbitral tribunal are bound by the provisions of the Arbitration Rules in the First Schedule. Thus, the much flaunted party autonomy in respect of arbitral procedure is very much more limited in domestic arbitration under our law than under the UNCITRAL Model Law. … It also follows that in a domestic arbitration, the parties are not free to adopt the Rules of arbitration institutions like the I.C.C. if the rules conflict with the Arbitration Rules in the First Schedule.[47]

Does the restriction imposed by section 15(1) of the ACA mean that in domestic arbitration the parties have no rights to determine the procedure to be followed? The effect of section 15(1) is that the parties are bound to adopt the procedural rules in the Schedule to the ACA and are prevented from choosing their own self-drafted set of rules. Commenting on the effects of sections 15(1) and 53 of the Act, Binder stated thus

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[45] See also Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (West African Book Publishers Ltd 1997) 7-9

[46] This Schedule is substantially the same as the UNCITRAL Arbitration Rules. See UN General Assembly Resolution No. 31/98 of 15 December, 1976

[47] J O Orojo and M A Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Ltd, 1999), p 166.

> Section 15(1) in combination with section 53 of the Federal Republic of Nigeria's Arbitration and Conciliation Decree 1988 compels the parties to use either the arbitration rules laid down in Schedule 1 to the Law, in the UNCITRAL Arbitration Rules or in "any other international arbitration rules".[48]

Although section 15(1) appears restrictive, a cursory look at other provisions of the ACA will reveal that some of them are based on the principle of party autonomy.[49] In other words, the "two-level system" is reflected in other sections dealing with domestic arbitration. The possibility of choosing the procedural rules that are to be applied by the tribunal constitutes one of the major attractions for parties contemplating resolving their disputes via arbitration. The provisions in the ACA would seem to deny the parties this right. It is submitted, therefore, that the provisions in section 15(1) should be reviewed. In the case of *ad hoc* arbitrations, the parties can draft their own rules. It should be noted that under section 31 of the Lagos State Arbitration Law, 2009, the parties can agree otherwise. In other words, they can decide the applicable Arbitration Rules.

By giving the parties the rights to determine how the proceedings will be conducted is a re-statement of the private nature of the proceedings. Consequently, the Model Law and other enactments modeled on it recognize and guarantee the principle of party autonomy. In commenting on this principle, Herrmann asserted thus

> The most fundamental principle underlying the Model Law is that of the autonomy of the parties to agree on the "rules of the game". Such recognition of the freedom of the parties is not merely a consequence of the fact that arbitration rests on the agreement of the parties but also the result of policy consideration geared to international practice.[50]

Prior to the adoption of the Model Law, there were national procedural laws that were inappropriate or inadequate for international commercial arbitrations. Similarly one of the frustrations inherent in municipal laws is that such laws may have mandatory provisions that are not universal in nature. Such provisions produce unexpected and undesired consequences. The principle of party autonomy

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[48] Binder (n 19) 284.

[49] See the ACA, sections 6, 7, 9, 13, 16,, 17, 18, 19, , 20, 21, and 22.

[50] Herrmann G "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Petar Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman, 1989), p 9. See also Marshal E A *Gill: The Law of Arbitration* (4th Edn, Sweet & Maxwell, 2001) pp 24 and 27

is intended to prevent such frustrations. Commenting on the importance of this principle, Goldstajn opines that the "Model Law is based on the principle of freedom of contract, according to which the parties are free to determine numerous terms of the contract".[51] Another distinguished scholar, Julian D M Lew has also acknowledged the importance of this principle. In his words

> Party autonomy gives the contracting parties the power to fashion their own remedial process within the limits of public policy. It follows from this principle that the arbitration agreement reflects the individual interests within the framework of bilateral and multilateral transactions, albeit agreed upon by both parties. For instance, a party from the Middle East may desire a provision calling for the appointment of at least one Middle Eastern arbitrator, such a provision would satisfy the individual interest and concerns of the party without prejudicing the other party.[52]

The paramountcy of this principle cannot be over-emphasised. Parties are advised to take full advantage of this principle otherwise the provision of the law/rules will apply. In other words, the provisions of the law, and rules will apply if there is no agreement by the parties to the contrary.

