Party autonomy and judicial participation in commercial arbitration: recalibrating the role of Nigerian courts.

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Party Autonomy and Judicial Participation in Commercial Arbitration: Recalibrating the Role of Nigerian Courts

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Abstract

Courts and arbitration tribunals aim to resolve disputes and make enforceable decisions in their distinctive way. However, unlike courts, tribunals lack state enforcement power to function independently. Consequently, arbitrating parties have had to approach the courts for various supports. However, while supporting arbitration, the Nigerian courts have been criticised for overwhelmingly undermining party autonomy. Thus, the determination of the extent to which Nigerian courts should participate in arbitration remains topical.

This research reviewed the current regime governing the scope and limits to the court's roles in arbitration in Nigeria, aiming to find out the problematic areas where the court's roles have been a leeway to undermine party autonomy. The research found that the current practice in Nigeria generally observes party autonomy as an affirmative stance by the Nigerian courts and laws. It further found the areas where the Nigerian system has, nevertheless, created some leeway for the courts to undermine party autonomy. These include (i) the narrow phrasing and interpretation of Section 34 of the Act and some specific provisions, and their failure to set out a definite limit to courts' roles in arbitration, (ii) the application of the concept of constitutional supremacy which has been interpreted to allow Nigerian courts to participate in all cases including arbitration and override parties' agreement, (iii) absence of Institutionalised tracking and periodic recalibration of the relationship between the courts and arbitration, and (iv) judicialisation of administrative roles of the courts in arbitration.

To this end, a legal and analytical review of these problematic issues was conducted, particularly using some elements of the legal comparative approach to analyse the problems in the light of the related practices in some similar or advanced jurisdictions such as the United Kingdom, Ghana and Malaysia. Lessons were drawn from the analysis. Short- and long-term recommendations were, therefore, made for law reforms in Nigeria, particularly towards recalibrating the court's roles in arbitration such as to wedge the loopholes in the system without which recalcitrant parties and jurists could take advantage to undermine party autonomy.

Keywords: *Arbitration, party autonomy, judicial participation, court system, judiciary, arbitration tribunal, recalibrate, commercial arbitration, over-judicialisation.*

Author's Declaration

I declare that I am the sole author of this thesis. To the best of my knowledge, no part of the thesis is previously published or submitted for any degree, except where duly referenced.

Signed: Bamikole Martins Aduloju
Date: 28th October 2023

Dedication

First, to God Almighty— source of all knowledge.

And to my charming wife, Olufunke, and children ‘Desire, ‘Siji, and ‘Leke.

Then, my mum, Agnes Titilayo Aduloju, who passed at the zenith of this Research. May the good Lord of resurrection rest her soul.

Personal Statement

My early years in law practice were marked by fervent litigation. I worked for one of Nigeria's busiest litigation law firms, where I learnt to treasure courtroom battles, meticulously craft arguments, and tirelessly advocate for clients. Innocently but consciously, for more than a decade, I immersed myself in navigating the intricacies of the courtroom for only one goal— to win cases for clients— regardless of how the opposing party feel. And to its credit, I became a Notary Public in 2015.

But, over time, I began to feel the weight of the adversarial nature of court litigation and crave for a more constructive and collaborative approach to resolving disputes. My breaking point came when a Claimant (Ihuoma) in an employment suit I defended lost her life to poverty Six years after her alleged wrongful dismissal and 5 years into the case entangled with protracted technical objections while Ihuoma's entitlements was stayed pending conclusion of the suit, and sadly till her death. Ihuoma's story broke my one-sided view of dispute resolution.

Then, my turning point eventually came in 2017 when I had the opportunity to work on the litigation-fragment of two ongoing arbitration cases in my firm; one before ICSID (Case No. ARB/13/20) and another before IDRC London (Esso Exploration v. NNPC). Witnessing the process' less egoism and flexible nature, I was captivated by the potential to guide parties towards mutually beneficial resolutions without the fierce and protracted battles that often accompany court litigation. It was a revelation that sparked a deep desire within me to know more.

But, with time, I realised again that the smooth running and success of arbitration, from commencement to enforcement of awards, are fundamentally resting on its relationship with the law court! But I observed some sort of rivalry between arbitration and court-room lawyers, and a kind of subtle skepticism between arbitrators and judges— one suspecting the other of overstepping its boundaries. Amidst all these, I know that in 2017, the Supreme Court of Nigeria issued a Practice Direction on the relationship between courts and arbitration tribunals which was widely celebrated but it did not change the kind of mistrust and subtle animosity between the two systems and their practitioners. Then, I wondered what exactly the problem is. By my estimation, beyond the inspirational façade projecting Nigerian legal system as arbitration friendly, if the relationship between courts and tribunals is not recalibrated, businessmen, businesses, and the national economy would continue to agonize at the receiving end.

Providentially, when the opportunity came in 2019 to further my study to the PhD level, I did not hesitate to choose this topic, to enable me to understand the exact problem underpinning the imbalance in the relationship these two important institutions, and perhaps to come up with informed solutions.

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Many thanks and love to my parents, Engr Joseph Olaiya Aduloju and the late Mrs Agnes Aduloju, for their sacrifices, supports, and training through the years. I also offer my sincere love and thanks to my uncle and life coach: Professor Kelvin Aduloju and family, and also my parent-in-law, Dcn Gbenga and Grandma Omotola, for all their support during this study. My heartfelt appreciation goes to my siblings Kayode, Bobola, Bosede, Yemisi, Sunday, 'Tope, Sunkanmi, 'Jide, Wunmi and Ayomiposi, and their families. I am also grateful to all my brothers and sisters-in-law.

Special appreciation goes to my bosses— Dr Kayode Ajulo, who took time out of his busy schedule to visit me two times in Aberdeen during this research, Kehinde Ogunwunmiju SAN, Regina Okotie-Eboh, Kolawole Oloowere Esq, for all their encouragements. To my family at Afe Babalola & Co., Demola, Sunday, Olamide, Tunde, Alh Isiaka, Mike, Oby, and Friday. Thank you to my bothers Adeola Adedipe SAN and Oluwole Adaja, and their families. My gratitude also goes to the leadership and members of Winners Chapel International Aberdeen for all their support, especially Pastor Favour and family, Pastor Adeyinka and family, Evang. Olusoji Taiwo and family, Deacon Corinthian and Sis Pere-ere Duoduo, Pastor Osezua Ogudo and family, Dr Ajibola Bankole and family, Bro Lekan Azeez and his family; for their help, support, prayers, and advice.

List of Major Abbreviations

AA	-	Arbitration Act, 1996, United Kingdom
AAA	-	American Arbitration Association, New York (Established 1926)
ADRA	-	Alternative Dispute Resolution Act, Ghana,
All NLR	-	All Nigerian Law Reports
Arb Int'l	-	Arbitration International Journal, published by LCIA, lau nched in 1985
Arbitration Ordinance	-	Arbitration Ordinance, 1914, Nigeria, repealed in 1958
CA	-	Court of Appeal of Nigeria
CLRN	-	Commercial Law Report of Nigeria
FHA	-	Federal High Court of Nigeria
FWLR	-	Federation Weekly Law Report
Geneva Convention	-	Geneva Convention for the Execution of Foreign Arbitral Awards, Signed 26 September 1927
ICC	-	International Chambers of Commerce
ICSID	-	International Centre for the Settlement of International Disputes, Washington DC (Established 1965).
LCIA	-	London Court of International Arbitration, London (Established 1892).
LPELR	-	Law Pavillion Electronics Law Reports
Model Law	-	Model Law on International Commercial Arbitration, adopted 21 June 1985
New York Convention	-	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958
NWLR	-	Nigerian Weekly Law Report
Revised Model Law	-	Revisions to the Model Law, adopted December 2006.
Rome Convention	-	Rome Convention on the Law Applicable to Contractual Obligations
SCN	-	Supreme Court of Nigeria
SCY	-	Supreme Court Yearly
The Act, ACA	-	Arbitration and Conciliation Act, Nigeria, 1988 (Now Cap A18 Laws of the Federation of Nigeria, 1990)
UNCITRAL Model Law	-	UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006)
UNCITRAL	-	United Nations Commission on International Trade Law, Vienna (Established 1996)
W.L.R. N	-	Weekly Law Reports of Nigeria

List of Rules of Courts, National and International Legislation

Nigeria

Arbitration and Conciliation Act, Chapter A18, LFN, Nigeria 1990, 2004, 2017
Arbitration Ordinance 1914, Nigeria, (later renamed as Arbitration Act Cap. 13, 1958), s 15
Lagos State High Court Civil Procedure Rules, 2019, Order 15 Rules 3 and 4
Constitution of the Federal Republic of Nigeria, 1999 (Altered in 2003, 2007, 2011, and 2023), s 6(6)(a) –(b)
Federal High Court Act, Cap F12 LFN, Nigeria, s 13(1)-(2)
Federal High Court of Nigeria (Civil Procedures) Rules, 2018, Nigeria, O 52 r 3
Federal High Court of Nigeria Civil Procedure, 2009, O 2 r 1 and 2, O 34(6)
Gazette 980013 No. 34 1988 Decree No. 36 Arbitration, Nigeria
Legal Practitioner Act, Nigeria, Cap L15 LFN 2004, S. 24
Supreme Court Ordinance, 1914, Nigeria
Rivers State High Court Civil Procedure Rules, 2010, Nigeria, Order 32
Arbitration and Mediation Bill (Awaiting President Assent), Nigeria, s 52 and 85
Sherriff and Civil Process Act, Cap S19, LFN, Nigeria, 2004, s. 82
Supreme Court Practice Direction in Arbitration Clause in Commercial Contract (2017) Ref No. CJN/P.D./VOL.1/001; Paragraph 3(4) of the Directive of the Nigerian Judicial Institutes to all heads of Courts in Nigeria, in "Re: Arbitration Clause in Commercial Contract" (2017) Ref No: NJI/CJI/CON/IV 26th May 2017
The Arbitration Act (Cap. 13 Laws of the Federation of Nigeria 1958), Nigeria
The Judicature Act, Laws of Federation of Nigeria, 1873

Ghana

Alternative Dispute Resolution Act, Ghana, 2010. Ss 18(3), 26(1)
High Court (Civil Procedure) (Amendment) Rules of 2020, CI 133, Ghana
The Land Act, Ghana, Act 1036 2020, s 989(1)

Cameroon

Civil Rules Code, Cameroon, 2010, s 112
Uniform Act on Arbitration, OHADA

Singapore

Arbitration Act, 2001, Singapore
International Arbitration Act, Singapore, 2021
International Arbitration Act, 1994, Singapore, s 5

China

Arbitration Law, China, 2017, Articles 5 and 26
Civil Procedure Law of the Peoples' Republic of China, 1999, Article III

France

Arbitration Decree (No. 2011-48), France, January 2011, Articles 1452 and 1473

Hong Kong

Arbitration Ordinance, Cap 609 Laws of Hong Kong 2011, Ss 13 and 24

United Kingdom
Arbitration (Scotland) Act 2010. Ss 1(c), 21, 22, and Schedule 1 Rule 7
Arbitration Act, 1996, England, Wales and Northern Ireland, Ss 1(c), s 18(3)
English Arbitration Act 1698, s 1
John Locke' Statute (on Arbitration), United Kingdom, 1698
English Arbitration Act, 1975, s 38
UK Public General Act, United Kingdom, 1965

Malaysia
Arbitration Act, 2005, Malaysia Act 646, ss 13 (5), (6) and 17(8)

Kenya, Benin Republic, and South Africa
Arbitration Act, Cap 49 2012, Kenya, s 10
International Arbitration Act, Kenya, 2013
High Court Civil Procedure Code, Benin Republic, 2019, Rule 32(XVII)
High Court Civil Procedure Code, Benin Republic, 2019, Rule 32(XVII)
International Arbitration Act, South Africa, Cap 15 2017

Finland
Arbitration Act, No. 967 1992, Finland (Amended in 2015 as No. 745)

India and Japan
Arbitration and Conciliation (Amendment) Act, India, 1996, 2019 and 2021, s 5
Arbitration Law, Japan, Law No. 138 2003, Article 14

United Arab Emirate
Arbitration Law, No. 6 of 2018 Federal Law, United Arab Emirate

United State of America and Argentina
Federal Arbitration Act, US, 1925 (9 U.S.C. § 200)
International Commercial Arbitration Law, No. 27, 449 2018, Argentina

International Instruments
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
UNCITRAL Model Law on International Commercial Arbitration, 1985
The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927
UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021)

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Part I

Introduction

Chapter One

Introductory Background to the Research

"The role of the courts in arbitration is an engaging topic for both arbitrators and judges and it continues to be controversial as the precise extent of (acceptable) judicial intervention in arbitration has not been uniformly determined by arbitration laws."[1]

1.0 Introduction

Arbitration is an adjudicatory method of dispute settlement where the parties submit their grievances to a third party whose decision they agree to trust and accept as binding.[2] The 2021 arbitration survey conducted by Queen Mary's School of International Arbitration reported that the use of arbitration for the settlement of commercial disputes generally, and particularly for disputes hitherto confined to court litigation, has significantly increased more than ever before.[3] Statistics published by some major arbitration institutions have shown a continuous uptrend in the choice of arbitration (domestic and international) as the preferred means of settling commercial disputes globally.[4] Abdel Raouf further observes that not only has arbitration become the standard method of settlement of commercial disputes but also investment disputes at all level, ranging from disputes emanating from a simple contract to a complex transnational business.[5]

Further, some jurisdictions where international arbitration had, in the past, been seemingly unpopular, such as China, UAE, and generally

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1 Edward Torgbor, 'Courts and the Effectiveness of Arbitration in Africa' (2017) Vol 33 Arbitration International 369, 379.

2 Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 2; Olakunle Orojo and Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates 1999) 3.

3 Queen Mary's School of International Arbitration, *International Arbitration Survey: Adapting Arbitration to a Changing World* (QMU London 2018). <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf > accessed 12 January 2023.

4 Markus Altenkirch and Jan Frohloff, *Global Arbitration Cases Still Rise – Arbitral Institutions' Caseload Statistics for 2015* (2016) < https://www.globalarbitrationnews.com/2016/08/25/global-arbitration-cases-still-rise-arbitral-institutions-caseload-statistics-2015/> accessed 21 March 2019.

5 Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros Brekoulakis, Julian Lew, and Lonkos Mistelis, *The Evolution & Future of Arbitration* (Kluwer Law International 2016).

Africa, have increasingly embraced arbitration as a preferred system to settle international commercial disputes.[6] The nature of disputes being arbitrated has also changed in diversity— arbitration is now being utilized to resolve some hitherto 'inarbitrable' disputes such as matrimonial matters,[7] medical negligence,[8] and antitrust cases.[9] Thus, with globalization and the resultant increase in the volume of trade and commerce being transacted globally, and the disputes emanating from it, the frontier of arbitration continues to spread even to some fields perhaps yet unthinkable — Butcher-Lyden, for instance, has recommended mandatory statutory arbitration to settle election disputes in the United States.[10]

Many commentators have attributed the growth of arbitration to its private and autonomous nature.[11] While its private nature has birthed some of its fundamental features such as confidentiality, limited public access, preservation of business relationship during and after proceedings, etc., its autonomous nature enables procedural flexibility, informality, parties' choice of law applicable to the contract and the appointment of an arbitrator, the neutrality of forum, speed, and finality of an arbitrator's decision, etc.[12] These features are preserved by the principle of 'party autonomy' or its broader doctrine of 'arbitral autonomy.'[13] Party autonomy is one of the fundamental principles sustaining arbitration.[14] By this doctrine, arbitrating parties can agree

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6 Kim Joongi, 'International Arbitration in East Asia: From Emulation to Innovation' (2014) Vol. 4 *The Arbitration Brief* 1; Lise Bosman, *Arbitration in Africa: A Practitioner's Guide* (Wolters Kluwer 2013); Guy Pendell, *The Rise and Rise of the Arbitration Institution* (2011) <http://kluwerarbitrationblog.com/blog/2011/11/30/the-rise-and-rise-of-the-arbitrationinstitution/> accessed 14 March 2019.

7 Pratyusha Kar, 'Divorce Disputes – Mediation and Arbitration' [2018] Vol. 3 Issue II International Journal of Socio-Legal Analysis and Rural Development 42 – 47. See also the decision of the Royal Court of Justice in BG v. GB [2019] EWFC 7 < http://www.bailii.org/ew/cases/EWFC/HCJ/2019/7.html> accessed 11 May 2019.

8 US Human Resource Division, *Medical Malpractice: Alternatives to* Litigation (Report to Congressional Committee GAO/HRD.92.28 2021) 8; Kathleen Meredith, *Contractual Arbitration of Medical Negligence Claims: Is it a Practical Option* (Wiley 2009).

9 Samuel Salako, *Arbitration and Anti-Trust: An Examination of the Arbitrability of Anti-Trust Disputes in Major Jurisdictions* (LAP Lambert Academic Publishing 2016).

10 Erin Butcher-Lyden, 'The Need for Mandatory Mediation and Arbitration in Election Disputes' (2010) Vol. 25 2 *Ohio State Journal on Dispute Resolution* 531 - 574.

11 Ali Khan, 'Arbitral Autonomy' (2013) Vol. 74 No. 1 *Louisiana Law Review* 41 – 81; Sunday Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality' (2015) Vol. 6. 1 *Afe Babalola University J. of Sust. Dev. Law and Policy* 222-246.

12 Stuart Dutson, Andy Moody, an Neil Newing, *International Arbitration: A Practical Guide* (Global Law and Business London 2012) 13-16.

13 ibid.

14 Sunday Fagbemi, (n 11) 225.

to opt for arbitration to settle their disputes and have a say on where, when, how and whom to resolve their disputes.[15]

Therefore, the principle of party autonomy generally holds that since arbitrating parties have chosen to submit their grievances to arbitration instead of a law court, the parties and their arbitrators should have control over the process, with the courts playing only a defined role where necessary.[16] However, it is essential to note that there are two popular schools of thought on this subject. The first set of proponents, like Capper, argued that given the principle of arbitral autonomy, arbitration should be entirely self-sufficient, independent of court-litigation.[17] Conversely, Khan and Carbonneau have argued that the principle of arbitral autonomy should not bar the courts from intervening in the arbitration process.[18] Nevertheless, in practice, 'nearly all arbitration laws, rules, and conventions which recognize the principle of party or arbitral autonomy' also provide for the roles of courts in arbitration.[19]

To this end, as arbitration continues to take a significant chunk of the cases that would traditionally go to court, particularly in commercial disputes, the court still appears to be the mainstay of the adjudicatory system and the central support system for arbitration.[20] It uses the state's powers to compel enforcement of proceedings and decisions.[21] Moreover, arbitration is regarded as a system borne out of the freedom given to the parties under the law of contract, which could be validly exercised only within the law,[22] and that the courts, being arguably the ultimate guardian of laws in the various states, wield power to

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15 Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice* (2nd edn, Centre for Commercial Law Development 2013) 25.
16 ibid 49.
17 Richard Allan Horning, 'Interim Measures of Protection; Security for Claims and Costs and Commentary on the WIPO Emergency Relief Rules (in Toto)' (1998) Article 46, 9 AM. REV. *International Arbitration* 155, 156.
18 Ali Khan (n 11) 32; Thomas Carbonneau, 'At the CrossRoads of Legitimacy and Arbitral Autonomy' (2005) Vol. 16 *The American Review of International Arbitration* 213.
19 Sunday Fagbemi (n 11) 228.
20 Margaret Wang, 'Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?' [2000] Vol.16 Iss 2 *Arbitration International* 189*,* 191.
21 ibid; Ali Khan (n 11) 33.
22 Tunde Oyekunle and Bayo Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (LexisNexis London 2018)16.

supervise the exercise of such a contractual right by the arbitrating parties.[23]

Thus, practice experience has shown that arbitration is not absolutely autonomous from the courts because it needs their powers to function optimally.[24] Redfern and Hunter gave an example of a legislative experiment by the Belgium government to completely exclude their courts from intervening in international arbitration. Even though the policy was made to attract international arbitration to Belgium, it dissuaded arbitration users from choosing Belgium as a seat of arbitration out of fear of the absence of courts for assistance and enforcement.[25]

Thus, in practice, some areas where arbitrating parties often seek the court's participation in arbitration include; the determination of the tribunal's jurisdiction, the appointment of an arbitrator, stay of court litigation for arbitration, interim measures to protect the subject of arbitration, injuncting adverse litigation file against arbitration, issuance of subpoenas to assist in gathering evidence, recognition/enforcement of arbitral awards, etc.[26]

Curiously, therefore, as essential and unavoidable the court's participation in the areas highlighted above in arbitration appears, it poses limitations to the parties' ability to enjoy maximum autonomy to determine 'who', 'what', 'when', 'why', and 'where', and how their disputes are resolved. Based on additional factors, including public policy and national sovereignty, national and international arbitration laws provide mandatory provisions that practically limit what the parties can agree upon while exercising their right to party

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[23] ibid; Mary Hiscock, 'Judicial Support of Arbitration' (2018) 11 *Contemp. Asia Arb*. J. 1, 2.

[24] Harris v. Reynolds (1845) 7 Q.B. 71; Obembe v. Wemabod Estates Ltd (1977) LPELR2161(SC). See also Michael Kerr, 'Arbitration and the Courts: the UNCITRAL Model Law' (1985) 34 *Int'l & Comp. L.Q.* 1, 1; George A. Bermann, 'What does it mean to be Pro-arbitration?' (2018) Vol. 34 *Arbitration International* 341-353, 343.

[25] Nigel Blackaby and others (n 2) 417.

[26] Julian Lew, 'Does National Court Involvement Undermine the International Arbitration Process', (2009) 24 *Am. U. International L. Rev.* 489; Edward Torgbor (n 1) 394. See also: James Allsop and Clyde Croft, 'Judicial Support of Arbitration' (2014) A Paper Presented at the APRAG Tentch Anniversary Conference, Melbourne, Australasian Legal Info. Inst. <http://classic.austlii.edu.au/au/journals/FedJSchol/2014/5.html> accessed 19 February 2019.

autonomy.[27] These include the acceptable format of the arbitration agreement, the mandatory appellate jurisdiction of a court over arbitration award, mandatory observance of the principle of natural justice by an arbitrator, the acceptable format of an award, restriction on an agreement to affect a third party, the court's power to grant anti-arbitration injunctions, etc.

To this end, while the court's participation in arbitration is essential, and even unavoidable, particularly to the growth of arbitration, if the scope and limits of the court's involvement in arbitration is not cautiously defined and managed, it may undermine the right of arbitrating parties to enjoy party autonomy which is the bedrock of arbitration.[28] In practice, therefore, there has always been tension between arbitration and the courts, particularly concerning where and when the court's participation in arbitration necessarily supports arbitration or unnecessarily undermines the principle of party autonomy.[29] This is because when the scope and limits of the court's involvement in arbitration are not ascertainable in a jurisdiction, it causes inconsistency, disorder, and uncertainties in the system.[30] Inexperienced or boisterous judges could then have a leeway to undermine party autonomy. At the same time, recalcitrant parties too could take advantage of using litigation to disrupt arbitration. Ultimately, these dissuading factors could discourage arbitration users from patronizing such jurisdictions.[31]

The issue surrounding the need to recalibrate the relationship between arbitration and the courts, particularly in a jurisdiction facing challenges in this area, is therefore of global significance for the arbitration system.[32] As Gomez put it, ascertaining the necessary boundary of court's intervention in arbitration has the 'potential of preventing and remedying injustices or abuses— either by the parties

[27] Fagbemi (n 11) 240.
[28] ibid 239-244.
[29] Edward Torgbor (n 1) 379.
[30] ibid.
[31] Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers 2012) 45.
[32] ibid 41.

or the arbitral tribunal.'[33] Rawls also notes a direct link between the economic development of any jurisdiction and transparency or certainty in her arbitration system.[34] However, despite its importance, Torgbor notes that 'the precise extent of judicial intervention in arbitration (is yet) not uniformly determined by arbitration laws (in many jurisdictions)."[35] This situation usually causes tension between the national courts and arbitration tribunals, which Botchway argued could be resolved if there are 'clear and authoritative rules that indicate the structure of the relations between both systems', but unfortunately, many jurisdictions still struggle to navigate this difficult terrain.[36]

Thus, being the maker of the arbitration laws and the managers of the national courts, delineating the boundaries of judicial participation in arbitration largely falls on every national government, which needs to organize its legal system to strike the right balance (recalibrate) between arbitration and the courts. However, this has been challenging for many nations and international institutions.[37] For instance, in terms of how complex this subject has been even for the United Nations, Gomez observes:

> Notwithstanding the desire of the Model Law to foster certainty regarding the role of courts in relation to international arbitration, 'the line between the restriction on court intervention provided for under article 5 of the Model Law, and the residual inherent power of the court is not always easy to determine. National courts have (also) relied on different approaches to manage 'the tension between the need for judicial restraint and the understandable inclination of some judges to intervene to prevent abuses of process, but the outcome always depends on the limitations imposed by their own legal systems and the state of their domestic case law.[38]

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[33] Manuel Gomez, 'Article 5: Extent of Court Intervention' in Ilias Bantekas, et al., *UNCITRAL Model Law on International commercial Arbitration* (Cambridge Press, 2020) 84.

[34] Amanda Rawls, 'Improving the Impact of International Arbitration on Economic Development' (2018) *Kluwer Law International* 96; Mary Hiscock (n 23) 2.

[35] Torgbo (n 1) 379.

[36] Francis Botchway, 'African National Courts, International Arbitral Tribunals ant the Quest for Harmonious Relations' in Richard Frimpong Oppong, *A Commitment to Law, Development and Public Policy: A Festschrift in Honour of Nana Dr SKB Asante* (Wildy Simmonds and Hill Publishing 2016) 219.

[37] Manuel Gomez (n 33) 95.

[38] ibid, 95.

Accordingly, framing the permissible extent to which the courts ought, or ought not, to involve in arbitration remains topical and controversial among scholars, jurists, and arbitration users.[39] This research is, therefore, an effort to investigate the causes of these challenges and to recalibrate (i.e strike the right balance in) the relationship between arbitration and the Nigerian courts, such as to manage the extent to which party autonomy is undermined.

1.1 Problem Statement

While in some jurisdictions, such as England, France, and the United States of America, the determination of the extent to which a court would participate in arbitration is being recurrently reviewed and repositioned (recalibrated), and could be said to be relatively ascertainable,[40] but this area is still largely problematic in some other jurisdictions such as Nigeria.[41] In Nigeria, the continuous arguments surrounding the roles of courts in arbitration have generated contentious issues such as: (i) the unsettled judicial positions on some novel matters surrounding the roles of courts that are not covered in the Nigerian Arbitration and Conciliation Act (the Act), (ii) some inconsistent decisions of the Nigerian courts emanating from different selective interpretation of the provisions of the Act, (iii) the presence of some mandatory provisions of the Act that undermine the principle of party autonomy, (iv) the absence of default provisions to regulate some of the roles often left to the courts to play in arbitration, (v) some complexities arising from the question as to which of the courts is competent to play some specific roles in arbitration, and (vi) some complexities have arisen from the interpretation and application of some conflicting provisions of the Act relating to the extent of the roles of the court in arbitration, etc.

Simply put, the Nigerian courts, like many other jurisdictions, are caught between the duty to uphold the principle of party or arbitral autonomy by allowing the parties to construct their arbitration

[39] Edward Torgbor (n 1) 379.
[40] Elizabeth Gloster, 'Symbiosis or Sadomasochism? The relationship between the courts and arbitration' (2018) Vol. 34 *Arbitration International* 321-339.
[41] Emilia Onyema, *Rethinking the Role of African National Courts in Arbitration* (Wotler Kluwer 2018) 65;

proceedings as they wish and balancing this with the court's duty to participate in arbitration within the confines of the law which is still indeterminate in many respects. Hence, the controversies trailing some provisions of the Nigerian Arbitration Act, and some decisions of the courts in cases emanating from arbitration. Therefore, this research focuses on critically examining this subject to find a way to rebalance (recalibrate) the relationship between the courts and arbitration in Nigeria without which the Nigerian regime will remain uncertain and unsettled for the arbitrating parties, thereby making the jurisdiction unenticing to arbitration users.

1.2 Research Aim, Question, and Objectives

1.2.1 Research Aim

This research aims to critically examine the practices and concepts of party autonomy and judicial participation in commercial arbitration in Nigeria with the view to recalibrate the role of the Nigerian courts in arbitration.

1.2.2 Research Question

To what extent do the Nigerian courts observe or undermine party autonomy in their participation in the commercial arbitration cases under the current regime in Nigeria? And how can the roles of Nigerian courts in arbitration be crafted to achieve a balance between party autonomy and judicial intervention with the ultimate aim of improving certainty for users?

1.2.3 Research Objectives

To achieve the research aim, therefore, the following objectives are set out for the research:

1. To critically examine the current legal framework underpinning the present regime regarding the roles of the Nigerian courts in commercial arbitration.
2. To analytically review the extent to which party autonomy is observed or undermined and the gaps/challenges in the current legal

framework and practices relating to the roles of the Nigerian courts in commercial arbitration.

3. To critically and methodically appraise the gaps/challenges in the current legal framework and practices on the roles of the Nigerian courts in commercial arbitration and identify the underpinning causes, using some other relevant jurisdictions as comparators.
4. To draw lessons from the analytical review and recommend ways to recalibrate the roles of the Nigerian courts in commercial arbitration, restoring a level of certainty into the system, and without undermining party autonomy.

1.3 Research Methodology

Although the prevailing opinion within the academic community is that research must not rigidly follow a particular method or procedure already or commonly used in the conduct of past research,[42] it is still generally recommended that, regardless of the uniqueness or flexibility of the research methodology deployed, any research should still find its place among the established methodologies.[43] Nonetheless, the prevailing suggestion among researchers is that the most feasible methodology to conduct research should be determined by the research objectives and aim.[44] Thus, the legal doctrinal methodology is the most realistic methodology to achieve the objectives and aim of this research. Although this research seeks to investigate some social-legal phenomena, it is still essentially exploratory, hence the choice of legal doctrinal methodology. More so, the research question has no statistical elements, therefore, it is not necessary to do a quantitative research.

The legal doctrinal methodology is the traditional approach to legal researching, where a subject or problem is investigated by collecting data, primarily from legal texts, for analysis through established methods of investigating legal problems such as interpretivism, constructivism,

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[42] Paul Atkinson, Sara Delamont, et. al., *Sage Research Methods Foundations* (1st edn, Sage Publications Ltd 2021) 623.
[43] Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage Publications 2008) 17.
[44] William Trochim, 'Social Research Methods – Knowledge Base – Home' (2006) <http://socialresearchmethods.net/kb/> accessed 5 January 2020.

functional, and deductive reasoning methods, etc. In this research, however, some other relevant research methods or tools are deployed to use the legal doctrinal methodology fully. The methods include the analytical method, the constructivist method, the historical method, and some elements of the comparative analysis method.

1.4 Narrowing the Research Methodology on meeting the Research Aim and Objectives

In narrowing the key methodology and methods to meet the research aim and objectives, the exploratory part of the research objectives, which is to critically examine the roles of the Nigerian courts in commercial arbitration within the current regime and the extent to which it upholds or undermines party autonomy, will be investigated by collecting data (legal texts/subjects) through desk-based reading. By this, data will be gathered from authoritative sources like the Nigerian arbitration legislation, domestic and foreign case law on arbitration, relevant international instruments on arbitration, institutional documents, academic literature, scholarly comments, policy documents and doctrinal literature, etc., as relating to arbitration practice and the roles of court in arbitration, which are the main source of data underpinning the positive laws on the research subject.

Thus, the exploratory part of the research focuses on five major substantive areas of law, which are: commercial arbitration laws and practices in Nigeria and some comparator jurisdictions, the doctrine of party or arbitral autonomy and its application in practice, the court's interpretation and application of the arbitration laws in Nigeria and some comparator jurisdictions, laws and practices surrounding judicial and supervisory powers of courts over arbitration, and the legal theories relating to arbitration. Where necessary, historical and theoretical methods or tools will be used in discussing the background of the research.

Subsequently, the data collected from the above will be subjected to critical analysis using some established methods of legal reasoning and tools of qualitative researching, which are: deductive, analytical, interpretivism, and constructionist tools, without the need for fieldwork.

This will enable the researcher to evaluate the gaps in the Nigerian system and factors responsible for the gaps.

Further, the findings garnered from this analytical review will be subjected to some elements of comparative study, using the English jurisdiction as the major comparator among others. However, it is essential to observe that the method adopted here is not the legal comparative methodology. Instead, it is a selective comparative investigation, limited to looking beyond Nigeria but only within the areas of practice where gaps are found in the Nigerian regime and the focus is to draw valuable lessons and to reconcile the Nigerian regime with best practices. To this end, the analytical method will also be valuable to make useful recommendation on how to recalibrate the relationship between the courts and arbitration in Nigeria without undermining party autonomy and to create a level of certainty in the system.

1.3.1 Justification for the Choice of the English and other Legal Systems as Legal Comparators

As discussed earlier, Nigeria is the primary case study of this research, and even though the research engages with some comparative elements, this work is not a typical comparative legal research. Moreover, the Problem Statement has revealed the rationale behind the choice of Nigeria for this research. Edward Eberle, a legal comparatist, opines that the striking benefit of comparative legal analysis is to have a comparator (other legal system or subject) against which the gaps in the primary case study can be tested to 'illuminate different perspectives that may yield a deeper understanding of the primary legal system.'[45] Additionally, Robert Yin observes that 'the main tool for any comparative analysis is the use of case studies.'[46] In investigating this research's aim and objectives, the English jurisdiction is the primary comparator to engage the gaps plaguing the Nigerian regime. Suffice it to say that, where necessary, examples are also drawn from other jurisdictions, such as Ghana, China, Malaysia, France, and the United States of America.

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[45] Edward Eberle, 'The Methodology of Comparative Law' (2011) Vol. 16:Iss. 1 Article 2 *Roger Williams University Law Review* 53-54.

[46] Robert Yin, *Case Study Research: Design and Methods* (Sage, Newbury Park CA 1994) 68.

Xanthaki suggests that when selecting a case study, it is essential 'to ensure that each case study selected is relevant to draw appropriate conclusions' to achieve the aim of a research,[47] and that a researcher using comparators at any level 'should be able to give good reasons why her choice is fitting and acceptable from a scholarly point of view.'[48] In choosing the comparators for this research's comparative element, the first factor considered is that Nigeria belongs to the same legal family as the English legal system. As recommended by Pieters, if ra esearch is at a mere 'micro-comparison level,' it will be helpful to 'compare national legal arrangements of countries belonging to the same legal family.'[49]

Moreso, the research, being one at micro-comparison level,[50] the English jurisdiction (and others such as Ghana and Malysia) are selected as comparators within the same legal family as Nigeria because they have the same common law tradition, they have similar judicial frameworks, and the legal philosophies and practices in one of the jurisdictions influence others.[51] As noted by Edward, the selection of comparators that belong to the same legal family 'enables a researcher to step outside the primary case study, looking to similar others for illumination in the hope to gain more insight into both the compared and comparator-jurisdictions.'[52]

Another important commonality in the case study is that their current frameworks concerning the roles of courts in arbitration were inspired by the same international soft law (UNCITRAL Model Law). Thus, investigating the domestication and workings of some relevant provisions of UNCITRAL Model Law across the selected jurisdictions helps to validate the research outcome. Even though the selected

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47 Helen Xanthaki, 'Legal Transplants in Legislation : Defusing the Trap' (2018) 57 (3) *International Comparative Law* Quarterly 662.

48 ibid. See also: Mark Van Hoeche, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 135 4.

49 Danny Pieters, 'Functions of Comparative Law and Practical Methodology of Comparing, Or How the Goal determines the Road!' <https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf>15 accessed 3 July 2019.

50 ibid.

51 Theodore Plucknett, *A Concise History of the Common Law* (1st edn, Liberty Fund Inc 2010); John Assein, *Introduction to Nigerian Legal System* (Sam Bookman Publishers 1998) 76.

52 Edward Eberle, 'The Methodology of Comparative Law' (2011) Vol. 16:Iss. 1 Article 2 *Roger Williams University Law Review* 53-54.

jurisdictions share a common source of international soft law and legal tradition in the subject area of study, some arbitration surveys have shown that the English jurisdiction is the most preferred one globally, which has primarily attributed to the relatively advanced regime governing the relationship between the courts and arbitration compared to Nigeria.[53] Thus, a comparative engagement with the English jurisdiction regarding the gaps in the Nigerian regime will explain the factors underpinning the different practice experiences that exist despite their common source.

Further, almost all the relevant statutes, policies, doctrines, and practices surrounding arbitration in Nigeria to be examined and analyzed in this research can be traced to English jurisdiction due to the colonial ties between the jurisdictions. Moreover, the origins of the statutory frameworks regulating the roles of the Nigerian courts in arbitration can be traced to English jurisdiction and are still influenced by it. For instance, even though the current Nigerian court system is fashioned after the US system, court practices, legal theories, and judgments from English jurisdiction are more persuasive than those of the US within Nigeria.[54] Thus, these historical and legal ties make the English and some other jurisdictions appropriate as comparators in this research.[55]

More so, preliminary review has shown that even though Nigeria sourced its arbitration laws and practices in her formative stage from the English jurisdiction, arbitration regimes in the English jurisdiction have witnessed several reforms over the years, with her present status as being the most preferred seat of arbitration, unlike Nigeria.[56] Thus, setting the gaps in the Nigerian system comparatively against the development so far made within the English jurisdiction and influencer, will be helpful to achieve the aim and objectives of this research.

Furthermore, in some instances, some jurisdictions are selected because of proximity in location and system with Nigeria such as Ghana. Besides that the Ghanaian regime shares similar common law traditions and a legal historical and practice connection with the English and Nigerian

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53 Queen Mary (n 3).
54 Ovo Efemini, *Modern Nigerian Constitutional Law: Practices, Principles and Precedents* (1st edn, African Books Collective 2017) 122.
55 Alan Watson, *Legal Transplants* (2nd edn, University of Georgia Press 1993) 316.
56 (n 3).

regimes, Ghana is within the same West African sub-region as Nigeria and has the most recent amended arbitration regime in the sub-region.[57] Moreover, the two jurisdictions have witnessed similar constitutional law development;[58] they run similar court practices and administration of civil justice, which are critical to this research, particularly as they affect the roles of the court in arbitration and the observance of party autonomy.

Finally, the prospects for possible legal transplantation, if needs be, is considered in the choice of the comparators. At the risk of being 'ethnocentric,'[59] the research hopes to find and draw useful inspiration, lessons, or models for recommendations on policy reforms to be adapted or transplanted to improve the Nigerian regime. To this end, practices in any other relevant jurisdiction useful for this purpose will be comparatively examined besides the major comparator. As observed by Watson, a comparative analysis should ultimately have a utilitarian value: 'improvement made possible in one legal system as a result of the knowledge of the rules and practices in another system.'[60]

1.3.2 Method of Examining Laws and Practices of the Comparators

As noted earlier, this research is not a legal comparative study. However, some elements of comparative analysis are deployed for the sole purpose of relating the practice in the comparators' jurisdictions with the gaps analytically deduced from the Nigerian regime. The decision regarding the way to conduct research in the comparative part of this study is designed to achieve the four research objectives earlier discussed. To achieve the first objective, the research identified the substantive laws, doctrines, philosophies, and practices relating to the court's participation in arbitration in the English jurisdiction, particularly those transplanted to Nigeria. It further examined how the Nigerian regime had received and progressed with the inherited system. Then, the research investigated how the English jurisdiction has fared over time, reconciled it with the Nigerian regime, and critically analyse what has crystalized in one regime that is not present in the other and how it

[57] Alternative Dispute Resolution Act, Ghana, 2010.
[58] Ovo Efemini (n 54) 87.
[59] Danny Pieters (n 49) 26-28.
[60] Alan Watson (n 55).

applies in practice. It is reasoned that comparing the two jurisdictions through this approach will help in better understanding the gaps between the present regime in Nigeria and what may be described as 'international best practice'.