The rights to determine the rules of the game are not absolute. In other words, the autonomy is subject to mandatory provisions. For example the parties cannot derogate from the right to treat the parties equally and to give each party full opportunity of presenting his case.[53] In accordance with the principle of party autonomy, the following are matters on which the parties may make agreements otherwise the arbitral tribunal or other appointing authority will make the choice for them. This is what the principle of party autonomy is all about.

a) **Receipt of Written Communication**[54]. The parties are free to agree on the manner of service of any notice or other written communications that are to be served in pursuance of the arbitration agreement.

[51] A Goldstajn, "Choice of International Arbitrations, Arbitral Tribunals and Centres: Legal and Sociological Aspects" in Sarcevic P (ed) (n 450) 28.
[52] Julian D M Lew, "Arbitration Agreements: Form and Character" in Sarcevic (ed) (n 50) at 51.
[53] Others include Statement of Claim and Defence (Art 23(1) of the Model Law, section 19 of the Act),.Hearing and written proceedings (Art 24(2) and (3)of the Model Law , section 20(2), (3), (4), (5) and (6) of the Act), Court assistance in taking Evidence (Art 27 of the Model Law, section 23 of the Act), Settlement (Art 30(2) of the Model Law, section 25 of the Act), Form and contents of the Award (Art 31(1), (3) and (4) of the Model Law, section 26 of the Act), Termination of Proceedings (Art 32 of the Model Law, section 27 of the Act), and Correction and Interpretation of the Award/Additional Award (Art 33 of the Model Law, section 28 of the Act).
[54] See the Model Law, Art 3 and the ACA, section 56.

b) **Appointment and number of Arbitrators**[55]. This is a very important choice. If the parties fail to agree on the method of appointment, the fallback provisions will apply and if they fail to determine the number of arbitrators, the number shall be three.
c) **Challenge Procedure**[56]. There are grounds provided for challenging the appointment of an arbitrator. However the parties are free to agree on the procedure for challenging an arbitrator and if they fail, there are default provisions.
d) **Power of Arbitral Tribunal to Order Interim Measures**[57] Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection of the subject matter of the dispute as the tribunal may consider necessary.
e) **Determination of the Rules of Procedure**[58]. This has already been discussed.
f) **Place of Arbitration**[59] This is an issue on which if the parties do not agree, can give rise to serious difficulties especially in relation to the setting aside and recognition and enforcement of the award. The proper meaning of 'place of arbitration', 'seat of arbitration', 'venue for hearing' and 'venue of arbitration came for determination in *Process & Industrial Development v The Federal Republic of Nigeria*[60]
g) **Commencement of Arbitral Proceedings**[61]. This section provides a means of establishing when arbitral proceedings have been commenced, both for the purposes of the arbitration itself and for periods of limitation. The date of commencement is established by reference to the date of service of notice of arbitration or the date when a request to appoint a tribunal is made to an appointing authority.
h) **Language**[62]. The parties are free to determine the language(s) to be used in the arbitral proceedings, failing which the arbitral tribunal shall determine the language(s)
i) **Statements of Claim and Defence**[63]. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.
j) **Hearing and Written Proceedings**[64]. One of the striking features of arbitration is that the parties can decide that the proceedings will be on "documents only" basis and without oral hearing/argument. If there is no contrary agreement by the parties, the arbitral tribunal will determine this.
k) **Default of a Party**[65]. In civil proceedings, there are usually periods for filing pleadings and various consequences follow any default in filing them. Similarly in arbitral proceedings, unless otherwise agreed by the parties, if, without showing sufficient cause the claimant fails to file his point of claim, the arbitral tribunal shall

[55] See the Model Law, Arts 10 and 11 and the ACA, sections 6 and 7
[56] See the Model Law Art 13 and the ACA, section 9
[57] See the Model Law Art 17 and the ACA section 13.
[58] See the Model Law Art 19 and the ACA section 15.
[59] See the Model Law Art 20 and the ACA section 16.
[60] [2019] EWHC [2019] EWHC 2241 (Comm), 16 August, 2019
[61] See the Model Law Art 21 and the ACA, section 17
[62] See the Model Law Art 22 and the ACA, section 18
[63] See the Model Law Art 23 and the ACA, section 19
[64] See the Model Law Art 24 and the ACA, section 20
[65] See the Model Law Art 25 and the ACA, section 21

terminate the proceedings. However, where the respondent fails to communicate his statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. Where any party fails to appear at a hearing or produce documentary evidence, the tribunal may continue the proceedings and make an award on the evidence before it. It is therefore left for the parties to agree on the consequences of any default otherwise the default provisions will apply.

l) **Expert Appointed by the Arbitral Tribunal**[66]. Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal.

m) **Rules Applicable to the Substance of the Dispute**[67]. One benefit derivable from arbitration that is not available in litigation is that the parties can determine the applicable law. Consequently the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties, failing which the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable bearing in mind *lex mercatoria*[68].