To achieve the second and third objectives using the comparative approach, it studied the extent to which the principle of party autonomy is practically reflected in the laws regulating the roles of the court in arbitration, particularly under the relevant statutes and cases. It studied how the comparators observe this doctrine similarly and differently to Nigeria. Thus, this test of the experience of and practice in other jurisdictions will expand knowledge about the relevance or current state of observance and application of the doctrine of party or arbitral autonomy in determining the extent to which courts should participate in arbitration in Nigeria.

1.4 Outline of Chapters

The thesis is broadly split into three segments, differentiated as Parts I, II, and III. The first part (chapters 1 and 2) introduces the research subject and problem. It then conveys how the research aims to investigate the research subject to solve the research problem. It then sets out the significance of conducting the study and what it will contribute to the body of knowledge and foreseeable economic prosperity in Nigeria. The first part concludes by discussing the historical and theoretical background to the research, as well as clarifying some basic concepts and principles relevant to the subject of study and necessary background knowledge regarding a better understanding of the research subject.

Part II of the research (chapters 3, 4, and 5) focuses on the legal framework underpinning the present regime, the roles of the Nigerian courts in commercial arbitration and how (and to what extent) the legal framework and the practices ensuing from it are observant of the doctrine of party or arbitral autonomy. This part discusses the roles of courts in arbitration from three perspectives, which in this thesis are called the 'windows' of court participation in arbitration. These are the pre-commencement roles, the court's roles during proceedings, and the post-

award roles of the courts. A chapter is dedicated to critically examining the laws and practices on each window of court participation in arbitration, and the gaps in the system are analytically unravelled.

Part III of the research (chapters 6, 7, and 8) methodically filters the gaps or challenges identified from the three windows of court participation in arbitration, and analytically examines them to understand the factors responsible for the identified problems or gaps. It then uses related practices dominantly from the English jurisdiction and other jurisdictions, such as Ghana, China, and France, etc., as comparators to further analyze the reasons for the gaps in the Nigerian regime. It concludes by drawing lessons from the analytical review and findings made. Then it recommends way to recalibrate the relationship between the Nigerian courts and arbitration with the view of having a level of certainty in the system, and without undermining party autonomy.

1.5 Significance of the Research

One of the major impacts of globalization on the economic landscape of countries in the contemporary society is that for any state to achieve satisfying economic development or prosperity, it must engage in trades, commerce, and investments domestically and with other countries.[61] Meanwhile, research has shown that for a state to be attractive for businesses from both domestic and foreign investors, its dispute resolution mechanism or justice system must be ascertainable and efficient.[62] For instance, research has shown that a major catalyst to economic development of a nation is the inflow of Foreign direct investment (FDI) which is observed to be essentially influenced by the efficacy of international commercial arbitration in a country.[63] In a research conducted by Myburgh and Paniague about how reforms in arbitration system do impact on the volume of FDI and resultant economic growth, it was observed that within the first five years of the adoption of the New York Convention on the Recognition of Foreign

[61] Cherie O'Neal Taylor, 'Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?' (1996-1997) 17 *Nw. J. Int'l L. & Bus.* 850.
[62] ibid.
[63] Andrew Myburgh and Jordi Paniague, 'Does International Commercial Arbitration Promote Foreign Direct Investment' (2016) 59 *JL & Econ* 597.

Awards (NYC) which was a major reform in the relationship between the domestic courts and arbitration, the member states recorded unprecedented geometric growth in the volume of FDI inflow, and trade increased by 15% to 39% as against 2% growth prior to NYC ratification in those countries.

Another study conducted by the office of The Commonwealth Head of Government (COHGM) in 2019 has shown that small-to-medium-sized-enterprises (SMEs), making up 95% to 99% of the private sector in the Commonwealth countries, would gain more opportunities when there is effective and ascertainable framework (particularly in terms of the relationship between courts and arbitration) to resolve cross-border commercial disputes.[64] Further, in terms of developing economies like Nigeria, Meltz observes that reforms in the arbitration system, and by extension its relationship with the court system, is a crucial condition precedent to attract investment and create employment, critical infrastructure, skill transfer, trades and investments, trainings, etc., in those countries.[65] This is because economic development is retarded in the jurisdiction that lacks ascertainable or effective framework to resolve commercial disputes. This is because businessmen involving in both domestic and cross-border, particularly the capital-intensive, commercial transactions would find a jurisdiction attractive for business only when they could ascertain access to, effective institutions, and transparency in how their disputes are resolved.[66] Thus, when there is an effective regime on the relationship between the arbitration system and the national courts in a country, economic development and prosperity of such a country is relatively assured, *ceteris paribus*.

In narrowing the foregoing to the Nigerian jurisdiction and this research, uncovering the problems plaguing the relationship between Nigerian courts and arbitration system, and finding practical solutions to

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64 The Commonwealth, 'How a robust international arbitration framework can boost global trade and economic growth' <Blog: How a robust international arbitration framework can boost global trade and economic growth | Commonwealth (thecommonwealth.org)> published 7 November 2019 accessed 20 September 2023.

65 Daniel Meltz, 'International Arbitration as An Instrument of Economic Development: The Indo-pacific Case Study' (published 29 April 2022), *Kluwer Arbitration Blog* <International Arbitration as an Instrument of Economic Development: The Indo-Pacific Case Study - Kluwer Arbitration Blog> accessed 21 September 2023.

66 Amanda Rawls (n 34) 97.

recalibrate the relationship, would impact positively on the Nigerian economic growth. As observed by Aje-Famuyide and Akano, Nigeria is yet to become a preferred seat of international commercial arbitration essentially because the current quality of 'judicial support and supervision which are essential factors determining the attractiveness of a jurisdiction.'[67] More so, according to the 2018 Queen Mary's Arbitration Survey, a major factor the users of arbitration consider in selecting a preferred seat is the extent to which the national courts in such jurisdiction observe party autonomy and support arbitration.[68] Thus, being a country with the largest population, highest Gross Domestic Product (GDP), and volume of commercial transactions in Africa,[69] an analytical review of the roles of the Nigerian courts within the space of commercial arbitration (domestic and international) towards recalibrating the current regime, making it attractive to more business is essential to the growth and sustenance of commercial arbitration in Nigeria, and the country's economic development generally.[70]

1.6 Originality and Contributions to Existing Knowledge

Considering the significance of effective judicial support and supervision of commercial arbitration to the economic prosperity of Nigeria and her sub-Saharan region, a research to resolve the problems around the extent to which a Nigerian court should participate in arbitration, and recalibrate the relationship, is not only topical but also timely. Thus, though the broad subject under which this research falls is not novel, what makes the research innovative to the body of knowledge in this field are the approach to the investigation of the research subject, the case study selected, and the research outcome.

Firstly, existing body of literature on the roles of the courts in commercial arbitration within the African space have been the subject of several

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[67] Olufunke Aje-Famuyide and Nimisore Akano, 'Challenges of Nigeria as a Preferable Seat of International Commercial Arbitration' (2021) (18) 11-32 *Reality of Politics* 24.

[68] Queen Mary's School of International Arbitration, 'International Arbitration Survey: The Evolution of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdfInternational-Arbitration-Survey-report.pdf> accessed 12 March 2019.

[69] Statista, 'Africa Countries with the Highest Gross Domestic Product in 2021' (2022) < https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/>

[70] Amanda Rawls (n 34).

academic publication, seminars, symposia, workshops, and conferences, among which was the 2016 conference organized by the School of Oriental and African Studies on the role of African courts and judges in arbitration.[71] The 2016 conference was a gathering of jurists, scholars, practitioners, arbitrators, government officials, registrars of courts, researchers, policymakers, representatives of multinational companies, and other users of arbitration from various countries in Africa to discuss the subject. It was perhaps the first time this subject was addressed in the international forum, as it affects the African space,[72] and as a follow-up, some scholars have published on the subject, such as Torgbor,[73] Tameru,[74] Penda and Olokotor,[75] Nassar,[76] and Idornigie and Bozimo, etc.,[77] and Onyema has further compiled these publications and subsequent research and recommendations in a textbook.[78]

However, the remarkable departure of this research from the foregoing existing literature is that while the latter focuses broadly on Africa, this research narrows its focus on Nigeria. More so, the existing literature investigates this research subject from the common or traditional 'pro-arbitration' approach which focuses on redefining the roles of courts with the aim of gaining more autonomy for arbitration and least supervision from the court. Instead of focusing on gaining more independence for arbitration from court's participation like in the traditional approach, this research investigates the roles of the Nigerian court in arbitration with the aim of finding the balance between the two competing responsibilities of a court towards arbitration which are to uphold the principle of party autonomy on one hand and to oversee justice delivery to aggrieved

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71 Please see: Papers delivered at the 2nd SOAS Arbitration in Africa Conference: 'The Roles of Courts and Judges in Arbitration,' held in Lagos Nigeria, on 22 – 24 June 2016. Available at <http://eprints.soas.ac.uk/22727/> accessed 12 April 2019; Emilia Onyema, *Rethinking the Role of African National Courts in Arbitration*, Chapter 3 (Wolters Kluwer 2018) 67 – 96.

72 Lucius Nwosu, *Awake Africa: A Necessary Alliance To Reduce Judicialization of Arbitration* (Ceenai Publishers Lagos 2017) 23.

73 Edward Torgbor, 'Overview of the Disposition of Courts Towards Arbitration in Africa' in Emilia Onyema (n 71) 39 – 66.

74 Leyou Tameru, 'Publication and Access to Arbitration Related Decisions from African Courts' in Emilia Onyema (n 66) 67 – 96.

75 Jean Alin Penda Matipe and Ndudi Councillor Olokotor, 'Judicial Attitudes Towards the Enforcement of Annulled Awards' in Emilia Onyema (n 66) 97 – 116.

76 Nagla Nassar, 'Attitude of Egyptian Courts Towards Arbitration' in Emilia Onyema (n 66) 153 – 178.

77 Paul Idornigie and Isaiah Bozimo, 'Attitude of Nigerian Courts Towards Arbitration' in Emilia Onyema (n 66) 89.

78 n 71 [67 – 96].

arbitrating parties on the other hand, thereby guaranteeing certainty in the regime.

Engaging the subject from this atypical approach, therefore, some of the groundbreaking findings gained from this research is that as much as the Nigerian court and legal system is commonly characterized as 'arbitration-friendly' with 'pro-arbitration' laws and policies, a study of the relevant case laws and practices surrounding the subject would show that many of the court's roles in arbitration in Nigeria are still plagued with uncertainties. Extending the frontier of knowledge on this subject, the research shows that in practice, the use of the inherent judicial powers vested in the Nigerian courts by the Constitution has created a level of uncertainty in the court's roles in arbitration, particularly the courts of first instance. More so, the research will show that despite several efforts at reforming the Nigerian arbitration laws in the past, those efforts have not yielded in creating certainty in terms of the roles of courts in arbitration because of the absence of relevant, and wrongly focused reforms. Further, comparing the Nigerian experience with some other related jurisdictions, the absence of regular tracking and periodic review of the roles of court in arbitration by a dedicated body could explain why reform efforts are not yet yielding results in this field. Also, case law analysis would show that many inconsistencies in the courts' decisions in Nigeria regarding their roles in arbitration could be attributed to lack of definite theory of arbitration or ideology underpinning the roles of Nigerian courts in arbitration.

Thus, the approach adopted to research this subject and the findings has shown that research focusing only on pushing the Nigerian courts away from arbitration will only address this subject at a surface level. As a result, despite the general 'pro-arbitration' aspiration acclaimed for the Nigerian jurisdiction, tensions still exist between arbitration and the courts which most time undermine party autonomy.[79] To this end, this research is contributing to the existing knowledge by identifying five major factors responsible for the challenges plaguing the Nigerian regime, and recommended solutions to the problems.[80] It is hoped that the

[79] Ladi Williams, *International Arbitration Practices and Nigerian Judicial System – A Surgery* (Macrosy Publishers, Lagos 2013) 54.
[80] Please see Chapters 6 and 7.

findings and recommendations in this research will improve the current practice regarding the roles of the Nigerian courts in arbitration without undermining party autonomy, thereby creating a level of certainty in the system, making the jurisdiction a preferred seat and spurring economic development.

To this end, this research has established five key diagnosis of the problems with the roles of court in arbitration under the Nigerian legal system which are the problems with the wordings and interpretation of Section 34 of the Act and some other provisions; the problems with the interpretation of Section 6(6) of the Constitution and the concept of Constitutional Supremacy in Nigeria; the lack of definite theory and ideology underpinning court's participation in arbitration in Nigeria; absence of institutionalised tracking and periodic recalibration of the relationship between Courts and Arbitration; and over-judicialisation of administrative roles of the Nigerian courts in arbitration. Finally, the research anticipates that it will stimulate necessary reforms to some related UNCITRAL Model Law and Rules provisions.

1.7 The Limitations of the Research

Being legal doctrinal research, a significant part of the study focuses on investigating the laws and practices surrounding the scope and limits of the court's roles in arbitration, as could be filtered from case law. Meanwhile, Section 57 of the Arbitration and Conciliation Act, which is the parent arbitration legislation in Nigeria, designates the superior courts of first instance (High Courts of the thirty-six states, the High Court of federal capital territory, and the Federal High Court) as the competent court to involve in arbitration where allowed. Thus, a meaningful way to understand the current and prevailing practice on this subject in Nigeria is to access the repository of the judgments of the courts of first instance on arbitration matters which has proven challenging.

Thus, a significant limitation of this study is the difficulty in accessing relevant law reports or judgments of courts of first instance in Nigeria. This is because few law reports are dedicated to reporting the judgement of the courts of first instance in Nigeria. Further, the few available law ones, such as Anambra State High Court Monthly, Lagos State Courts

Reports, Mid-Western States Commercial Law Reports, etc., do not have an online presence and are state-specific.

To solve this problem, the researcher relied on personal contact with the court registries of some major city-states in Nigeria, such as Lagos, Rivers, Oyo, Enugu, Kano, and Adamawa States. By this, the researcher obtained the certified true copies of the relevant unreported judgements of these High Courts for this study. Suffice it to note that sometime around November 2021, two newly established Nigerian online reports, Supreme Court Yearly (SCY) and Nigerian Weekly Commercial Law Reports (NWCLR), started publishing judgments of the High Courts in Nigeria but are still in the process of uploading backlog from 1985. Even though these online law reporters are yet to upload the relevant judgments between 1900 – 1985, the available ones, which are sufficient, were consulted to conduct this research.

Chapter Two

Historical and Theoretical Frameworks to the Research

"As science works with atoms and molecules as its basics, so does the task of complex legal analysis first requires some understanding of the basic concept and the way law describes the world—its conceptual structure."[1]

2.0 Introduction

The focus of this chapter is twofold. It explores the historical and theoretical underpinnings of judicial participation in arbitration. It reviews the system of arbitration and the courts from the historical and conceptual perspectives. For a start, it discusses what is commercial arbitration, the evolution of the court system, as well as its relationship with arbitration from the English and Nigerian perspectives. On the theoretical aspect, this chapter discusses arbitration theories and their impact on the role of courts in arbitration. From these two perspectives, the necessary background is set to appraise the practice relating to the court's roles in arbitration in Nigeria as subsequently done in Chapters 3, 4, 5, 6, and 7 of the thesis.

2.1 The Concept and System of Arbitration

Arbitration is a form of dispute resolution that is central to this study. Like other dispute resolution methods, describing Arbitration in definite terms is problematic.[2] However, there is consensus regarding the essential features of Arbitration.[3] The first is that, just like court litigation, Arbitration is another form of 'adjudicative system' constituted to settle disputes, but usually privately arranged.[4] The second is that, unlike judges in a law court appointed by the state to settle disputes through litigation, in Arbitration, arbitrators are appointed by private individuals or their proxies to settle

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1 Archie Zariski, *Legal Literacy: An Introduction to Legal Studies* (Athabasca University Press 2014) 56.

2 Tinuade Oyekunle and Bayo Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (LexisNexis 2018) 10.

3 Stuart Dutson, Andy Moody and Neil Newing, *International Arbitration: A Practical Guide* (Globe Law and Business London 2012) 7-13.

4 *Halsbury's Laws* (4th edn, 2008) 256, para. 501.

their disputes.[5] The third is that, unlike a law court where disputants are fixed to a rigid procedure in adjudicating their cases, disputants in Arbitration tailor the settlement process to suit their choice or Agreement.[6] Finally, in Arbitration, parties voluntarily make the arbitration agreement and are expected to be bound by their arbitrator's decision (Award), often treated as final.[7]

Thus, Arbitration could be described as 'a private law system available generally to those who agree to use it' and often serves as a substitute for court litigation.[8] However, the emergence of Arbitration in the dispute resolution space is difficult to trace with precision. Some writers have argued that the use of Arbitration predated both formal laws and law courts, and many writers making this claim often cite the biblical example of the dispute involving one baby and two mothers adjudicated by King Solomon in ancient Jewish society.[9] Further, other writers have traced Arbitration in the earliest times to mythology in Greek society, citing the disputes between Juno, Pallas and Venus and the trio's voluntary selection of Paris (the Royal Shepherd) to settle their disputes.[10]

Whatever is the case, Arbitration is not relatively new in dispute resolution as historical records and literature have shown that it is as old as, if not older than, the court system.[11] Suffice to note that the arbitration system has developed through times and history in the various societies where it is accepted and practised. It has evolved into what is today described as the most preferred dispute resolution mechanism to settle commercial disputes (domestic and international) in many civilised states.[12]

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5 Tinuade (n 2) 13.
6 ibid.
7 ibid.
8 ibid 9.
9 The Holy Bible, I Kings, Chap 3 Verses 16-28.
10 Frank Emerson, 'History of Arbitration Practice and Law' (1970) 19 *Clev. St. L. Rev.* 155.
11 Wesley Sturges, 'Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence' (1962) 46 pp 819-867 *Minnesota Law Review* 825; Daniel Centner and Megan Fond, 'A Brief Primer on the History of Arbitration' chapter 1 in Ashley Belleau, Lee McGraw and Laurence Jorther, et. al., *Arbitration and the Surety* (American Bar Association, Tort Trial & Insurance Practice Section, 2020).
12 Stuart Dutson (n 3) 7.

2.1.1 Commercial Arbitration

As Arbitration has evolved over the centuries, it has crystallised into many forms, grouped based on different perspectives. One of the primary criteria to classify Arbitration is the nature of the subject matter of the disputes being arbitrated. In this regard, Arbitration is classed as a commercial, investment, or construction arbitration, etc.[13] This research work focuses on commercial Arbitration. Disputes in commercial Arbitration often revolve around matters of commerce and business, such as contractual matters, the trade of goods or services, general business transactions, etc.[14]

For this research, the definition of commercial Arbitration follows its description by the United Nations Commission on International Trade Law (UNCITRAL), broadly defining it as covering matters 'arising from all relationships of a commercial nature.'[15] Thus, the field of commercial Arbitration is selected as the case study for this research. This streamlining would help to achieve a focused analysis and research outcome. This is because the field of Arbitration is now so enormous that each form of Arbitration is worthy of advanced research of this nature.

2.1.2 Domestic and International Commercial Arbitration

Commercial Arbitration could further be viewed from the perspectives of the national or global status of the arbitrating parties or the underlying contract, described as domestic and international commercial Arbitration.[16] What constitutes a domestic or international commercial arbitration is characterised differently from one jurisdiction to another.[17] Nonetheless, this study focuses on domestic and international commercial Arbitration as they relate to the case study. The research examines these two forms of Arbitration together, but clarifications are made when it is essential to differentiate between them. Moreover, it examines domestic and

[13] Tinuade (n 2) 19.
[14] Olakunle Orojo and Ayokunle Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Ass., 1999) 1.
[15] See generally: United Nations' General Assembly, *International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration Report for the Secretary* (Ref 28249 United Nations 1985) 5.
[16] Arbitration and Conciliation Act, 2007, Nigeria, s 57(2).
[17] ibid.

international rules and practices on commercial Arbitration apart from where a distinction is required to demonstrate differences or ensure clarity.

It is also essential to state that, in the main, this research explores *ad hoc* rather than institutional Commercial Arbitration. While *ad hoc* arbitration is an impromptu form of Arbitration where the parties and the arbitrators essentially determine the composition, adjudication, and administration of the arbitration cases,[18] the latter is an arbitration administered by a standing arbitration establishment. This research focuses on *Ad hoc* arbitration because the subject of investigation, the practices around the court's roles in Arbitration, relate more to *ad hoc* Arbitration than institutional Arbitration. In other words, *ad hoc* arbitration tops the list in the form of Arbitration where issues surrounding the court's involvement are regularly raised.[19] This is essential because, unlike *Ad hoc* arbitration, many arbitral institutions have established layers of internal checks and authorities to perform a court's roles in *Ad hoc* arbitration.[20]

Moreover, surveys have shown that the vast majority of arbitration references in Nigeria are *Ad hoc* arbitration.[21] Reports have also shown that most arbitration cases conducted or seated in Nigeria are based on the provisions of the Arbitration and Conciliation Act and ACA's Rules.[22] Nevertheless, in this research, some examples are still drawn from institutional commercial Arbitration where explaining or reinforcing important points or making some analyses more explicit is crucial. To this end, whenever the expression 'arbitration' is used in this research, it generally refers to *ad hoc* commercial Arbitration (domestic and international) unless the context appears otherwise or is expressly stated otherwise.

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18 Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law & Practice* (2nd edn, Centre for Commercial Law Development 2013) 12.

19 Ola Olatawura, *Adhoc and Institutional Arbitration in Africa* (Mbendi Publishers Lagos 2020) 34.

20 Templars LLP, 'Templars' Arbitration Report on Nigeria' (2021) (Vol. 1) <TEMPLARS ARBITRATION REPORT ON NIGERIA 2020.cdr (templars-law.com)> accessed 5 May 2022.

21 Emilia Onyema, '2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats' (2020) 14 < https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf> accessed 5 May 2022.

22 ibid.

2.2 Historical Background

2.3 The Origin and Development of the Court System

The law court is the second major concept or system at the heart of this study. It is often described as a system or place where the state-appointed judges adjudicate disputes, make judgments, and use the state's force to compel compliance with the judgment.[23] A more in-depth description of a court is not simple. However, it is noted that a court or the judiciary in a society is part of the core components of any state's 'legal civilisation'.[24]

Using a law court to settle disputes dates back to time immemorial and cuts across different civilisations.[25] A view that appears to cut across all legal traditions and almost all legal writings is that a court is created by a government on behalf of society to purposely oversee the administration of justice under the law.[26] Thus, A court is responsible for settling disputes, interpreting legislation, and developing law,[27] and the system is collectively described as the judiciary[28] So, nowadays, a state with a well-organised and independent court system or judiciary is considered civilised, regardless of its form of government.[29]

However, the historical review conducted later in this chapter will show that human societies have not always had a court to settle their disputes. Instead, the court system gradually emerged as human endeavours became more complex, and as the societies have no choice but to continue to organise themselves into a more orderly one for the ultimate purpose of economic prosperity.[30] The discussion below on the advent of the court system and their roles is focused on the English courts from where the modern Nigerian court system and practices originated.

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[23] Funke Fagbohunlu, *You and the Law* (2nd edn, University Press Ibadan 2006) 96.
[24] Shen Deyong, 'Chenese Judicial Culture: From Tradition to Modernity' (2009) Vol. 25 Issue 1 *Brigham Young University Journal of Public Law* 130-141, 131.
[25] George Bonner, 'The History of the Court of King's Bench' (1933) 11 *Bell Yard: JL Soc'y Sch L* 3, 176.
[26] Clifford Kirsch, 'A History of Court Administration- The American Experience' (1972) 55 *Judicature* 329.
[27] George Bonner (n 29) 3; Richard Messick, 'The Origins and Development of Courts' (2002) 85 *Judicature* 175-181, 175.
[28] ibid.
[29] Shimon Shetreet, *Role of Courts in Society* (1989, Springer) 421; McIntyre Francis, *The Judicial Function: Fundamental Principles of Contemporary Judging* (2019, Springer Singapore Pte Ltd., Singapore).
[30] Funke (n 23) 57.

2.3.1 Evolution of the English Court System: An Overview

While the roles of a court in contemporary society are easily discernible, the advent of the institution/system and its development across different legal traditions is difficult to trace.[31] First, no legal historian can convincingly tell whether prehistoric societies used a court or court-like system to settle disputes.[32] Existing literature had only shown that before the medieval age, all forms of trial by ordeal were prevalent for fact-finding and punishment.[33] However, there is hardly empirical evidence to show whether the primordial adjudicatory processes were coordinated in a court-like system.[34] It is reasoned, therefore, that even though disputes did arise and were settled among the people of early civilisations,[35] it does appear too that it was a period of "might-was-right", where there was no law court, legally speaking, and in the modern phraseology, to settle disputes.[36]

Legal historians, therefore, have traced the beginning of the use of the court system to the period after the dark age, and that the idea was borne out of society's need for a fair and orderly way of settling disputes without which it would not witness peace and prosperity.[37] In English society, for instance, it is found that court-like institutions started emerging among commercial merchants and religious groups during the Anglo-Saxon era for the primary purpose of selecting some groups in society that would settle disputes by common customs and logic.[38] However, disputes were submitted to various privately arranged fora as no state-sponsored court-like system existed.[39] The era is described as a period of 'rough justice' because disputes were settled privately but arbitrarily, and a victory in a case depended on how a disputant could compel his adversary to 'justice.'[40]

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31 Richard Messick, 'The Origins and Development of Courts' (2002) 85 *Judicature* 17.
32 Clifford Kirsch (n 26) 330.
33 Leeson Peter, 'Ordeals' (2012) Vol.55(3) *The Journal of Law and Economic* 701.
34 Clifford Kirsch (n 26) 330.
35 Usborne, *The Usborne Book of World History* (Usborne Publishing Ltd, Belgium 1985) 14.
36 Clifford Kirsch (n 26) 330.
37 Thrasher John and Vallier Kevin, 'Political Stability in the Open Society' (2018) Vol.62 (2) *American Journal of Political Science* p.398-409.
38 Rabin Andrew, 'Law and Legal Culture in Anglo-Saxon England' (2020) Vol.18(10) *History Compass* 1-13.
39 ibid.
40 Douglas Hay, 'Crime and Justice in Eighteenth- and Nineteenth-Century England' (1980) vol. 2 The University of Chicago Press, 45-84.

The details of the 'justice system of the Anglo-Saxon period are little known,'[41] but what stands out from history is that many privately-sponsored 'courts' did spring up during this era,[42] and were deployed to settle trade and commercial disputes.[43] One fundamental feature of the court system in those eras of 'privately arranged judiciary' was the lack of central management and uniformity in the practice, rules, customs, or procedures applied to settle disputes.[44] Moreover, obeying the private 'courts' decision was either left to the choice of the culprit or the use of private force.[45] Thus, the prehistoric and medieval justice system was disorganised and lacked certainty.

2.3.2 State-Supervised Courts from Medieval to Renaissance Age

As time passed by, the Medieval age and society approached the Renaissance age, the public authorities in many societies began to participate in dispute resolution alongside those hitherto privately arranged systems.[46] Initially, in many societies, civil and commercial matters were determined by the privately arranged 'courts,' and the monarch, for instance, was involved only in criminal matters.[47] The monarchs (or public authorities) began entertaining and resolving disputes in many societies.[48] Many societies, like the English, considered the monarch the fountain of justice 'and general conservator of the kingdom's peace.'[49]

Further, in Renaissance English society, while presiding over cases in the Royal courts, the monarchs appointed some high-ranking officials to assist the court (termed *Justiciarius Regis),* such as his 'closest officials and persons of the highest rank in the kingdom.'[50] Patrick Glenn observes that these 'officials' assisting the monarch came about because the Normans were French men, and they needed 'some kind of permanent judicial officer,

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41 Martin Burr, 'The Anglo-Saxon Judiciary' (A paper presented to the British Legal History Conference in Oxford, 2nd – 5th July, 2007).
42 ibid.
43 ibid.
44 Rabin Andrew (n 38) 7.
45 Richard Messick (n 31) 177.
46 Rabin (n 38) 9.
47 Richard Messick (n 31) 179.
48 ibid.
49 George Bonner, 'The History of the Court of King's Bench' (1933) 11 Bell Yard: JL Soc'y Sch L 3.
50 ibid.

who could work in a controlled and efficient manner,' and who understood the relevant local rules, language, practices and procedures.[51] Thus, the appointment of these officials may be described as the beginning of the state's appointment of professionals (such as commercial law judges) to carry out judicial functions, which eventually replaced the hitherto 'private judges.'

2.3.3 The English Courts in the Modern Age

In the modern era, a law court is now found and functions in every society to oversee justice administration, even during war.[52] Therefore, the rationale for having a court system in contemporary society remains like in medieval times, in that courts derive power from the people to settle disputes, maintain law and order, and ultimately oversee how justice is delivered by itself or any other dispute resolution system including privately arranged mechanism of dispute resolution. Elliot and Thomas summarised the function of a court in the modern era under three headings: operating as a longstop for citizens to seek remedy; exercising the coercive powers of the state to enforce their authority; and balancing the use of power by other bodies.[53] Roderick has added that for a body to be qualified as a court in this modern age, it may have to share some or all of the features identified by some scholars, such as being an institution,[54] being set up by a government,[55] having the power to resolve disputes and make binding decisions,[56] acting as the guardian of the law, policy and order in a society, having clear rules and practices, and ensuring justice are done in all cases.

2.4 The Relationship between Arbitration and the English Courts

Expectedly, the origin of the relationship between Arbitration and court in the dispute resolution space, particularly in English jurisdiction, is difficult to trace with precision. Nonetheless, going by their history and functions, the

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51 ibid.
52 Michael Light, Michael Massogha, and Ellen Dinsmore, 'How Do Criminal Courts Respond in Times of Crisis? Evidence from 9/11' (2019) Vol. 125 Number 2 *American Journal of Sociology* 123.
53 Mark Elliot and Robert Thomas, Public Law (3rd edn, OUP Oxford 2017) 265 – 266.
54 Denise Meyerson, 'What Is a Court of Law?' (2019) 42 *University of New South Wales Law Journal* 61.
55 Joseph Raz, *Practical Reason and Norms* (Hutchinson, 1975) 132.
56 ibid.

two systems are bound to intersect during the performance of their respective adjudicatory roles. The discussion below reviews how the relationship between the two systems has developed, leading to the contemporary practice or framework, particularly within the English and Nigerian jurisdiction. Again, tracing the interaction between the two systems within English jurisdiction will enable a better understanding of the Nigerian system because of their colonial ties.

2.4.1 The Unregulated Period (Prior to the 17th Century)

As discussed earlier, after the age of 'rough' or 'private' justice systems in England came the dominance of the law courts in the business of dispute settlement. However, the court's dominance in this space has generally developed over time and, in many societies, has evolved from a highly hostile relationship with arbitration to different shades of symbiotic relationship.[57] Thus, the relationship between the two systems has, down the ages, gone through several phases of reforms, regulations, and repositioning (recalibrated).[58]

Thus, existing literature has traced the involvement of the English courts in the arbitration process to what appears like the beginning of the use of commercial Arbitration as a recognised method of dispute resolution in the jurisdiction.[59] According to Brekoulakis, Arbitration was able to develop in the United Kingdom as a method of dispute resolution primarily because of the role played by the courts through the common law doctrines of 'submissions' and 'reference' to Arbitration, which were developed by the English courts in the 16th century.[60]

Through the doctrine of 'submission to arbitration,' when a commercial dispute had arisen between merchants, the common law courts permitted the parties to still agree, orally or in writing, to submit the existing dispute to Arbitration.[61] Thus, where one of the parties approached any common

[57] Elizabeth Gloster, 'Symbiosis or Sadomasochism? The relationship between the courts and arbitration' (2018) Vol. 34 *Arbitration International* 321-339.
[58] Stavros Brekoulakis, 'The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration' (2019) Vol. 39 Issue 1 124-150 *Oxford Journal of Legal Studies* 124, 150; Wellington v. McIntosh (1743) (1743) 26 ER 741.
[59] ibid.
[60] ibid.
[61] ibid.

law courts to seek redress disregarding the earlier Agreement (made after the dispute had arisen), the court will dismiss the suit pursuant to the Agreement.

In the 'arbitration by reference,' there was no need for a prior Agreement before a court could direct parties to resort to Arbitration. Once the court found that the dispute submitted before it was commercial, it would refer it to the arbitrators.[62] Thus, the rule of "*compromissio"* empowered the court to refer a matter to an arbitration tribunal only if it found that after disputes had arisen between the parties and before filing a suit in the law court, the parties had agreed to submit to Arbitration. Meanwhile, the rule of 'reference' or '*bond execution*' allowed parties to agree to submit to Arbitration and sign a bond on the basis that a party who refused to abide by the submission would pay an agreed penalty to the other party.[63]

Therefore, under those rules, the role played by the English courts was to scrutinise the timing of the *compromissio* and the *bond* made by the parties. If it found that the *disputants made the submission before* filing any suit, the court would direct the recalcitrant party to respect the "submission" and yield to Arbitration. According to Edward Powell, the two rules (of "*compromissio"* and *"reference"*) through which courts participated in Arbitration emerged after decades of tension between the court and arbitral tribunals.[64] Thus, it can be observed that one of the first examples of evidence of the relationship between Arbitration and court was the reference of disputes to Arbitration by the courts under these two practices.

Further, the Ecclesiastical courts ran by the Christian Church had also been identified as ones that became involved in Arbitration by referring cases involving the laity and church leaders to Arbitration before going to litigation.[65] Paul Sayre suggests that the common law courts borrowed the Ecclesiasticus's practice of referring cases to Arbitration.[66]

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62 ibid.
63 ibid.
64 ibid.
65 Henry Fraser, 'Sketch of the History of International Arbitration' (1926) Vol. 11 February Issue 2 Article 3 *Cornel Law Review* 179-208.
66 Paul Sayre, 'Development of Commercial Arbitration Law' (1928) Paper 2251 pp 595 – 617 *Articles by Maurer Faculty of Law* 597; Wills Jones, *Vetus Registrum Sarisberiense* (1st ed., R.S., 1884) 1. 256-259; John Brownbill *The Coucher Book of Fiurness Abbey* (ed., Chetham Soc., New ser., Ixxvim 1916).

However, in the academic literature, the exact roles of the English courts beyond referring cases to Arbitration pursuant to those two concepts were not specific.[67] Nonetheless, with more recognition given to the use of Arbitration by the English courts and widespread referral of cases to the arbitral tribunals, more principles, concepts, doctrines, and rules continued to crystalise from the courts' practices, to become what can be described as the early legal framework governing the relationship between the courts and arbitration tribunals in England.[68]

Legal historians, though, have noted that in this era, parties preferred the use of the court's 'reference' to the use of a 'submission' agreement. This led many litigants to approach the law court first to obtain an order of reference to Arbitration with the court's backing instead of Arbitration under a 'submission' agreement. Nevertheless, in both arrangements, the court's involvement and limits were determined by the principles of common law and equity (substantive and procedural) developed over the years.[69]

However, Lorenzen explained that the attitude of the English courts during this era was more of rivalry than assistance.[70] For instance, in that era, where the court chose not to stay legal proceedings, or the party against whom an award had been published refused to respect the Award, the only remedy available to the aggrieved party was to bring an action under the common law rule of breach of contract (bond) to recover penalties on the bond issued to guarantee the performance of the "*submission.*"[71] David Raack has explained the unlimited powers of the common law court on arbitration in this era thus:

> In this early period, there were few judicial precedents and only a handful of statutes. The central acommon law courts possessed vast discretionary powers and could do whatever equity required.[72]

From the foregoing, the common law courts and Chancery had vast discretionary powers to interfere in arbitral proceedings, such as injuncting

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[67] Henry Fraser (n 65).
[68] ibid 61.
[69] Wills Jones, *Vetus Registrum Sarisberiense* (1st ed., R.S., 1884) 256-259.
[70] Ernest Lorenzen, 'Commercial Arbitration–International and Interstate Aspects' (1934) 43 *Yale L.J.* 721.
[71] Stavros Brekoulakis (n 58).
[72] David Raack, 'A History of Injunction in England Before 1700' (1985-1986) Vol. 61 No. 4 pp. 539-592 *Indiana Law Journal* 545.

proceedings, removing arbitrators, revoking arbitrators' authority, nullifying proceedings before arbitrators, taking over proceedings before arbitrators, sanctioning the revocation of arbitration agreements, and setting aside awards. However, they also assisted Arbitration in issuing preservative orders, procedural and evidential matters, securing witnesses, enforcing awards, etc.[73] That was the situation until 1698 when the Parliament enacted the first English Arbitration statute, which further impacted the relationship between the court and Arbitration in English jurisdiction.

2.4.2 Introduction of Statutory Regulation of the Roles of Courts in Arbitration

As discussed earlier, a key feature of the early period of interaction between courts and Arbitration was the absence of a legislative framework.[74] The relationship between the two systems continued until 1698 when the English Parliament, for the first time, enacted a legislation known as John Locke Statute to complement the established common-law system and further regulate the courts' roles in Arbitration.[75]

The John Locke's Act simply provides:

> It shall and may be lawful for all merchants and traders & others desiring to end any controversies suit or quarrel (for which there is no…remedy but by … Arbitration to agree that their Submission of their Suit or the Award or Umpirage of any person or persons should be made a Rule of any of His Majesties Courts of Record which the Parties shall choose and to insert such their Agreement in their Submission or the Condition of the Bond or Promise whereby they oblige themselves respectively to submit to the Award…
> that the Parties shall submit to and finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire pursuant to such Submission. And in case of Disobedience to such Arbitration or Umpirage the party … shall be subject to all the penalties of contemning a Rule of Court… which Process shall not be stopped or delayed in its Execution by any Order or Rule or Command or Processes of any other Court either of Law or Equity…[76]

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[73] Stavros (n 58) 142.
[74] ibid.
[75] A copy of John Locke's Statute is downloadable from < https://www.british-history.ac.uk/statutes-realm/vol7/pp369-370> Accessed 21 December 2019.
[76] English Arbitration Act 1698, S. 1; A copy of this Act can be accessed at < https://www.british-history.ac.uk/statutes-realm/vol7/pp369-370> accessed 21 December 2019.

Even though the Act contained only two paragraphs, it was the first English legislation to recognise Arbitration as part of the dispute resolution system formally.[77] It gave a statutory back up to the prior applicable common law practice of 'arbitration by reference.'[78] As observed by Carlin, the 1698 Act 'combined the benefits of common law arbitration and reference by Rule of the Court'.[79] Horwitz and Oldham also observed that it was 'a hybrid, (to) extending judicial practice by means of parliamentary enactment.'[80]

Going by its provision, a striking feature of the 1698 Act was that it compelled the court to direct parties to arbitrate their disputes in deference to their arbitration agreement, and it abolished the practice that allowed parties to subvert their arbitration agreement based on the principle of revocability. Further, the legislation, for the first time, expressly allowed parties to register their Agreement in court to make the agreement part of the Rules of the Court. The arbitrators' decision also enjoyed the same status as the judgment or order of the endorsed court.[81] Thus, the Agreement could no longer be treated like mere contractual Agreements capable of unilateral revocation by any party.

The second role expressly assigned to the court under the Act was to use its contempt powers to enforce the arbitrator's decision (Award) against the losing party. The third (and last) role expressly assigned to the court under the Act was to set aside the decision of arbitrators on three grounds: (i) where the arbitrators were adjudged to have misbehaved themselves, (ii) where the Award was procured by corruption or (iii) where the Award was procured by undue means. From the foregoing, it could be suggested that the origin of the statutory regulation of the relationship between the English Courts and arbitration institutions is traceable to the enactment of the 1698 Act. Moreover, the Act could be said to have originated the 'three windows' through which a court could involve an arbitration matter.[82]

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77 Stavros Brekoulakis (n 58).
78 Henry Horwitz and James Oldham, 'John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century' (1993) Vol. 36 No.1 pp. 137-159 *The Historical Journal* 139.
79 Carlin Conklin, 'A Variety of State-Level Procedures, Practices and Policies: Arbitration in Early America Symposium' (2016) 61-80 *J Disp Resol* 63.
80 Horwitz and Oldhams (n 78) 158.
81 Stavros Brekoulakis (n 58).
82 The three windows are explained in Chapter 1, and are discussed in Chapters 3, 4 and 5.