It should be noted that in Nigeria, the Evidence Act[69] does not apply to arbitral proceedings or proceedings before an arbitrator. Consequently commercial arbitration in Nigeria allows for flexibility of procedure whilst avoiding the technicalities of the rules of evidence. [70]

The Powers of Arbitral Tribunals

The sources of powers of the arbitral tribunal are statutory, express, implied and terms of trade.[71] Whatever is the source, the arbitrator is the master of procedure – as soon as an arbitrator is appointed and the arbitral tribunal constituted, he takes charge of the proceedings. The arbitral tribunal has specific powers to rule on its competence and give orders, awards, correct awards, interest on awards, security for costs, and determine fees if not determined by an institution. Thus an arbitral tribunal

a) may rule on its own substantive jurisdiction[72];
b) decide matters by a majority[73];
c) may rule as to whether the tribunal is properly constituted;
d) may rule as to whether the proceedings are within the reference;

[66] See the Model Law Art 26 and the ACA section 22.
[67] See the Model Law Art 28 and the ACA, section 47.
[68] See also P O Idornigie "Determining the Applicable Laws in Arbitral Proceedings" *MODUS International Law & Business Quarterly*, Vol. 5, No. 3, September 2000 pp 11-18
[69] See section 256(1) of the Evidence Act, 2011.
[70] cf the ACA, section 15(3)
[71] See C A Candide-Johnson, SAN and Olasupo Shasore, SAN, *Commercial Arbitration Law and International Practice in Nigeri*a (LexisNexis 2012) 55
[72] The ACA, section 12
[73] Ibid, section 26(2)

e) may admit objections to jurisdictions;
f) may decide where and when any part of the proceedings is to be held;
g) may appoint experts[74];
h) may order a claimant to provide security for costs;
i) may dismiss a claim for want of prosecution;
j) may proceed ex parte[75]; and
k) ensure equal treatment of parties[76].

These are all in addition to the default powers earlier discussed.

The Relationship Between National Courts and Arbitral Tribunals

The legal source of the relationship between arbitration and the courts in Nigeria is the arbitration enactment. It contains clearly spelt out court intervention provisions which empower the courts to play a role in arbitration. This is underscored by the provisions of section 34 of the ACA to the effect that the courts cannot intervene unless as provided by the ACA. These provisions form the foundation for the relationship between arbitration and the courts. Given that the courts play a role in the success or otherwise of arbitration (particularly commercial arbitration) in their jurisdictions, we shall identify and analyse the provisions of the ACA with the view to analysing how it creates a relationship between the arbitration and courts. It shall begin by identifying the provisions, after which it will analyse the linkages and opportunities created by the ACA for the courts to assist in the efficient dispensation of arbitration cases in Nigeria

The court intervention enabling provisions include the following:

S.2 provide thus: *"Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court, or a judge"*

S.4 allows a court before whom an action which is a subject of an arbitration agreement, upon request of one of the parties in a certain circumstance, order a stay of proceedings and refer the parties to arbitration.

S. 5 allows a party to an arbitration to apply to the court for stay of proceedings where any of the parties to commences an action in court in respect to a matter which is a subject of arbitration.

S.7 (2) (a) (1) and (2) allows the courts to appoint an arbitrator where no procedure for the appointment of arbitrators is specified by the parties, and if a party fails to appoint an arbitrator within 30 days, or if the arbitrators fail to

[74] ibid, section 22
[75] ibid section 21
[76] ibid, section 14

appoint a third arbitrator within 30 days of their appointment, the court shall appoint an arbitrator or a third arbitrator for either the parties or the arbitrators as the case may be.

S.23 empowers the court or a judge to compel the attendance of a witness before a tribunal via subpoena (1). It can also order a writ of habeas corpus to bring a prisoner for examination before any arbitral tribunal (2).