2.4.3 The Case of *Scott v Avery* and the Role of Courts in Arbitration

The progressive impact of the introduction of a statute to regulate the court's roles in arbitration has been emphasised by scholars, using the 1856 case of *Alexander Scott v. George Avery*.[83] The case involved an arbitration clause in a ship insurance agreement between the parties. When disputes arose, the plaintiff proceeded to court without exploring the agreed arbitration route. The defendant filed a plea challenging the competence of the case and was dismissed by Exchequer. On appeal, the House of Lords reversed the decision of the Exchequer because an arbitration agreement did not override the court's jurisdiction. Instead, the Agreement simply made Arbitration a mandatory step to be taken first before the jurisdiction of the court can be validly invoked.

The decision in the *Scott v Avery* case was remarkable in the relationship between the court and Arbitration in the English jurisdiction.[84] It appears to be a turning point in curtailing one of the significant reasons English courts often intervene in Arbitration contrary to the parties' Agreement under common law.

As time passed, the principle established in *Scott v Avery* started serving as the basis for the widespread use of what is now known as the *Scott v Avery Clause.* This 'standard arbitration clause' generally mandates an aggrieved party first to commence Arbitration and obtain an arbitral award as a condition precedent before exercising the right to bring legal proceedings to court.[85] That was another milestone in the development of the relationship between the court and Arbitration in the English jurisdiction, as demonstrated by many subsequent decisions by the English courts. Examples of cases are *Watford & Rickmansworth Railway v London & North-western Railway,*[86] and *B v.S.*[87]

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[83] Scott v Avery (1855) 5 HL Cas 811. Summary facts of the case can be accessed from <https://www.lawteacher.net/free-law-essays/contract-law/scott-v-avery-clause-an-introduction-contract-law-essay.php> Accessed 2 January 2020.
[84] Stavros (n 58).
[85] ibid.
[86] (1869) LR 8 Eq 231.
[87] [2011] EWHC 691 (Comm).

2.4.4 The English Court and Arbitration in the Post-Locke Regime

Even though Locke's Act was the English pioneer legislation in regulating the relationship between courts and Arbitration until the close of the 19th century, other legislation, such as the 1697 Administration of Criminal Justice Act and the 1854 Common Law Procedure Act, also played a role in this regard, until the advent of the 1889 Arbitration Act.[88] Legal commentators and scholars have described the introduction of the 1889 Act as the first attempt to regulate the country's arbitration system through an all-inclusive piece of legislation.[89] This suggests that the introduction of the 1889 Act shifted the guiding authority for the relationship between the court and the arbitral tribunal from primarily a case-based practice to largely statutory regulation.

2.5 Arbitration and Court System in Nigeria: Pre-Colonial to Modern Age

2.5.1 Arbitration and the Courts in Pre-Colonial Nigeria

When Britain officially took over the administration of Nigeria in 1900, the 1889 English Arbitration Act was operative, regulating the court's roles in Arbitration in England. Thus, Nigeria inherited the pre-1900 legal development relating to the relationship between courts and Arbitration from English jurisdiction.[90] This was because by the British style of colonialism, Britain imposed her common laws, doctrines of equity, court practices and procedures, case laws, and her statutes of general applications on Nigeria without regard for any existing legal system.[91] Suffice to observe that, as of 1900, the British colonialists met some established systems of dispute resolution and institutions hitherto playing the roles of the present-day courts and arbitration tribunals in pre-colonial Nigerian societies.[92]

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88 A copy of the 1889 Arbitration Act is available from <http://rarebooksclub.com> accessed 10 January 2020.

89 Charles Nordon, 'British Experience with Arbitration' (1935) Vol. 83 *University of Pennsylvania Law Review* 314-325*;* Mohammad Bashayreh, *The Separability Doctrine in English Arbitration Law* (PhD Thesis submitted to the Orient College of the University of Oxford, 2012) 49.

90 Ibidapo Adaramola, *Customary Arbitration in the Traditional African Societies* (2nd edn, Ilesami Press, 1981) 72.

91 ibid.

92 Ade Obayemi, 'Between Nok, Ile-Ife and Benin: Progress Report and Progress' (1980) Vol. 10 No. 3 *Journal of the Historical Society of Nigeria* 79-94.

Thus, historians suggest that societies in Nigeria had existed since the prehistoric and Iron Ages, with organised industrial and commercial activities and dispute resolution mechanisms. Instances of these cultures were the Nok, Benin, Igbo Ukwu, Ile-Ife, etc.[93] Although it would be difficult to tell precisely how disputes were settled in those times because records of the period were not kept in modern-day written forms, there were inscriptions on stones, artworks, and predominantly oral histories handed down from generation to generation.[94]

Thus, indigenous Nigerian societies had dispute resolution mechanisms similar to litigation, arbitration, and alternative dispute resolution systems (ADRs), such as mediation, conciliation and negotiation.[95] As Chukwuemerie submitted, however, these systems did not go by any present-day descriptions.[96] Then, pre-colonial Nigeria comprised independent groups of people (the Western, Northern and Eastern people), each with unique cultures, including different institutions and dispute resolution systems.[97]

To begin, the Yoruba tribe has occupied the Western part of Nigeria since pre-colonial times, with a well-developed system of dispute resolution mechanisms and principles governing justice established before colonialism.[98] The nature and character of a conflict would determine who settled the dispute and what method of dispute settlement was to be adopted.[99] The society was divided into kingdoms, with each community having its political and judicial structures.[100] The "Obas" (Kings) were the

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93 Oluwatoyin Sogbesan, The potential of digital representation: The changing meaning of the Ife 'Bronzes' from Pre-Colonial Ife to the post-colonial digital British Museum (Unpublished Doctoral Thesis, City University of London, 2015).

94 Samuel Johnson, *The History of the Yorubas: From the Earliest Times to the Beginning of the Protectorate* (1st ed., Cambridge University Press, 1921), 3.

95 Andrew Chukwuemerie, 'Salient Issues in the Law and Practice of Arbitration in Nigeria' (2006) 14 *African Journal of International and Comparative Law* 1, 4.

96 ibid.

97 Akintunde Obilade, *The Nigerian Legal System* (Sweet and Maxwell 1979) 17; L.A. Ayinla, 'ADR and the Relevance of Native or Customary Arbitration in Nigeria' (2009) 5 *The University of Ilorin Law Journal* 254, 255; Andrew Chukwuemerie, 'The Internationalisation of African Customary law arbitration' (2006) 14(2) *African Journal of International and Comparative Law* 143.

98 Olukayode Taiwo, 'Traditional Versus Modern Judicial Practices: A Comparative Analysis of Dispute Resolution Among the Yoruba of South West Nigeria' (1998) Vol. 23 No. 2 *Africa Development Journal* 209-226, p. 215.

99 Anthony Okion Ojigbo, 'Conflict Resolution in the Traditional Yoruba Political System' (1973) Vol 50 *Cartiers d'Etudos Africaines* 275-292, 275.

100 ibid.

political rulers who exercised judicial power mainly in criminal or other serious matters.[101] However, settlement of civil matters such as commercial disputes, family conflicts, land matters, etc., were left in the hands of some privately arranged authorities, such as heads of secret societies, peer groups, trade associations, family heads, etc., depending on the nature of the disputes or whom the disputants respected and agreed to submit their matter,[102] thereby performing the modern-day roles of an arbitrator.

In any of these cases, the Oba had the paramount power to intervene by taking over or reviewing the decision made, except where the head of secret societies advised otherwise.[103] More so, the Oba could be consulted to encourage or compel parties who were resiling from the process to return to there or enforce decisions.[104] Thus, the role of Oba could be likened to the present-day court system, as the litigants had no choice but to submit to his jurisdiction and decision, and the secret societies were likened to other means of settlement, like present-day arbitration.[105]

Like the western part, the northern part of Nigeria, which the Hausa and Fulani predominantly occupy, also had a stable society with its own traditional institutions and conflict resolution system before colonisation.[106] However, the 1810 Jihad (war) led by Uthman Dan Fodio against the established Hausa dynasties in Northern Nigeria led to the emergence of an Islamic theocratic state in the area. Thus, Northern Nigeria's dispute settlement system was predominantly Islamic before colonisation.[107] The Caliphate was divided into emirates, each with appointed officers assigned to specific portfolios. These emirates were further divided into districts

[101] Bolaji Awe, 'The Ajele System: (A Study of Ibadan Imperialism in the Nineteenth Century)' (1964) Vol.3 No.1 *Journal of the Historical Society of Nigeria* 47-60.
[102] ibid.
[103] Ademola Bamgbose, 'Towards a Suitable Domestic Arbitration Practice in Nigeria' (2016) Thesis submitted for the award of the PhD degree in Law to the University of Warwick, p51. <http://wrap. warwick.ac.uk/87345/1/WRAP_Theses_Bamgbose_2016.pdf> accessed 13 September 2019.
[104] ibid.
[105] Anthony Okion Ojigbo, 'Conflict Resolution in the Traditional Yoruba Political System' (1973) Vol 50 *Cartiers d'Etudos Africaines* 275-292, 265.
[106] Ibidapo Adaramola, *Customary Arbitration in the Traditional African Societies* (2nd ed., Ilesami Press, 1981) 72.
[107] ibid.

headed by the Hakimi, an officer in the palace of the Emir.[108] The Hakimi was appointed to oversee the settlement of disputes within each emirate.[109] Islamic laws were applied in the Emirates, derived from the Sharia Islamic Codes, which were based on the teachings of prophet Mohammed.[110] Such laws also dealt with issues which include commercial transactions such as trade in goods and services, investments, contracts, property ownership, etc.[111] Thus, the Emir appointed the Alkalis (judges) to administer justice among the people. They were trained in Islam, and their decisions regarding litigants were binding.[112]

However, besides the Alkalis, whose role could be likened to the present-day court system, integral to Islam in northern Nigeria is the practice of '*Sulh',* which encourages parties to pursue amicable reconciliation of disputes, including appointing a third party to settle them.[113] Thus, the '*Sulh'* practice could be likened to the present-day arbitral system among the pre-Europeanized northern communities in Nigeria. It should be noted that because of the religious leadership position of an Emir, he had the power through the Alkalis to enforce or review the decision taken through the *'Sulh'* practice.[114]

However, the Igbos in Eastern Nigeria had an egalitarian society with no established traditional ruler or political institution, unlike other nationalities.[115] As such, they have several private arrangements for dispute resolution. The head of a family is the first recognised authority and has political and judicial authority within the family.[116] The family is the first point of contact in disputes, including commercial disputes, and is presided over by the first male child, the 'Diokpala,'[117] and makes

[108] ibid.
[109] ibid.
[110] Anthony Okion Ojigbo, 'Conflict Resolution in the Traditional Yoruba Political System' (1973) Vol 50 *Cartiers d'Etudos Africaines* 275-292, 265.
[111] ibid.
[112] ibid.
[113] Ahmed Othman, 'And Amicable Settlement Is Best': Sulh and Dispute Resolution in Islamic Law' (2007) 21 *Arab Law Quarterly* 64.
[114] Aseel Al-Ramahi, *Sulh: A Crucial Part of Arbitration* (LSE Law, Society and Economy Working Papers 12/2008) 35.
[115] Emmanuel Onyeozili and Obi Ebbe, 'Social Control in Pre-colonial Igboland in Nigeria' (2012) Vol. 6 No.1 *African Journal of Criminology and Justice Studies*, 2.
[116] Chika Ifemesia, *Traditional Human Living Among the Igbo: A Historical Perspective* (Fourth Dimension Publishers, Enugu 1979) 109.
[117] ibid.

decisions based on the contribution of other male children but may take advice from female children.[118]

In unsatisfactory decisions, next to the nuclear family unit is the Kindred Assembly called Umunna, where each Diokpala represents his family unit. The Umunna is also presided over by the eldest male of the kindred.[119] In enforcing their decisions, the Diokpala oversees 'ofo', the sacred symbol of authority and guarantor of justice.[120] Thus, the Diokpala is believed to have the support and wisdom of all family ancestors when making his decisions.[121] At the final lap is the Council of Elders called the 'Ndichie', a body of elders representing different families and wards. It is like an appeal court for aggrieved parties.[122] In extreme cases, the parties still reserved the right to appeal the decision of Ndichie to priests or Oracles and sometimes to the Secret Societies like the Masquerades as well as the Titled Men and Age Grade Association.[123]

The above were the various practices and regimes for dispute resolution among the indigenous people of Nigeria until colonialism. Thus, the foregoing has shown that a process akin to court and Arbitration was recognised and used across indigenous Nigerian societies, and what cuts across the societies was that the private arrangement was borne out of voluntary Agreement without the state's input and often administered by one or more respected people in the society, particularly someone with religious, family, or trade affiliations with the arbitrating parties. Further, like the modern-day Arbitration, the public adjudicatory institutions such as the Obas or Emirs reserved the power to assist Arbitration by compelling witnesses, getting a recalcitrant party back to the table, enforcing the decisions, or enforcing the decisions of the chiefs or elders. Accordingly, it evidenced respect for the 'arbitration' process, with public enforcement authorities coming in only where the 'arbitrator' could not perform or compel action.

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[118] Cynado Ezeogodi, *The History of Conflict between Aguleri and Umuleri 1933- 1999* (2013) (Unpublished PhD thesis, submitted to the Department of History and International Studies, University of Jos Nigeria) 121.
[119] ibid.
[120] Chika Ifemesia(n 116).
[121] Cynado Ezeogodi (n 118) 53.
[122] Fidelis Buah, *West Africa Since AD 1000* (2nd edn, Frank Class Publishers London1974) 72.
[123] Cynado Ezeogodi (n 118) 8.

2.5.2 Arbitration and the Nigerian Colonial Courts

A significant factor that influenced the European and Arabian merchants to journey to Nigeria, and by extension to other parts of Africa, in the pre-colonial era was economic exploitation, empire and business expansion.[124]Thus, it could be argued that the prosperity of pre-colonial Nigeria during the transatlantic slave trade and the influx of European traders into the country led to the need for the merchants to find a way to resolve their trade and commercial disputes.[125]

Although it seems that existing literature does not show any case where the commercial merchants had agreed on which dispute resolution to adopt, some incidences show that the African traders started forsaking their traditional dispute resolution practices for the European ways. An early instance was the celebrated 1746 case made by some West African merchants from the tribes of Elmina and Fante (now in the present Republic of Ghana) against their European slave-trading counterparts, The Dutch West Indian Company (DWIC), in respect of the enslavement of some local canoe paddlers by one captain Christiaan Hagerop, in breach of the slavery agreement between the European company and her African trading partners.[126] Due to their contact with the European traders and the 'international' nature of the case, the African complainants had to resort to European-style arbitration to settle the dispute.[127]

As time went by, the European traders started establishing their courts in some parts of the West African territories where they traded to settle some commercial matters related to their trade.[128] For instance, in the case of Gold Coast, the Council of Elmina was established by the Dutch slave traders as the highest Dutch judicial body in the area.[129] Suffice to

[124] Babacar M'baye, 'The Economic, Political, and social Impact of the Atlantic Slave Trade on Africa' (2006) Vol.11 pp. 607-622 *Journal of European Legacy* 618.
[125] Gerhard de Kok and Harvey Feinberg, 'Captured on the Gold Coast: Illegal Eslavement, Freedom and the Pursuit of Justice' (2016) Vol.1 2-3 274-295 *Journal of Global Slavery 275*.
[126] ibid.
[127] ibid.
[128] Olusola Ademulegun, 'Nigeria History through The Slave Trade' (2019) Vol.*6 Afe Babalola University Law Journal* 234-256.
[129] ibid.

observe that during this period, the traditional rulers' courts and private native 'arbitrators' in the various communities in Nigeria were still in use alongside the foreign style courts.[130]

However, there was no uniform system for both court and Arbitration during this period throughout the country, as the relationship between the available courts (be it African or European style) and the privately arranged means of settling disputes, particularly among the traders (Arbitration), was as yet unregulated by statutes. This was the case until the 17th century when the British traders took over the slave-trading and other businesses in West Africa and established their colonial government.[131]

2.5.3 Received English Arbitration Laws and Practices in Nigeria

The British colonial administration became more established following the 1851 Lagos invasion and its subsequent annexation and proclamation as a Crown Settlement in 1861.[132] By 1914, present-day Nigeria had been brought under a single legal system known as the British Protectorate of Nigeria.[133] Therefore, to formalise and restructure the dispute resolution mechanism, the colonial government introduced English-style courts through the Foreign Jurisdiction Act of 1843 and 1893 and the arbitral system, with a more defined relationship between Arbitration and courts.[134]

The earliest of the colonial courts was the 'Court of Equity', set up in 1854 to administer justice in the Lagos colony.[135] Further, the Royal Niger Company was allowed to establish a "Consular Court" to settle commercial disputes.[136] Meanwhile, the colonial government recognised the indigenous justice system discussed earlier but classed it as 'native courts' (now

[130] Fidelis Buah, West Africa since AD 1000 (2nd ed., FrankClass Publishers, London, 1974) 72.
[131] ibid.
[132] ibid.
[133] ibid.
[134] ibid.
[135] Onyekachi Wisdom Duru,'The Role and Historical Development of the Judiciary in Nigeria' (2012) 10 SSRN Electronic Journal. <https://www.researchgate.net/publication/256033174_The_Role_and_Historical_Development_of_the_Judiciary_in_Nigeria/citations> accessed 20 November 2019.
[136] The Royal Charter was granted by the UK Parliament in 1886, and had the power to govern and administer justice in its area of operations until the Charter was removed in 1899.

customary courts).'[137] Finally, in May 1900, the government made three proclamations introducing the English Laws and legal system into Nigeria.[138] Under the framework, the courts were to apply to disputes before them the English Common Law, doctrines of Equity, and Statutes of General Application (SOGA), in force in England from January 1900.[139] Thus, SOGA brought the 1889 English Arbitration Act and centuries of case law and principles that had crystalised Arbitration from English jurisdiction into the Nigerian system.

Further, the amalgamation of Nigeria in 1914 eventually harmonised the administration of justice by introducing more explicit statutory provisions, which further impacted the relationship between the court and Arbitration.[140] Most significant to this research were the following: (i) the 1914 Arbitration Ordinance, (ii) the Supreme Court Ordinance, and (iii) the Provincial Court Ordinance.[141] Under the new regime, High Courts were established to apply these laws to cases.[142] The 1914 Arbitration Ordinance was made by the Governor General of the Nigerian colonial government, Lord Lugard, by proclamation.[143] The Nigerian Council had been formed, though it did not have the power to make laws. Thus, the Arbitration Ordinance was a mere reproduction of the 1889 English Arbitration Act.

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[137] Akintunde Obilade, 'Jurisdiction in Customary Court Matters in Nigeria: A Critical Examination' (1973) Vol. 17, No.2 *Journal of African Law* pp. 227-240.

[138] Olusola Ademulegun, 'Nigeria History through the Slave Trade' (2019) Vol.*6 Afe Babalola University Law Journal* 234-256.

[139] Ohimai Ovbiagele, 'The Nigerian Legal System Justice and the Repugnancy Doctrine' (2019) a paper presented at the Nigerian Bar Association Conference on 25th February 2019 at Lo'Meridan Centre Benin City Nigeria < www.nigerianlawguru.com/articles/customary law and procedure/THE NIGERIAN LEGAL SYSTEM ,JUSTICE AND THE REPUGNANCY DOCTRINE.pdf> accessed 11 November 2019.

[140] Joseph Omotayo, 'The Nigeria 1914 Almagamation' <https://the234project.com/history/nigeria/the-nigeria-1914-amalgamation/> accessed 23 November 2019.

[141] Copies of the Nigerian 1914 Arbitration Ordinance and Supreme Court Ordinance can be accessed from the British Online Archive < https://microform.digital/boa/terms-of-use>.

[142] Akintunde Obilade (n 137); Onyekachi Wisdom Duru,'The Role and Historical Development of the Judiciary in Nigeria' (2012) 10 SSRN Electronic Journal. https://www.researchgate.net/publication/256033174_The_Role_and_ Historical_Development_of_the_Judiciary_in_Nigeria/citations accessed 20 November 2019.

[143] Efiong Isaac Utuk, *Britain's Colonial Administration and Develpments, 18-61-1960: An Analysis of Britain's Colonial Administrations and Developments in Nigeria* (1975) Unpublished Dissertation submitted to the Portland State University, USA) 22 < Britain's Colonial Administrations and Developments, 1861-1960: An Analysis of Britain's Colonial Administrations and Developments in Nigeria (pdx.edu)> accessed 12 June 2021.

The 1914 Arbitration Ordinance had 18 Sections, with 1 Schedule. The first power granted to the Supreme Court was the discretion to revoke an arbitration agreement.[144] Sections 4, 6 and 7 empowered the Supreme Court to participate in the appointment and removal of arbitrators. Section 5 enabled the Court to exercise the power to stay litigation for Arbitration where the subject matter of litigation had a binding arbitration clause. However, a party to an arbitration agreement was also allowed to apply to the court to stay proceedings in a case brought by a third party as long as the third party had filed its case under or through a party to the arbitration agreement.

Further, the Ordinance granted the court the power to assist during arbitration proceedings by the issuance of subpoenas or habeas corpus,[145] to extend the time within which an arbitrator could make its Award,[146] to entertain cases from aggrieved parties and make an order to remit back or order the arbitrators to reconsider its decision on a matter,[147] to remove an arbitrator based on misconduct, and set aside awards based on improper procurement.[148] It also allowed the court to entertain cases referred to by the arbitrators to decide some questions of law about matters before the arbitrators and grant leave to enforce the Award (decision) of the arbitrator, like the court's judgment.[149]

An examination of the provisions of the Ordinance shows firstly that this formal attempt to regulate the relationship between Arbitration and the courts in Nigeria was based on the assumption that Arbitration was an appendage of the courts. This conclusion could be drawn from the 18 sections of the Arbitration Ordinance. Except for four sections, all the sections in the Ordinance referred to the court and apportioned roles to it. Secondly, it is deducible from the provisions of the Ordinance that the court’s roles in Arbitration under the regime were not considered important judicial matters; sometimes, they were regarded as administrative interventions to be carried out not by the courts but by the administrative

[144] Arbitration Ordinance 1914, Nigeria, s 3.
[145] Ibid ss 9 and 14.
[146] Ibid s 10.
[147] Ibid s 11.
[148] Ibid s 12.
[149] Ibid ss 15 and 13.

staff of the court.[150] This probably explains the absence of case reports on judicial interventions in Arbitration in Nigeria around this time.

Thus, the legislative disposition showed the attitude of the regime towards Arbitration. Allowing the administrative staff of a court to determine arbitration matters was tantamount to treating Arbitration like any other administrative issue in the court. Then again, there was no express provision in the Ordinance to define the scope of the court's power to participate in Arbitration. It could, therefore, be reasoned that the omission of a provision to expressly curtail the jurisdiction of the Nigerian court to participate in Arbitration in this era might be unintended or an accidental lacuna in the regime. This is because the 1914 Ordinance simply imported the pre-1900 regime in English jurisdiction into the Nigerian system. As the then-Attorney General summarised:

> The purpose of this Ordinance is to extend to the Colony and Protectorate the provisions of the English Statute law relating to Arbitration by consent of the parties.[151]

Further, Section 14 of the Supreme Court Ordinance, which allowed the Nigerian courts to apply English case laws and principles, had limited this to English cases decided before 1900. The implication of this was that although English jurisdiction had further improved its legislative regulation on the relationship between Arbitration and courts,[152] early decisions of the English courts had become authoritative for the Nigerian regime.
The foregoing shows that the relationship between courts and Arbitration started under Nigeria's indigenous dispute resolution systems, which were widespread but not uniform and not regulated by statutes. Meanwhile, even though the traditional public institutions in the pre-colonial days recognised the privately arranged dispute settlement system, the former still reserved the power to intervene in some instances though not defined. Then, from 1900 onwards, the indigenous judicial practices and institutions were practically side-lined and replaced by the English-style courts and arbitration system. Accordingly, in 1914, the laws and practices surrounding Arbitration and courts operating in the English jurisdiction as

[150] Ibid s 17.
[151] ibid Schedule I.
[152] Stavros (n 58).

of 1900 were formally imported into the Nigerian legal system. Curiously, as found in the earlier review of English jurisdiction, the imported pre-1900 English laws and practices were regulated mainly by arbitration statutes, making Arbitration an appendage of the law courts with an undefined scope and limits of their relationship.

Thus, as found in the above review, the wording of the 1914 Arbitration Ordinance was open-ended, so much so that the roles of courts in Arbitration were almost unlimited. Then again, it could be deduced that English case laws were unhelpful in striking a balance between court and Arbitration at that period. This is because when the English regime had enacted more Arbitration statutes to refine further the courts' roles in Arbitration, the Nigerian regime had already become independent and would not be bound by English cases. Despite the significant developments in the arbitration field, particularly within international Arbitration, in the late 1950s and early 1960s, Nigeria made no changes to its arbitration legislation apart from merely renaming the 1914 Ordinance Act as the 1950 Arbitration Act.

Looking insightfully, therefore, to date, there has not been indigenously made arbitration legislation tailored to the local characteristics and foreign commercial policy of the country in Nigeria. This is a more reason why the issue surrounding the relationship between the Nigerian courts and the arbitration system remains topical and a matter of grave concern.

2.5.4 Transition to the Modern Arbitration Practice in Nigeria

The narrowly scoped and loosely worded Arbitration Ordinance of 1914 had made the roles of the Nigerian courts in Arbitration largely unchecked until the 1988 Arbitration and Conciliation Decree.[153] By 1988, Nigeria had become independent from Britain and was operating a unitary system under the military government.[154] Then, the Federal military government promulgated the 1988 Arbitration and Conciliation Decree (later renamed Arbitration and Conciliation Act— ACA), providing a more detailed regulation of the relationship between the Nigerian court and Arbitration.

[153] The 1914 Arbitration Ordinance was later renamed in 1958 as the Arbitration Act (Cap. 13 Laws of the Federation of Nigeria 1958) without amendment to the provisions.
[154] Akintunde Obilade (n 137) 56.

However, it would be observed that this Decree was not really homemade or an initiative that considered the peculiarities of the Nigerian system. Instead, the background to the Decree was international developments in Arbitration typified by two instruments developed under the auspices of the United Nations— the 1958 New York Convention and the 1985 UNCITRAL Model Law. Accordingly, the 1988 Act simply coupled together these two international instruments to make a local legislation governing the Nigerian arbitration space and by extension, the role of Nigerian courts in arbitration.[155]

Meanwhile, the 1988 ACA has remained the parent legislation regulating, among other things, the roles of the Nigerian courts in Arbitration (international and domestic) to date.[156] Since the 1990s, there have been several efforts to amend the current legislation in line with the realities of the Nigerian contemporary business space or to replace it with a more modern one, but this has not crystallised into a legislation. However, in May 2022, the current Bill— Arbitration and Mediation Bill—successfully passed the approval of the National Assembly and presently awaits the president's assent.[157] Although the proposed Bill is partly examined in Chapter 7, particularly as it relates to the roles of the court in Arbitration, it is essential to note that the legislation still does not impact much on, or provide a landmark reform to, the current practice relating to the roles of courts in Arbitration.

Nonetheless, even though the prospect of 'legislative reform of Nigeria's arbitration laws continues to be under discussion'[158] on the roles of courts in Arbitration, the current legislation is a considerable advancement from the practice under the 1914 Arbitration Ordinance. While the current ACA retains the court's power to stay litigation for Arbitration, assist in the

[155] Commercial Law Research Network Nigeria, 'CLRNN Conversations with Prof Idornigie SAN II' (13 March 2022) <https://www.youtube.com/watch?v=ZKuge-RV5JE> accessed 23 June 2022.
[156] Tinuade Oyekunle and Dayo Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (2018 LexisNexis London) 6.
[157] Kwadwo Sarkodie, Luiz Aboim, and Lisa Dubot et. al, 'Spotlight on Planned Reforms to Nigerian Law on Arbitration and Mediation' (published on 17 October 2022 on Mayer Brown) <Spotlight on planned reforms to Nigerian law on arbitration and mediation | Perspectives & Events | Mayer Brown> accessed 12 November 2022.
[158] ibid.

procurement of witnesses and documents, participate in the appointment of an arbitrator, and set aside an award, it added more areas of the court's involvement in Arbitration, such as (i) revocation of an arbitration agreement, (ii) remission of Award, (iii) revocation of an arbitration agreement, etc. It is important to note that a detailed examination of the current practices relating to the roles of courts in Arbitration (domestic and international) under the current ACA is discussed in Chapters 3, 4, and 5. However, for now, it is vital to observe that one remarkable and innovative provision introduced into the current ACA is Section 34 of the Act (reproduced from Article 5 of the UNCITRAL Model Law), which aims, but fails, to curtail the hitherto unrestrained power of the courts in Arbitration.

2.6 Theoretical Background

2.6.1 The Theoretical Rationalisation Underpinning the Relationship between Arbitration and the Courts

Besides the national arbitration legislation such as the Nigerian ACA and the English Arbitration Act, and the international arbitration instruments such as the New York Convention, Geneva Protocol, and the UNCITRAL Model Law, etc., which regulate, among other things, the interaction between Arbitration and courts, there are also some 'doctrinal principles and concepts upon which the functions of both the arbitral tribunal and court are founded, which impact upon and nurture the relationship between the two systems.'[159] The below review of the doctrinal underpinnings further explains how theoretical understanding of the nature of Arbitration in a jurisdiction has shaped over time, and still does shape, laws and practices on the relationship between Arbitration and the courts. As Torgbor observes:

> It is in common knowledge that the functional capacities of the arbitral tribunal and the court depend on the terms of the arbitration agreement, the category of disputes the law allows to be arbitrated, and the extent to which the law and doctrinal percepts permit the court to enter the arbitration space.[160]

[159] Edwar Torgbor, 'Disposition of Courts in Africa Towards Arbitration' in Emilia Onyema, *Rethinking the Role of African National Courts in Arbitration* (Wotler Kluwer 2018) 52.
[160] ibid [52].

Accordingly, there are four primary legal theories on the nature of Arbitration, which are:

1. contractual theory
2. jurisdictional theory
3. hybrid theory
4. autonomous theory[161]

These legal theories are often explained through four lenses. These are (i) the legal character of the arbitration system, (ii) the source, scope and limits to an arbitrator's power, (iii) the type and scope of the relationship between the arbitrator and the parties, and (iv) the status of an arbitral award.[162] Thus, some literature on the nature of Arbitration has postulated that the way arbitration is treated by the national court or users of Arbitration in a jurisdiction is generally determined by the prevailing theory of Arbitration in the jurisdiction.[163] Though the theories look at four areas, the review below focuses primarily on the nature of Arbitration under the four theories, as that will, by extension, explain the position of each of the theories on the relationship between the courts and Arbitration.

2.6.2 The Contractual Theory

Although various proponents of the contractual theory have some differences in their views about the nature of Arbitration, their central idea is that Arbitration derives its legitimacy from the freedom given under contract law to citizens to make a contract among themselves.[164] This freedom extends to the parties' right to agree on who should settle their disputes and how they should be settled - sometimes described as 'party autonomy'.[165] The contractual theorists, therefore, hold the view that the parties' Agreement to arbitrate is like any contract, which basically

[161] Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 2-4.
[162] Hong-Lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 2 Contemp Asia Arb Journal 265; Ilias Bantekas (n 211) 2-4; Edwar Torgbor (n 209) 52.
[163] ibid.
[164] Ilias Bantekas (n 161) 2.
[165] Won Kidane, *The Culture of International Arbitration* (Oxford University Press 2017) 54.

represents the exchange of promises by the parties that whoever is aggrieved between them would submit his grievance to Arbitration rather than a court.[166]

By implication, the contractual school of thought claims that the authority wielded by an arbitrator is derived from the parties' contract and supported by the law of contract. Both arbitration laws and courts should not control an arbitration process but rather leave the control to the parties.[167] It is said that Bernard first developed this idea as a school of thought in 1937.[168]

Curiously, the proponents of the contractual theory hold various views about what nature of a contract is an arbitration agreement and how Arbitration should be treated under the law.[169] The ideas range from one end to the other. At one extreme are the contractualists who believe that the life cycle of Arbitration (from the arbitration agreement to the award enforcement) should be wholly regulated by the parties' Agreement and not interfered with by a court.[170] They argue that the terms of the arbitration contract should be the controlling law and rules for an arbitration process and should not be overridden by any law or court.[171] At the other end are the contractualists who hold the same view as above but then believe that a law or law court could still participate in the running of an arbitration process but that such involvement must not negate the parties' Agreement.[172]

Thus, the core of the contractualists' understanding of Arbitration is that every arbitral proceeding is a product of a contract made by the arbitrating parties, and a court should not ordinarily interfere with the terms of such

[166] Hong-Lin Yu, (n 162).
[167] ibid.
[168] Julian Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications Inc., 1978) 51-52; Angulia Daniel, 'The Role of Domestic Courts in International Commercial Arbitration' (2010) http://www.ssrn.com/abstract=1674760 p.9.
[169] Won Kidane (n 165).
[170] Hong-Lin Yu, (n 162).
[171] Thomas Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreement' (2003) 36 *Vand. J. Transnat'l L.* 1189, 1193.
[172] Richard Moore, *Contractual Theory of International Arbitration: Paradox* (Blacksburn Publishers, 2016) 98.

contract or the process.[173] In its stead, the role of a court or state is just to ensure that the arbitration agreement is recognised and enforced.[174]

2.6.3 The Jurisdictional Theory

The understanding of jurisdictional theorists about Arbitration and the roles of a court in Arbitration is almost the direct opposite of the contractualists'. Proponents of this theory would agree with the contractualists that arbitration proceedings are generally initiated and conducted through the parties' Agreement. However, they argue that Arbitration derives its legal recognition from the national laws, particularly of the seat of the Arbitration, whose role is paramount.[175] Thus, the freedom and powers being exercised respectively by the parties and arbitrators are given by the law and should be ultimately regulated by the law rather than the parties' contract.[176]

To this end, the jurisdictionalists would state that rather than the parties' contract, the 'validity of an arbitration agreement and procedures' should be regulated by the national laws and courts' without which Arbitration cannot be validly run.[177] As such, the provisions of many arbitration legislations are divided into 'mandatory' and 'permissible' provisions and could be said to exemplify jurisdictional theory's role in the relationship between a court and Arbitration. This is because many arbitration laws provide some mandatory provisions highlighting issues or procedures that parties cannot override or contradict in their arbitration contract, despite their freedom of contract.

Thus, the jurisdictional theory accepts more supervisory roles for the national courts or laws over arbitration tribunals than the contractualist theory.[178] The jurisdictional theorists argue that the law of contract itself, upon which the parties' Agreement derives its validity, is the making of the law and courts.[179] All civilised societies allow their citizens to enter

[173] Hong-Lin Yu (n 162) 261.
[174] Okozie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorom Books Connecticut 1994) 10.
[175] Ilias Bantekas (n 161) 2.
[176] Hong-Li Yu (n 162).
[177] ibid 258.
[178] ibid.
[179] ibid.

contractual relationships freely. However, such contracts are regulated by the provisions of the law and the courts established according to the law. In international Arbitration, for instance, if the parties' Agreement or procedures offend the laws of the seat, the entire Arbitration may become a nullity.[180] Thus, the principle of 'arbitrability' upon which many national laws forbid parties to arbitrate some disputes could also be argued to be borne out of jurisdictional ideology.

Francis Mann, one of the leading advocates of this school of thought, argued that international arbitration law requires arbitration proceedings to be conducted following the will of the parties, but only to the extent that the *lex fori* allows, because the sovereign state is 'entitled to approve or disapprove the commercial activities carried out within its territory.' [181] Hong-Lin further explained that it is the jurisdictional theory that features in the international arbitration process when its proceedings are subject to scrutiny under the national law, such as the validity of the arbitration agreement, the arbitrability of the underlying dispute, breach of public policy, the propriety of the arbitral procedures, the scope of submission and the enforceability of the awards etc.[182] Andrea explained that the parties do when they submit their disputes to Arbitration simply to 'ignite' or 'utilise' the 'framework' already provided by the national laws, which allow Arbitration to function, but following the supervisory law.[183]

Lastly, unlike the contractualists who believe that an arbitrator derives his authority from the parties' contract and that the court has a minor or no role in the arbitrator's conduct, the jurisdictional theory argues otherwise. Some disciples of this school of thought believe in the 'delegation theory,'[184] which states that the jurisdiction or adjudicative power exercised by an arbitrator is the state's judicial power but delegated to the

[180] Olawale Orojo, *International Arbitration: Law and Practices* (IUP 1984) 34.
[181] Francis Mann, 'State Contracts and International Arbitration' (1967) 42 *Brit. Y.B. Int'l L.* 1 10 14, 16.
[182] Hong-Lin Yu, (n 162) 259.
[183] Andrea Leffgant, *Arbitration System and Its Various Contracts* (Auckland City Press, 2015) 56.
[184] See generally: Alec Stone Sweet and Florian Grisel, 'The Evolution of International Arbitration: Judicialization, Governance, Legitimacy', in Walter Mattli and Thomas Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence,* (Oxford University Press, 2014) 22 – 46.

arbitrator through various provisions of the arbitration laws.[185] Thus, some jurisdictionalists believe that recognising the roles played by an arbitrator in the letters of law is tantamount to the 'implied' delegation of the adjudicative powers.[186] However, some other proponents of this school of thought do not support the delegation theory and argue that, since an arbitrator's adjudicative function is a public function, they are subject to the regulation of the law, like the national courts.[187]

2.6.4 The Hybrid/Mixed Theory

Many proponents of the hybrid theory hold that the contractual and jurisdictional theories are not mutually exclusive.[188] The mixed theory was supposedly conceptualised by Serville, who opined that effective arbitration functions on principles drawn from contractual and jurisdictional theories in practice. He argued that Arbitration is a product of the national law and the parties' Agreement.[189] Sauser-Hall, who later developed the idea, reasoned that Arbitration is a mechanism with a dual character. He submitted that it is contractual because it commences with the parties' Agreement through which validity and enforceability are still defined and regulated within a legal regime.[190] Sauser-Hall described the theory in the following words:

> (Arbitration is) a mixed juridical institution, *sui generis,* which originates in the [parties'] Agreement and draws its jurisdictional effects from the civil law.[191]

Thus, mixed theorists claim that the theory goes beyond a mere academic view of how Arbitration works or should work because, in practical terms, there is hardly any legal system where Arbitration functions exclusively on the ideas propounded by either the contractual or jurisdictional theories. Thus, proponents of the hybrid theory believe

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[185] Hong-lin Yu (n 162) 261.
[186] ibid.
[187] Moutulsky Ecrits, (1974) 14 cited in Hong-Li Yu (n 162).
[188] Ilias Bantekas (n 161) 2.
[189] Fernand Serville and Francois Arthuys, *Cours Elementaire De Droit International Prive* (7th ed., 1925) 634-635.
[190] Hong-Lin Yu (n 162) 274; Sauser-Hall, 'L'arbitrage Droit' International Priva' (1952) & 47(11) *ANN. INST. DR. INTERN.* 394 (1957) in Hong-lin Yu, (n 193) 274.
[191] Sauser-Hall, ibid, 274.

that even though Arbitration begins as a private agreement between parties, there cannot be an effective and enforceable arbitration process without the involvement of the law and the courts. Redfern and Hunter used the example of international commercial Arbitration, which buttresses this reasoning by observing that though Arbitration operates through private proceedings, it still ends with an award which needs scrutiny and recognition from the enforcing laws and courts.[192]

2.6.5 The Autonomous or Delocalization Theory

The autonomous theory is the most recent of the four main philosophical ideas about Arbitration. It is claimed that the theory was conceptualised in 1965 by Rubellin-Devichi, who reasoned that rather than the three traditional theories, an appropriate philosophical theory about Arbitration should focus on the use and purpose of Arbitration.[193] Rubellin-Devichi opined that both jurisdictional and contractual theories are not in tune with the goal of Arbitration because they advocate for state-controlled Arbitration, though to different degrees.[194] She further criticised the hybrid theory on the basis that it is unreliable because it does not reveal any definite parameters to strike the boundary between the contractual or jurisdictional elements.[195] Hence, the autonomous theory argues that the nature of Arbitration is 'neither contractual, nor jurisdictional, nor hybrid,' but autonomous.[196]

The autonomous theory is prevalent among writers of international commercial Arbitration, who generally believe that the development of international Arbitration will be impeded if the national courts are allowed to exercise supervisory jurisdictions over any aspect of Arbitration.[197]

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[192] Alan Redfern et. al., *Law and Practice of International Commercial Arbitration* (2nd edn., OUP) 8.
[193] Hong-Lin Yu (n 162) 278; Jacqueline Rubellin-Devichi and Vincent Jean, *L'iabitrage: Nature juridique: Droit interne et droit international prive (*Paris: Librairie generale de droit et de jurisprudence, 1965) as cited in Julian Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (n 168) 60.
[194] ibid.
[195] ibid.
[196] Hong-Lin Yu (n 162)278; (n 193).
[197] Okozie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorom Books Connecticut 1994) 14; William Craig 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Texas Intl LJ 1*, 16.