Application for setting aside- S. 29 provides thus:

> *(1) A party who is aggrieved by an arbitral award may within 3 months*
> *(a) from the date of the awards; or*
> *(b) in a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.*
> *(2) The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the arbitration so however of the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.*
> *(3)The court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.*

S. 31 provides as follows:

> *(1) An arbitral award shall be recognised as binding and subject to this section and section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.*
> *(2) The party relying on an award or applying for its enforcement shall apply-*
> *(a) the duly authenticated original award or a duly certified copy thereof; and*
> *(b) the original arbitration agreement or a duly certified copy thereof.*

(3) An award may, by leave of the court or a judge, be enforced in the same manner as a judgement or order of the award".

An award can be set aside in case of misconduct by arbitrator, etc. S.30 provides:

(1) Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award.
(2) An arbitrator who has misconducted himself may on the application of any party be removed by the court.

S.32 provides thus: Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award without providing for such circumstances. The question arises about under what circumstances can a person refuse recognition or enforcement award?

The import of the court intervention enabling provisions is that they empower the courts to do the following:

a. Grant leave to revoke an irrevocable arbitration agreement.
b. Order a stay of proceedings in a matter before it in certain circumstances and refer the parties to arbitration.
c. Order stay of proceeding where a matter before it is a subject of arbitration.
d. Appoint an arbitrator, or a third arbitrator where none had been appointed within 30 days of the commencement of the arbitration.
e. Compel witnesses to attend arbitral proceedings by subpoena.
f. Order a writ of *habeas corpus* to bring a prisoner before an arbitral tribunal.
g. Set aside an arbitral award if the matters contained in the decisions are beyond the scope of arbitration.
h. The court can suspend proceedings for a period to allow the tribunal to eliminate the grounds for setting aside of the award.
i. The court shall recognise as binding, and enforce an arbitral award upon request in writing
j. The court can set aside an award upon misconduct by an arbitrator.
k. A court can remove an arbitrator upon complaint of misconduct.

l. A court can refuse to recognise or enforce and award in various circumstances including the circumstances set out in the provision of S. 31 and 32.

The effect of these role defining provision for courts in arbitral matters is that they clearly set out the boundaries of the relationship by setting the general rule that the courts shall not interfere in arbitration. It keeps the courts at arm's length from arbitration. However, the exceptions by way of the provisions set out above brings the court back in, in such a way that utilises and benefits from the institutional strengths of the courts. Bearing this in mind, the *ACA*, being the point of convergence between the courts and arbitration should be celebrated for seeking to establish and maintain a cordial relationship and harmony between the courts and arbitration. It also suggests an awareness of the ability of the courts to strengthen arbitration and make it more efficient and capable of providing the kind of service that meets the expectations of arbitration services consumers. Without these provisions, it will be difficult to see the point of convergence between arbitration and the courts. Whether or not the *ACA* as it exists today has been able to achieve what it set out to do can be determined through an analysis of judicial attitude and approach towards intervention in arbitration.

Analysis of the Relationship

The *ACA* empowers the courts to intervene albeit in a limited manner in arbitration in three stages: before, during and after arbitration. Judicial intervention before arbitration has to do with upholding arbitration agreements and appointment of arbitrators where none have been appointed by the parties, or where the party appointed arbitrators fail to agree on the appointment of a third arbitrator. Judicial intervention after the commencement of arbitration has to do with its powers to stay proceedings for any of the following reasons: to revoke an arbitration agreement, appoint an arbitrator, where a proceeding is going on in respect of a matter before it, and to compel the appearance of witnesses. Judicial intervention after arbitration has to with enforcement and setting aside of arbitral awards.

In exercising its powers as provided for by the *ACA* in the different stages of arbitration, one of the key stages where judicial intervention has had a huge impact, resulted in tension and created inconsistency is its intervention to stay proceeding at the arbitration stage in line with the powers bestowed upon it by Sections 4 and 5 of the *ACA*. The case of Statoil v NNPC, AGIP v NNPC, and Shell v Cresatar allude to lack of uniformity in arbitral approach towards its powers to

stay proceeding. While the ACA empowers the courts to intervene in specified circumstances, S.6 of the 1999 Constitution established the various courts and vested them with inherent powers over all cases between parties in all actions and proceedings brought before them. Therefore, in the cases mentioned here, it is clear that in some instances, the courts relied on the powers conferred on them by the ACA, while in the other, the Court of Appeal relied on the inherent powers conferred on it by the Constitution through the Court of Appeal Act to arrive at a decision on an application for stay of proceeding.