Being 'autonomous,' the theorists assert that Arbitration is independent of any national legal system or contract laws but develops itself by the businessmen, as it provides a flexible and easily controlled method and not because any national government or law recognises it.[198] Thus, the theory appears to say that Arbitration existed as a system long before several states started acknowledging it in their laws and benefiting from its mechanisms. The autonomists would argue, therefore, that since Arbitration develops independently of any state law, it should be free from the constraints of substantive and procedural national laws or courts.

This philosophical thinking is part of the justification for the principle of party or arbitral autonomy and the idea of arbitral delocalisation (or supranational Arbitration). The 'autonomy paradigm is to minimise, if not eliminate, the supervisory roles' of the national laws or courts on Arbitration.[199] Ali Khan views the idea of arbitral autonomy from two perspectives: First is the *de facto* autonomy, which proposes that all the 'stages of arbitration proceedings should be concluded and the award enforced without court's assistance or intervention.'[200] Second is *de jure* autonomy, which holds that the national laws or courts could participate in Arbitration, but only to assist the arbitral tribunals or parties and to 'effectively close escape routes' being used by recalcitrant parties to disrupt Arbitration.[201] Notably, these two philosophical ideas on party autonomy stand on opposite extremes, even though they both champion the cause of the autonomists. However, the most recent idea of delocalisation favours the *de facto* arm of the theory.

The idea of delocalisation came as a reaction to the Seat theory (a subsect of Jurisdictional theory),[202] which asserts that national law or a court could apply or intervene respectively in international Arbitration if the court's jurisdiction or legal system is the Seat arbitration.[203] So, the delocalists contend that to uphold the principle of party autonomy, which is the 'core fabric' of international commercial Arbitration, arbitration proceedings

[198] Julian Lew (n 177).
[199] Ali Khan, 'Arbitral Autonomy' (2013) Vol.74 *Lousiana Law Review* 5
[200] ibid 6.
[201] ibid.
[202] Emilia Onyema (n 159) 18.
[203] Hong-Lin Yu (n 162) 259.

should be free from being pinned to national law or court (de facto autonomy).[204] Nevertheless, Rubellin-Devichi agreed that Arbitration should run on a party's contract. However, the striking feature of the theory is that parties should have full autonomy on how the Arbitration should run.[205]

2.7 The Influence of Arbitration Theories on Court's Roles in Arbitration

As discussed earlier, the prevailing ideological understanding of the nature of Arbitration in a jurisdiction is a valuable indicator to identify the factors responsible for the practices surrounding the scope and limits of the court's roles in Arbitration in the jurisdiction. To start with, the Contractual theory, one of the consequences of this ideological principle equating Arbitration to any contractual construct is that any legal system or judge that shares this philosophy would view a court's role in arbitration as their role in any contract case. Hence, for a court in a contractualists-led jurisdiction, its most prevailing practice would be to limit the involvement of a court in Arbitration to the areas agreed upon by the parties. Thus, a court in such jurisdictions would avoid involvement in arbitration matters when it could read that such involvement is against the parties' agreement.

Thus, when an arbitration contract is matched with some basic principles of contract law to understand and rationalise the scope of courts' involvement in Arbitration, it is observed that some of the current practice fits into the idea of contractual theory. Some examples are (i) the practice that a court ought to stay litigation for Arbitration once it is shown that parties have a valid arbitration contract, (ii) a court's power to nullify arbitral agreements based on illegality,[206] the 'inarbitrable' nature of the subject matter,[207] legal incapacity of parties, public policy, etc.[208] (iii) a

[204] Teck Sing Voon, 'Arbitration's great conundrum- seat theory versus delocalisation' (2022) < Arbitration's great conundrum - seat theory versus delocalisation - Legal Cheek> accessed 12 October 2021.
[205] Jacqueline Rubellin-Devichi (n 193); Hong-lin Yu (n 162) 278.
[206] Patel Engineering Limited v. North Eastern Electric Power Corporation Limited (Unreported decision of the Supreme Court of India, delivered on 22 May 2020, Petition No: 3584-85)
[207] Esso v. NNPC (Unreported decision of the Court of Appeal of Nigeria, Appeal No. CA/A/507/2012; delivered on 22nd July 2016).
[208] ibid.

court's power to grant interim protective orders to protect Arbitration,[209] (iv) a court's power to secure attendance of witnesses or procurement of document, or enforcement of Award, etc.

Accordingly, it would be straightforward for a contractualists court to reason that the court's power to appoint an arbitrator according to the parties' Agreement is simply to uphold the parties' right to make a contract guaranteed under the contract laws of many jurisdictions. Then, the theory would underpin the position that an arbitrator cannot possess any jurisdiction outside the parties' Agreement.[210] Further, contractualists would argue that a court's power to stay litigation for Arbitration is borne out of the duty of a court under contract law to preserve and enforce a valid contract.

In terms of the power to nullify an invalid arbitration contract, contractualists would argue that it is borne out of the court's power to subject a contract to a validity test, so also could the arbitration contract be tested against the validity test by a court. Thus, if an arbitration contract fails the validity test, a contractualist court could rightly intervene to nullify such a contract. A contractualist judge may further argue that to do otherwise by a law court would be to breach some principles of contract and law; an example is the common law principle, *ex turpi causa non oritur actio,* that is, a court would not enforce an illegal contract. Moreover, a court's power to secure the attendance of witnesses, issue interrogatories, or produce documents, etc., would still be explained to the effect that a court would assist parties in performing their contract by all legal means.

However, unlike the contractualists, the jurisdictional theory-led courts would back the practice that the laws of the place of Arbitration should govern an arbitration rather than the parties' contract. Thus, when jurisdictional theory is also matched with some roles played by courts in Arbitration in some jurisdictions, it could explain the philosophical thinking behind those roles. Examples are: (i) the court's default power to appoint

[209] Shell v. Crestar (2016) 9 NWLR Pt 1517 pg. 301.
[210] ibid.

an arbitrator, (ii) to remove an arbitrator, (iii) to determine jurisdictional issues, (iv) to grant an anti-arbitration injunction, (v) to revoke an arbitration agreement, (vi) to set aside or enforce an award, (vii) to order for remission of Award, and (viii) to order commencement of an arbitration, etc. The foregoing instances, and many more practices that seem to empower a national court or law to supervise Arbitration, even sometimes against the wishes of the parties, could be rationalised within the philosophical thinking underlining the jurisdictional theory.

It is curious to note that there appears to be no jurisdiction where the court's role in Arbitration is fashioned after only one philosophical line of thinking. Instead, while one of the theories may be dominant in a legal system, elements of other theories may still be reflected in its arbitration practice. It is against this background that the mixed theory, which seems to form a compromise between the two traditional theories, has emerged. As discussed earlier, the mixed theory agrees with the fundamentals of the contractual and jurisdictional theories but without one excluding the other. Thus, some jurists that follow the mixed theory believe that 'neither the jurisdictional theory nor the contractual theory provides a satisfactory and logical explanation of the modern framework of international commercial arbitration.'[211] To them, arbitration law and practice is to strike a balance between the need to uphold 'party or arbitral autonomy' (borne out of the contractual theory) and the need to still have a public body like a court to supervise arbitrator's activities (borne out of the jurisdictional theory).[212]

The dual character of Arbitration professed by the mixed theory proponents could be explained, for instance, in practice relating to the appointment and removal of an arbitrator under the Nigerian commercial arbitration laws. Many arbitration laws recognise the parties' freedom to appoint their arbitrator, but a court can step in and make the appointment where there are glitches. Moreover, arbitrating parties are often not permitted to agree in opposition to the roles of a court in this respect. This is due to the court exercising its duty under the law of contract to enforce the parties' Agreement by ensuring that arbitrators are appointed to

[211] Hog-Lin Yu, (n 162) 255.
[212] ibid.

adjudicate the case. Further, the 'mixed' philosophical line of thinking could be said to have manifested itself in other areas of the relationship between Arbitration and the courts, such as (i) the power between arbitrators and courts to determine jurisdiction, (ii) the arbitrator's power to escalate a question of law to a court, (iii) the court's power to enforce or set aside an arbitration award, and (iv) the court's power to remit an arbitration award, etc.

Finally, regarding the autonomous theory, as much as its rationale appears convincing, it does not seem to be in tune with the reality of arbitration practice where the court's role in Arbitration is indispensable. William Park's counterargument to the autonomous theory is that it will be impracticable to claim that Arbitration has its own legal system when it does not have its own enforcement power.[213] Thus, though it is undoubtful that the autonomous theory has played a significant role in bringing to prominence the crusade for the 'delocalisation' of International Arbitration, its critics have argued that the theory will still be better in tune with the reality if the proponents could accept that the process cannot be entirely detached from national laws or courts.[214]

2.8 Summary of Discussion and Conclusion

This chapter explores the historical and theoretical explanations to the roles that the courts play in arbitration. It reviews some theories, concepts, and principles that are relevant to understand the two systems that are central to the subject being investigated in the research, that is the court and arbitration systems and their intersection. Particularly, this chapter explains the system of commercial arbitration, the evolution of the court system, and its relationship with arbitration from the English and Nigerian perspectives. In terms of the theoretical underpinnings, the chapter explains some philosophies that influence the recognition of arbitration as a system of dispute resolution, and the basis upon which the courts relate with arbitration system. Four theories were discussed

[213] William Park 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 *ICLQ* 21, 26.
[214] Jan Paulsson 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 *ICLQ* 53, 54.

(jurisdictional, contractual, hybrid, and autonomous), and the chapter concludes with the finding that the regime and roles of the courts towards arbitration in any jurisdiction is largely determined by the prevailing theory of arbitration in the jurisdiction. However, where there is no prevailing theory or ideology in a jurisdiction, and there are gaps in the laws which resultantly allow each judge to impose his ideology to play roles in arbitration, it creates a level of uncertainty in the system.

Part II

Exploring the Three Windows of Judicial Participation in Commercial Arbitration in Nigeria

Chapter Three

Appointment and Removal of Arbitrators: The Roles of Nigerian Courts

"If we go by the idea of absolute autonomy, I am afraid to say that it will consume us all. We should wonder how chaotic arbitration cases will be without the court's fallback authority to appoint or remove an arbitrator when parties fail to agree, and I tell you from my four decades of practice experience that parties do often fail..."[1]

3.0 Introduction

As a prelude, the Chapter generally examines the legal and regulatory frameworks for arbitration and court litigation in Nigeria. It studies the three major areas under the current legal frameworks where Nigerian courts involve in arbitration (referred in this Study as the 'three windows of judicial participation in arbitration'). In the main, the Chapter examines the laws, policies, and practices relating to the involvement of the courts in appointing and removing arbitrators under the Nigerian legal system, which is the first 'window' of judicial participation in arbitration. It examines the provisions of the Nigerian Arbitration and Conciliation Act and the annexed Rules (the Act), the New York Convention, the UNCITRAL Model Law, relevant practice directions and national policies on arbitration as they relate to the appointment and removal of arbitrators by the courts. The current practice on this subject is drawn mainly from the court's interpretation and application of the arbitration laws and policies garnered from both reported and unreported case laws.

The Chapter ultimately aims to interrogate the current practice to reveal the extent to which the courts uphold or undermine party autonomy while exercising their authority to appoint or remove arbitrators under the regime. The gaps uncovered in this study are further appraised, analytically and comparatively, in Chapters 6 and 7 to bridge the gaps identified in the system, by offering solutions to recalibrate the relationship between

[1] Olawale Orojo, 'Promoting the Symbiotic Relationship between Courts and Arbitration' (Paper delivered at the 13th Anniversary of the Young Arbitrators League, Sheraton Hotel Abuja, 16 February 2005) 45.

arbitration and courts without unnecessarily undermining the principle of party autonomy.

3.1 Overview of the Legal Framework for Arbitration in Nigeria

As discussed in Chapter 2, the Nigerian commercial arbitration regime and the court's roles are now regulated primarily by the national arbitration statute, international instruments, and relevant case laws. The exact applicable laws and practices also depend on whether the arbitration is domestic or international.[2] Meanwhile, to complement these primary sources are the Nigerian Constitution, Rules of courts and Practice Directions, and relevant foreign case laws.[3] As discussed in Chapter 2, all these sources of arbitration law were inherited from the English jurisdiction system and further developed, albeit slowly, into the contemporary frameworks in Nigeria.

The primary legislation governing the roles of the Nigerian courts in arbitration is the Arbitration and Conciliation Act (the Act).[4] It regulates both domestic and international commercial arbitration seated or enforceable in Nigeria. As also discussed in Chapter 2, the Act domesticates the UNCITRAL Arbitration Rules by incorporating it into the Act as an Annexure,[5] thereby providing procedural rules for the parties to conduct arbitral proceedings under the Act. Further, the Act makes the New York Convention applicable in Nigeria by incorporation into the Act for enforcement of awards.[6] These and the courts' decisions on the interpretation of the provisions of the Act are the primary sources of arbitration laws in Nigeria. Then, the various High and Appellate courts in Nigeria have their Rules of Court, which also regulate to some extent the roles of Nigerian courts in arbitration.

Further, each court in Nigeria has the power to issue Practice Direction to regulate its role in arbitration. Still, as of today, only the Supreme Court has made a Practice Direction on arbitration in 2017.[7] These are the secondary

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2 Fabian Ajogwu, *Commercial arbitration in Nigeria: Law and Practices* (2nd edn.,Centre for Commercial Law Development Lagos 2013) 19.
3 Niki Tobi, *Sources of Nigerian Law* (MIJ Professional Publishers Ltd Benin 1996) 112.
4 Laws of the Federation of Nigeria, Cap A18, 2004.
5 ibid, Schedule 1.
6 ibid, Schedule 2.
7 Supreme Court Practice Direction in Arbitration Clause in Commercial Contract (2017) Ref No. CJN/P.D./VOL.1/001.

sources of arbitration laws in Nigeria, save for some foreign case laws that are also persuasive and relevant in determining court's roles in arbitration in Nigeria.[8] Suffice to note that there is currently a Bill (Arbitration and Mediation Bill) awaiting the assent of the Nigerian President on this subject. When enacted, the Bill will replace the current Act. However, as it will be explained later, almost all the gaps in the Nigerian practice found in this study are yet unaddressed in the Bill. Thus, the anticipated eventual enactment of this Bill notwithstanding, the subject of this research is still topical and relevant for the recalibration of the relationship between arbitration and courts in Nigeria.

3.2 Arbitrator's Appointment

Primarily, Nigerian laws accord vast autonomy to parties in a commercial dealing to agree on how their arbitrator should be appointed or who should appoint an arbitrator to adjudicate their disputes without necessarily involving a court.[9] Thus, some arbitration agreements (whether domestic or international) do provide 'a procedure for the selection of the arbitrator(s)— either expressly or by incorporating institutional rules into their agreement.'[10] The liberty is often credited to two doctrines – freedom of contract and party autonomy.[11] Thus, Sections 7 and 44 of the Act allow parties to exercise their right of autonomy by agreeing on the number of arbitrators and the appointment procedure.[12] They may also specify a third party or office to make the appointment.[13] Sections 11 and 46 of the Act make the parties' initial agreement on the arbitrator's appointment applicable to subsequent appointments. While Sections 7 and 11 apply to both domestic and international arbitration, Sections 44 and 46 apply only to international arbitration, though both provisions are worded alike.[14]

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8 Fabian Ajogwu (n 2) 21-23.
9 (n 4) s 7(1).
10 Gary Born, *International Arbitration: Law and Practice* (2nd edition Wolters Kluwer 2016) 130.
11 Sunday Fagbemi, 'The doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) Vol 6:1 *ABUAD J of SUST DEV LAW & POL J* 228.
12 (n 4), Ss. 7 and 44.
13 ibid.
14 (n 4), s 43.

However, where the parties do not have appointment procedures or cannot achieve their agreement, Sections 7 and 44 of the Act mandate them to fall back on the default procedures contained in the Act. The default appointment procedures are stipulated in Sections 7, 11, 44, and 46 of the Act and empower a law court, among other authorities, to participate in appointing an arbitrator— domestic or international arbitration. Accordingly, there are three instances where parties would seek the court's assistance to appoint an arbitrator under the Nigerian arbitration laws. These are:

(i) Where parties have agreed to have three arbitrators simpliciter but without any further agreement on the appointment procedure.[15]
(ii) Where parties have agreed on the number of arbitrators and the appointment procedure, but those terms could not be fulfilled.[16]
(iii) Where a prior-appointed arbitrator is no longer in the reference.[17]

The practice surrounding these three circumstances is examined in detail below. For clarity, they are discussed under three broad headings which are: (i) appointment of arbitrators in a domestic arbitration, (ii) appointment of arbitrators in an international arbitration, and (iii) appointment of emergency arbitrators under the state laws in Nigeria.

3.3 Appointment of Arbitrators in Domestic Arbitration

As observed earlier, though within the same Act, the provisions regulating the court's role in appointing an arbitrator for international arbitration are in some ways separated from the provisions regulating an arbitrator's appointment in domestic arbitration.[18] Thus, for domestic arbitration, unless the parties expressly name a court as their 'appointing authority,' a court will only play an appointment role as a last resort if the parties' arrangement fails or they fail to make an arrangement. Thus, the law allows a court to appoint a domestic arbitrator in two circumstances: (i) appointment of original arbitrator, and (ii) a substitute arbitrator.

[15] ibid, Ss 7(2) and 44.
[16] ibid, Ss 7(3) and 44.
[17] ibid, Ss 11 and 46.
[18] ibid, s 43.

3.3.1 Appointment of Original Arbitrators in Domestic Arbitration

An original arbitrator refers to an arbitrator appointed from the commencement of arbitration and ordinarily, in accordance with the intention of the parties, to adjudicate the substantive claim in an arbitration matter.[19] Section 6 of the Act provides three arbitrators as a default number if the parties fail to agree. Then, where the parties fail to provide an appointment procedure, Section 7(2) of the Act empowers a court to make the appointment if approached by the parties. Thus, Section 7(2)(a) covers a situation where the parties have agreed to have three arbitrators simpliciter, but without specifying the method of appointment or where the parties fail to specify the numbers of arbitrators and the procedure of appointment. In this case, the default rule under Section 7 is that each party would appoint their respective arbitrator, and the two party-appointed arbitrators will, in turn, appoint a third arbitrator to join them.

However, the courts are allowed to make appointments for the parties where one or more of the parties fail to do this within thirty days of receiving a request to make his appointment.[20] Then again, if the party-appointed arbitrators failed to agree on the appointment of a third arbitrator within thirty days of their appointments, a High Court is also permitted to make the appointment for them.[21] Meanwhile, Section 7(1)(b) of the Act covers a situation where the parties have agreed to have a sole arbitrator but failed to agree on the appointment procedure. In this case, a court is also allowed to appoint for the parties within thirty days of their disagreement.[22]

However, in a domestic arbitration where the parties agree on the procedures of appointment, but the terms of the agreement cannot be fulfilled, a law court is permitted to participate in such an appointment process. Section 7(3) (a) – (c) of the Act covers three scenarios on this subject which are: (i) when a party fails to make an appointment as required under the procedure agreed, or (ii) both parties fail to make an appointment

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19 Rosemary Lee, *Eric Lee's Dictionary of Arbitration Law & Practice* (2nd edition, Mansfield Law Publishers, Oxford 2011) 75; French Arbitration Decree No. 2011-48, 2011, Article 1473.

20 (n 4), s 7(2)(a)(i).

21 ibid, s 7(2)(a)(ii).

22 ibid, s 7(2)(b).

or agree on the appointment or the party-appointed arbitrators fail to reach agreement as required under the procedure, or (iii) an 'appointing authority' chosen by the parties has failed to perform its appointment duty under the agreed procedure.[23]

Although a detailed analysis of the judicial interpretation and the gaps founds in the practices emanating from Sections 6 and 7 of the Act is made later in this Chapter, and further analysed comparatively in Chapter 6, it suffices at this point to observe that the duty imposed on Nigerian courts to appoint an arbitrator for the parties as a secondary authority is without any right on the part of the parties to question the court's decision.[24] Thus, the decision of a Nigerian court in this respect is not subject to appeal or party's choice.[25] It is also essential to observe that the Act does not provide the procedure to follow by a court when making appointments for the parties in domestic arbitration. Instead, the Act simply imposes a duty to appoint arbitrators on the courts, *simpliciter,* without much guidance on what steps to take in the appointment process.

3.3.2 Appointment of Substitute or Replacement Arbitrators in Domestic Arbitration

A substitute arbitrator is appointed, as a contingency plan, to replace an original arbitrator.[26] Thus, Section 11 of the Act provides three situations where the Nigerian courts could participate in the appointment of a replacement arbitrator.[27] These are where: (i) an arbitrator withdraws, (ii) an arbitrator's mandate is revoked, or (iii) any other reason 'whatsoever.'[28] Unlike the original arbitrator, a Nigerian court could appoint a substitute arbitrator only where the court was the one that appointed the original arbitrator to be replaced.[29] Although a detailed analysis of the current judicial interpretation of this provision and the gaps in the practice is conducted later in this Chapter and further in Chapter 6, it is, however, crucial to note that

[23] ibid, S 7(3)(a)-(c).
[24] Risco International v. Onward Press Ltd (2001) 2 SCY 76, 83 (Eko JCA).
[25] (n 4) s 7(4).
[26] LexisNexis, *Appointing a Replacement Arbitrator (*Published on 12 June 2021) <appointing a replacement arbitrator | Legal Guidance | LexisNexis> accessed 12 Juy 2022.
[27] (n 4) s 11.
[28] (n 4) Ss 9 and 10.
[29] Fideity Bank Plc v Otunba Fayewa (2020) 1 SCY 62, 89.

there are unresolved complexities where it becomes impracticable for the parties who appointed the original arbitrator to appoint a substitute arbitrator.

3.4. Appointment of Arbitrators in International Arbitration

As discussed in Chapter 2, the Model Law was incorporated into the Act in 1988, which creates two separate practices for international and domestic arbitration. However, the two regimes seem to overlap in some areas while maintaining distinct practices in other areas. Thus, as Sections 6, 7 and 11 of the Act on arbitrator's appointment apply to both domestic and international arbitration, Sections 44 and 46 of the Act, which also cover the subject apply exclusively to international arbitration. Though analysed in detail later, it is essential to observe that the extent to which the Act maintains different treatments for domestic and international arbitration has also been problematic.

Thus, Sections 44 and 46 of the Act provide additional guidance for the arbitrator's appointment in international arbitration. However, some of the provisions negate the earlier provisions of Sections 7 and 11 of the Act. For instance, unlike the procedures under Sections 7 and 11 of the Act, Section 44 does not mention a court nor expressly vests a role of a default appointing authority in a law court. In its stead, Sections 44 and 46 simply vest such roles in 'appointing authority,' which Section 54 of the Act reveals to be the Secretary-General of the Permanent Court of Arbitration (SGPC) at The Hague.[30] To appoint a sole arbitrator, therefore, Section 44 requires the contingent appointing authority SGPC to give an identical list of some arbitrators to both parties who, within fifteen days, will delete the name(s) parties object to and then number the remaining names in their order of preference. The appointing authority then appoints a sole arbitrator in the parties' order of preference.[31]

Meanwhile, Sections 45(10) and 46 of the Act provide a procedure to appoint a substitute arbitrator in international arbitration. Thus, Section 45(10) covers a situation where the original arbitrator was removed by a court, the

[30] (n 4) s 54(2).
[31] ibid, s 44(3)(c)

SGPC or other appointing authority. In other circumstances such as death, resignation, failure to act, etc., Section 46 provides that the appointment of such a substitute arbitrator is made in the same manner and person as the appointment of the original arbitrator.

3.5 Backdrop to Sections 7, 11, 44, and 46 of the Act

Notably, the wording of Sections 7, 11, 44, and 46 of the Act governing the court's roles in appointing arbitrators in Nigeria was first introduced under the 1988 Decree (now the current Act). However, the earlier 1914 Ordinance contained some provisions on the appointment of an arbitrator, but they were not as detailed as the current provisions.[32] Moreover, these provisions were transplanted from Articles 11 and 15 of the UNCITRAL Model Law.[33]

3.6 A Critical Appraisal of the Legal Frameworks for Arbitrator's Appointment and the Gaps in the Regime

3.6.1 Appointment of Arbitrators by Parties to Multi-party Arbitration: Absence of Statutory Provision and Definitive Practice

A critical insight into Sections 7, 11, and 44 of the Act shows that the statutory framework on arbitrator's appointment assumes that arbitration would always not have more than two parties. In other words, the current framework does not make provision for how the parties and courts could appoint arbitrators to multi-party and multiple-contract arbitration and other adjunct matters. As a result, the role of a Nigerian court has become problematic where parties in multiple contracts are to appoint arbitrator either at the commencement of arbitration or after the consolidation of different arbitration cases, as well as joinder or intervention of more parties to an ongoing arbitration proceeding, etc. Moreover, this issue has become more challenging for the court to observe the principle of party autonomy because whatever position the parties take on this issue is not covered by the law and could be disregarded by the court.

It could be argued that, by the principle of party autonomy, parties to a multiple contract or multi-party arbitration could include in their arbitration

[32] See: Sections 3, 6, 9, 10 of the Arbitration Ordinance, 1914, Nigeria.
[33] See: UNCITRAL Model Law (1985), Articles 11 and 15.

agreement if and how to appoint a multi-party tribunal. Issues surrounding consolidation of arbitration cases, joinder of parties to arbitration, and third-person intervention in arbitration may also be agreed upon by the parties. However, this is not the usual case in practice, and it has been observed that many agreements are silent on the 'selection of tribunals for a multi-party arbitration, and also on the issue of consolidation and joinder/intervention.'[34] Thus, when there is no agreement, or the parties' agreement fails, the court is often left with the burden of deciding these issues, and it has been 'one of the most complex aspects of consolidation and joinder/intervention cases in arbitration.'[35]

One of the cases where this problematic issue came up in Nigeria was *Kilima Groups v. Oceanwide Shipping Company China*.[36] The agreement between the Applicant and Respondent contained an indemnity clause that imposed a contractual obligation on Cornerstone Insurance Plc. When the consignment incurred demurrage and Cornerstone refused to indemnify the Respondent, the Respondent commenced arbitration against Cornerstone in China without joining the Applicant. Once aware of this, the Applicant approached a High Court in Abuja, Nigeria, to join the ongoing arbitration in China, but the court refused to grant the application on the basis that a Nigerian court lacks the authority to join a party or consolidate cases in international arbitration under the Act, except by the express agreement of the parties. The court relied on the provision of Section 34 of the Act to the effect that a court would only participate in arbitration as expressly provided in the Act. The court further held that its position is also borne out of the principle of party autonomy, which 'places the intention of parties above court's disposition.'[37]

It is curious to observe that *Oceanwide's* case may be the first to test this legal question in Nigeria, as no Nigerian decision was found to support the judgment. Then again, in arriving at its decision, the court observed that such a critical issue, mainly as it concerns international arbitration, should have been covered under the Model Law but is silent on the subject, yet, the

[34] Gary Born (n 10) p.233.
[35] ibid, 233.
[36] [2019] 4 SCY 67.
[37] ibid 81.

ACA does not contain provisions to 'fall back on.'[38] So, in this case, the court relied on two American cases: *Champ v. Siegel Trading Co.,*[39] and *Centennial Ins. Co. v. Nat'l Gas Co.*[40] In these US cases, the Second Circuit reasoned that no court could join a party to ongoing arbitration except where the parties have expressly agreed to it.

However, the same High Court took a directly opposite position from *Oceanwide's* case in the case of *Moaka Foams Ltd. Nigeria v. Qingdao Yuanyong Int'l Forwarding Co., Lt.,*[41] which came up two months after *Oceanwide*'s but before another jurist. While an arbitration proceeding was ongoing in Hong Kong, the Applicant applied and was joined by the Tribunal to the case as a third party. However, the Tribunal insisted on proceeding with the Tribunal as constituted and rejected the Applicant's application to appoint its arbitrator. The Applicant then approached the High Court of FCT Nigeria, Justice Okeke, to permit it to appoint its arbitrator. The court reversed the decision of the Tribunal on the basis that the refusal to allow a party to appoint its arbitrator offends the principles of party autonomy and equal treatment, which are fundamental to arbitration proceedings. However, the court observed that such multi-party arbitration settings are not covered under the Act but that where it is agreed by the parties, the court would enforce the agreement. Curiously the court relied on the same Section 34 of the Act to arrive at this conclusion and ordered the Tribunal to allow the third party to appoint its arbitrator.

The decision in *Moaka Foams* has also been followed by some decisions of other Nigerian High Courts, but not without some concerns. In *Rismic Resources v Tripple Tee*,[42] the court held that it could grant an application to join a third party to an arbitration case only if it could be gleaned from the underlying contract that the parties expressly agreed to it. However, the later decision in *Spring Bank Plc v. Leventis Autos.,*[43] stated that even where there is no express agreement of the parties, the court has the power to grant a

[38] ibid 92.
[39] 55 F.3d 269 (7th Cir.) 1995.
[40] 951 F. 2d 107 (6th Cir) 1991.
[41] [2019] 76 V.76 CLRNS 18.
[42] [2021] 101 V 92 CLRNS 61.
[43] [2021] 103 V 98 CLRNS 12.

joinder or consolidation application if the Applicant is one of the parties to the underlying contract in the arbitration case. Thus, even if the parties do not agree that consolidation is allowed, a Nigerian court would still grant such an application if the Applicant were privy to the underlying contract. However, in the more recent case of *Oceanview Incorporation v. Marine Platform Ltd.,*[44] in the High Court of Abuja, Justice Oseji held that although there is no express statutory provision to guide the court on this matter, nevertheless, the court would follow some common law principles such as privity of contract, party autonomy, equal treatment of parties, etc.

The court held that Section 44 of the Act should be construed as one vesting implied authority on a High Court in Nigeria to appoint an arbitrator in international arbitration. It highlighted three areas where a Nigerian court would participate in a multi-party or multiple-contract arbitration: (i) joining a party to an ongoing arbitration where the arbitral parties allow joinder of party or consolidation of arbitral actions, (ii) allowing a third party to intervene in ongoing arbitration where the party is not privy to the underlying contract, but is an interested party to the dispute before the Tribunal, and, (iii)consolidating two or more arbitration cases where the cases emanate from the same multi-party or multiple-contract agreement.[45]

The foregoing appears to establish a prevailing practice that, despite Section 34 of the Act, Nigerian courts can grant an application to join a party to an arbitration or allow intervention by a third party, yet it is not conclusively so. This is because almost all the decisions reviewed above were only dealt with by the court of first instance, and also international arbitration cases. Moreover, there is yet no appellate decision to settle the issue. Consequently, since the decision of a High Court is not binding on another, the position remains unsettled in Nigeria.[46] Further, the available decisions were inconsistent and uncertain and did not lay down a clear position. Each judge decides his case as he wishes.

[44] [2021] 110 V 112 CLRNS 10.
[45] ibid 23.
[46] Global Transport Oceanico S.A. v. Free Enterprise (Nig.) Ltd (2001) 5 NWLR Pt.706, 426.

What appears to be the only decision of an appellate court close to this issue in Nigeria was *Statoil (Nigeria) Ltd & Anor. v. FIRS & Anor,*[47] where Statoil had commenced arbitration against NNPC regarding a multi-party contract. While the case was ongoing, FIRS— the government tax agency— sought to join the arbitration case because the outcome of the proceedings would affect the Nigerian revenue, but the Tribunal refused the application on the basis that FIRS is not privy to the underlying contract. FIRS then approached the Federal High Court to allow it to intervene to challenge the legality of the underlying contract and the arbitral proceeding. The court granted FIRS' application on the basis that even though the Act does not provide for the scenario, the outcome of the arbitration would affect its interests, though not privy.

The decision in *Statoil v. FIRS* raises some concerns in the arbitration community, particularly regarding questions such as whether the practice laid down in the judgment is in accord with the principle of party autonomy and international best practice. It is likely to open a floodgate for all kinds of intervention in arbitration cases in Nigeria outside of Section 34 of the Act.[48] Also, allowing a third party to participate in arbitration against the parties' agreement could be interpreted as violating party autonomy. Thus, this judgment provides a floodgate for courts to interpret any 'interest' expressed by an applicant in the possible outcome of an ongoing arbitration case, like FIRS, as a sufficient interest to ground intervention.

3.6.2 Appointment of Multi-Party Arbitrators: Absence of a Default Provision on the Procedure of Appointment

Even though the court's authority to order a joinder of a third party to arbitration is yet unsettled, some Nigerian courts have assumed jurisdiction in this regard. More problematic and a corollary to this issue is the concern regarding the court's power and practice to select multi-party arbitrators. As earlier reviewed, there is no statutory provision regarding multi-party or multiple contract arbitration in Nigeria, and by extension, there is none on

[47] [2014] LPELR – 23144 (CA).

[48] Jeremy Wilson, 'Nigeria Court of Appeal Allows Third Party to Challenge Arbitration Award' (15 February 2017) < https://www.insideenergyandenvironment.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/> accessed 2 April 2020.

the determination of the number of arbitrators and the mode of their appointment in a multi-party arbitration. Thus, even if the parties could agree on this issue pursuant to the principle of party autonomy, the problematic question then is the procedure to follow or to what extent the court could assist regarding the appointment process where the parties fail to agree or their agreement fails. In these circumstances, the question of what a Nigerian court should do in the face of the absence of statutory provisions and the need to observe party autonomy has become problematic.

Like the issue of joinder and intervention of third parties in a multiple contract-based arbitration, there is no default provision or rules regarding the number of arbitrators or mode of appointment in a multi-party arbitration under the Nigerian legal system. Then again, there is also yet no clear direction or practice on this subject in Nigeria, thereby creating inconsistent decisions and practices in the system. Moreover, many Nigerian courts do participate in this matter base on Section 34 of the Act. Even where a law court decides to participate, there are bound to be inconsistencies because of the absence of statutory or practice guidance.

The oldest case on this subject in Nigeria is the 1968 case of *U.A.C. Ltd. v. Agbomagbe Bank Ltd.*[49] In this case, there were exchanges of some cheques between one Mrs Esther Amushan and one CFAO to which the later company had delivered its goods to Mrs Amushan. However, one of the cheques was not honoured by Agbomagbe Bank and was later paid off by Mrs Amushan, who sued Agbomagbe for recovery before the Lagos High Court. The court ordered the commencement of arbitration between Amushan and Agbomagbe Bank Ltd. While the arbitration was ongoing, U.A.C. Ltd., who had insured Amushan and paid C.F.A.O. on her behalf, sought to join the case and was allowed by the Chief Judge of Lagos State to do so. However, the Chief Judge was urged to remove the existing arbitrators and appoint a sole arbitrator to arbitrate the dispute. The two existing parties to the arbitration challenged the joinder of the U.A.C. to the case and the appointment of a sole arbitrator. They argued that it would be against party

[49] Judgment of the High Court of defunct Western Region, delivered on 12th of March 1968, Unreported Suit No. WRN/CV/NH/234/68.

autonomy to appoint a sole arbitrator where parties have agreed to three-man arbitration. However, the Chief Judge removed the existing three arbitrators and appointed a sole one. The court made this decision on the reasoning that the case had changed from biparty to multi-party arbitration, which the arbitration agreement did not cover, and the court had the constitutionally inherent power to decide what was fair.[50]

The court in *Agbonmagbe* ruled that the party just joined had the right to equal treatment and that the cost of having more than three arbitrators would be too much on the parties. The decision was appealed in 1969 but was withdrawn when *Agbonmagbe* was liquidated. The decision is relevant to the current regime because there is no statutory provision covering multi-party arbitration in Nigeria. Therefore, the practice established in *Agbonmagbe* is that the courts have unfettered power under the Constitution to decide on the number of arbitrators and the mode of appointment in a multi-party arbitration, mainly where the parties' agreement does not cover the subject.

Curiously, in 2016, the Federal High Court in Asaba faced a more complicated issue concerning the appointment of arbitrators in a multi-party arbitration, in which the decision in Agbomagbe appears to be unhelpful. This was in the case of *West Atlantic Energy Ltd. v. Dafest*.[51] In this case, Dafest was employed by *YF Construction Development Ltd* to provide a dredging service at its sites in Delta State. Another company, *Industrial and General Insurance Plc* was engaged to provide indemnity for the drilling machines. Before the drilling ended, Dafest brought an application for a variation of the contractual sum, which was rejected. Dafest stopped working on the site, and the machine incurred demurrage which International General Insurance (Igi) was called upon to reimburse. A dispute broke out, and Dafest commenced arbitration against YF Construction and Igi Insurance. West Atlantic Energy— the owner of the contract— but not named in the agreement, applied to join in the arbitration, a request which was granted.

[50] ibid p 18.
[51] Judgment of the Federal High Court sitting in Delta State, Unreported Suit AN/CV/CS/567/06.

However, while *YF Construction and West Atlantic Energy* agreed that the three-person Tribunal should be maintained, *Igi Insurance* opted for the sole arbitrator in order to cut costs. However, Dafest argued that since the interest of *West Atlantic* and *YF Construction* aligned, both of them should have an arbitrator, and then *Igi Insurance* and *Dafest* would appoint their respective arbitrators, which would make the Tribunal a three-person tribunal without any need for party-appointed arbitrators to appoint a third arbitrator.