The take home from the judicial approach towards granting or denying an application to stay arbitral proceedings is that the combination of Section 5 as it exists in the current ACA, and the inherent powers bestowed upon the courts by virtue of Section 6 of the 1999 Constitution accords a wide margin of discretion upon the courts on how to proceed regarding stay of proceedings. Furthermore, views have been expressed about the possible hostility towards arbitration by some courts due to the provisions Section 34 of the ACA which precludes the courts from intervening in arbitration except in limited circumstances. It has been suggested that this may have informed the attitude of some courts when called upon to intervene in the limited circumstances as they perceive Section 34 of denying them their inherent powers as provided for by Section 6 of the 1999 Constitution.

Judicial approach towards Section 34 in some cases also suggests limited appreciation in some instances of the role the courts are expected to play within arbitration through the limited powers bestowed upon them. The powers appear to be designed to ensure the smooth and speedy disposition of arbitral proceedings. However, making a distinction between domestic and international arbitration when interpreting the ACA and invoking inherent powers to address a matter even when provisions within the rules contained in the ACA alludes to the need to treat both domestic and international aspects of arbitration in Nigeria holistically as one exhibits the thinking behind the distinction and the need to fill the gap.

The effect of the provisions of the ACA mentioned earlier is to limit intervention by the courts to only the circumstances stipulated therein. However, the cases of Statoil, AGIP and SPDC suggest that the way some of these provisions have been couched leaves it open to wide interpretation. The implication of this is that it gives the courts wide discretion on how to interpret these provisions. The outcome of this is the inconsistent decisions as seen in the above cases. These challenges make arbitration unable to work effectively. Another aspect of the relationship between the courts and arbitration which creates tension and

contribute to the imperfect relationship is the ability, through statute of a judge who has no experience in arbitration to review arbitral decisions. This makes it nearly impossible for the judge who is reviewing the arbitral decision to appreciate the context within which the decision was made, as well as the implication his decision can have on the fundamental reason behind the choice of arbitration in the first place as well as the ability of parties to have private control over their dispute resolution.

In the words of Blackaby and Partasides

> *The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts which alone have the power to rescue the system when one party seeks to sabotage it.*[77]

The relationship between courts and *ad hoc* arbitration has been compared to a relay race:

> *Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the courts; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can in case of the need lend its coercive powers to the enforcement of the award.*[78]

Ideally, arbitration ought to be independent of the courts given the nature of an arbitration agreement[79]. Any standard clause on arbitration bears testimony to this. For instance, the UNCITRAL Arbitration Rules, 2010 provides that a model clause can be worded thus: 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall

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[77] Nigel Blackaby and Constantine Partasides *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) 415. See also P O Idornigie, 'The Relationship Between Arbitral and Court Proceedings' *Journal of International Arbitration* 19(5) 443-459, October 2002

[78] See Lord Mustill, 'Comments and Conclusions' in *Conservatory Provisional Measures in International Arbitration, 9th Joint Colloquium* (ICC Publication, 1993) page 118

[79] See also the model clauses of the Arbitration Rules of London Court of International Arbitration, 2014 and that Rules of Arbitration of the ICC International Court of Arbitration, 2014.

be settled by arbitration in accordance with the UNCITRAL Arbitration Rules'. Similarly, an arbitral award ought to be self-executing. Accordingly, Article 32(2) of the Arbitration Rules annexed to the ACA provides that the arbitral award shall be final and binding on the parties. Secondly the parties undertake to carry out the award without delay. But this is not always the case as the losing party usually invokes the court's jurisdiction in an attempt to set aside an arbitral award. Thus regardless of attempts to free arbitration of all local restrictions or interventions by the courts, until arbitral tribunals gain court-like powers, arbitration remains ultimately dependent on the courts for assistance before, during and after arbitral proceedings ("the relay race").

It is important to stress that the courts play restricted supportive and supervisory role over arbitration. Having said that, we must separate arbitration conducted under the ACA from those regulated by the High Court (Civil Procedure) Rules subject to the supportive roles of the courts.[80]

Article 5 of the UNCITRAL Model Law is *in pari materia* with section 34 of the ACA. According to the Report of UNCITRAL[81], the purpose of this provision is

> to achieve a certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the (model) law on international commercial arbitration all instances of court intervention.