The court refused to go by any of the suggestions made by the parties and instead ordered that each party appoint its arbitrator, and the four arbitrators would appoint a fifth arbitrator to preside. This decision appears sound but does not uphold the principle of party autonomy. The court's decision was not borne out of any of the choices made by the parties, and the choice of five arbitrators did not consider the issue of cost of arbitration raised by one of the parties. The decision suggests that a Nigerian court has unfettered discretion to decide the number of arbitrators and the appointment procedures in a multi-party arbitration. A significant concern for the arbitration community regarding the current practice is that 'an unfettered judicial power over arbitration would open a floodgate to undermine party autonomy.'[52]

3.6.3 Separating Domestic from International Arbitration: Arising Inconsistencies and Complications

As noted in the earlier review of Sections 7, 11, 44 and 46 of the Act, Nigerian arbitration laws separate domestic and international arbitration practices. While Part III of the Act is dedicated solely to international arbitration, Part I applies to domestic and international arbitration. Thus, the dichotomy has created inconsistencies in the practices surrounding the court's appointment of international arbitrators. Instead of providing a distinct regime for the appointment of international arbitrators, the *proviso* to Part III of the ACA creates an additional regime for international arbitration. The implication is that Parts I and III of the Act apply in appointing international arbitrators in Nigeria. Thus, Sections 7, 11, 44, and 46 are

[52] Alatise Umoru, *Arbitration Laws and Practices in Nigeria: A Companion* (Cennia Press 2021) 76.

mutually applicable in guiding a court to appoint international arbitrators. However, curiously, these provisions are contradictory, and this is where the problem arises. The Nigerian courts have had to apply the conflicting provisions in appointing international arbitrators, which has created more uncertainties within the system, as there is yet no settled or prevailing practice in this regard, leaving each court to interpret as it wishes and even disregarding the parties' position.

To start, the appointment of an international arbitrator raises the question of whether the ACA permits a court to exercise its default power to appoint an international arbitrator for the parties. In *Juli Pharmacy Ltd. v. Röhlig Logistics GmbH & Co. KG.*,[53] the parties to international arbitration simply agreed that the Act would be applicable in resolving their disputes. When the Respondent failed to appoint an arbitrator, the Applicant referred the case to the Federal High Court Ado Ekiti for the court's assistance in appointing an arbitrator for the Respondent which the Respondent objected. Then, Sections 7(2)(a) and 54(2) of the Act were called to question. While the former expressly empowers a court to appoint an arbitrator on the one hand, the latter designated the office of the Secretary-General of the Permanent Court of Arbitral (SGPCA) as the 'appointing authority' in international arbitration. The court held that both provisions apply to international arbitration and that a mention of SGPCA in the latter provision does not preclude the court from exercising its power of appointment under the former provision and to appoint an arbitrator, even outside the list provided by the parties.
In contrast, in the later cases of *Aero Contractors v. Lilly Valley Incor*.,[54] and *Bürgerliches Brauhaus v. The Standard Breweries*,[55] the same Sections 7 and 54 were interpreted by the Federal High Court Lagos and Ibadan, respectively. While the *Röhlig Logistic's decision persuaded the Ibadan High Court* to exercise its power to appoint international arbitrator, the Lagos court read the two provisions differently from the earlier decisions and departed from them. In this case, the court based its decision on the doctrine

[53] FHC/ADK/567/2000 Unreported decision of the Federal High Court Ado Ekiti, (Tawo J) delivered on 7th July 2001.
[54] FHC/LAS/43/2016. Unreported decision of the Federal High Court Lagos State, (Olagbegi J) delivered on 18th March 2018.
[55] FHC/IB/12/2020. Unreported decision of the Federal High Court Ibadan, delivered on 2nd May 2020.

generalibus specialia derogant – that is, in interpreting the conflicting provisions, Section 54, being a special provision on a subject, prevails over Section 7, which is just a general provision on the same subject. In arriving at its decision, the court relied on some earlier cases, such as *Schroder & Co. v. Major & Co. (Nig.) Ltd.*,[56] and *Kraus Thompson Organization v. N.I.P.S.S*.[57] Thus, the court refused to appoint an international arbitrator under Section 7 of the Act even against the parties' agreement that the court should so appoint. In its stead, the court held that Section 54 of the Act, which designates the SGPCA as the appointing authority in international arbitration, prevails. The court further held that under Section 34 of the Act, courts are not allowed to intervene in an arbitration matter unless a specific and valid provision of the Act permits it.

Thus, *Juli*'s case suggests that even though the parties agreed that the Nigerian court should appoint an international arbitrator for them, the court still would not. This is a typical way by which party autonomy is undermined. Additionally, whether a national court can appoint an international arbitrator when the parties failed to do so remains unsettled. These conflicting decisions have reflected in other areas of international arbitration practice in Nigeria, which continues to affect the observance of party autonomy. For instance, despite the settled position of law, anchored on the interpretation of Section 34 of the Act - that Nigerian courts are not allowed to grant an injunction to impede an arbitration process- the question of whether the same position applies to international arbitration remains unsettled in Nigeria. When the issue arose in *S.P.D.C.N. Ltd. v. Crestar*,[58] the Court of Appeal held that the arbitration practice applicable to international arbitration cases in Nigeria is primarily borne out of the Model Law and not the Act. A court in Nigeria is allowed to grant an anti-arbitration injunction against an international arbitration whose seat is not Nigeria. In this case, the parties are Nigerian companies who designated London as their seat of arbitration, and the court reasoned that it could grant an injunction to restrain the arbitration because it is not bound by Section 34 of the Act, which prohibits the court from granting an anti-arbitration injunction.

[56] (1989) 2 NWLR (Pt. 101) 1.
[57] (2004) 17 NWLR (Pt. 901).
[58] [2016] 9 N.W.L.R. Pt.1517 300.

The above decision is an example of some inconsistencies in the arbitration practice in Nigeria.[59] The popular position before the decision in *S.P.D.C.N. v. Crestar* was that a Nigerian court would apply the provisions of the ACA (including Part III of the Act) to international arbitration. However, not all courts in Nigeria follow this position. For example, in some international arbitration cases, the Nigerian Federal High Courts have refused to injunct international arbitration on the basis that Section 34 of the Act applies to both domestic and international arbitration. These are *Mourg Press v. Bradley King,*[60] *Marco Bidetta v Omolayo Standard Press,*[61] and *Royland F.I.D.D v. Raymond Disney,*[62] etc., However, in *Wood v. Banco*,[63] the Nigerian Federal High Court injunct an arbitration proceeding in Brazil due to the court's reasoning that Section 34 of the Act does not regulate the court's roles in international arbitration.

To this end, the analysis of Nigerian case law on the appointment of international arbitrators has shown that the present framework separating domestic and international arbitration practice in Nigeria has, at best, caused confusion and inconsistency in the system, undermining party autonomy. These gaps have caused Nigerian judges to reach contradictory conclusions on whether to participate in international arbitration proceedings and still without a particular standard or parameter cutting across all cases.

3.6.4 Absence of a Framework or Default Provision on the Mode of Appointing a Sole Domestic Arbitrator

The Act does not provide the procedures to guide a Nigerian court on how to appoint a sole arbitrator in domestic arbitration. This gap appears minor but has raised serious issues in practice. Thus, besides Section 44 of the Act, which applies only to international arbitration, stipulating identical-list procedures for a court to appoint a sole arbitrator, no other provision of the Act guides the court regarding how to appoint a sole arbitrator in domestic arbitration.

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[59] Olorunfemi John Fusho, 'Anti-Arbitration Injuction in Nigeria: A Review of Shell Petroleum Development Company of Nigeria Limited (SPDC) v. Crestal Integrated Natural Resource Limited' (2022) Vol.5 Iss.1 *International Law Review* 13-25.

[60] Judgment of the Federal High Court Abuja, in FHC/ABJ/CV/45/17 delivered 10/4/18 (Umar J).

[61] Judgment of the Federal High Court Ado Ekiti, in FHC/EK/87/19 delivered 2/3/20 (Tawo J).

[62] Judgment of the Federal High Court Enugu, in FHC/EN/CS/142/15 delivered 7/4/17 (Aluko J).

[63] Judgment of the Federal High Court Lagos, in FHC/LS/CV/413/14 delivered 23/1/14 (Yinusa J).

The resultant effect of this gap is that the appointment of a sole arbitrator in a domestic arbitration is left to the unfettered discretion of each court, as the Nigerian judges do refer to their judicial power under Section 6 of the Constitution, thereby causing uncertainties and inconsistent decisions. For instance, in *Lakeside Autos v. National Peoples Bank*,[64] the defunct Federal Supreme Court of the Western Region of Nigeria held that the decision of a judge of the High Court who appointed his former partner in a law practice as sole arbitrator, even against parties' choice, was valid. The court held that since there was no party's agreement or statutory provision in Nigeria to guide a law court on the procedures to adopt in appointing a sole arbitrator in domestic arbitration, the only test to be applied was the test of fairness. Curiously, the court noted that there might be something 'ethically wrong' about the choice of the judge's friend as an arbitrator, but it held that there was no breach of any statutory provision. This gap is damaging to the principle of party autonomy because it places court's discretion above parties' choice.

Thus, some of the questions arising from this practice are whether the matter entrusted to the court here should be left to the discretion of each judge or whether there should be a minimum standard set towards step-to-step procedure to discharge the court's duty. Again, turning to the rules of the various High Courts in Nigeria does not assist in this regard.

3.6.5 Problems Stemming from the Court's Role to Appoint Substitute or Replacement Arbitrator in Domestic Arbitration

As discussed earlier, under Section 11 of the Act, where a replacing arbitrator was initially appointed by a court, the same court can appoint a replacement. However, Section 11 does not provide the procedures to be followed by a court to make this appointment. Then again, the Nigerian case law on this subject is as yet unsettled, particularly where it concerns how a court should strike a balance between upholding party autonomy and exercising its discretion on the procedure of appointment. In *Techno Oil Ltd. v. Ascon Oil Coy Ltd.,*[65] a deceased arbitrator was appointed by the court when the two

[64] [1990] 2 LWLQ 45.
[65] [2021] 45 V. 83 NCLRS 71.

arbitrators could not agree on the third arbitrator. After his death, the two party-appointed arbitrators agreed to appoint Mr K.U.K Ekwueme as a third arbitrator. The Applicant objected to the appointment and approached a High Court of Lagos State regarding the appointment of a replacement arbitrator. The court nullified the appointment made by the two arbitrators and appointed a replacement arbitrator against the choice of both parties.

This practice not only disregards party autonomy because of the unguarded power the courts wielded, but it also enables conflicting decisions. In *Zercom Systems Ltd. v. TI Tech.,*[66] the same High Court of Lagos state refused to appoint an arbitrator in the circumstances like *Techno Oil's* case. It was the court's reasoning in *Zercom's* case that the parties' position had reverted to what it was at the first appointment, giving them another chance, pursuant to the principle of party autonomy, to make their choice of arbitrator regardless of the procedure adopted to appoint the initial arbitrator.

Further, unlike Section 46(1) of the Act, which lays down the procedure to replace a dead arbitrator in international arbitration, there is no corresponding provision for domestic arbitration. Thus, the facts in the two old cases of *AICO Company v Societe Generale Bank*[67] *and Coastland Energy Logistics Ltd., v. Honourable Justice Oseni & 4 Ors.,*[68] demonstrate the effect of the gap created as it relates to the principle of party autonomy. In AICO's case, AICO bought shares in Societe Generale in Nigeria but could not complete the transaction. A panel was formed, which included Justice Ademola Adetokunbo, who died a few years after his appointment. An application was filed before a court for a replacement that both parties agreed to, yet the court dismissed it due to its interpretation of Sections 11 and 34 of the Act, meaning that the party-appointed arbitrator is the only person to appoint the replacement arbitrator. Thus, despite the parties' agreement, the court still refused to assist them.

Meanwhile, in *Coastland Energy's* case,[69] when a High Court in Ogun State was approached to appoint a replacement arbitrator, the judge revisited the

[66] Judgment of the High Court of Lagos State, in LS/CV/341/21 delivered 25/5/21 (Lawal J).
[67] [1983] 5 V. 41 NCLRS 6.
[68] [1999] 14 V. 8 NCLRS 51.
[69] Judgment of the High Court of Ogun State, in CV/67/20 delivered 11/3/21 (Shina J).

list of potential arbitrators placed before it in the prior application for appointment, from which it appointed Mr Ogunde. However, the parties argued that the court ought to have adopted the procedures in Section 7 to appoint the arbitrator. It was held by the court that there is no procedure provided under Section 11 which gives the court the leverage to 'do what is fair and similar to the proceedings leading to the appointment of the replacing arbitrator.' More so, the court stated that the provisions of Section 46 are only applicable to international arbitration.

The question arising from this gap in the current regime is what procedures do the drafters of the Act expect parties and courts to follow in the appointment of an arbitrator to replace a deceased arbitrator in domestic arbitration. In practice, the Nigerian courts have been performing this function, but with no definite position and procedure. Therefore, this space is left for the individual judge to decide whether the parties would be allowed to determine the procedures, or such power would lay absolutely with the court.

3.6.6 Problems Emanating from the Non-Appealable Nature of Court's Decision to Appoint Arbitrators

Where a Nigerian court has appointed an arbitrator into either domestic or international arbitration reference under the Act, issues are still raised regarding the right of a party to challenge the court's appointment. This is traceable to Section 7(4) of the Act, which seems to expressly exclude party's choice by foreclosing parties outrightly from appealing or challenging an appointment made by a court. Section 7(4) provides:

> A decision of the court under subsections (2) and (3) of this section shall not be subjected to appeal.

Curiously, this provision governs domestic arbitration; no corresponding provision applies to international arbitration. However, under the general position of the Nigerian courts that all provisions applicable to domestic arbitration are also applicable to international arbitration, the provision may apply equally to international arbitration. The gap in this provision, nevertheless, is that the practice of court-appointed arbitrators without a right to challenge the appointment may undermine party autonomy by

forcing arbitral parties to accept court-appointed arbitrators without a right to challenge.

Thus, in many cases where Nigerian courts have had to determine the propriety of making the decision of a High Court final, the courts have sometimes declared such a position unconstitutional.[70] This is because the 1999 Constitution vests the power in the Court of Appeal to receive all appeals from a High Court, except where exemptions are legally created.[71] On this basis, some Nigerian jurists have pronounced the provision of Section 7(4) of the Act ineffective.[72] For instance, in *Ogunwole v Syrian Arab Republic*,[73] the Respondent applied for a court-appointed arbitrator, which was granted. Upon appeal, the Court of Appeal dismissed the appeal based on Sections 7 and 34 of the Act. Even with this, 'scholars, legal practitioners and commentators have seriously debated the finality of the court's decision in appointing an arbitrator,'[74] and the appellate courts in Nigeria have yet taken no definite position on this issue. This is because there have been inconsistent decisions regarding the interpretation of Section 7 and the impact of Section 34.

In *Nigerian Agip Oil Company Limited v. Kemmer & Ors.,*[75] the Court of Appeal reasoned that Section 7(4) was 'although a good law when the Nigerian Constitution was suspended under the military administration, but now unacceptable since the Constitution is supreme.' The court acknowledged the presence of a conflict between Section 7(4) of the Act and Section 241 of the Constitution and applied a mischief rule to interpret the provision. Under this, the court resolved that the inclusion of Section 7(4) in the ACA against the provision of the Constitution could have only resulted from an oversight by the legislators. Accordingly, the court's decision appears to uphold party autonomy by allowing parties to appeal against a court's appointment of an arbitrator.

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70 Skye Bank Plc v. Iwu [2017] 16 NWLR (Pt 1590) 24; Gassol v. Tutare and Ors. (2013) 14 NWLR (Pt. 1374) 221.
71 F.R.N. v. Osahon (2006) 5 NWLR (Pt. 973) 361.
72 Agip v Kemmer [2001] 8 N.W.L.R. Pt.716 Pg.506.
73 [2002] 9 NWLR (pt 771) 127.
74 Emmanuel Wingate and Pontian Okoli, 'Judicial Intervention in Arbitration: Jurisdictional Issues Concerning Arbitrator Appointment in Nigeria' (2021) 65 2 *Journal of African Law* 240.
75 (n 72).

However, scholars like Ola Olatawura and Charles Ihua-Maduenyi have argued that the correct interpretation of the provision is to make the decision of a High Court regarding an arbitrator's appointment non-appealable.[76] Curiously, in some cases that followed *Kemmer*'s decision, the Nigerian courts have again held that a right to appeal under Section 7(4) of the Act against a court's appointment of an arbitrator is not available to parties in all cases. The subsequent position is that parties are not allowed to question the procedural errors made by a court when appointing an arbitrator. This was the decision of the Court of Appeal in *Ibad Investment v. Afam Power Electricity,*[77] where the court held that a challenge against the criminal record of an arbitrator appointed by a court was appealable because it was not against the procedure of appointment.

Also, in *Bendex Eng., v. Efficient Pet. (Nig).,*[78] the court of appeal further attempted to differentiate an appealable from a non-appealable case under Section 7(4) of the Act, when it suggested that what the drafters of the Act and Model law intended to make as final are not all issues relating to arbitrator's appointment but only procedural issues on arbitrator's appointment. However, the Nigerian courts have no decision yet to put this issue to rest. In a recent decision of a High Court in Ogun State, in *Star P. United v Obat Oil Ltd.,*[79] Justice Onamade still granted leave to an Applicant to appeal against an alleged procedural error made by the court in appointing an arbitrator. In contrast, in *Mainframe Films and Television Production v. Union Bank Plc.,*[80] based on Section 34 of the Act, a Federal High Court in Lagos refused to grant leave to an Applicant to appeal against an appointment of an arbitrator where it is alleged that the court appointed a foreigner which would make the arbitration more costly for the parties than expected.

The gap created in the system when all these conflicting decisions are put together is that it is difficult to point at a definitive position of the Nigerian

[76] Ola Olatawura, 'Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction— Facts, Problems and Solutions' (2014) Vol 28 Iss:1 *International Arbitration* 3-4; Charles Ihua-Maduenyi, *Internation Arbitration and Public Policy Rule* (UniIfe Press 2009) 43.
[77] [2017] 17 V. 3 NCLRS 32.
[78] [2001] 8 N.W.L.R. Pt.715 Pg. 333.
[79] Judgment of the High Court of Ogun State, in CV/112/22 delivered 10/11/22 (Onomade J).
[80] Judgment of the High Court of Lagos State, in LS/CV/481/22 delivered 8/3/23 (Lawal J).

courts on Section 7(4) of the Act, that is, on the extent to which party autonomy is observed or undermined in terms of party's right to have a say or to question a court that is appointing an arbitrator for them. In one breath, some decisions uphold an absolute bar against an appeal from the appointment decision made by a court - which could be described as anti-party autonomy. But then, in another breath, some judicial decisions simply limit the appeal right to matters other than procedural errors. Then again, some decisions have allowed appeals on all grounds, including procedural error. The consequence of the unpredictable regime is that it brings uncertainty into the system.

3.7 The Court's Roles in the Removal of Arbitrators

Like the appointment of arbitrators, the Nigerian arbitration laws observes party autonomy by first giving the parties the right to agree on the mode of removing their arbitrator, but in compliance with the Act. This practice is governed by Sections 8(3), 9(1), (2), (3), 10, and 12(1)(2) of the Act. Thus, besides the situations where an arbitrator resigns, withdraws, dies, etc., there is no provision allowing parties to agree to remove an arbitrator outside the grounds provided under the Act. In practice, parties do agree to remove arbitrators and often with some cost implication in favour of the arbitrator. Thus, the Act allows the parties to remove an arbitrator on three grounds, which are:

(i) By challenging the qualification of an arbitrator pursuant to Sections 8, 9 and 45 of the Act.
(ii) By challenging the jurisdiction of the Tribunal under Section 12(1) of the Act.
(iii) By agreeing to terminate the mandate of an arbitrator pursuant to Section 10 of the Act.

The practice surrounding these three situations is examined in detail below. They are discussed with a specific focus on the roles of the courts and the gaps in the system, particularly as they affect the principle of party autonomy.

3.7.1 Arbitrator's Removal for lack of Qualification

Parties could remove an arbitrator by questioning the arbitrator's authority to adjudicate (or continue adjudicating) a dispute because he is not (or is no longer) qualified to adjudicate on the matter. The practices and procedures governing qualification-challenge applications are provided under Sections 8 and 9 of the Act (for domestic arbitration) and Section 45 (for international arbitration). Curiously though, under the Act, no specific credential is required to be possessed by an arbitrator without which he could be challenged,[81] but from the practice experience, the qualifications expected of an arbitrator could be categorised as two elements. The first category is the qualification laid down by the Act, which is 'impartiality' and 'independence.'[82] The second qualification category is the one mutually agreed upon by the parties. Thus, Section 8(1) imposes a duty on a prospective arbitrator to promptly disclose any circumstance that is likely to doubt his qualification. Meanwhile, this duty subsists before the appointment of an arbitrator and all through the proceedings.

Whichever case it is, Sections 8(3) and 45 of the Act allow a party to file a challenge application when there are doubts about the arbitrator's qualification, including their impartiality and independence. Section 9(1) empowers the parties to determine the challenge procedure, but in the absence of agreement, Section 9(2) mandates parties to present it to the Tribunal as a 'written statement'. However, even though no role is assigned to a court in this regard, they still participate in practice, whether to review or determine such an application. Nonetheless, the extent to which a court would involve itself in such a case is unclear due to Section 34 of the Act, which enjoins a court to participate only where expressly provided in the Act.[83] It is curious to observe that the Model Law explicitly defines a court's role in resolving disputes surrounding the qualification of an arbitrator, unlike the Nigerian regime.[84]

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81 Tinuade Oyekunle (n 156) 62.
82 (n 5) s. 8(1) and (3).
83 Tinuade Oyekunle (n 156) 75.
84 UNCITRAL Model Law (Amended in 2006), Article 13(3).

3.7.2 Arbitrator's Removal for want of Jurisdiction

Where a party alleges that an arbitrator or a Tribunal lacks jurisdiction to determine a case, Section 12(1) of the Act allows the party to request the arbitrator or Tribunal to recuse from the case based on the *Kompetence-Kompetence* principle. The only condition on filing such a challenge application under the provision is that it should be filed 'not later than the time a Defence in the matter is submitted.'[85] Also, where the challenge application concerns an allegation that the arbitrator exceeds the scope of its authority, a challenge application should be filed as soon as the issue that is 'beyond the scope of the arbitrator's authority occurs during the proceedings.'[86] Further, an arbitrator can determine the challenge application as a preliminary issue or in the final award on the case's merits. The provision also makes an award on this subject 'final' and 'binding.'[87]

Even though the Act does not expressly provide that a court can participate in this subject, in practice, parties do approach Nigerian courts to determine jurisdictional challenges. Such applications may get to the court through different routes. For instance, if a tribunal dismisses a challenge application, a party can resubmit the application to a court for fresh determination or present the unfavourable decision of the Tribunal to a court for review and reversal. In some cases, the challenger may apply directly to a law court without first approaching an arbitrator or Tribunal. In another scenario, a third party to an arbitration agreement may be the one approaching a court to challenge ongoing arbitration.[88]

Whichever route a challenge application gets to a law court, the court's roles on this subject have been controversial and unsettled, particularly in the face of Section 34 of the Act.[89] Thus these controversies are primarily borne out of the divergent interpretations given to Sections 12 and 34 of the Act.

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85 (n 5) s 12(3).
86 ibid s 12(3).
87 ibid s 12(4).
88 Tinuade (n 156) 91.
89 Ola Olatawura, 'Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction— Facts, Problems and Solutions' (2014) Vol 28 Iss:1 *International Arbitration* 3-4; Paul Idornigie, 'Nigeria's Appellate Courts, Arbitration and Extra-legal Jurisdiction—Facts, Problems, and Solutions: A Rejoinder' (2015) 31 *Arbitration International* 171-180.

3.7.3. Termination of an Arbitrator's Mandate

Section 10 of the Act provides that an arbitrator's mandate would terminate when the arbitrator withdraws or fails to perform his functions or act without undue delay or the parties agree to terminate his appointment for reasons of his inability to perform his functions. The weakness in this provision and the practice around it are further discussed later in this chapter and in chapters 6 and 7, but it is noteworthy that the provision does not state what should be done if the Tribunal refuses to withdraw and there is no consensus between the parties as to the termination of the arbitrators' mandate.

3.8 A Critical Appraisal of Court's Interpretation of the Provisions Relating to Arbitrator's Removal and the Gaps in the Regime

3.8.1 Unresolved Problematic Questions Surrounding the Finality of the Tribunal's Decision

The wording of Section 12 of the Act does not only suggest that a tribunal should determine an application to remove arbitrators based on a jurisdictional challenge application, Section 12(4) also state that the decision of a tribunal on a challenge application is 'final' and 'binding.' As simple as this provision reads, it has generated different interpretations from case law and views from arbitration practitioners.

Firstly, the prevailing case law appears to posit that the literal meaning of the words "final" and "binding" is that the parties have no choice but to accept the arbitrator's decision regarding a challenge application because it is unappealable.[90] However, like court's decision on arbitrator's appointment, some writers have argued that the literal meaning of the two words notwithstanding, their contextual meaning does not connote an unappealable decision.[91] Owoade, for instance, is one of the leading voices in this respect.[92] Comparing the provision of Section 12(4) of the Act and Section 7(4) of the Act, Owoade postulates that, had the drafters of Section 12(4) desired to make the tribunbal's decision on jurisdictional challenge non-appealable, they would have chosen the same or similar wording as in

[90] Ola Olatawura, ibid.
[91] Paul Idornigie, ibid.
[92] Paul Owoade, 'Development of Commercial Arbitration Law in Nigeria' (2010) 45th Series Paper 2251 pp 595 – 617 *Nigerian Bar Association's Articles,* 597.

Section 7(4) which is that the decision 'shall not be subjected to appeal.' He argued, therefore, that the choice of a different expression in Section 12(4) by the same drafters of Section 7(4) signifies a different intention.

Although Owoade's argument sounds defensible, and it appears to have been adopted and followed by some Nigerian jurists in their decisions,[93] the argument still has its flaws in that it does not explain why the legislature has chosen the words "final" and "binding" whose literal meaning is a direct opposite of the contextual meaning given by Owoade. More so, the argument is premised on a questionable assumption that the legislature cannot choose different words or phrases in the same legislation to convey the same meaning. Further, Section 12(4) may be considered unconstitutional by the decision in *Nigerian Agip Oil Co. Ltd. v. Kemmer*[94] discussed earlier, where it was held that only the Constitution could curtail the appellate power of a court. However, in a more recent case of *Somtom v Novatem,*[95] the High Court of Plateau State refused to entertain a case to review the removal of a tribunal based on Sections 12(4) and 34 of the Act.

Perhaps the conflicting stance of the Nigerian courts surrounding the interpretation of Sections 12 and 34 of the Act and their application to the relationship between the court and arbitration tribunal is an issue envisaged by the drafters of the UNCITRAL Model Law, where its Article 16(3) expressly allows a court to participate in a jurisdictional challenge application and makes the decision of the court not subject to an appeal, unlike the decision of the arbitrators under Section 12(4) of the Nigerian law. Thus, the present regime in Nigeria is caught between it permitting an arbitrator to decide a jurisdictional question as a preliminary point - thereby opening the decision to the court's early intervention - or making an arbitrator's decision on a jurisdictional question await an award on the merit before a court's intervention.

3.8.2. The Unguarded Roles of Courts in Removing Arbitrators

The danger in the current practice where the Act does not assign any role to a court in a challenge application, but the courts still involve in such

[93] Kliev v. ASCON (2010) 11 NLCR 45; Yuvlux v NNPC (2009) 3 SCY 34 Vol 5.
[94] ibid.
[95] (2022) 5 NCLRS H5 CV 78.

application without any statutory guidance, is that it allows the court to exercise unguarded or unfettered discretion which could undermine party autonomy. Moreover, it enables inconsistent judicial decisions, as each judge can decide to intervene as they please. This is unlike the practice in some jurisdictions like Ghana, where a High Court is expressly allowed to review the decision of an arbitrator regarding a jurisdictional challenge application[96] and Malaysia,[97] Scotland[98] and Argentina, etc.,[99] where parties are expressly allowed to lodge an 'appeal' in a law court (of the first instance) against an unfavourable ruling of the Tribunal on a jurisdictional challenge.

Consequently, this gap in the Nigerian practice has bred some inconsistent decisions in the case law on this subject. For instance, in *Bond Investment v. Akwa Ibom State*,[100] the question before the court was whether the express donation of the power to determine jurisdictional challenge in a tribunal under Section 12 with a statutory silence over the court's role would mean an absolute bar on the court's involvement in this subject. The court held that by Section 6(6) of the Constitution, the decision of a tribunal in this respect is a condition precedent to invoke the jurisdiction of a court and cannot override the court's constitutional power. However, in *Aso Savings v. Rosebud*,[101] an Abuja High Court still held that the legislators have deliberately removed the court's role in this subject and barred the courts from intervening in a jurisdictional challenge application.

Regarding scholarly insights on this issue, Olatawura and Idonigie are leading proponents of different schools of thought. Olatawura argues that any recourse to a court from arbitration cases must be based on an explicit 'statutory authorisation.'[102] Although he believes that the Act was enacted without stakeholder consultation, which makes it open to 'constitutional and interpretation controversies,'[103] he based his reasoning on the provision of Section 34 of the Act, which has been interpreted to mean that the court is allowed to participate in arbitration only where the Act has assigned a role to

[96] Alternative Disputes Resolution Act, 2010, Ghana, s 26(1).
[97] Arbitration Act, 2005, Malaysia Act 646, s 17(8).
[98] Arbitration (Scotland) Act, 2010, ss 21 and 22.
[99] International Commercial Arbitration (LACI) Law, Law No. 27, 449 2018, Argentina.
[100] Unreported Judgment of the Federal High Court, Uyo, deliverend 5/2/20 (Aluko J).
[101] Unreported Judgement of FCT High Court CV/FCT/342/2016 delivered 12/11/19 (Oseji J).
[102] Ola Olatawura (n 89) 3-4.
[103] ibid.

the court. Olatawura further argues that an 'absolutist' approach that a court should not entertain a jurisdictional challenge at all will reduce the overbearing caseload plaguing the Nigerian courts and assist in growing the arbitration industry in Nigeria, which is allegedly stalled by the court's unnecessary involvement in arbitration.[104]

However, the core of Idonigie's contrary argument was that the Nigerian courts do not derive their judicial powers from the Act but from Section 6 of the Constitution. Even though he admits that Section 34 of the Act is included in the Act to limit the court's intervention in arbitration, he argues for the supremacy of the Nigerian Constitution over the Act.[105] However, his arguments were channelled towards the conclusion that where issues from arbitration find their way to a High Court, it has invoked the jurisdiction of the appellate courts, which an Act cannot constrain.[106]

Nonetheless, whichever way the positions of the two schools of thought go, from the judicial decisions, it is observed that the statutory silence in Section 12 over the court's roles in a jurisdictional challenge application has not dissuaded the Nigerian courts from entertaining challenge applications when they wish to. Thus, as a first-time application or for a review of an unfavourable ruling on the jurisdiction of the Tribunal, many cases questioning the jurisdiction of the arbitration tribunal have been determined by Nigerian courts. Also, there have been cases where the contending parties have approached the court directly, and the court entertained those cases.[107]

From the foregoing, because of the undefined limits to the court's jurisdiction, which is borne out of the current practice, it may be difficult to argue convincingly that a law court should continue to participate in a challenge application within its limit and against the wording of Section 12 of the Act. It would also be curious to note that the same court that has severally interpreted the provision of Section 34 of the Act to bar the court's

[104] ibid.
[105] Idornigie (n 89) 34.
[106] ibid.
[107] See generally: FIRS v Shell & NNPC (2011) Unreported decision of the Federal High Court in Suit No. FHC/ABJ/CS/774/11]; NNPC v Esso Unreported decision of the Federal High Court Abuja; FIRS v. NNPC & 3 Ors [FHC/ABJ/CS/764/11]; Esso Exploration Nigeria Limited & Anor v NNPC Suit No. CA/A/507/2012 unreported judgment delivered on 22 July 2016; Shell Nigeria Exploration and Production & Ors. v FIRS and Anor; Suit No.CA/208/2012 unreported judgment delivered on 31 August 2016.

involvement except in the areas expressly designated some roles to the court in the legislation also abandoned this principle.[108] The combined interpretation of Sections 12 and 34 of the Act should tilt more towards the position that the court should be excluded from a challenge application. However, the position that the power of the Nigerian courts is founded on the Constitution cannot be overlooked as the legal implication, particularly considering the supremacy of the Constitution, is to have both the Tribunal and courts sharing their jurisdictions, but without a clear demarcation of the limits to their jurisdictions.

3.8.3 The Problems Surrounding Ascertaining the Exact Court to Determine a Jurisdictional Challenge Application.

As reviewed earlier, the Act does not expressly provide for the court's participation in a challenge application, but, in practice, the Nigerian courts do participate in this matter. This is so because, as briefly discussed in Chapter 2, the question of which Nigerian court is to determine a jurisdictional challenge application is one of the problematic issues in this area. Accordingly, not mentioning any court under Section 12 of the Act could make searching for the appropriate court more challenging. The first issue raised above is borne out of the fact that the Nigerian court system is moulded after the country's political structure, which is federal in character and each court has its jurisdiction individually ingrained in the country's Constitution which is supreme above all other laws in the country.[109] The federal character means that all the constitutional offices and authorities in the country, including the judiciary and its jurisdictions, are shared among the three tiers of government (i.e. the Federal, the State, and Local governments).

Hence, the current Constitution has established different courts at each tier of government and set out their jurisdictions, and the courts established at the three tiers of the federation are relatively independent of one another. By implication, every State in Nigeria has its own High Court, named after each State, and the central government, whose High Court is named the

[108] Kabusa v. Incorporated Trustee of FALCON (2020) 1 SCY 234.
[109] A.G Ondo v. A.G Federation (2000)3 NWLR Pt. 1234 Pg. 34.

Federal High Court.[110] Under the Constitution, these courts are clothed with distinctive territorial and subject-matter jurisdictions which are ordinarily not expected to overlap.[111] However, in practice, the jurisdictions of these courts do overlap, which often strains their relationship and stresses the users, including the arbitrating parties, who are approaching the court for intervention. In some cases, however, the arbitrating parties opposing the court's involvement in an arbitration matter to take advantage of the jurisdictional conflicts to frustrate the court's proceedings and the other party.[112] Fundamental to the issue surrounding jurisdictional conflicts within the High Court to entertain cases emanating from arbitration is whether the parties could approach any of the High Courts listed in section 57 of the Act to seek judicial involvement.

Section 57 mentions a High Court and further defines it as including the three High Courts: ' the High Court of a State, the High Court of the Federal Capital Territory, Abuja and the Federal High Court.' As explained, though these three High Courts wield equal judicial powers in the hierarchy of courts in Nigeria, their territorial and subject matter jurisdictions differ and sometimes overlap.[113] Thus, the question as to which of the three High Courts should decide on a challenge application becomes imperative because Section 57 lists the three courts without clarifying the devolution of jurisdiction.[114] Even if Section 57 had gone further to devolve jurisdiction among the Courts regarding their involvement in arbitration or allowed the parties to specify one in their agreement, the argument that the Act and agreement are subject to the Constitution and cannot alter the constitutional devolution of jurisdiction would still make the issue topical.[115]

The *Associated Discount House Ltd. v. Amalgamated Trustee Ltd*. [116] case illustrates the complications in jurisdiction conflicts among the High Courts in

[110] 1999 Constitution, Nigeria, Ss 251, 257, and 272.
[111] ibid.
[112] Earl Wolaver, 'Historical Background of Commercial Arbitration' (1934) 83 U. Pa. L. Rev. 132 pp 132 – 146 *University of Pennsylvania Law Review* 136.
[113] Clestus Nweze, 'Jurisdiction of the State High Court' in Elizabeth Azinge, *Jurisprudence of Jurisdiction* (Oliz Publishers 2005) 85 at 90.
[114] Paul Okorie 'Extent of the Jurisdiction of the Federal High Court in fundamental human rights cases in Nigeria: A Review of the Supreme Court Decision in Grace Jack v University of Agriculture, Makurdi' (2004) 2 *Nigerian Bar Journal* 241.
[115] ibid.
[116] [2006] 5 SC (Pt.1) 32.

Nigeria. The defendant challenged the Federal High Court's jurisdiction and was directed to the High Court of Lagos State. At the latter court, the defendant again challenged the jurisdiction of the High Court of a State, but the Court dismissed the objection and assumed jurisdiction. On appeal, the Supreme Court reversed the decision and held that the High Court of Lagos State had the jurisdiction. For almost ten years, the case was stalled at the High Court of Lagos State merely due to the question of jurisdiction between the two High Courts.[117]

Besides the jurisdictional conflicts between the Federal High Court and a State High Court, there are still time-long complications in the jurisdictional conflicts among the States' High Courts too. For instance, in order to determine which of the High Courts is competent to entertain a breach of contract case, the Nigerian courts have applied several principles at different times and in different cases, such as (a) *lex loci contractus* — the State where the contract was made,[118] (b) *lex loci solutio*— the State where the contract is to be performed,[119] (iii) *dominum reus* — the State where the defendant resides, etc.[120]

Chevron USA Inc. v. Britannia-U Nigeria Ltd.,[121] exemplifies how these jurisdictional conflicts affect the High Court's involvement in arbitration. In this case, the plaintiff disregarded arbitration agreement to file a case at the Federal High Court for a dispute bothering an alleged breach of contract connected to bidding for an oil mining lease. One of the objectors to the suit argued that the plaintiff ought to approach the High Court of a state instead of the Federal High Court because the case concerned a simple contract. One of the parties argued that the Federal High Court should transfer the case to the High Court of a state instead of striking it out. Yet another objector argued that both High Courts lacked jurisdiction to entertain the case and that the arbitration agreement should be enforced by the court making an

[117] See also Oladipo v. Nigeria Customs Services Board (2009) 12 NWLR (Pt. 1156) 563.
[118] Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd (2013) 16 NWLR (Pt. 1379) 60; First Bank of Nigeria Plc v Kayode Abraham (2008) 18 NWLR (Pt. 1118) 172.
[119] *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; Dairo v. Union Bank of Nigeria Plc (2007) 16 NWLR (Pt 1059) 99; Mailantarki v. Tongo & Ors (2017) LPELR-42467; Audu v. APC & Ors (2019) LPELR – 48134.
[120] British Bata Shoe Co v. Melikan (1956) SCNLR 321; Nigerian Ports Authority v. Panalpina World Transport (Nig) Ltd (1973) 1 ALR Comm 146, 172; Muhammed v. Ajingi (2013) LPELR-20372 (CA); Barzasi v. Visinoni (1973) NCLR 373.
[121] (2018) LPELR-43519 (CA).

order to remit the case to arbitration. The trial Federal High Court dismissed all the objections and found that it has jurisdiction because the matter related to an oil mining leasehold which is within its exclusive jurisdiction.

An appeal was lodged against the High Court ruling at the Court of Appeal, and the Court consolidated all the appeals lodged on this subject and gave a comprehensive judgment.[122] It reversed the decision of the Federal High Court and found that the court lacks the jurisdiction to entertain the matter on the basis that, though the contract relates to an oil mining lease, the suit in dispute largely concerned a breach of simple contract, which is within the exclusive preserves of the High Court of a state. However, the court still found that though the arbitration agreement was valid, the Federal High Court could not participate in its enforcement because the suit before arbitration was not the type the court could determine.

The court's decision appears to have set a blanket rule that the appropriate High Court to participate in arbitration is the court, which, if not for the arbitration agreement, would have been the proper court to litigate the case. This rule is entrenched in what could be described as a 'but for' or 'if not for' test. It could also be observed that the 'but for' test emphasised in *Chevron v. Britannia* has widely influenced many court decisions to resolve jurisdictional conflicts relating to the High Courts, arbitration or otherwise. In the case of *FUTA v. BWA Ventures Nigeria Ltd*,[123] which involved a construction contract awarded and carried out in 2010. The Respondent sued to pay its contract sum at the Federal High Court, but due to the arbitration agreement, the court stayed proceedings and referred the parties to arbitration. The arbitration award was found in favour of the Respondent in 2013, and the Appellant challenged the competence of the Federal High Court in entertaining the case. The court dismissed the objection, but in 2018, the appeal court reversed the Federal High Court decision and nullified the judgement on the ground that there should be a nexus between the competence of the registering court to entertain a case if it had the opportunity and the arbitration case it is requested to determine.

[122] CA/L/495/16, CA/L/557/14, and CA/L/105/16.
[123] (2018) 7 NCLRS H3 CV 11.