In the Analytical Commentary on the Model Law[82] it was stated that the effect of the provision is "**to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law**". In addition to the advantage of providing clarity of law, which is particularly important for businessmen especially foreign investors, the provision is meant to accelerate the arbitral process in allowing less of a chance for delay caused by dilatory court proceedings. In the words of Chukwuemerie[83], section 34 of the ACA "takes away the courts' power to sit on appeal over decisions of arbitrators and also removes

[80] Paul Obo Idornigie, "The Significance of section 34 of the Arbitration and Conciliation Act, 2004 on the Extent of Court's Intervention in Matters Governed by the Act" in O Omole (ed) *Reflections on Nigeria, Law, Vol. 2: Commemorative Essays in Honour of Prof (Mrs) Jadesola Akande* (Lagos: Speakes Promotions Ltd, 2013) pp 233-244

[81] United Nations document A/40/17, para 63

[82] United Nations document A/CN.9/264, Art 5, para.2

[83] Andrew I Chukwuemerie, 'International Commercial Arbitration and the UNCITRAL Model Law under Written Federal Constitutions: Necessity versus Constitutionality in the Nigerian Legal Framework' in 16 J. Inter Arb 2 (1999) 49

the principle of case stated (both of which and more were obtainable under the old Arbitration Act)"

In *Cetelem v Roust*[84], the Court of Appeal (English) held that this provision is *'intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it'. It is a well established principle of English law that section 1(c) of the English Arbitration Act* ***'makes it clear that the general position is that there is no inherent common law jurisdiction of the court to supervise arbitration outside the framework of the Arbitration Act 1996'***[85]***.***

The provision dealing with the extent of the court's intervention differs from jurisdiction to jurisdiction. In most jurisdictions, the word used is 'shall' while in England, the word used is 'should'. It is important, therefore, that in dealing with this subject matter, the relevant provisions of the statute should be carefully analysed. Globally, however, the principle of judicial non-intervention is one of the pillars of arbitration.[86]

Principle of Arbitrability

Another way of looking at this relationship is by examining the principle of arbitrability[87]. This principle differs from country to country and even from one period of time to another. Generally, it is the state that determines the boundaries of arbitration and enforces these boundaries through its courts. 'Arbitrability' simply means the quality of being capable of resolution by arbitration.[88] The question of whether particular disputes can be referred to arbitration should not be confused with the question of what disputes fall within the terms of a particular arbitration agreement (scope of the reference). In challenging the jurisdiction of an arbitral tribunal, the ground of challenge could be that of arbitrability. In the words of Sutton *and Others*

> The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration,

[84] (2005) 1 WLR 3555 at 3571. See also the position of the House of Lords *in Lesotho Highlands v Impreglio SpA, per Lord Wilberforce* (2006) 1 AC 221 – 'it has given to the court only those essential powers which I believe the court should have'.

[85] Sutton *and Others, Russell on Arbitration* (23rd edn, Sweet & Maxwell, 2007), 345

[86] Idornigie (n 79)

[87] See P O Idornigie, 'Anchoring Commercial Arbitration on Fundamental Principles' in *The Arbitrator & Mediator, The Journal of The Institute of Arbitrators & Mediators, Australia* (2004) 23 (1) and P O Idornigie, 'The Principle of Arbitrability Revisited' in *Journal of International Arbitration* Vol. 21, Issue No. 2, 2004

[88] See also Amazu Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press, 2001) p 146.

> when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable; second in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement.[89]

What this principle does is to circumscribe matters that are arbitrable and those that are not. For example, issues concerning the validity of patents and trademarks, and antitrust disputes are excluded from arbitration in Yugoslavia; in Austria, matters concerning bills of exchange, the validity of patents, bankruptcy, and attachment are not arbitrable.[90] According to section 35 of the *ACA*, the Act shall not affect any other law by virtue of which certain disputes:-

> may not be submitted to arbitration; or
> may be submitted to arbitration only in accordance with the provisions of that law or another law.

Similarly, section 48(b)(i) and (ii) of the *ACA* provide that an arbitral award may be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria or that the award is against public policy of Nigeria.[91] In *Kano State Urban Development Board v Fanz Construction Ltd*[92] the Supreme Court comprehensively elucidated on the type of dispute or difference which the parties can refer to arbitration. Quoting from the *Halsbury's Laws of England*[93], the Court held thus:

> The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiceable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering. Equally, disputes leading to a change of status, such as a divorce petition, cannot be referred,

[89] Sutton and Others, (n 84) 15
[90] Madl, F "Competence of Arbitral Tribunals in International Commercial Arbitration" in Sarcevic (n 48) 95
[91] See also section 52(b)(i) and (ii) of the ACA and Article V.2 of the 1958 New York Convention
[92] (1990) 4 NWLR (Pt 142) 1
[93] 4th Ed, page 2565, paragraph 503

nor, it seems, can any agreement purporting to give an arbitrator the right to give judgment in *rem*.