However, it is still problematic to apply the above argument to a challenge application filed in a court against the jurisdiction of a tribunal. This is because a High Court is called upon to determine the arbitrators' jurisdiction and not to register the arbitrator's decision as that of the court. In this circumstance, therefore, it is difficult to rationalise the insistence on the competence of the court over the subject matter of the case submitted to arbitration before the court can determine the jurisdictional issue.

3.8.4 The Problematic Nature of the Court's Proceedings and Decisions Regarding Jurisdictional Challenge

The corollary to the problems reviewed above is the difficult question concerning what the nature of the High Court's procedures and proceedings on a jurisdictional challenge and its decisions should be. From the available case law in Nigeria, the problems that has often arisen from this issue do stem from the question whether a High Court is to review the Tribunal's jurisdictional decision or to take the jurisdictional challenge application afresh. Moreover, to what extent can the parties decide what the court should do in the circumstance. Curiously, the Act is not helpful in this regard because, as discussed earlier, it does not, *ab initio,* provide for, let alone regulate, court's participation in a jurisdictional challenge. The issue, therefore, remains challenging and unsettled in the Nigerian case law.

In *Shell & 3 Others v. FIRS.,*[124] the Respondent challenged the Tribunal's jurisdiction and requested the arbitrators' removal on the basis that the notice of arbitration and statement of claim were incompetent because they were jointly signed with an English law firm instead of only a Nigerian lawyer, pursuant to Section 24 of the Legal Practitioner Act.[125] The Tribunal dismissed the objection, and the parties agreed to proceed with the arbitration. However, while arbitration was ongoing, FIRS filed a separate application on the same subject but before a High Court which later went on appeal. There, the issue regarding the competence of the notice of arbitration and statement of claim was raised afresh at the Court of Appeal. The Appeal Court took fresh evidence and arguments from the parties and

[124] Shell v FIRS, Unreported decision of the Court of Appeal of Nigeria, Appeal No. CA/A/208/2012.
[125] Legal Practitioner Act, Nigeria, Cap L12 LFN 2004, s 24.

declared the appeal notice incompetent, nullifying the Tribunal's entire proceedings.

Although it was not clear whether, in the *Shell* case, the court ever considered the Tribunal's earlier decision on the jurisdictional issue, the facts show that the court's attention was drawn to the arbitrator's decision. The arbitrator's decision notwithstanding, the court still considered the challenge application afresh and took a decision directly contrary to the arbitrator's decision. Meanwhile, the court also disregarded the parties' consent to proceed with the arbitration. The court reasoned that the nature of the jurisdictional issue raised by the Respondent was substantive and only a court is competent to determine because it involves the interpretation of some legislation and the Constitution.

In 2014, a similar case to the *Shell* case came up before the same Court of Appeal in *Stabilini Visionole Ltd. v. Malisson & Partners Ltd*.[126] In the case, the appeal court granted leave to a party to challenge the Tribunal's jurisdiction for the first time at the Court on an issue not raised at either the Tribunal or the High Court. Even though the jurisdictional issue was resolved against the Applicant, it was a new application before an appellate court which took full argument on the issue and decided upon it. These cases establish a practice that Nigerian courts possess the power to entertain a jurisdictional challenge application afresh, not minding what transpired at the Tribunal and even making decisions without the knowledge of the affected arbitrator and regardless of the position of the parties. The examples set in *Shell* and *Stabilini* suggest that the scope of the court's involvement in a jurisdictional challenge application against an arbitrator's jurisdiction is unlimited and subject to each court's discretion.

Regarding whether the decision of a High Court regarding a jurisdictional challenge application is appealable to the appeal courts in Nigeria, the cases of Shell and Stabilini have suggested that such a decision is appealable in Nigeria. However, as discussed earlier, two schools of thought have emerged: the anti-appellate and the pro-appellate schools of thought. While the anti-appellate school generally believes that arbitration should not

[126] Stabilini Visinoni Ltd. v. Mallinson & Partners Ltd. [2014] 12 N.L.W.R. Pt.1420 pg.134.

exceed the court of first instance for a review, the pro-appellate school believes otherwise. One of the key proponents of the anti-appellate school of thought is Olatawura.[127] He believes that the Appellate courts lack jurisdictional competence over commercial arbitration in Nigeria. He argues that since the High Court is the only court specifically prescribed in Section 57 of the Act as being able to participate in arbitration under Section 34 of the Act, no other court is competent to entertain an arbitration-related matter. He then argues that recourse to an appellate court after the High Court's decision is an 'aberration' and contrary to the intention of the drafters of the UNCITRAL Model Law and the Nigerian arbitration statute.[128] He believes his reasoning is supported by Sections 34 and 57 of the Act.[129]

Olatawura argues that when Section 34 provides that a court should intervene in an arbitration matter only where the Act allows it to intervene, Section 57 has clarified that the court referred to in Section 34 is a High Court and not any other court. He then argues that 'court-associated delays have stalled the growth of the arbitration industry in Nigeria,' and if the finality in determining arbitration cases rests with a High Court, it will ensure speed and curb delays in arbitration cases.[130] Olaifa has adopted the same logic used in Olatawura's reasoning to argue that even a High Court should not be involved in a jurisdictional challenge application because there is no mention of a court in the provision of Section 12 of the Act. It may also be argued that if any court must participate in such a process, it could only be a High Court because of the mention of its name in the Act, and no appeal should go to any other court not mentioned in it.

However, the proponents of the pro-appellate school of thought believe that the anti-appellate school is too simplistic in their understanding of the judicial authority and jurisdiction of the appellate courts in Nigeria. Thus, the school argues that notwithstanding that there is no mention of the appellate courts in the arbitration statute, parties could escalate their arbitration-related dispute from a High Court to the appellate courts. In a direct reply to

[127] Ola Olatawura, (n 89) 63-76.
[128] ibid.
[129] These provisions are respectively similar in content to Articles 5 and 6 of the UNCITRAL Model Law, 1985 (amended in 2006).
[130] Ola Olatawura (n 89).

Olatawura's writing, for instance, Idonigie argues that the judicial authority vested in the courts in Nigeria is determined by a combination of many statutes and the Constitution, and not just the ACA.[131] It was argued that the Nigerian Constitution enjoys supremacy over other laws and that the Constitution designates the Supreme Court of Nigeria to give a final judgment in all civil matters in Nigeria. It was further specifically argued that Article 11(5) of the UNCITRAL Model Law, which appears to support the notion that the decision of a High Court shall not be subject to an appeal, is unconstitutional and invalid in Nigeria.[132]

The reasoning of the pro-appellate school appears to be the prevailing position in Nigerian case law. To this end, the appellate courts have severally relied on Section 6 of the Constitution as the basis to review a tribunal's decision regarding the jurisdictional challenge, notwithstanding any contrary wording of the Act or agreement of the parties. For instance, in *Bendex Engineering Corporation & Anor v. Efficient Petroleum Nigeria Ltd.*,[133] the Court of Appeal was invited to interpret the provision of Section 7(4) of the Act, which states that the decision of a High Court on the matter of appointment of an arbitrator is not appealable. The court held that the provision does not automatically bar the appellate court from entertaining the matter and that it depends on the facts of the case and the grounds upon which the appeal is being pursued. The appellate court's decision in *Bendex*'s case gives leeway to the appellate court to look beyond the words of Section 7(4) of the Act. However, in the subsequent judgment of the court in *Nigerian Agip Oil v. Kemmer & Ors,*[134] the Court of Appeal, though from a division different from *Bendex*'s case, implicitly declared the provision of Section 7(4) of the Act unconstitutional. This is because the court held that, regardless of Section 7(4) provision, the court of appeal could entertain such an appeal based on Section 241 of the Constitution, which generally designates powers to the court to entertain all appeals from the High Courts.

[131] Paul Idonigie (n 89) 171-180.
[132] Paul Idonigie (n 89) 173.
[133] (2001) 8 N.W.L.R. (Pt. 715) 333 at 339.
[134] (2001) 8 N.W.L.R. (Pt. 716) 506 at 525-526.

3.8.5 Absence of Statutory Provision on Court's Roles in a Qualification Challenge Application.

As observed earlier, Sections 8, 9 and 45 of the Act reflects the spirit of party autonomy by allowing parties to agree on a procedure for challenging an arbitrator's qualification. However, the law provides that where the parties do not provide any procedure, an objector should, within fifteen days of becoming aware of the Constitution of a tribunal or becoming aware of the alleged disqualifying circumstances, submit a 'written' challenge application to the same Tribunal. At this point, the arbitrator is allowed to withdraw from the case, or both parties may decide to concede the challenge application and remove the arbitrator, or the Tribunal may decide the application in favour of the objector. However, where all these options do not favour an objector and a further redress is sought, in practice and depending on the type of arbitration, such further objection is often filed before a law court. However, like the issue with the jurisdictional challenge, the Act does not designate such power to a court in domestic arbitration and does not provide for any procedure to guide a court in this regard.

Meanwhile, the Act separates the regime in international and domestic arbitration. While Section 45 of the Act provides a framework for a qualification challenge in international arbitration, domestic arbitration is regulated by Sections 8, 9 and 45. But then, none of these provisions really provide a remedy for an objector seeking further redress in a qualification challenge application that has failed at the tribunal level. Thus, the inconsistency created in Nigerian arbitration practice regarding the role of a court in an unsuccessful challenge application could be explained through two applications filed by NNPC before different judges, but on a similar issue, in *NNPC v Esso & 5 Ors*.[135] The two applications were offshoots of a challenge application from a three-person arbitration tribunal, with Nigeria as the seat. The Applicant applied to the tribunal to remove the presiding arbitrator because of a disqualifying position he alleged to have put himself. The application was unsuccessful, and the Applicant filed its first application to review the decision of the tribunal at the Federal High Court.[136]

[135] NNPC v. Esso & 5 Ors. (FHC/ABJ/CS/43/2017 and FHC/ABJ/CS/390/2018) Unreported decisions of the Federal High Court, Abuja Judicial Division, Nigeria.
[136] FHC/ABJ/CS/43/2017.

Despite the jurisdictional issue raised against the court, it still assumed jurisdiction on the application and partly held in favour of the Applicant by ordering the tribunal to re-consider it without breaching the Applicant's right to a fair hearing. The court's ground for such intervention here was Section 6(6) of the Constitution and its inherent judicial powers. However, the Tribunal re-considered the application and dismissed it. Thus, the Applicant returned to the Federal High Court, but before another judge, Dimgba J. In this second round of similar application, the court held that it outrightly lacked jurisdiction to review the decision of a tribunal regarding a challenge application. The court's reason was based on the provisions of Section 34 of the Act. The court, therefore, held that since there is no express statutory provision empowering it to involve in an unsuccessful challenge application, the only time the court could visit such a case is if the final award is challenged.

Although, *NNPC v Esso* is a decision of the court of first instance— not the apex court. It, nevertheless, represents the current position of law on this subject which shows a divided position and gives each court a leeway to exercise its discretion, thereby creating uncertainty within the system. Thus, in practice, parties still do approach the court under its inherent constitutional power to review the decisions of a tribunal in an unsuccessful qualification challenge application.

3.8.6 Absence of Statutory Provision Regarding Court's Roles to Terminate Arbitrator's Mandate

As discussed earlier, Section 10 of the Act creates the third reason to remove an arbitrator: to have his mandate terminated on some stipulated grounds. The problematic nature of this provision was brought to bear in *NNPC v Total E & P Nig. Ltd*.[137] In this case, the Respondent (in an ongoing arbitration case) submitted a challenge application before the arbitrators and applied for an in-person hearing of the application in the seat of arbitration. The three arbitrators resided in different jurisdictions: Switzerland, Canada and Nigeria. The arbitrators refused the application and asserted, among other things, that it was 'impracticable' for them to conduct in-person hearings for the

[137] Unreported judgment of the Federal High Court Abuja Division, delivered by Honourable Justice Nnamdi O.Dimgba on 1st March 2019 in FHC/ABJ/CS/390/2018.

Challenge Application. The Respondent approached the High Court for assistance in terminating the arbitrators' mandate according to Section 10 (b) and (c) of the Act. One of the factors upon which the suit was based was that the arbitrators had shown unreadiness (inability or impracticability) to perform their duty. The other party opposed the suit and relied on the provision of Section 34 of ACA to urge the court not to intervene. The trial court refused to intervene in the ongoing arbitration on the basis that it was precluded from doing so under Section 34 of the Act. The court held that there was no role expressly assigned to a court in Section 10 to terminate the mandate of an arbitrator.

This problem is demonstrated in the wording of Section 10(b) and (c) of the Act, which simply states that the mandate of a non-performing arbitrator should be terminated for 'inability to perform' but without stipulating the specific actor (court or otherwise) to sanction the termination of the arbitrator's mandate in the circumstance. Although the judge in *NNPC v Total* did not give an in-depth reasoning for his decision, nevertheless, the most rational explanation is that the court followed the reasoning that, since the provision of Section 10 of the Act has specifically covered the subject in contention (termination of arbitrator's mandate for inability or refusal to perform), which does not vest power in the court to intervene, any intervention would contravene Section 34 of the Act. To this end, there is yet no clear position on this issue from any appellate court in Nigeria, thereby leaving each court, for now, the discretion to participate when and how they wish to in this regard, thus undermining party autonomy.

3.9 Summary of Discussions and Conclusion

The chapter discusses the first window of court's participation in arbitration which essentially encompasses the roles that a court plays at the pre-commencement stage of arbitration. Meanwhile, to set a stage for a good understanding of the place of arbitration within the Nigerian legal system, as a prelude, the chapter briefly examines the legal and regulatory frameworks for arbitration in Nigeria. Further, and in the main, the chapter examines the laws, policies, and practices relating to the court's participation in the appointment and removal of an arbitrator under the Nigerian laws. From the

analytical review of the current regime in terms of this window, the chapter finds twelve key problems with the system, using the extent to which the court observes or undermines party autonomy as the parameter. From the findings, therefore, the chapter observes many inconsistent decisions of the Nigerian courts, particularly the courts of first instance, which have resulted to uncertainties in the relationship between the courts and arbitration, and resultantly undermines party autonomy. These problems are further appraised in chapters 6 and 7, and recommendations suggested in chapter 8 to resolve the problems.

Chapter Four

The Court's Roles in Assisting or Supervising Arbitration

'It is no good complaining that judges must keep right out of arbitration. For arbitration cannot flourish unless the judges are ready and waiting at the door, if only rarely allowed into the room.'[1]

4.0 Introduction

This chapter examines the statutes, rules and regulations, and judicial decisions culminating in the current practice surrounding the courts' assistance or supervision of ongoing arbitration proceedings in Nigeria, which is the second window of court's participation in arbitration. At the core of the study in this chapter is the goal to critically assess the extent to which the Nigerian courts uphold or undermine party autonomy while assisting or supervising ongoing arbitration. Thus, the statutory and case analysis conducted below reveals ten major roles expressly assigned to the Nigerian courts to play in arbitration proceedings, covered under Sections 4, 5, and 14 to 22 of the Act, and one other role not expressly prescribed in the Act but performed by the Nigerian courts, that is the role to restrain ongoing arbitration by way of injunction.

Thus, an intensive survey which reviewed almost all arbitration cases where Nigerian appellate courts have participated, spanning from the 1990s to 2021 has revealed that out of these eleven roles, the two major roles that are recurrent and unsettled, and yet undermine the principle of party autonomy in Nigeria, are the court's roles in granting anti-arbitration injunctions and staying litigation for arbitration,[2] and these are the primary focus of this chapter.

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[1] Lord Mustill quoted in David Williams, 'Defining the Role of the Court in Modern International Commercial Arbitration' (2014) Vol 10 Iss 2 *Asian International Arbitration Journal* 1.

[2] Templars LLP, *Templars' Arbitration Report on Nigeria 2021* (2021) (Vol. 1) <TEMPLARS ARBITRATION REPORT ON NIGERIA 2020.cdr (templars-law.com)> accessed on 4th February 2022.

4.1 Assisting or Supervising Arbitration Proceeding: Legal Framework and Practices

The Act dedicates ten major provisions, Sections 14 to 23, to regulate the conduct of domestic and international arbitration in Nigeria. The provisions lay down various minimum procedural standards that an arbitrator should meet in determining arbitration case. These range from the duty to treat the parties equally, to be guided by the Rules annexed to the Arbitration and Conciliation Act (the Act) or Rules made or chosen by the parties, and the arbitrator's discretion to conduct arbitration in a manner considered appropriate to ensure a fair hearing where there is no rule to cover an issue,[3] to determine relevance, admissibility, materiality, and weight of evidence,[4] to inspect documents and goods,[5] to determine the language of arbitration under the parties' agreement,[6] to determine the mode and basis of the hearing,[7] and to facilitate the attendance of witnesses and or experts, etc.[8] There are still some ancillary roles vested in a tribunal during arbitration outside of these ten provisions, such as the granting of interim measures of protection and ordering for security under Section 13 of the Act, and making orders to continue arbitration during the pendency of litigation on the same subject under Section 4(2) of the Act, etc.

Thus, in observance of the principle of party autonomy, the statutory provisions share these roles primarily between the parties and arbitrators, and minimize the court's roles. In sharing the roles, while the primary role in managing arbitration proceedings, at least by the minimum standard provided in the statute, is vested in the arbitrators, the parties' agreements prevail in many circumstances too.[9] For instance, Section 20(1) of the Act empowers a tribunal to decide whether a proceeding should be conducted by oral or documentary hearings or by both and also to decide when to hold a hearing. Nonetheless, the parties reserves the right to override the tribunal's decision.[10]

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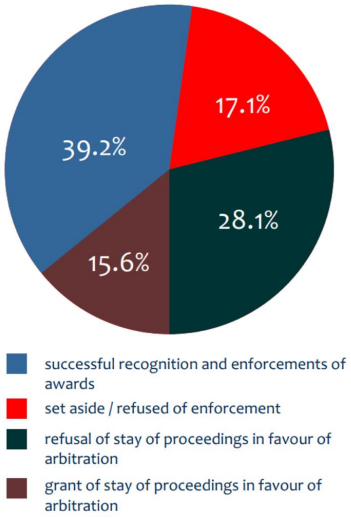
3 Arbitration and Conciliation Act, LFN Cap A18, Nigeria, 2004, s 15(2).
4 ibid, s 15(3).
5 ibid, s 16.
6 ibid, s 18.
7 ibid, s 20.
8 ibid, s 23.
9 See generally ibid Ss 2, 6, 7(1) and (3), 8(3), 9, etc.
10 ibid, s 20(1).

However, a more in-depth study of these provisions will show that in all the statutory roles provided to manage arbitration proceedings under the Act, it expressly gives only two roles to a court. These are contained in Sections 4 and 5 of the Act, designed to enforce arbitration agreements by staying litigation for arbitration, and Section 23, designed to assist a tribunal to compel the attendance of witnesses. Nonetheless, in practice, arbitrating parties in Nigeria still approach the courts to resolve issues concerning Sections 14 to 22 of the Act, notwithstanding the provision of Section 34 of the Act which generally limit court's participation to the subject specifically vested in courts under the Act.[11] This non-statutory participation of courts in arbitration includes making interim orders of protection, compelling the production of documents, resolving controversies surrounding the arbitration seat, and resolving questions about the mode of hearing adopted by an arbitrator, etc.[12] Thus, it sometimes becomes debatable whether Nigerian courts should involve themselves in subjects that are though outside Section 23 of the Act but ensuing from arbitration proceedings.

Nonetheless, going by the 2021 Templars' Arbitration Report on the roles of Nigerian courts in arbitration, which reviewed all the commercial arbitration cases that witnessed the participation of Nigerian appellate courts from approximately 30 years ago (1990 and 2021),[13] it could be garnered that there were perhaps few disputes involving the roles of the tribunals and parties in Sections 14 – 23 of the Act leading to court litigation (appellate courts). It is observed that, except for some pockets of cases at the High Courts, which are insignificant in numbers, the Nigerian courts have primarily allowed the parties and tribunals to direct the affairs of arbitration proceedings in Nigeria.[14] However, two significant issues during arbitration proceedings that often recur, and remain controversial and topical, causing 'protracted arbitration-related proceedings' in the Nigerian courts, are the problematic issues surrounding anti-arbitration injunctions, and stay of

[11] Olawale Orojo and Ayo Ajomo, 'Law and Practice of Arbitration and Conciliation in Nigeria' (Mbeyi & Associates Nig. Ltd., 1999) 42.
[12] ibid.
[13] Templars (n 2) 6.
[14] ibid [4].

litigation for arbitration (See figure 4.1 below),[15] which are now discussed in detail.



4.2. Problematic Issues Surrounding Anti-Arbitration Injunction

An anti-arbitration injunction is 'an order of a court prohibiting a party or tribunal to continue with arbitration.'[16] It is one of the controversial ways Nigerian courts supervise arbitration. Even though an anti-arbitration injunction is often filed during arbitration, it is also used to stop commencement of arbitration or enforcement of an award.[17] Curiously, in all the 58 provisions of the Nigerian Arbitration and Conciliation Act (the Act), there is no mention of the word 'injunction,' let alone authorizing a court to grant injunctive relief against arbitration. Nonetheless, there have been inconsistent decisions of the courts and divergent opinions of scholars on this issue, particularly as concern the Nigerian arbitration space.

To start with, before the recent decision in *SPDCN v Crestar*,[18] the long-time position of the Nigerian courts was that they lacked the power to grant anti-arbitration injunction. In *Statoil v. NNPC*,[19] the Court of Appeal stated this prevailing position in the following words:

> The legislature's intention in making the provision in Section 34 of ACA is to protect the mechanism of arbitration and to prevent the courts from

[15] ibid [4].
[16] Enuma Moneke and Paul Idornigie, 'Anti-Arbitration Injunctions in Nigeria' (2016) Vol. 82 Iss 4 *The International Journal of Arbitration, Mediation and Dispute Management* 441.
[17] ibid.
[18] (2016)9 NWLR (Pt.1517) 300.
[19] (2013) 14 NWLR (Pt. 1373) 1, 29.

> having direct control over arbitral proceedings… It is a settled position in line with plethora of authorities… In this case, the issuance of an ex-parte order of interim injunction was not permitted under the Arbitration and Conciliation Act, more so that there is no where 'injunction' is mentioned under the Act. In this circumstance, the trial court erred when it made the order sought by the 1st respondent.[20]

In this case, the applicant challenged the jurisdiction of the Tribunal to arbitrate their dispute because a court's judgment had declared non-arbitrable a subject matter similar to the ongoing arbitration. On that basis, the applicant obtained an *ex parte* injunction from a High Court to restrain the arbitrators from continuing to hear the non-arbitrable matter. On appeal, the Court of Appeal reversed the High Court's injunctive order essentially on the reasoning that Section 34 disqualifies Nigerian courts 'from intervening in arbitral proceedings outside the intervention lists specifically provided in the Act' which visibly excludes injunction. In other words, Nigerian courts could not injunct ongoing arbitration because no provision of the Act expressly empowers courts to 'prematurely' terminate arbitration.

However, in a more recent decision in *SPDCN v Crestar*,[21] the same Court of Appeal departed from its earlier position. In this case, whilst Crestar was challenging the legality of an arbitral agreement at a High Court, SPDCN commenced arbitration at the International Court of Arbitration (ICC) regarding the same arbitration agreement. Then, Crestar applied for an injunction to restrain the continuation of the ICC's arbitration. Opposing the application, SPDCN relied on Section 12 of the Act to argue that Crestar ought to submit its jurisdictional issue (i.e., questions surrounding the legality of the arbitral agreement) before the arbitrators instead of seeking an injunction in a court and that under Section 34 of ACA, courts are barred from granting an injunction to restrain ongoing arbitration. Nonetheless, the court reasoned that Section 34 does not apply to international arbitration but only to domestic arbitration.

However, whether the Act excludes international arbitration from its non-interventionist disposition is still arguable because some provisions of the Act

[20] See: Agip v. NNPC (2014) 6 CLRN 150
[21] (n 18).

expressly and exclusively deal with international arbitration.[22] Nonetheless, the decision in *Crestar's* case highlights the permissible use of injunction in ongoing arbitration under the Nigerian legal system. In other words, while Nigerian courts would generally not injunct ongoing domestic arbitration, this restriction does not apply to international arbitration. However, the court may still injunct ongoing domestic arbitration in 'exceptional circumstances.'

The decision in *Crestar* echoes the disposition of some judges of High Courts who have, over time, been pushing for permissible use of anti-arbitration injunction in Nigeria. An example was *NNPC v. SNL*,[23] where SNL, a party to an arbitration agreement, commenced arbitration against NNPC and both parties exchanged pleadings. However, on the hearing date, NNPC applied to the Tribunal for a stay of proceedings on the ground of court's decision in another case related to the subject matter of the present arbitral case. The Tribunal refused the application, yet NNPC repeated the same application before a Federal High Court and further obtained an injunction from the court restraining the Tribunal from continuing with the arbitration pending the court's decision. Then again, in *Eyitayo Cooperative v. Union Bank*,[24] a High Court injuncted arbitration and rejected the plea that the arbitration agreement expressly excludes the court's participation except for the arbitrator's appointment and award enforcement. The court held that the parties could not agree to override the injunctive power inherently vested in a court by the Constitution.

Thus, going by the laws cited in these cases, the frontiers opened up in the controversies surrounding the use of the court's injunctive powers in Nigeria are traceable to the irreconcilable disparities in the provisions of Section 34 of the Act, which generally prohibits judicial participation in arbitration when not expressly bestowed on the court, Section 6 of the Constitution which inherently vests in a court the judicial powers in Nigeria including injunctive power, and also the establishing laws or Rules of High Courts which grant the

22 Arbitration and Concilation Act, Cap A18 LFN, Nigeria, Ss 43 – 55.
23 Unreported judgment of the Federal High Court Lagos Division FHC/L/CS/341/16 deliverd 7 March 2017, coram:I.N. Buba J.
24 (2016) 5 SCY 9, 67.

various courts unhindered injunctive powers. For instance, Section 6 of the 1999 Constitution of Nigeria:

> 6—(6) Provides the judicial powers vested in accordance with the foregoing provisions of this section
>
> a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law
>
> b) shall extend, to all matters between persons, or between government or authority and to any persons 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.[25]

The clause, 'all inherent powers and sanctions of a court of law,' has been interpreted to include the power to grant injunction.[26] This is because, as discussed in Chapter 2, at the establishment of the Nigerian judiciary, one of the equitable remedies included in the inherent powers of courts under the 1873 Judicature Act was the power to grant an injunction.[27] Thus, the injunctive powers inherent in courts appear almost unlimited. This is because the courts have severally held that they can grant injunctions in all cases if 'it appears to them to be just or convenient that such an order be made'.[28] Moreover, determining the proper case or circumstances to exercise the power to grant injunctions is left mainly within the court's discretion, and it appears that no case is exempted. Further, the Act establishing the Federal High Court, for instance, also provides:

> 13—(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 unconditionally or on such terms and conditions as the Court thinks just.[29]

The conflicting positions of Section 34 of the Act with Section 6 of the Constitution and Section 13 of the Federal High Court Act is noticeable, and because Nigeria practices a written constitutional system, the provision of Section 6 prevails over other statutes.[30] The combined effect of the prevailing

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[25] Constitution of Nigeria 1999 (As Alteration in 2023), s 6(6)(a) –(b).
[26] Kotoye v CBN [1989] N.W.L.R. Part 98 at 419.
[27] The Judicature Act, Laws of the Federation of Colonial Nigeria, 1873.
[28] Kotoye (n 26).
[29] Federal High Court Act, Cap F12 LFN, Nigeria, s 13(1)-(2).
[30] Nwokedi v Anambra State Govt (2022) 7 NWLR (Pt.1828) 29.

status of the latter provision is that, regardless of the parties' agreement or arbitrator's decision and the stance of Section 34 of the Act, a Nigerian court may still injunct arbitration on the inherent authority attributed to the Constitution. Even without constitutional backing regarding injunctive power, in a case like *CITEC v. Multichoice*,[31] a High Court in Abuja injuncted ongoing domestic arbitration because an injunction is a tool that a court could use in any area where it has jurisdiction to participate. It was held in *CITEC's* case that Section 34 of the Act only limits the court to the areas of arbitration 'where' it could participate and not 'how' to participate.

Section 34 of the Act states, 'A court shall not intervene in any matter governed by this Act except where so provided in this Act.' It was reasoned in CITEC's case that the only word used in the provision to limit the court's involvement in arbitration in Section 34 is the word 'where' and not 'how.' It was argued that if the legislators intended to curtail 'how' a court should participate in the areas where it is allowed to participate in arbitration, the closing phrase of Section would have read 'except how so provided in the Act' instead of 'except where so provided the Act.' The reasoning in CITEC's case further narrows the impact of Section 34 in curtailing the court's participation in arbitration. It shows that the Act provides examples of some areas "where" the court's participation in arbitration is necessary, whilst the provisions of the Constitution and other relevant statutes further provide "how" the court should intervene in arbitration matters submitted before it. Curiously again, there is no provision for the parties to agree to either opt in or opt out of the court's use of injunctions in their case.

Thus, in recent times, the Nigerian courts have approached the issue of the court's participation in arbitration by way of injunctions in a more liberal way. For instance, when the case of *Nigerian Agip Exploration Ltd. v. NNPC* came before the Court of Appeal a year after the decision in *Statoil v. NNPC*, even though the court maintained its general position as established in Statoil's case, it went on to expound the earlier decision. It reasoned that courts should limit themselves to the areas where the Act allows them to participate in arbitration and, in doing so, they could exercise their inherently vested

[31] (2017) 9 SCY 118.

powers, including injunctive power but not all the time. These were the court's words:

> "The legislative intention by virtue of Section 34 of the Act (supra) is that except where so provided under the Arbitration Act, no Court of law should intervene in arbitration proceedings. The power of the Court to intervene in arbitral proceedings is limited to well defined situations or circumstances. The Court may at times do so by invoking her inherent jurisdiction as provided under Section 6 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999…"

The decision in this case further weakens the general position in the earlier cases that Section 34 forecloses the use of court injunctions in arbitration. Of further note is the word 'should' used by the court in the said decision, as opposed to the word 'shall,' as indeed contained in Section 34. In this case, the word 'should' appears to be deliberate and signals a slight departure from the earlier position that the word 'shall' in Section 34 removes the court's general power and discretion to intervene in arbitration. Therefore, the reasoning in *Agip v. NNPC* sanctioned the position that a Nigerian court may exercise its inherent injunctive powers regarding ongoing arbitral proceedings, particularly under Section 6 of the Constitution and regardless of the parties' agreement to the contrary.

However, the decision in *Agip v. NNPC* does not represent a settled position of law on the subject of anti-arbitration injunction in Nigeria. This is because it is not the apex court's judgment, as the Supreme Court has not yet pronounced on this subject. Nonetheless, in *T.E.S.T. v. Chevron,*[32] when the Supreme Court of Nigeria had something of an opportunity to decide on a subject close to anti-arbitration injunctions, her decision appears more in support of the liberal approach in *Agip v. NNPC.,* rather than the strict stance taken in the earlier cases. These were the words of the Supreme Court:

> … there is a need for arbitrators to act within the agreement of the parties, and when an arbitrator veers off the track, the necessity of the court as was done in the case in hand to right the wrong.[33]

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32 [2017] 11 NWLR (part 1576) 187.
33 ibid, at 210 paras A-B.

Like in *Statoil (Nig.) Ltd. v. NNPC.,* and other judgements within Nigerian jurisdiction*,* the above decision may not yet open a wide door for courts to freely participate in the arbitration through an injunction; however, it means that the court's participation is not limited to the areas provided in the Act.

Thus, the supreme court's position in *Agip v NNPC* makes the Nigerian regime become a double-edged sword that could be relied upon by both pro-injunction and anti-injunction jurists in Nigeria, not minding the parties' agreement, thereby allowing courts. It is particular to the courts of first instance to pick and choose when and when not to injunct arbitration. The different decisions taken by the High Court in *Econet Wireless Ltd. v. Econet Wireless Nigeria Ltd*[34] and *Lagos State Government v. Power Holding Company of Nigeria*[35] exemplify this gap. In the former case, a disagreement arose concerning operating a Shareholders' Agreement. While the appointment of the Three-Man Arbitrator was ongoing, the applicant sought injunctive relief against the respondent before a High Court. The applicant's position was that the court's power to entertain the action lay in the Companies and Allied Matters Act (CAMA), which the ACA cannot override. The court refused to intervene in this matter, which included that, being legislation specifically enacted for arbitration, the provision of the ACA overrides any other general legislation, such as the CAMA. It was argued that this decision was based on an erroneous interpretation of Section 34 of the Act because the provision does not expressly foreclose the court's use of all remedies it deems necessary and lawful under its establishing statutes to aid arbitration where there is no express provision in the ACA.[36]

However, in *Lagos State Government v. Power Holding Company of Nigeria,*[37] the same court of first instance, though a High Court of another state (Lagos), took a directly opposite position. In this case, there was a dispute between the Applicant and Respondent regarding a Barge Power Purchase Agreement and Contribution Agreement, which was submitted to arbitration. While the

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34 Unreported Judgment of Federal High Court Lagos in Suit No: FHC/L/CS/832/2003.
35 (2012) 7 CLRN 134.
36 Isaiah Bozimo, 'Rethinking the Role of Courts and Judges in Supporting Arbitration in Nigeria' < http://nji.gov.ng/images/Workshop_Papers/2017/Induction_Newly_Appointed_Judges/s5.pdf> accessed 16 May 2019.
37 (n 35).

arbitration was pending, the applicant sought interim injunctive relief, which the court granted, not minding the provision of Section 34 of the Act.

4.3 Problematic Issues Surrounding Stay of Litigation for Arbitration

Another controversial way Nigerian courts support ongoing arbitration (international or domestic) is to exercise their judicial power to suspend ongoing litigation for arbitration. In legal parlance, it is termed a 'stay of proceedings pending arbitration'.[38] An application to stay litigation in deference to arbitration often comes from a defendant who will draw the court's attention to an arbitration agreement or clause that legally implies that the dispute submitted for litigation should be settled by arbitration. In practice, such applications could also originate from the plaintiff or both parties, though this scenario is uncommon.[39]

The court performing this role implies that it allows the parties to enforce the arbitration agreement, thereby promoting party autonomy. On the contrary, if a court chooses to proceed with litigation while arbitration continues, it may result in two conflicting decisions: that of a court and a tribunal. However, where the court assumes jurisdiction and proceeds with a case without staying for arbitration, and the parties are forced to proceed with the court, it undermines party autonomy and the growth of arbitration generally in the jurisdiction. Whichever role the court chooses to play in this regard would always raise a question as to whether the decision serves the interests of justice to the party who files the action or the party who requests for Stay, or even both. Thus, in practice, the question surrounding where and when the court should enforce an arbitration agreement, and by extension, party autonomy, by staying litigation or by continuing to exercise its judicial powers by determining the merit of a case remains topical, contentious, and unsettled.[40]

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38 Edward Patrick, *The Protective Roles of Court in International Arbitration* (2nd edn, Pensbury Publishers 2018) 312.

39 Fabiyi v. Adekunle (2009) N.W.L.R (Pt. 1654) 115.

40 Taofeeq Alatise, 'Stay Proceedings Pending Arbitration: Protecting the Interests of Third-Parties to Arbitration in Nigeria' (2018) Vol. 9: 2 *Afe Babalola University J. of Sust. Dev. Law & Policy* 222.

4.4 Statutory Framework on Stay of Litigation for Arbitration

Sections 4 and 5 of the Act are the major statutory provisions that guide the Nigerian courts in deciding whether to enforce arbitration agreements by staying litigation. It provides:

> 4.—(1) A court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.
>
> (2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral Tribunal while the matter is pending before the court.
>
> 5.—(1) 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.
>
> (2) A court to which an application is made under sub-section(1) of this section may, if it is satisfied-
>
> (a) That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
>
> (b) That the applicant was at the time when the action was commenced and remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Section 4(1) of the Act mandates the court to stay litigation and refer parties to arbitration if it is proven that the dispute submitted before it has an arbitration agreement, and the party applying for Stay is yet to join issues with the plaintiff on the substance of the dispute. This general position was reiterated by the Supreme Court in *Mainstreet Bank Capital Ltd. v. N.R.C. Plc.,*[41] and the court also held that the court's power and procedure to stay litigation pending arbitration in Nigeria is strictly governed by statute and not inherent judicial powers.[42] The court further held that under Section 4(2) of the Act, whether or not the court grants the application for Stay, any arbitration proceedings conducted regarding the same disputes filed in court remain valid.

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41 [2018]14 N.W.L.R. (Part 1650) page 423 at 455 paragraph E.

42 See also: K.S.U.D. v. Fanz (1990) 4 NWLR (Pt.142) 1.

Similarly, Section 5 of the Act also empowers a court to stay litigation for arbitration, but base on more conditions than the two conditions prescribed in Section 4(1). The additional conditions provided in Section 5 are that it must be proven that (i) at the time the applicant made its application for Stay, he has not taken any steps in the case other than just entering an appearance, (ii) that there is no sufficient reason to refuse the application, and (ii) when the case was filed there was no evidence that the applicant was not ready and willing to participate in arbitrating the dispute.[43]

4.5. Problematic Issues Arising from Staying Litigation

As simple as Sections 4 and 5 appear, in practice, they have generated conflicting and unsettled judicial interpretations when applied to cases, triggering unresolved debates within the arbitration community in Nigeria.[44] Going by the historical account reviewed in Chapter 2, the two provisions were imported from different regimes into the Act.[45] While the wording of Section 4 was first introduced into the Nigerian legal system in the 1988 Act as a cut and paste from Article 8 of the Model Law,[46] Section 5 was reproduced from Section 5 of the Nigerian 1914 Arbitration Ordinance, with slight modification.[47]

Thus, while some writers have traced the inconsistency in the Nigerian regime regarding Stay of litigation for arbitration to what they called 'inelegant wording' by stipulating that both Sections 4 and 5 were to run alongside each other in the Act, which some writers described as a 'mistake by the military drafters,'[48] others have traced the gaps in the system to the fact that the court's source of power to stay litigation is not limited to the Act,

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43 (n 22) s 5.

44 Taofeeq Alatise (n 41); John Olorunfemi, 'Reconciling the Conflicts between Sections 4 & 5 of the Nigerian Arbitration and Conciliation Act' (2011-2012) Vol. 10. 5 *The Nigerian Judicial Review* 67-110; Ola Olatawura, 'Stay of Proceedings in Nigerian Law of Arbitration: An Analysis of Its Functions, Problems, and Applications' (2012) vol. 28 Iss 4 *Arbitration International* 689 - 720; Andrew Okekeifere, 'Stay-of-Court Proceedings Pending Arbitration in Nigerian Law' (1996) Vol. 13 Iss 3 *Journal of International Arbitration Kluwer* pp. 119-142; Nduka Ikeyi, 'Nigeria: Stay of Proceedings Pending Arbitration' (1999) 2(3) N37-40 *Int. A.L.R.* 54.

45 Taofeeq Alatise (n 41) 76.

46 See: UNCITRAL Model Law (1985) Article 8; Taofeeq Alatise (n 46) 224.

47 Olawale Orojo (n 11) 11.

48 Taofeeq Alatise (n 41) 222.

thereby giving the court unguided discretion in this respect.[49] Some of the gaps identified in the current regime are discussed below.

4.5.1 Conflicting Wording and Interpretations of Sections 4 and 5 of the Act

It is important to note that the inconsistent reading and interpretation of Sections 4 and 5 of the Act come from academia, arbitration practitioners, and Nigerian courts.[50] Thus, the different perceptions about the provisions can be grouped into four, all concerning the divergent positions and case laws on the procedural steps required of an applicant to successfully invoke the court's power to stay litigation for arbitration in the current regime in Nigeria.

4.5.2 The Mandatory versus Discretionary Power of a Court to Stay Proceedings

To begin, the opinion of scholars and that of judicial decisions contrast regarding whether the court's power to stay litigation for arbitration is mandatory or discretionary. This divergent position is borne out of using the words 'shall' in Section 4(1) and 'may' in Section 5(2) of the Act to signal the court's role in staying litigation for arbitration. By implication and long-time construction of statutory wording under the Nigerian jurisprudence of statutory interpretation, when the word 'shall' or 'may' is used in a statute, it respectively connotes a mandatory or discretionary duty.[51] In *Confidence Ins. Ltd. V. Trustees of O.S.C.E,*[52] the court held that the duty imposed on a judge to stay litigation for arbitration under the Act is mandatory as long as the statutory conditions are fulfilled. It was held that the court has no discretion to continue with a case where all the conditions for Stay under Act are fulfilled, particularly where evidence has shown that there is an arbitration clause underpinning the case. In *Mainstreet Bank Capital Ltd. V. Nig. RE,*[53] *O.S.H.C v Ogunsola.,*[54] and even the recent decision in *Kwara State Govt v. Guthrie (Nig.) Ltd.,*[55] the courts have followed the general and long-standing

[49] ibid.
[50] ibid, 223.
[51] Fidelity Bank Plc v. Monye (2012)10 NWLR Pt 1307 p.1.
[52] (1999)2 NWLR (Pt.591) p. 373.
[53] (2018)14 NWLR (Pt. 1640) p. 423.
[54] (1998) 10 NWLR (Pt. 568) p. 106.
[55] (2022) 13 NWLR Pt. 1864 p. 189.

position of supporting the mandatory nature of the court's duty to stay litigation for arbitration.

*Ogunsola'*s case reaffirmed a strict adherence to the bindingness of the judicial duty to stay litigation. In the case, a defendant applied to the trial court to stay proceedings based on a written arbitration agreement between the parties, dismissed by the court, who then proceeded to trial and gave final judgment. The issue was again raised at the Court of Appeal, and the court set aside the entire proceedings at the trial court and ordered the parties to go to arbitration.

Nevertheless, in some other cases, the same Nigerian courts have held that the nature of the duty vested in a court under the Act is not mandatory. Starting from the same position as *O.S.H.C v Ogunsola,*[56]the Court of Appeal held:

> It is not automatic that once there is an arbitration clause, any prayer for Stay of proceedings in an action pending arbitration must be granted as a matter of course. Whether to grant or refuse Stay of proceedings pending arbitration shall depend on the peculiar facts and circumstance of each case.

Some commentators view the above quote as a true reflection of Section 5, which uses the word 'may' in enjoining a court to grant a stay. Some other decisions of the Nigerian court in line with this reasoning are the seminal case of *K.S.U.D v. Fanz*[57] and *Cornerstone v. Fischer Shipping*.[58] In the former, the Supreme Court relied solely on Section 5, instead of Section 4 of the Act, to exercise some discretion on a stay application. Then, throughout the period between 2006 to 2017, other appellate courts in Nigeria followed the Supreme Court decision in *K.S.U.D.*'s case by often relying on only Section 5 of the Act, even where an applicant relied on Section 4 of the Act.

However, some scholars believe that the provision of Section 4(1) of the Act establishes its regime on Stay of litigation, separate from the provision of Section 5 of the Act.[59] These scholars reasoned that the duty vested in the Nigerian courts to stay litigation is mandatory under Section 4 of the Act and

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[56] (2000) 14 NWLR (Pt. 687) p. 431.
[57] ibid.
[58] (2011) 76 SCY 12.
[59] Please see:

that the existence of Section 5 in the Act is pointless and incongruous.[60] This argument hinges on the premise that the two provisions (Sections 4 and 5) should be interpreted and applied separately.[61] For instance, Okekeifere argued that under Section 4 of the Act, once the court finds an arbitration agreement between the parties, the court has no choice but to stay litigation immediately.[62] Orojo and Ajomo reasoned that while Section 4(1) of the Act vests a mandatory duty on the court to stay litigation in favour of arbitration, Section 5 merely restates that the mandatory duty is only obligatory when certain conditions are met.[63]

Meanwhile, Nwosu has argued that since it is absurd to create both mandatory and discretionary duties in the same statute and on the same subject, the aim of the drafters of the provisions must have been the one reflected in the earlier provision which was to create a 'mandatory duty' to stay litigation.[64] Similarly, Ezejiofor opines that the co-existence of these two provisions is 'certainly an error most likely inadvertently made.'[65] These writers reasoned that the existence of Section 5 in the Act is defeating the purpose of Section 4 because, if the provisions are not applied separately, courts would prefer to exercise the discretion that Section 5 offers whenever they are requested to stay proceedings instead of the mandatory regime created by Section 4 of the Act.[66]

In contrast to the above position is what could be described as the 'Inclusivist' school of thought. Critics and judges whose reasoning falls under this school of thought generally believe that the Act and its drafters aimed to vest a 'conditional' or 'discretionary' duty on the court when faced with the decision to stay litigation rather than the 'mandatory' duty canvassed by the earlier scholars. Thus, the proponents of this school, such as Olatawura, argued that Section 4(1) does not create or vest a mandatory duty to stay proceedings on the court and that the co-existence of the two provisions in

60 Andrew Okekeifere (n 45) 124.
61 ibid.
62 ibid, 134.
63 Olawale Orojo (n 11) 318.
64 Lucius Nwosu, *The Practice of International Arbitration in Nigeria: To Stay or Not to Stay Litigation* (Ekoyi Publishers PortHarcourt 2017) 78.
65 Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman 1997) 42. See also, Andrew Chukwuemerie (n 50) 84.
66 John Olorunfemi (n 45) 5; Olawale Orojo and Ayo Ajomo, (n 11) 318.

the Act is not inimical to the development of arbitration in Nigeria. He reasoned that Section 4 of the Act simply set out the 'tone' or 'policy' underpinning the Nigerian regime on Stay of litigation in favour of arbitration. In contrast, Section 5 is a continuance of the general policy set out in Section 4.[67] In other words, while Section 4 introduces the regime in general terms, Section 5 becomes more specific regarding what the court must consider before it exercises the power vested in it. By this, both provisions do not necessarily contradict each other. Thus, this school reasoned that Sections 4 and 5 should be read and interpreted together as one all-inclusive or holistic provision governing the regime of Stay of litigation for arbitration in Nigeria.

Odubela has further argued that when these two provisions are read and interpreted together, what is described as 'discretionary duty' in Section 5 would be a 'conditional duty.'[68] This means that Section 5 simply prescribes the conditions within which the court could discharge its duty to stay litigation. Olatawura, for instance, argues that Section 5 basically complements the provisions of Section 4(1) because both provisions were drafted on the general basis that 'though arbitration agreement exists, parties may still choose to litigate.' Therefore, courts must be sure of the conduct and intentions of parties before exercising their powers to still enforce the arbitration agreement by granting an order or stay or otherwise.[69]

The foregoing shows the divergent opinion of scholars and judicial decisions on the nature of the judicial duty to stay litigation for arbitration as contained in Sections 4 and 5 of the Act. The inconsistency in the case law caused by these conflicting two provisions still lingers. Accordingly, the court's decisions on stay applications oscillate between these two schools of thought, making it difficult to have a consensus among the Nigerian judges. Nonetheless, in *Owners of MV Lupex v. Nigeria Overseas Chartering & Shipping,*[70] although the Supreme Court reversed the decision of the lower court, which refused to grant a stay application despite that the applicant fulfilled the conditions

67 Ola Olatawura, (n 45) 708, cf Andrew Okokoifere (n 45) 133.
68 Olusegun Odubela, *How Compulsory is the Judicial Duty to Stay Proceeding for Arbitration in Nigeria: A Review of NNPC v Klifco Case* (Ilesanmi Press Ibadan 2019) 34.
69 Taofeeq Alatise (n 45) 225. See also: Obembe v Wemabod Estates Ltd. [1977] 11 N.S.C.C. 264, 272; Ola Olatawura (n 45) 700.
70 [2003]15 N.W.L.R. (Pt. 844) 469.

stipulated in Section 5 of the Act, the apex Court emphasized that the duty vested the court to stay proceedings is not a rigid one, viz:

> ... this is not an inflexible rule (duty). The court... undoubtedly has a discretion in the matter which, in the ordinary way and in the absence of strong reason to the contrary, would be exercised in favour of holding parties to their bargain.[71]

In *Mainstreet's* case*,* which is more recent, the Supreme Court reversed the decision of a trial judge who dismissed a case in favour of arbitration. The Apex Court agreed that the trial judge was allowed to exercise some discretion regarding a stay application. However, the court must be satisfied that a stay application is granted strictly upon fulfilling the conditions stipulated in Section 5 of the Act. The Supreme Court reasoned that the trial judge must exercise his discretion within the ambit of Section 5 of the Act because, but for the statutory provisions, a trial judge ordinarily lacks the power under the common law to stay proceedings properly filed before it. As discussed earlier, the Court of Appeal followed this reasoning in *Confidence Insurance Ltd. v. Trustees of O.S.C.E*[72] and *O.S.H.C v. Ogunsola.*[73] In the latter case, the Court held that a stay application should not be granted just because 'there is an application for stay' and there is an 'arbitration agreement between parties,' but that courts should use their discretion and consider the peculiar facts and circumstances of each case and the provisions of the Act. In *Onward Enterprise v. MV Matrix,*[74] the Supreme Court explained that the nature of discretion given to the trial judge when determining a stay application is a 'statutory discretion,' and such discretion is not at large.[75]

4.5.3 Conflicting Decisions on the Procedures for a Stay Application

Besides the nature of the judicial duty to stay litigation, there are conflicting decisions and unsettled positions among Nigerian courts on some procedural issues surrounding how an applicant could invoke the court's jurisdiction to stay litigation for arbitration. From the wording of Sections 4 and 5 of the Act and the case law on this subject, there are three major conditions to meet or

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[71] The words in the bracket are added by the researcher for clarity purpose.
[72] (1999) 2 N.W.L.R. (Part 591) page 373.
[73] (2000) 14 N.W.L.R. (Part 687) page 431.
[74] (2010) 2 N.W.L.R. (Part 1179) page 530.
[75] ibid.

steps to take by an applicant for a Stay of litigation pending arbitration, which are as follows:

(i) The standard procedure for an application to Stay litigation[76]
(ii) The timing of an application for Stay and willingness to arbitrate[77]
(iii) Proof of an arbitration agreement and reason not to litigate[78]

It is essential to observe that a preliminary search into case law on this matter shows that besides the first two conditions, which are still surrounded by controversial interpretations and unsettled judicial decisions which undermine party autonomy, there is no such contention on the third condition, which is the requirement to prove the existence of an arbitration agreement and reason not to litigate. Therefore, the following sections will focus on the first two statutory conditions.

4.5.4. The Standard Procedure for an Application to Stay Litigation

Sections 4(1) and 5(1) of the Act mandate that a party make a 'request' or 'apply' to a court to stay litigation for arbitration when necessary. The prevailing position among the Nigerian courts is that where parties to an arbitration agreement fail to exercise this right, the court would presume that the parties have waived their right to arbitrate, thereby rescinding the arbitration agreement by conduct.[79] Moreover, Nigerian courts are precluded from unilaterally raising the existence of an arbitration agreement or the necessity to stay litigation for arbitration.[80] In *Confidence Insurance Ltd v. Trustees of O.S.C.E.*,[81] the Court held that no matter how conspicuous the existence of an arbitration agreement, a judge is not allowed to invoke the provision of Section 5 (and, of course, Section 4 too) on their own volition without a request from the party. Thus, where parties do not want to waive their right, the law requires them to request or apply for a stay of litigation.

However, the Act does not provide a standard procedure or form for an application to stay litigation for arbitration. Also, Section 57 of the Act, the

[76] (n 22) Ss 4(1) and 5(1).
[77] (n 22) Ss 4(1) and 5(1)-(2).
[78] ibid.
[79] Asaka Cement v. ALSCON (1999) 2 N.W.L.R. (Pt. 1056) 78.
[80] ibid.
[81] (n 73).

interpretation provision, does not define the standard form or procedure to make a 'request' or an 'application' for Stay before a law court.[82] Even though this matter appears trivial, it has however raised some serious issues that remain unsettled in practice. The reason for the controversies surrounding this issue stems from the settled practice in Nigeria that a valid request is made to a court through standard forms, usually prescribed by the Rules of Civil Procedure of each court.[83] Where there is a prescribed standard form, and a party fails to use it to make a request, the court may reject or accept it and determine the application under the standard form.[84] In Nigerian civil law jurisprudence, standard forms for application to court could be classified into informal or formal.[85] While an informal application could be an official letter, note or memo to a court, a formal application could be a Motion, Summons, Petition, etc.[86] However, more fundamental and problematic on this matter is that where there is no procedure or standard form prescribed at all in the Rules applicable to a proceeding, a Nigerian court, more often than not, has the authority or discretion to reject such application outrightly, or to insist on any form the judge thinks appropriate and fair in the circumstance.[87]

Thus, an application for a Stay of litigation for arbitration falls under the latter category, where the court could reject or insist on a particular form used by an applicant. This is because the Act and the Annexed Rules do not provide a standard form to apply for Stay. More significantly, unlike other provisions of the Act, which have the proviso to allow the parties to agree on the appropriate procedure to progress an issue, Sections 4 and 5 do not grant such part autonomy. It, therefore, puts a party applying for a stay in an unstable situation, where each judge decides on what form is acceptable in his court and could dismiss any application on this subjective procedural defect, thereby undermining the principle of party autonomy.

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[82] (n 22) s 57.
[83] Fidelis Nwadialo, *Civil Procedure in Nigeria* (MIJ Professional Publishers Lagos 1990) 142.

[84] ibid.
[85] Sebasten Hon, *Civil Procedures in Nigeria* (Myetti Publications 2014) 310.
[86] ibid.
[87] ibid.

Thus, in *Ayeni Motors v Kilofames Ifaki Importers*,[88] even though a plaintiff in a case conceded to a stay application filed by the defendant, the court dismissed the application on the point that it ought to have been brought by way of Motion on Notice instead of a Summons. The court then proceeded with the case and ordered the defendant to disclose its defence. Also, in *Rosebud Hotel v. Olutayo*,[89] the court dismissed an application for Stay of litigation for arbitration on the basis that the application was made orally instead of a Motion on Notice. In this case, the court reasoned that even though there was no standard application prescribed for an application for a stay, being a superior court of record, the applicant ought to have used a Motion on Notice. Meanwhile, in *MOP Marine v Lilly Valley,*[90] a High Court in Abuja granted a stay application in favour of arbitration. It dismissed a respondent's argument that such an application should be on Notice and should not have been embedded in a notice of preliminary objection meant only to challenge a court's jurisdiction. Even though the decision, in this case, was on a frivolous objection on the form of an application for Stay of litigation, what is more curious and concerning is the reasoning of the judge, set out on page 18 of the cyclostyled ruling:

> …the reliance placed by the respondent on the Rules of this court is not applicable in this case because an application to stay litigation pending arbitration is strictly regulated by Sections 4 and 5 of the Act. I have noted that the Act does not provide for a procedure or standard form by which this application should be made. In this circumstance, the prevailing practice is that the court has unfettered discretion to decide which procedure and form is acceptable as long as it is fair and reasonable.
>
> Let me note that the applicant did not argue against the respondent's position in this respect. However, such a concession does not oust the jurisdiction of this court from determining the application because the Act does not allow parties to direct the court on which procedures to follow in this regard.

The crux of the above decision is that regardless of the parties' agreement on the procedure or format an application for Stay should take, Nigerian courts have unfettered discretion to determine the appropriate procedures and form

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88 Unreported Judgment of the High Court of Ekiti State EK/CV/1234/22, delivered 23/11/22 (Ajileye J).

89 Unreported Judgment of the FCT High Court, FCT/CV/CS/546/22, delivered 14/9/22 (Adeniyi J).

90 Unreported Judgment of the FCT High Court, FCT/CV/42/2016, delivered on 18/1/17 (Folashade Ojo J).

in each court. Again, this undermines the principle of party autonomy as the regime creates some uncertainties that some hostile judges or recalcitrant parties may take advantage of. In the final analysis, it is essential to note that many of these cases were the court's decisions of first instance, as a search through reported cases of the appellate courts did not show that this issue is regularly raised at that level.[91] Nonetheless, going by the reported appellate cases relating to arbitration, the filing of a 'Motion on Notice' is the common practice in Nigeria,[92] but Sections 4 and 5 of the Act do not forbid the use of other forms of application to stay litigation pending arbitration; such as "summons," "memo," "letter" to the judge, or even oral application. Thus, whether a requesting party could use any form other than a 'Motion on Notice' remains unsettled, for instance, Olatawura has suggested that a (simple) letter written to the administrative judge (chief judge) by "the requesting party" or "through his counsel – supported with evidence of an arbitration agreement" should suffice as a valid application for a stay, thereby upholding the principle of party autonomy.[93]

4.5.5 The Timing of an Application for Stay

The time within which an applicant brings its application to stay litigation is an essential factor in enforcing an arbitration agreement. In *UBA v Trident Consulting Ltd*,[94] the court held that the right to file a stay application is time-bound because it is a personal right which is deemed waived or abandoned once the statutory period expires. Accordingly, this procedural requirement is created by Sections 4(1) and 5(1) of the Act. Curiously, these provisions do not set a specific time for an applicant to file a stay application. Instead, they make the applicant's steps or actions taken from filing the suit a pointer to determine when the right to file a stay application will lapse.

While Section 4(1) permits an applicant to file a stay application 'not later than when submitting his first statement on the substance of the dispute,' Section 5(1) allows an applicant to file its application 'at any time after appearance and before delivering any pleadings or taking any other steps in

91 (n 2) 6.
92 (n 43).
93 Olatawura (n 45) 696.
94 (2013)4 CLRN 119.

the proceedings.' Thus, besides the failure to specify an exact time to file, the more problematic issue with the standards set by the provisions is that both provisions differ and can also be read as raising different standards for an applicant. These divergent standards have created some uncertainties in the regime, thereby causing inconsistent decisions within Nigerian courts, particularly at the court of first instance, and this has become a recurring contentious subject within Nigerian case law and scholarly works.

Even though judicial authorities of the appellate courts are relatively in agreement that the criterion set out in Section 4(1) and Section 5(1) are similar and that both provisions imply that a defendant can no longer file a stay application if it has filed a process which makes it joins issues with the plaintiff's case,[95] some decisions yet defined the word 'first statement' (according to Section 4) or 'pleadings' (as used in Section 5) to include processes such as Statement of Defence,[96] Counter Affidavit,[97] Answer to Petition etc.,[98] but the list is open-ended. Then again, there have been divergent decisions on whether a defendant can file his 'first statement' or 'pleading' and stay application simultaneously.[99] Some cases have also presented a scenario where the defendant filed a stay application at the right time but subsequently filed his pleadings before the stay application hearing.[100]

From the foregoing, the phrase 'before... taking any other steps in the proceedings' as contained in Section 5(1) of the Act has not been given a definite or 'one-size-fits-all' interpretation by the Nigerian courts, and this has led to some inconsistent decisions and caused uncertainties in the system because it allows the courts to exercise blanket discretion to pick and choose any 'step taken' by an applicant as one falling within or outside the scope of Section 5(1) of the Act.

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95 Eco Bank Plc v. Anifowose (1999)4 SCY 115; Raphael Ayu v First Foundation 92003) 6 SCY 54; N.P.A v. Middleniss (2001) SCY 78; M. V. Panoramos Bay v. Jonason Triangle (1989) 4 CLRNS 32.

96 See for instance, Order 2 Rule 1 of the Federal High Court of Nigeria Civil Procedure, 2019; Order 15 Rule 3 of the High Court of Lagos State Civil Procedure Rules, 2019.

97 See for instance, Order 2 Rule 2 of the Federal High Court of Nigeria Civil Procedure, 2019; Order 15 Rule 4 of the High Court of Lagos State Civil Procedure Rules, 2019.

98 ibid.

99 Olaoluwa v Fashaki Press (1999)2 SC (34) 45, cf decision of Eko J., in Arowolo v. Craig Incorp. (2000) WRN Vol. 4 43.

100 Ashgate v. Aso Savings (2003)4 SCY (76) 87.

One of the earliest decisions of the Nigerian court on what it means to 'take any other step' by an applicant beyond mere appearance in a case was decided by the Supreme Court in *Obembe v. Wemabod Estate*.[101] The dispute arose from a contract made in 1969 which had an arbitration clause. Before the Plaintiff submitted the dispute for litigation, he wrote a letter to the defendant for settlement through arbitration, in which he resisted by stating that 'a submission to arbitration would serve no useful purpose.' When the case was filed, the defendant defended the action and obtained a judgment in his favour without applying for Stay or referencing arbitration. The trial judge dismissed the Plaintiff's case due to insufficient evidence.

Nonetheless, the judge held that even if there were sufficient evidence, he still would not have determined the case because of the existence of the arbitration clause in the underlying contract. This latter reasoning of the trial judge was challenged at the Supreme Court. The apex court held that the trial court could no longer enforce the arbitration clause because not only had the defendant failed to file a stay application but also because the defendant had taken some steps in the proceedings against the provision of Section 5 of the Act, which should prevent the court from enforcing the arbitration clause. The lead judgement stated that:

> In order to have a stay, a party to submission must have taken no step in the proceedings. A party who makes any application to the court, even if it is merely for application for an extension of time, takes a step in the proceedings. Delivery of a statement of defence is also a step in the proceedings.[102]

From the foregoing, any step a defendant takes after appearance could be interpreted as offensive to Section 5 of the Act. Meanwhile, it is crucial to note that there are many procedural steps that defendants do take between the time of appearance in a case and the delivery of pleadings; ranging from application for interrogation and discovery, pre-trial conferencing, application to vacate any order obtained against the defendant before its appearance, application for a preservative order, to an objection challenging the jurisdiction of the court, etc.

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101 (1977) All NLR 130.
102 Obembe (n 45) 76.

Thus, the decision in *Obembe* gives an open-ended interpretation of the phrase 'taking steps' as used in Section 5 of the Act, thereby widening the reasons why a court may refuse to stay litigation for arbitration. Moreover, as noted earlier, under Sections 4 and 5, the parties could not agree on this subject at all, let alone an agreement to override the court's discretion. Thus, bracketing all those steps described above within the same space as 'step taking' to waive an arbitration agreement undermines party autonomy and does not serve the interests of justice. In *Ijaodola v Remilekun*,[103] the court interpreted an application for extension of time to file pleadings as 'step taking.' In *Roderick v Summerset Hotels*,[104] another court held that if the pleading is not attached to the application for extension of time, it would not constitute a 'step taken.' Meanwhile, in a more recent case of *DHL v Loyola*,[105] a High Court in Ibadan held that an application to join a third party to a case filed before a stay application constituted a 'step taken' to waive an arbitration agreement.

Meanwhile, *K.S.U.B. v. Fans Const. Ltd.,*[106] presented an ample opportunity for the Nigerian Supreme Court to set out a clearer interpretation of the phrase. The case called for an interpretation of Section 5 of the Kano State Arbitration Law, which was of similar wording as Section 5 of the Act. At the first court session in 1979, the defendant's counsel orally requested time to file its pleadings, and the court made an order granting the defendant time for this. However, in the subsequent court sessions from 1980, both parties agreed to refer the case to arbitration according to the arbitration agreement, which the court granted and stayed proceedings. After the arbitration award had been published and the award debtor had failed to have the award set aside, on appeal to the Supreme Court, he argued that in 1980, when the trial court granted a stay pending arbitration, it lacked the power to do so because the defendant's prior application and court's order to file pleadings in 1979 constituted a 'step taken' by the defendant to bar the court from enforcing the arbitration agreement.

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103 (1982) 9 SCY 90.
104 (1988) 6 SCY 21.
105 Unreported Judgment of Oyo State High Court Ibadan OY.CS.78.2019 delivered 5/8/20 (Abimbola CJ).
106 (1990) 4 NWLR (Pt. 142) 1.

Although the court dismissed the appellant's argument on other grounds, the Supreme Court expounded on the controversial phrase 'step taken.' The supporting judgment of Obaseki JSC was the most valuable part of the decision. Firstly, he relied on the meaning of 'step taken' as defined in Halsbury Laws of England, to the effect that it means the making of 'any application whatsoever to the court' after appearance (rather than for Stay). Secondly, he relied on the decision of the English Court of Appeal in *Ives & Barker v. Willams,*[107] where the court held that once the defendant is fully aware of the substance of the case filed against him, any application to further the substance of the case would constitute a 'step in the proceedings', which means that the party has elected to abandon its right to insist on arbitration.

Curiously, the decision in *K.S.B.U.'s* case has yet to resolve the germane question: when exactly is a court allowed to foreclose a party to stay litigation after being fully aware of the case against him? Secondly, the decision tends to show that Nigerian courts will follow the interpretation of the phrase 'step in the proceedings' by their English counterparts. However, it cannot be said that the decision reached by Obaseki JSC, in this case, was in line with the reasoning of the English court in *Ives & Barker v. Williams,*[108] which he referred to. In *Ives & Baker*'s case, the English court found that a defendant cannot be said to have 'taken a step' simply because he requested a plaintiff to furnish him with the statement of claim to understand the case filed against it.

Another opportunity arose to explain further the phrase 'to take a step in a proceeding' in *Fawehinmi Construction Co. Ltd. v. O.A.U.*[109] In this case, the defendant's stay application was filed after the appearance but dismissed. Afterwards, the defendant challenged the competence of the suit because the requisite pre-action notice was not served before the case filing. When the plaintiff argued that the defendant can no longer raise the latter issue because he had taken a step in the proceedings, the Supreme Court dismissed that argument. It held that the trial court ought to have granted the stay application. It was held that the phrase 'to take steps in a

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107 (1894) 2 Ch. 478 at 484.
108 ibid.
109 [1998] 6 NWLR (Pt. 553) 171.

proceedings' is rooted in the doctrine of 'election' and 'waiver' and that for any court to raise such a presumption, the step/action taken must be 'clear' and 'unambiguous.'

It appears that the jurisprudence laid down by the Nigerian Supreme Court in *Fawehinmi*'s case is that, unlike the dictum in *Obembe*'s case, not all steps taken by a defendant between the time of appearance and the filing of pleadings would routinely make a stay application untenable. Even though the Supreme Court did not expressly overrule the 'blanket criterion' established in *Obembe*'s case, its decision in *Fawehinmi*'s case appears to have qualified the broad *dictum* in *Obembe*'s case. Thus, *Fawehinmi*'s decision has suggested that even if a defendant chose to file his statement of defence but indicated his intention to raise issues as to the competence of the suit, such action should not be taken as a 'step in a proceeding.' However, the decision was made after *Fawehinmi*'s case in *Confidence Insur. Ltd. v. Trustees of O.S.C.E.*,[110] did not follow the suggestion made in the former case. In *Confidence Insurance*, the defendant filed its defence and included in it a challenge against the competence of the case based on the existence of an arbitration agreement and argued that the court ought to stay proceedings. The Court of Appeal held that the filing of a defence was alone a 'step taken in the proceedings' that showed that the defendant has elected to waive his right to arbitration, the reference made to the arbitration agreement in the defence notwithstanding.

However, even though the open-ended approach in *Obembe* and *Confidence Insurance* is yet to be overruled explicitly by the Supreme Court, which the subordinate courts are at liberty to still follow, the current trend among Nigerian courts is to find whether the 'step' in issue could be interpreted to mean a step to pursue the merit of the matter If this is not the case, no matter how many steps there are, it may not be considered as a step to foreclose enforcement of an arbitration agreement. This trend became evident in *Onward Enterprises Ltd. v. M.V Matrix & ors.*[111] In this case, before the defendant filed its stay application, it had filed two other applications; one to release its vessel and the other to shift the vessel to anchorage. The Court

[110] (1999) 2 NWLR (Pt. 591) 373
[111] (2010) 2 NWLR (Pt. 1179) 530.

of Appeal held that the first two applications did not constitute a 'step in the proceedings' because they were not actions that related to the substance of the case or an indication of inclination to make a defence, but rather those steps were merely to protect the vessel at issue. The Court held:

> It is evident from the record that the respondents did not file any statement of defence nor applied for extension of time to file any statement of defence… It is only acts done in furtherance of the prosecution of the defence that may be said to amount to steps taken in the proceedings.[112]

In the most recent decision in *Williams v. Williams,*[113] after entering an appearance, the defendant orally applied to the court for an adjournment, prayed the court to grant an interim injunction sought by the plaintiff, and gave an undertaking regarding another application before the court. The Court of Appeal held that all those applications did not form part of the defence nor indicated a willingness to join issue on the substantive claim, and a stay application was granted.

4.6 The Supreme Court of Nigeria Practice Direction on Arbitration, 2017

Against the backdrop of uncertainty and inconsistency in the decisions of Nigerian courts on anti-arbitration injunctions and the court's participation in arbitration generally, in 2017, the Apex Court and the Nigerian Judicial Institutes (NJI) saw a need to address the issue. The two institutions described the unpleasant experience as the 'prevailing circumstances in which our courts assume jurisdiction in arbitration matters.' The apex court and NJI issued a Practice Direction to guide all courts in Nigeria on what steps to take when invited to participate in arbitration.[114] The content of the Practice Direction was meant to be a model to express the general disposition of the Nigerian judiciary towards arbitration and also serve as a guide which each head of court could follow to make Rules on the subject for their various courts. However, it appears that this piece of documentation has not really achieved much success in bridging the existing gap in the system, particularly

[112] ibid, at 551 (Mshelia J).
[113] (2013) 3 CLRN 114.
[114] Supreme Court Practice Direction on Arbitration Clause in Commercial Contract (2017) Ref No. CJN/P.D./VOL.1/001; Paragraph 3(4) of the Directive of the Nigerian Judicial Institutes to all heads of Courts in Nigeria, in "Re: Arbitration Clause in Commercial Contract" (2017) Ref No: NJI/CJI/CON/IV 26th May 2017.

in terms of ascertaining when and when not it is proper for a court to participate in ongoing arbitration, and also even when it is necessary to participate and how to participate.

Firstly, the Practice Direction merely repeats the general policy statement or caution that courts should avoid participating in arbitration without 'ensuring that the (arbitration) clause is invoked and enforced.' This is the crux of the Supreme Court Practice Direction which seems to be too simplistic because, as demonstrated in the review of the current regime, the question as to when and how courts should participate in arbitration is beyond such a general statement as this. Thus, the Practice Direction does not add much value in closing the loopholes in interpreting Section 34 of the Act.

Secondly, the Practice Direction further directs courts to refuse 'intervention' where a party to arbitration has refused to 'first invoke the (arbitration) clause' before approaching the court, and that the court should not only decline jurisdiction but also award "substantial costs" against the initiator of such proceedings. Again, this Directive is still unhelpful in closing the loopholes created by the wording and interpretation of Section 34 of the Act and the resultant inconsistent judicial decisions. Thirdly, the underpinning philosophy behind the making of the Practice Direction appears to be elusive. The second paragraph reads that it is made to 'encourage heightened commercial and economic activities and foreign investments' in Nigeria. The review undertaken so far has shown that the question surrounding the court's participation in ongoing arbitration could not be addressed only by focusing on encouraging 'economic activities' or 'foreign investment' but rather by a holistic recalibration of the court's duty to uphold party autonomy and at the same time exercising its inherent powers in all cases including arbitration. For instance, minimization of the court's participation in arbitration, as championed by some research, does not certainly translate to increased economic activity and foreign investment. Perhaps the obscure nature of the Supreme Court Practice Direction may be one of the reasons why many heads of courts in Nigeria are yet to make their corresponding Practice Direction mirroring the present one, as directed by the Chief Justice of Nigeria.

4.7. Summary of Discussions, and Conclusion

This chapter has examined the second window of judicial participation in arbitration, that is the role to assist or supervise arbitration. It reviews the statutes, rules and regulations, and judicial decisions, culminating to the current practice on this subject in Nigeria. The chapter reveals that the Arbitration and Conciliation Act expressly assigns ten major roles (and two implied roles) to the Nigerian courts in terms of the supervision or support during arbitration proceeding. However, the chapter examined only two roles (grant of anti-arbitration injunctions and stay of litigation pending arbitration) which are the most relevant to this research.

Thus, the review conducted on these two roles under the Nigerian legal system has shown that, while there is no statutory regulation of the anti-arbitration injunctive regime in Nigeria, the statutory provisions regulating Stay of litigation are self-contradictory, thereby creating uncertainties, inconsistencies, and procedural complexities in the system. The ultimate problem ensuing from the current system is that it undermines party autonomy. Moreover, the 2017 Practice Direction on the roles of courts in arbitration, issued by the Nigerian Supreme Court can still not regulate this important legal space because the Directive is ambiguous. Additionally, the Supreme Court is yet to give a definite position to bring certainty to the subject. Regarding the court's duty to stay litigation for arbitration, the inelegant drafting of Sections 4 and 5, coupled with the ambiguous wording in the provisions, have practically made the court's duty to grant a stay in arbitration discretionary. Although recent cases point toward having a prevailing position which is more certain, yet no Supreme Court decision has yet overruled the existing unsettled position. In conclusion, the effect of these gaps is that it undermines party autonomy, which means that under the present regime, the Nigerian courts have nearly unfettered discretion to pick and choose when to and not to injunct arbitration or enforce arbitration, regardless of the parties' agreement.

Chapter Five

The Court's Roles in Enforcement of or Recourse Against Awards

Just as the number of concluded references speaks to the competence of an arbitrator, the number of challenge applications resolved in the arbitrator's favour speaks to his or her suitability and integrity.[1]

5.0 Introduction

This chapter critically examines the third window of judicial participation in arbitration, that is, the roles that Nigerian courts play in arbitration after an arbitrator, or a tribunal has published its award. Thus, generally, the authority wielded by an arbitrator in both domestic and international arbitration normally ends when the tribunal has resolved the main dispute submitted to it by the parties and has made its decision known in an award. Then, it behooves on an award—debtor to voluntarily comply with the obligations pronounced against it in an award. If the award-debtor fails to do so, the award-creditor would usually desire to compel the award-debtor to compliance. In some cases, too, an award—debtor who is aggrieved with an award may desire to set it aside. However, as explained in chapter 1, these two major post-award aspirations of the arbitrating parties can only be achieved through some form of assistance from the court. This is because the requisite mechanism to either compel or discharge a debtor (an award-debtor in this case) from a legal obligation (like those obligations pronounced in an award) is within the judicial powers wield by the law court or judiciary.

Thus, almost, if not all, domestic and international arbitration laws allow the national courts to assist arbitration in enforcing or setting-aside an award, when necessary. The obligation given to the courts through this window has, in some circumstances, become a leeway to undermine party autonomy. Therefore, this chapter examines the statutory laws, international instruments, and judicial decisions that culminate into the current practice on

[1] Adebayo Adenipekun, 'Finality of Arbitral Awards in Nigeria— Separating Harm from Hubris' (Kluwer Arbitration, 24 January 2018) < Finality of Arbitral Awards in Nigeria- Separating Harm from Hubris (Contd.) - Kluwer Arbitration Blog> accessed 20 March 2021.

this subject among the Nigerian courts. The aim is to find the areas in which, and the extent to which, the current practice observes or undermines the principle of party autonomy when enforcing or setting-aside an award.

5.1 A Panoramic view of the Court's Roles to Enforce or Set-Aside Arbitration Awards

A fundamental principle of arbitration, flowing from the parties' contract and arbitration laws, is that every award is final and binding on the parties.[2] Thus, when an award is published, it could be said to have created a legal right to the benefit of a party whose favour an award is published (an award creditor) which is to enjoy the claims granted in the award. Conversely, it imposes a legal duty on the losing party (an award debtor) to comply with the claims granted in the award.[3] It is generally anticipated that an award debtor would discharge its duty under an award to enable an award creditor to enjoy its right. However, the need to enforce or make recourse against awards often arises where respectively the award creditor want to compel compliance, or the award debtor is aggrieved with the award and intends to relieve itself of the legal duty under it.[4]

Thus, besides few arbitration institutions, such as ICSID, that provide internal procedures to annul or revise awards within the institutions,[5] many commercial arbitration laws do not provide for such internal mechanisms. Instead, arbitrating parties are allowed to approach a law court to settle any issue relating to enforcement of or recourse against awards.[6] Thus, the court's participation in arbitration at the post-award stage is crucial particularly because in as much as the utmost goal of a claimant in arbitration is not just to obtain an award but to take benefit of any claim granted in their favour under an award, the court has the duty to only enforce awards that reflects the agreement of the parties and at the same time comply with the relevant laws.[7]

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[2] Arbitration and Conciliation Act 2004, LFN Cap A18, Nigeria, s 28(6); Tinuade Oyekunle and Bayo Ojo, Handbook of Arbitration and ADR Practice in Nigeria (LexisNexis 2018) 217.
[3] Tinuade, ibid, 228.
[4] ibid.
[5] ibid 230.
[6] Paul Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Panaf Press Abuja 2015) 279.
[7] Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practices* (Mbeyi & Associates Ni. Ltd., Lagos 2009) 144.

Thus, some writers have argued that the scope of authority vested in a court to involve in a post-award issues from arbitration should focus primarily on giving effect to an arbitration award, except in some exceptional circumstances, as doing so will mean ultimate manifestation of the parties' agreement.[8] Meanwhile, some other writers have further argued that the ideal approach is for the arbitration law to clearly set a limit to the extent to which a law court could refuse an enforcement or recognition of an award without which an award must be enforced by a law court.[9] To this end, a widely acceptable tradition in the arbitration community is that the court should generally enforce or recognises an award and minimize the setting aside cases to a few exception circumstances.[10] However, as simple as this standard appears, its application by the Nigerian courts, like some other jurisdictions too, is rather challenging.

Thus, in this post-award stage, the roles of a court vary from one jurisdiction to another and depends also on whether the award in question is obtained from an international or a domestic arbitration. In Nigeria, too, to determine the questions surrounding the proper court to approach, the appropriate procedures to follow, and the acceptable grounds for setting aside or refusing to enforce or recognize an award, the courts are guided by both the national arbitration legislation, case laws, and international instruments.

5.2 The Legal Framework on Court's Roles to Set-Aside or Refuse Enforcement or Recognition of Awards in Nigeria

The first method available to an award debtor to make a recourse against an award is by requesting the court to set aside an award or to refuse enforcement of award. The role of a Nigerian court in this regard, particularly in a domestic arbitration, is strictly guided by the provisions of Sections 29, 30(1), and 32 of the Act, and Sections 48 and 52 of the Act for international

[8] See: ibid 147; Olakunle Orojo and Ayodele Ajomo Law and Practice of Arbitration and Conciliation in Nigeria (Mbeyi & Associates, Nigeria, 1999) 287; Tinuade Oyekunle and Bayo Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (LexisNexis 2018) 6.

[9] ibid;

[10] Ola Olatawura, 'Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction— Facts, Problems and Solutions' (2014) Vol 28 Iss:1 *International Arbitration* 3-4.

arbitration.[11] Though these statutory provisions distinctly govern the two forms of arbitration, they are similar in wordings and imports.

5.2.1. Setting Aside Domestic Awards

Section 29 of the Act deals with the procedure to set aside arbitration award. Within three months after the publication of an award (or after a request for additional award is disposed of by the tribunal), the provision allows an award-debtor to approach a High Court and file a set-aside application to prove the arbitrator's decision in the award was on matters beyond the scope of submission to the arbitrator.[12] If the award-debtor can prove this ground, therefore, Section 29(2) empowers Nigerian courts to to set aside such award.[13] However, if the portion of the award complaining against could be separated from others that is untainted, the court is allowed under Section 29(2) of the Act to only set aside the tainted part and save the valid portion unless the tainted and untainted portions of the award are so intertwined that they cannot be separated. Meanwhile, Section 29(3) allows the court to suspend its proceeding to allow parties to correct the grounds for setting aside an award.