Consequently, none of the above matters can be subject of arbitration otherwise the award will be set aside or recognition will be refused. It should be borne in mind the 1958 New York Convention draws a line between objective and subjective arbitrability.[94] In Nigeria, the question of arbitrability of tax disputes has been controversial.[95]

Towards Strengthening the point of Convergence Between National Courts and Arbitral Tribunals

The preceding sections have identified the legal regime governing intervention in arbitration by the courts and highlighted some of the challenges posed by judicial approach towards implementing the law. It highlighted some shortcomings and gaps which have, either individually or collective resulted in the ACA (which is the point of convergence between the courts and arbitration) being incapable of realising its full potential.

To address the challenges posed by the provisions relating to stay of proceedings, there is the need to amend the provisions of the ACA to (a) limit the scope of intervention by the courts by clearly stipulating what it can do or not do in various ways, including through expanding the scope of arbitrability, (b) clarifying other provisions that enable courts to seek ways to interpret widely through for example clearly stating the lack of distinction between international and domestic arbitration for the purpose of applying the provisions of the ACA. This can limit the courts ability to rely on their inherent powers to determine arbitration related matters, (d) clarifying the inherent powers of courts to take into account the ability of parties to possess private control over their disputes through Alternative Dispute Settlement (ADR).

Regarding judicial attitude and animosity towards arbitration, the gaps created by them can be addressed in several ways, including the following: Given that the courts play their statutorily bestowed roles through the judges, there is the need to enhance the capacity of such judges to effectively engage and play their role in arbitration. Hence, there is the need to engage in (a) capacity building for

[94] 1958 NY Convention, Art II (1) concerning a subject matter capable of settlement by arbitration and II (3) dealing with stay of arbitral proceedings unless the courts find that the arbitration agreement is null and void, inoperative or incapable of being performed. Similarly Art V (2) dealing with recognition and enforcement of an arbitral award unless the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

[95] See ESSO v FIRS (CA/A/402/2012, Court of Appeal, Abuja, Nigeria, 10th March, 2017, Unreported.

judges to enable them appreciate the international and commercial nature of the arbitration related matters that come before them, and the impact that their decisions can have on the business concerns affected; (b) create specially designated courts to handle commercial disputes especially arbitration related cases to be manned by judges who are trained in commercial and business matters that go before arbitral tribunals. Capacity building for such judges should also include commercial arbitration to enable them fully appreciate arbitration. Their training will enable them fully appreciate and support arbitration by creating certainty through clear and predictable court decisions that take into account the intention behind giving the courts limited role in arbitration.

Concluding Remarks

Arbitration and the courts are two legally recognised ways of providing justice to citizens. They are governed by different rules and they apply different procedures. While the parties to court proceedings have no control over the rules of the game, parties to an arbitration control how, where and when it will take place. The point of convergence between the courts and arbitration is the limited role given to the courts in arbitration through the ACA and the laws establishing the courts. However, applying the rules of engagement by the courts has exposed how susceptible the point of convergence is lop-sided in favour of arbitration. If not properly managed can lead to abuse and inefficiency. That notwithstanding, the limited role provided bestowed upon the courts the potential to constructively contribute to ensuring the efficient operation of arbitration in Nigeria through clear, consistent and predictable decisions on matters provided for under Section 34 ACA. The only way this potential can be harnessed is through an overhaul of the legal regime for arbitration in Nigeria. Clearly, the courts can survive without arbitration but arbitration cannot be effective and efficient without the courts. This can be garnered from the roles of the parties and that of the national courts as well as the powers of arbitral tribunals.

The critical question is whether given our constitutional provisions in Nigeria regarding judicial powers[96], the courts should exercise their inherent powers over arbitral proceedings conducted under the ACA other than as provided in the ACA? However, in a search for finality in arbitral proceedings, the courts should recognize the agreement of the parties to arbitrate in so far that there is no derogation from mandatory norms.

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[96] See the Constitution, as amended, section 6.