Then again, Section 30(1) of the Act also empowers a court to set aside an award on two more grounds. These are where the award-debtor has proven through his set aside application that an arbitrator misconducted himself or herself,[14] or that the arbitral proceeding or award is procured improperly.

To this end, statutorily, a Nigerian court could set aside arbitration awards upon prove of any or all the following three grounds:

(i) The decision in an award was beyond the scope of submission.
(ii) The arbitrator misconducted himself or herself.
(iii) The arbitral proceeding or award was procured improperly.

5.2.2. Refusal to Enforce Domestic Award

Instead of making recourse against award by setting aside, Section 32 of the Act allows an award-debtor to simply apply to a High Court to refuse

[11] NITEL Ltd. v. Okeke (2017)9 NWLR Part 1571 page 473 paragraphs C-F.
[12] UNIC v. Stocco (1973)1 All NLR (Pt. 1) 178; Araka v. Ejeagwu, supra.
[13] K.S.D.B. v. Fanz Construction Ltd (1990)4 N.W.L.R. (Pt.142) 1 at 35-36.
[14] Taylor Wood (Nig) Ltd v. S.E. GMBH Ltd (1993) 4 N.W.L.R (Pt. 286) 127.

recognition or enforcement of the award. Though, details of the problems with the interpretation and application of Section 32 in practice are discussed later in this chapter, it is curious to note that unlike the provisions on setting-aside regime, Section 32 omits provision for the grounds upon which a court could refuse to recognise international arbitration award and the timeframe within which an applicant can bring the application. Moreso, it is observed that in Nigeria, the option of an application to refuse recognition of an award is usually taken by applicants as a counter process against application for enforcement of an award if filed by an award-creditor.[15]

5.2.3. Setting Aside International Awards

Section 48 of the Act allows an award debtor in international arbitration awards to file an application like a domestic arbitration, but without an express time limit as to when to file the application, to set aside an international award. Thus, as discussed in chapter 3 that all provisions applicable to domestic arbitration are applicable to international arbitration, a court is empowered to set side international arbitration award first upon any of the three grounds provided in Sections 29 and 30. Nonetheless, Section 48(a)-(b) further provides nine more grounds for setting aside international awards. These grounds are summarised as follows:

a) One of the parties lacks the legal capacity to enter the agreement,
b) The arbitration agreement is not valid,
c) The applicant was not given proper notice of an arbitrator's appointment or of the arbitral proceedings or unable to present his case,
d) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,
e) The award contains decisions on matters which are beyond the scope of the submission to arbitration,
f) The tribunal was not composed in accordance with the parties' agreement,
g) The tribunal was not composed in accordance with the Arbitration Act, where there no agreement on the composition of the tribunal,

[15] Paul Idornigie (n 6) 285.

h) The subject matter of the dispute is not capable of settlement by arbitration in Nigeria, and
i) The arbitration award is against the Nigerian public policy.

Accordingly, though details of the interpretation and application problems surrounding the interpretation and application of Sections 29, 30, and 48 of the Act in practice are critically reviewed in the succeeding sections, it suffices to note that before a court would set aside international arbitration award on the first seven grounds highlighted above, the applicant is duty bound to adduce evidence in proof of any of the grounds it is relying upon. However, in terms of the last two grounds, a court is allowed on its own to raise issues relating to those grounds and make its findings on them to set aside an international award. To this end, while there are three grounds available to a Nigerian court to set aside a domestic arbitration award, the courts have more grounds to set aside international arbitration awards.

5.2.4. Refusal to Enforce International Awards

Like domestic award, Section 52(1) of the Act empowers Nigerian courts to grant an application to refuse to recognise international awards irrespective of the country the award is made. However, unlike Section 32, Section 52(2) reproduces the nine grounds provided in Section 48 to set aside international award as same grounds upon which a court could refuse enforcement of international awards. However, Section 52(2)(a)(viii) introduces a relatively new ground upon which a court could also refuse recognition of international awards, which is that 'the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.'

5.3 The Legal Framework on Court's Roles to Enforce or Recognise Awards in Nigeria

The way the Act empowers the Nigerian courts to determine recourse against award is the same way it empowers the court too to entertain applications to enforce arbitration awards. This is regulated by Sections 31, 51, and 54 of the Act and the common law action. While domestic awards are enforceable under Section 31 and the common law action, international awards are enforceable

under Sections 51 and 54 of the Act. Each of these provisions establishes its own enforcement regime which is worthy of studying individually.

5.3.1. Enforcing Awards under Sections 31 and 51 of the Act

The provision of Sections 31 of the Act establishes what an enforcement practice known as Summary Procedure for enforcement of domestic arbitration awards in Nigeria.[16] It simply provides that a court could recognise an award as binding upon application in writing to the court from an award-creditor and then enforce the award. To achieve this, Section 31(2) mandates an award-creditor to furnish the court with proofs of duly authenticated original or duly certified copy of the (i) award, and (ii) arbitration agreement. Suffice to observe that the provision does not stipulate time within which this enforcement application should be filed and the form or procedure for the proceedings. However, in practice, applications under Section 31 is often sought through an Originating Summons (*ex parte* or on notice) to seek court's leave for recognition of the award as binding.[17] The implication of granting this leave is that the award becomes the judgment of the court, and it can be enforced as such.

Thus, depending on the nature of the claims granted in the recognised award, once the leave is granted, the award-creditor can enforce it through all the means available to judgment creditors in Nigeria to execute judgement. For instance, if it is a monetary award, the award-creditor may approach the court's registry for the issuance of a writ of *fieri facias*, or writ of *sequestration*, or judgment summons, or commence garnishee proceedings, etc. The Writ of Fieri facias, also known as 'writ of attachment and sale' is used to attach, seize and sell the properties belonging to the award debtor to liquidate the money owning the award creditor in the award.[18] For a wit of sequestration, the court would appoint a sequestrator to take over the award debtor's immovable property and collect rents and profits to liquidate the award-creditor's money after which the property is returned to the award debtor.[19]

[16] Paul Idornigie (n 6) 292.
[17] ibid 293; See also K.S.O. & Allied Products Ltd v. Kofa Trading (1996) 3 NWLR 244, 254.
[18] Fidelis Nwadialo, *Civil Procedure in Nigeria* (MIJ Professional Publishers Lagos 1990) 341.
[19] Sherriff and Civil Process Act, Cap S19, LFN, Nigeria, 2004, s. 82.

In a Judgment Summons procedure, an award debtor is summoned to the court for an investigation as to why he or she refused to pay the award-debtor. If a tenable or satisfactory response is not given, the court could sentence the award-debtor to prison term.[20] However, in the garnishee proceedings, the award creditor summons a third party in whose custody the award debtor keeps his or her monies to declare and forfeit the monies to the award creditor to liquidate the award.[21] Suffice to note that the provision of Section 51 is similar to Section 31 except that the former is applicable only to enforce awards from international arbitration, and in addition to the two grounds under Section 31, the award creditor need to also adduce a certified translation of the award and agreement into English language if it is published in other language than English.

5.3.2. Enforcing Awards through a Common Law Action

An award could also be enforced in a Nigerian court through a procedure known as the common law action on the award.[22] This procedure is inherited from the common law tradition of enforcement of contract.[23] Thus, although, the Act does not retain the procedure neither does it expressly prohibit it too. Therefore, in some rare occasions, award creditors still adopt the procedure to enforce domestic awards in Nigeria. Under this procedure, an award creditor often filed an originating process before a court for breach of arbitration agreement. They are often mandated to prove the existence of the arbitration agreement and award. They also serve the award debtor with the process for his or her defence, and call witnesses and obtain court's judgment in breach of agreement. This procedure is based on the reasoning that 'arbitration agreement contains an implied obligation to perform the resulting award and failure to do so is a breach of that arbitration agreement' which could be enforced like any breach of contract case.[24] Suffice to observe that even though this procedure is unpopular in Nigeria, in some few recent cases at the High Court of Enugu and Osun where it was still used between 2020 and 2021, and those courts were guided by the current practice in the English

[20] Caroline Omochavwe Oba, *Civil Procedure in Nigeria* (Kluwer Law Int'l London 2022) 241.
[21] Fidelis Nwadialo (n 18) 346; Ebokan v Ekwenibe & Sons (2001) 2 NWLR (Pt. 696) 32 at 41.
[22] Paul Idornigie (n 6) 295.
[23] ibid 296.
[24] ibid 295.

jurisdiction because Section 66(4) of the English Arbitration Act 1996 still retains the procedure.[25]

5.3.3. Enforcing Awards under Section 54 of the Act

An award creditor in international arbitration award is also allowed under the provision of Section 54 of the Act to approach Nigerian courts for recognition and enforcement of its awards. Section 54 provides makes applicable to the Nigerian jurisdiction the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention). A remarkable difference between enforcement of international awards under Section 51 and 54 of the Act is that while the former is applicable to awards from all jurisdictions, Section 54 can be explored only when an award is from a jurisdiction that is a signatory to the Convention. Thus, the conditions to apply Section 54 are:

(a) Provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention; and
(b) That the convention shall apply not to difference arising out of legal relationship which is contractual.

In terms of the procedure for recognition and enforcement under this regime, Article IV of the Convention simply states repeated the same procedures and grounds under Section 51 of the Act, that is to adduce the award, agreement, and their translation. Meanwhile under Article V of the Convention, the award debtor could also file a counter process for the court to refuse recognition and enforcement of the award. Suffice to also observe that neither the Convention nor the Act provides the form or procedure to be followed by the court in this proceeding. Moreso, the law does not provide for the days within which to which to apply for recognition under the regime. However, in practice, the common process use is Originating Summons.[26]

[25] Enuwa Ogala v. Cadbury (Unreported judgment of Enugu State High Court in CS/432/2021 delivered 3/3/22); Hilton Top Hotel v. Chicken Republic (Unreported Judgment of Osun state High Court CV/IF/CS/219/20 delivered 7/5/21).
[26] (n 18) 298.

5.4 Analytical Review of the Gaps in the Laws and Practices surrounding Courts Roles in a Recourse Against and Enforcement of Arbitration Awards

5.4.1 Outright Exclusion of Party Autonomy from Enforcement or Recourse Matters

An analytical examination of the three windows of court's participation in arbitration, discussed in Chapters 3, 4, and the instant Chapter shows that it is only in the post-award issues that the parties could not agree to provide their own procedures, either to opt-out or opt-in from many of the procedural matters and conflicting provisions plaguing the regime. In other words, despite that the practice shows some disregard for party autonomy in the first two windows of court's participation in arbitration, some of the statutory provisions earlier analysed still bear some *provisos* signaling some regard for party autonomy. Some of these provisions are Sections 6 and 7(composition and procedure for appointment of arbitrators), Section 9 (procedure to challenge an arbitrator), Section 13 (on interim measure of protection), Sections 16 and 17 (on place and date of the arbitral proceedings), Sections 20, 21 and 22 (form of hearing), etc., which start with provisos such as 'unless otherwise agreed by the parties', or 'subject to any contrary agreement by parties,' etc. In contrast, none of the provisions dealing with post-award issues bears this type of *proviso*.

The implication of this is that at the post-award stage, parties are outrightly foreclosed from making an agreement to manage the statutory roles and rights apportioned to courts and parties when enforcing or making recourse against awards. Thus, in *Arbico (Nig.) Ltd. v. N.M.T. Ltd.*,[27] the court held that once an award is published and brought to court for enforcement or setting aside, the case has transited from the realm of private to public law, thereby invoking the constitutionally guaranteed inherent power of court which parties could not agree to control or oust.

Meanwhile, it is also noteworthy to observe that this practice is not limited to the Nigerian arbitration laws. In fact, it is traced to the major international instruments under which the Nigerian award enforcement and set-aside regime is largely drawn. For instance, Articles 34, 35 and 36 of the Model Law

[27] (2002)15 NWLR Part 789, p 40 para C.

and Articles I – XVI of the New York Convention regulating enforce and recourse against arbitration do not provide for parties' choice on this subject. But curiously, even though this is the internationally acceptable practice, nevertheless, in the explanatory note to the Model Law, the drafters of the Model Law observed the importance of party autonomy on post-award issues but left each state to make decision as to the extent to which party autonomy will be allowed on post-award issue. At paragraph 41 of the explanatory note to the Model Law, it was said that:

> … a party (should not be) precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as in common in certain commodity trades).

Thus, as reviewed in chapter 2, as most of the provisions of the Model Law were adopted into the Nigerian Arbitration and Conciliation Act without alteration, so also is the provisions of Sections 29, 31, 32, 48, 51, and 54 that deal with enforcement and recourse against award. The adverse implication of the anti-party autonomy regime created at the post-award stage in Nigeria became manifest in the 1989 case of *Oyedele Motors v. Maersk*.[28]At the commencement of the tribunal seated in Paris, the parties agreed to defer jurisdictional challenge till the close of hearing. At the conclusion of hearing, the arbitrator asked the parties whether there was any jurisdictional issue to be raised before award and they reacted in the negative. Nevertheless, the applicant applied to the Lagos state High Court under Section 52(2)(a)(iii) of the Act to refuse recognition of the award, on the basis that it was able to fully present its case because the tribunal's directive on document schedule precluded it from tendering some important document. The respondent argued that by the parties' agreement on no-jurisdictional issue at the close of tribunal, the applicant is foreclosed from making recourse on that subject. The court of appeal held that parties cannot by their agreement waive the grounds provided in Section 52 of the Act.

The decision in *United Insurance v Noleggie Transport*[29] is like *Maersk's* case. In the case, the court of appeal declared that the parties' express affirmation

[28] (1989) 3 WRN 56 (2) 13.
[29] (1999) 21 SCY 87.

at the close of arbitration hearing that the tribunal was properly constituted would not bar the court from granting an application to refuse recognition of the award base on the defect in the composition of the tribunal. Also, in *Commerce Assurance v R T Briscoe*,[30] a court's authority to determine what happens to arbitration awards at the post-award stage of arbitration is described as 'unqualified.' In the case, the respondent challenged a set-aside application on the basis that the applicant has voluntarily paid a larger portion of the award-debt which should preclude the applicant still challenging the award. The court held that the parties cannot by express agreement or conduct oust the power of the court on this subject. Further, in the recent case of *NLGN v. Myron*,[31] a High Court in Enugu state declared as invalid an agreement between the parties to make recourse against award only within two weeks of the publication, and to limit the right of recourse to the three grounds provided in Section 29 of the Act. The court held that parties cannot oust the jurisdiction of the court or agree to limit statutory provisions.

To this end, the above decisions create a complete anti-party autonomy regime at the post-award stage in Nigeria. The Act does not give arbitrating parties the freedom at all to manage the procedures applicable to their case or regulate the extent to which a court should participate in the enforcement or recourse against their award.

5.4.2. Limitless Grounds to Set Aside or Refuse Enforcement or Recognition of Arbitration Awards.

As revealed earlier, the combined effect of Sections 29,30, 32, 48 and 52 of the Act is that a Nigerian court is expressly permitted to set aside or refuse to recognise an award (domestic or international) on eleven major grounds. However, a more insight into the wordings of some of the grounds and relevant case law have shown that they are open-ended and interpreted to include many reasons that are not expressly provided in the Act. A typical example of these problematic provisions is Section 30 of the Act which allows a court to set aside arbitration on the basis that an arbitrator has misconducted himself. The difficult word in this provision is the word 'misconduct.' This is because the Act does not elucidate on the scope and

[30] (2005) 19 SCY 54.
[31] Unreported Judgment of Enugu State High Court delivered 3/7/22 in EN/CV/2021/45 (Odugu J).

limits to what actions or inactions of an arbitrator would qualify as a 'misconduct.' Consequently, Nigerian courts have interpreted the word 'misconduct' to include many reasons not expressly stated in the Act, thereby leaving the grounds to set aside an award open-ended.

The *locus classicus* on the controversial interpretation of the word 'misconduct' in the Nigerian case law is the decision of the Supreme Court in *Taylor Woodrow (Nig.) Ltd. v. S.E. G.M.B.H.*[32] In the case, the appellant applied to a High Court of Lagos state to set aside an award based on arbitrator's misconduct. The alleged misconduct was that the arbitrator refused to allow the appellant to amend its pleadings to incorporate a particular document which the arbitrator found to be irrelevant to the case. Even though the Supreme Court affirmed the decisions of the two subordinate courts that a refusal by an arbitrator to consider matters outside his jurisdiction cannot amount to a misconduct, the court made attempt to define what the word 'misconduct' means to Nigerian courts as follows:

> Generally, the word "misconduct" is of wide import, and there is no exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire, but the following have been held to constitute misconduct: -
>
> (i) where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;
> (ii) where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced;
> (iii) where the arbitrator has been bribed or corrupted;
> (iv) technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct;
> (v) where the arbitrator or umpire fails to decide all the matters which were referred to him;
> (vi) where, by his award, the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference, for example:-
> (a) where the award contains unauthorised directions to the parties; or
> (b) where the arbitrator has power to direct what shall be done but his directions affect the interests of 3rd parties; or

[32] (1993)4 NWLR (Pt. 286) 127.

(c) where the arbitrator decided as to the parties' rights, not under the contract upon which the arbitration had proceeded, but under another contract.

(vii) if the award is inconsistent, or is ambiguous or there is some mistake of fact which mistake must be either admitted or at least clear beyond any reasonable doubt; -

(viii) where the umpire or arbitrator refuses to state a special case for himself or allow an opportunity of applying to the court for an order directing the statement of a special case;

(ix) where the arbitrator or umpire delegates any part of his authority, whether to a stranger or to one of the parties, or even to a co-arbitrator;

(x) where the arbitrator or umpire accepts the hospitality offered with the intention of influencing his decision;

(xi) where the arbitrator or umpire acquires an interest in the subject-matter of the reference, or is otherwise an interested party;

(xii) where the arbitrator or umpire takes a bribe from either party.

(xiii) where the abitrator or umpire has breached the rules of natural justice.

(xiv) if there has been irregularity in the proceedings as, for instance:-

(a) where the arbitrator failed to give the parties notice of the time and place of meeting; or

(b) where the agreement required the evidence to be taken orally and the arbitrator received affidavits; or

(c) where the arbitrator refused to hear the evidence of a material witness; or

(d) where the examination of witnesses is taken out of the parties' hands; or

(e) where the arbitrator failed to have foreign documents translated; or

(f) where, the reference being to two or more arbitrators, they did not act together; or

(g) where the umpire, after hearing evidence from both parties, received further evidence from one without informing or hearing the other; or

(h) where the umpire attended the deliberations of the appeal board reviewing his award.

(xv) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:-

(a) by hearing one party but refusing to hear the other; or

(b) by deciding in default of defence without clear warning; or

(c) by taking instructions from or talking with one party in the absence of the other; or

(d) by taking evidence in the absence of one party or both parties; or
(e) by failing to give a party the opportunity of considering the other party's evidence; or
(f) by using knowledge he has acquired in a different capacity in such a way as to influence his decision or the course of the proceedings; or
(g) by making his award without hearing witnesses whom he had promised to hear; or
(h) by deciding the case on a point not put by the parties.

In each of the above cases, the arbitrator or umpire has misconducted himself and the court has power to set aside his award.[33]

It is curious to observe that the decision in *Taylor Woodrow*'s case did not only expand the grounds upon which a Nigerian court could set aside arbitration award with another twelve grounds, the additional grounds are still open-ended, such that more grounds could be read into it.[34] To this end, many subsequent cases threw caution to the wind when they relied on *Taylor Woodrow* to set aside awards on some reasons such as arbitrator's mistake of sending an award to a wrong address,[35] arbitrator's mistake as to the shareholding structure of the applicant.[36] presiding arbitrator making reference to a wrong case law in an award,[37] and an award describing the parties' designations wrongly, etc.[38] This is unlike UK where misconduct is narrowed only on serious irregularity and substantive jurisdiction.

In the recent case of *Akande v Morris Adelabu Motors*,[39] an arbitrator who was hospitalised wrote the parties to obtain their consent to enable him take their address virtually during which he explained his state of health to the parties without objection. The award was set aside by the High Court of Kwara state because the drafted award was given to the arbitrator's secretary to type and return to him in the hospital for signing and publication. The court followed *Taylor Woodrow* to set aside the award on the basis that it is a misconduct to delegate the arbitrator's authority to a third party including the

[33] ibid, pp 142-144, paras. A-E.
[34] K.S.U.D.B v. Fanz, (n 13) 77.
[35] Starcom Ltd v Dolu (2008) 4 SCY 67.
[36] Lulu Bond v Isekola Enterprises (2010) 9 SCY 45.
[37] Okin Malt v West End Barley (2007) 11 SCY 23.
[38] RoseBud Hotels v. Silver Rivers (2012) 3 WRN 67 Vol. 2.
[39] (2022) 3 SCY 45.

tribunal's secretary. Most curious to note is that the limitless set-aside ground created in the Nigerian regime empowers a court to disregard party's agreement in substitute for the individual judge's discretion.

Thus, following *Taylor Woodrow's* case, for instance, the ground upon which the validity of an arbitration agreement could be challenged in a recourse application becomes open-ended and problematic. This is because if the Nigerian courts are allowed to review the validity of an arbitration clause like it would do to a simple contract in ordinary civil matter, it follows that a recourse application against an award on invalidity of agreement becomes an open door to let loose judges to entertain all kinds of challenges that could as well be raised against the validity of a simple contract under the general contract laws, such as capacity to contract, illegal elements underlying the a contract, voidability elements, duress and undue influence, frustration, etc.

This position is enabled by the open-ended wordings of Section 48(a)(i)and(ii) of the Act and that in *Taylor Woodrow*. The list of reasons for which courts could set aside an award under Section 48(a)(i) and (ii) of the Act is broad. For instance, some cases have demonstrated that such a contract has been invalidated on the reason of the age or mental capacity of the parties,[40] or on the claim that the applicant was fraudulently led into the arbitration agreement,[41] or that the applicant had entered the agreement by mistake or misconception of its nature,[42] or under duress,[43] undue influence,[44] or in error. Some other cases have questioned the validity of a contract based on allegation of illegality, misrepresentation, implied revocation, improper authorization, etc.[45] In *ACB Limited v Alao*,[46]for instance, the Nigerian Court of Appeal has held that no matter how huge the loss a party will incur or has suffered, or how long a case has been adjudicated, once an allegation of illegality (legal disability) is raised and proven against an agreement, it must

[40] Ajaokuta Steel Co. Ltd, v. Corp. Ins. Ltd. (2004) 16 NWLR (Pt. 899) 369; Obanye v. UBN Plc (2018) 17 NWLR (pt. 1648) 375; Knight, FrankRutley v A.G Kano (1990) 4 NWLR (pt. 143) 210; Econet Wireless Nigeria Limited v. Econet Wireless Limited (2014) 7 NWLR (Pt. 1405).
[41] Obanye v. Union Bank of Nigeria Plc 92018017 NWLR [Pt. 1684] 375.
[42] Knight, FrankRutley v. A.G. Kano State (1990)4 NWLR [Pt. 143] 210.
[43] Oilserv Ltd. v. L.A.I. Co. Nig. Ltd. (2008)2 NWLR (Pt. 1070) 191.
[44] First Bank of Nigeria Plc v. Funso Akinyosoye [2005]5 N.W.L.R. [Pt. 918} 340.
[45] Dantata Jnr v. Mouktar & Ors [2012]14 NWLR [Pt. 1319] 122; Mohammd v. Mohammed [2012]11 NWLR [Pt. 1310] 1.
[46] [1994]7 NWLR Pt. 621.

be overturned along with all proceedings conducted pursuant to the invalid agreement.

Following this far-reaching principle, the grounds upon which a court would involve in a set aside application against an arbitration award, therefore, have no limit. For instance, the limitless ground to invalidate an arbitration agreement in Nigeria is demonstrated in the application filed by the Nigerian government in the ongoing case *NNPC v P&ID* before the English High Court,[47] where the Attorney General has applied to set aside international arbitration award on some grounds which include an allegation that the Nigerian government officials that signed the underlying contract and the arbitration agreement had not acted in the best interest of Nigeria because as at the time of signing, they were at the brink of leaving the service of the government. The applicant, therefore, argues that the Nigeran officials had not acted in the best interest of Nigeria.[48] It could, perhaps, be argued that this ground upon which the Attorney General has persuaded the English court to set aside an award reflects the seemingly open-ended list of grounds allowed to set aside awards under Nigerian jurisdiction. Currently, the English court has given the Attorney General the opportunity to extend time to apply to set aside the arbitration agreement executed since 2006 (Sixteen years ago) and arbitration award published in 2015.

5.4.3. Application of Constitutional Supremacy as a floodgate for Courts to Set Aside Awards.

As explained earlier in chapters 3 and 4 that the Nigerian courts do place reliance on the provision of Section 6(6) of the Constitution to play some roles in arbitration which undermines the position or agreements of parties. This problem also manifests in the court's practices on post-award issues. This is because by the concept of constitutional supremacy, the judicial power vested in the Nigerian courts enables them to involve in any dispute within their jurisdiction without exempting arbitration. Thus, the negative impact caused by the unqualified constitutional power of the Nigerian courts to the principle of party autonomy then plays out during the post-award stage. To

[47] Nigeria v. P&ID [2020] EWHC 2379 (Comm)
[48] ibid; The most recent decision on the set aside application is downloadable from <https://f5p3e9e4.stackpathcdn.com/wp-content/uploads/2020/09/CL-2019-000752-Judgment.pdf> accessed 3 March 2022.

make the matter worse, there is no provision of the Act that allows a party to have a say in any post-award proceeding before a court.

Beside the cases reviewed earlier in Chapter 2 on this subject, some cases that exemplified the problem particularly in the post-award stage are *Dana Air v. Fijagbebi*,[49] *Arab Contractors v. Mubi LGA*,[50] *Daily Trust v Imazi Estates*,[51] and *Asheik v Jaiz Bank*.[52] In *Dana v Fijagbebi,* the applicant applied to set aside an award on the basis that the arbitrator went beyond the scope of the dispute submitted to him. The respondent argued that High Court of Lagos state lacks jurisdiction to entertain the matter because after the award, parties had agreed that if there is any post-award issues, it should be resolved in the Federal High Court of Abuja. Relying on Section 6(6) of the Constitution, the court assumed jurisdiction on the matter and held that the parties' agreement cannot oust the jurisdiction of the court. In *Arab v. Mubi,* the Adamawa State High Court followed the decision of the Lagos State High Court on this subject and hold that the court has an absolute discretion on post-award proceeding under Section 6 of the Constitution. However, in *Daily Trust v Imazi,* the Federal High Court in Abuja allowed the parties to agree to compromise part of the award being challenged before the court and file their agreement as the judgment of the court, setting aside part and declaring the other part as valid and enforceable. The approach in Daily Trust's case is a departure from *Dana* and *Arab Contractor.* These examples exemplify the same inconsistence in the system which has been explained in detail earlier in Chapter 2.

5.4.4. Application of the Practices and Procedures developed for Ordinary Civil Cases to Set Aside Awards.

It is crucial to observe again that the Act simply provides for the grounds upon which a court could enforce or set aside an award, but it does not provide any Practice Direction or provisions to guide a court to determine what is to constitute each ground. As a result of this gap, the Nigerian courts often resort to some practices and procedures developed specifically from and for ordinary civil cases to determine an application to set aside an award. The

[49] Unreported decision of
[50] (2003) 67 SCY 51.
[51] (2012) 32 SCY 112.
[52] (2015) 41 SCY 98.

common implication of this approach is that many a times, it gives a court the opportunity to relitigate some issues that have been settled (or should have been settled) during arbitration proceeding. It also makes a set-aside proceedings subject to the discretion of each judge as he or she may decide on which civil law principle to adopt or jettison, thereby given a leeway to disregard parties' agreement or opinion, and it makes a set-aside proceedings becoming too formalistic.

To start with, for instance, Section 48(a)(i)-(ii) of the Act allows a court to set-aside an award when an applicant claims that a party to the arbitration agreement is under some legal incapacity to make the agreement, or that the arbitration agreement was invalid and unenforceable because of some legal flaws. These two reasons interrelate as they both give a court a leeway to make a retrospective review (through many lenses though) of the competence of an arbitration agreement even after an arbitration proceeding had been conducted to conclusion and an award published pursuant to the arbitration agreement. Then, if a court finds that a party lacks the legal capacity to make the arbitration agreement (for many reasons such as age, mental condition, illegality, etc.,) or that the contract itself was invalid for some other legal disabilities, it is taken that the arbitrators ought not to enforce the arbitration agreement let alone publishing an award thereupon. Thus, this window seems to give a court an opening to pronounce invalid an arbitration agreement and, consequently, to set aside or refuse recognition or enforcement of any award published pursuant to the invalid agreement.

It is important to also note that, even though the Act does not provide for grounds pursuant to which a court should revoke an arbitration agreement, the court's power to do so is also derivable, primarily, from the provision of Section 2 of the Act which permits revocation of arbitration agreement by 'leave of the court or a judge.' Thus, this window allows a court to set aside an award based on a legal defect which directly affects an arbitration agreement rather than an award itself. Nigerian case laws on this subject appears to be rather uncommon.[53] This is because recourse application filed to set aside an award based on an alleged invalid arbitration agreement is not

[53] Idornigie (n 6) 294.

often raised at the enforcement stage.[54] However, some few related cases are worthy of note. In *Mekwunye v. Imoukhuede,*[55] the Respondent filed an application to set aside an award on the basis that the arbitration agreement was invalid and unforceable because it literarily empowers a non-existent body to appoint an arbitrator. Even though, the Supreme court saved the otherwise invalid arbitration agreement in this case on the reasoning that the defect would only make the arbitration clause a mere pathological clause which is enforceable, the supporting judgment delivered by Mary Odili in the case gave a clearer indication on how Nigerian courts would resolve a challenge against an award on the instant grounds— two principles could be deduced from the case.[56]

First is that, even though, arbitration related cases are described severally by Nigerian courts as *sui generis* (special and distinct) from the general civil suits,[57] nevertheless, a set-aside application which challenges the validity of an arbitration agreement would be treated like any simple contract.[58] The implication of this is that every grounds available to a court to nullify a contract (e.g. defect in the capacity of the parties such as age, illegality, etc.,) would be available to set aside an arbitration agreement. Second is that Nigerian courts would primarily uphold the validity of an arbitration agreement except where the alleged defect in the arbitration agreement is substantial.[59] Accordingly, when faced with a recourse application brought on a ground of alleged invalid arbitration agreement, as per Section 48(a)(i) and (ii) of ACA, the practice from the Apex court's decision is that courts should test the validity of the arbitration agreement like any other simple contract in ordinary civil case.

Again, in the recent case of *Sakamori Construction Nig. Ltd. v. L.S.W.C.*,[60] the Supreme Court of Nigeria reaffirmed its position that an arbitration clause is invalid if it is made in respect of a dispute that cannot be 'contractually compromised' because an arbitration agreement itself is a contract. In

[54] ibid.
[55] [2019]13 N.W.L.R. Pt. 1690 Pg. 439 at 474-477.
[56] ibid, 492.
[57] Emerald Energy Res Ltd. v. Signet Advisors Ltd. (2021) 8 NWLR (Pt. 1779) 579.
[58] Olakunle Orojo (n 3) 287.
[59] Tinuade (n 8) 91.
[60] (2022)5 N.W.L.R. [Part 1823] 339 at 389 paragraphs A-E.

contrast, in *Aye-Fenus Ent. Ltd. v. Saipem Nigeria Ltd.,*[61] an arbitration award was saved by a Nigerian court on the basis that none of the factors or grounds upon which a valid contract could be vitiated was present in the case.

Another example is the ground to set aside an award for improper notice or inability to present a case. A court is permitted to set aside or refuse enforcement or recognition of an arbitration award base on any of these reasons under Section 48(a)(iii) of the Arbitration and Conciliation Act— a reproduction of Article 34(2)(a)(ii) of the UNCITRAL Model Law and Article V of the New York Convention. While exercising this power, a court is to be guided by statutory provisions, case laws and international best practice.[62] But again, the Act does not provide for what the court could consider as a valid service of notice or opportunity to present a case.

In several applications brought on the first ground in Section 48(a)(iii) of the Act, the court is often faced with the call to first determine what constitutes a 'proper' or 'improper' notice. In a set aside application filed in *C.G.De Geophysique v. Etuk*,[63] for instance, the applicant alleged that it was not given a proper notice of appointment of the sole arbitrator who determined the arbitration case. Even though, the Applicant never denied expressly of being aware of the arbitration proceedings, its argument was that it was not served properly as a company should be served under the applicable company laws— instead to hand-over the notice to its directors, it was served on applicant's solicitor's secretary. However, the respondent admitted that the appointment notice was delivered to the applicant's solicitor's secretary but argued that both arbitration agreement or the arbitration Act do not stipulate a mode of service, and that the notice was served by a court's bailiff with an affidavit of service subsequently filed to prove it. The court agreed with the applicant and set aside the award on grounds which include the fact that being a corporate organization, the appointment notice served by proxy did not meet the requirement of the Nigerian laws on the service of documents on a company which requires personal service on its directors,

[61] (2009)2 N.W.L.R. (Pt. 1126) 483.
[62] Idornigie (n 6) 299.
[63] [2004]1 N.W.L.R. (Pt. 853) p 20.

secretary or any 'authorised' personnel at the company's head or registered office.[64]

Even though, the facts in *C.G.De Geophysique v. Etuk*[65] case clearly indicated that the applicant had a 'constructive' notice of the arbitration proceedings, because it received the initial Notice of Arbitration and also the subsequent attempts to appoint an arbitrator which was aborted due to the disagreement between the parties. Further, before the respondent chose to notify the applicant through its solicitor, it first tried to serve the applicant through a courier service provider, but the notice was returned as unclaimed. More so, the applicant never denied that its solicitor drew its attention to the purported appointment notice. This much, the court understood and appreciated but, nevertheless, the final award was set aside seven years after the cause of action had arisen and award published.

Unfortunately, the general laws on service of notice applicable to ordinary civil matters are themselves enmeshed in so many complications, ranging from diversity of acceptable form of notices, procedural regulations of service of notices, variety of acceptable means of serving notices, formalities involved in proving service of notice in a court, etc.[66] Thus, the current experience in terms of proceedings involving setting aside of arbitration award should not be surprising in the present circumstances where the determination of what constitutes a 'proper service' in a proceeding to set aside an arbitration award is extended to cover the determination of proper service under the general laws on service of notices.

It could be observed, therefore, from the cases earlier analysed, and the relevant statutory provisions that it may be easy for a recalcitrant party to an arbitration, who, even though had a constructive or perhaps an actual notice of an appointment or an arbitrator or arbitration proceedings, yet have an award set aside by a court against an unsuspecting award creditor. On this observation, Olatawura has argued that the duty of a court in this

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[64] ibid.
[65] ibid.
[66] John Oniekoro and Mariam Jemialu, 'Service of Orgininating Processes on Corporate Entities in Nigeria: A Review by the Supreme Court of its Extant Decisions on the Point' (2014) Vol. 29, 2014 *Journal of Law, Policy and Globalization* (ISSN2224-3259).

circumstance is simply to investigate whether the applicant was indeed unaware of the appointment of an arbitrator or the arbitral proceedings, and where it is found that the applicant was aware or ought to be aware of the appointment or proceedings— whether by ostensible, imputed, implied or even perceived notice— it will be unfair to set aside such award.[67] Even though, Olatawura did not expressly state whether the general laws on service of notices should not be applicable to a set-aside application, Edward argued that allowing all sorts of technicalities already enmeshed with the laws of service of notices in a set-aside application would defeat the objective of Section 48(a)(iii) of the Act. He then opined that the words 'proper notice' should be given a constructive interpretation which would promote the interest of justice in an application.[68] However, Achike has argued that the primary duty of a court is to protect an award that is valid on its face, thus, the courts should, in their inherent powers, apply the general law on service of documents to a set-aside application but in a liberal sense, particularly where it is found that an applicant indeed had a constructive or actual notice of the appointment or proceedings the court but chose to ignore it and rely on technical ground to set aside the award.[69]

When considering the numbers of cases where Nigerian courts have set aside an award and the applicant was aware of the appointment or proceedings but technically not so, then, it may be hard to contend that the present practice makes an award creditor too volatile to the antics of a recalcitrant award debtor who is open to challenge an award on seemingly limitless grounds. It is notable, and curiously so too, that these scholars have only ascribed to a court the duty to find out whether the applicant actually had a knowledge of an appointment or proceedings in question without reference to any law that stated so— this is because there seems to be none. In any case, such ascribed duty could only exist, at best, as a moral but not a legal duty on a court.

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[67] Ola Olatawura, 'A Global Review of Court's Intervention in Enforcement of Arbitration in Nigeria' (2019) Vol. 4 Iss 65 *University of Nassarawa Socio-Legal Journal* 13.

[68] Edward Kofi, 'Service of Notice of Arbitration: Pre or Post Award Issue under the Nigerian Arbitration Laws?' (2022) 71 L.R. *Ekiti State University Law Journal* 76.

[69] Achike Nwachuku, *Towards Harmonizing Arbitration Laws in Nigeria* (Mba Press Aba 2020) 97.

Thus, the leeway found by a recalcitrant party to set aside an otherwise valid arbitral award under Section 48(a)(iii) of the Act is enabled, firstly, by the open-ended wordings the statutory provision. More so, the provision of relevant international instruments, (UNCITRAL Model Law and New York Convention) to which Nigerian judges do consult for interpretative guidance, do not go any further than the provision of the Act. Then again, the way the Nigerian courts rank arbitration cases in the category of ordinary civil matters could have also enabled their acceptance of the general laws on service of notices in a set aside application involving an arbitration award. More reasons for the current practice may also be traceable to the time-long common law position taken by the Nigerian courts which is that the nature of the jurisdiction exercisable by a High Court in a set aside application is "original jurisdiction in a supervisory capacity."[70]

This position was again reiterated in the recent case decided by the Supreme Court— *MTN (Nig) Ltd. v. Hanson*.[71] The court held that a High Court should treat a set aside application proceeding like any other civil cases submitted for judicial review in the original jurisdiction of a court. The implication of this standard is that, even though a court is not permitted to call evidence or go into the merit of a case in a judicial review proceeding, it is not prohibited from applying the general procedural principles and practices, such as the law on service of notices, to the cases before it. Thus, in the present framework, a High Court or judge can subjectively decide what law, policy or rules should apply to the question about 'improper notice' of arbitrator's appointment or arbitral proceedings submitted before it and to determine the extent to which the general laws of service of notices are applicable to a case without considering parties' opinion or choice.

5.5 Summary of Discussions, and Conclusion

This chapter examines the roles that the Nigerian courts play in arbitration after the tribunal has completed its duty and published its award. The discussion in the chapter finds that almost, if not all, domestic and international arbitration laws allow the national courts to assist arbitration in

[70] See Bakar Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2000)12 NWLR (Pt 681) 393; Aye Fenus Ent. Ltd. v. Saipem (Nig.) Ltd. (2009) 2 NWLR (Pt. 1126) 483.
[71] (2017) 18 NWLR (Pt.1598) 394, 414-415 paras H-B.

enforcing or setting-aside an award, when necessary, and the Nigerian legal system follows this practice. Further, it is found that out of the three windows of judicial participation in arbitration investigated in this research, the regime governing the Nigerian court's role to enforce and or set-aside arbitration award is the most uncertain. This is because the ground upon which a Nigerian court could set-aside or refuse to recognize an award is almost limitless. Both case laws and relevant statutory provisions do not help in this respect. Notable among the judicial decisions that created this uncertainty in the current regime in Nigeria is the Supreme Court's decision in *Taylor Woodrow* which do not only add to the statutory grounds for setting-aside an award but also leave the grounds open-ended, thereby giving unfettered discretion to the Nigerian courts to extend this frontier even against party's choice. Thus, analytical review conducted in the chapter has narrowed the problems ensuing from this third window of judicial participation in arbitration to four problems which are further analysed in chapter 6 and 7, and solutions suggested in chapter 8.

Part III

Analytical Review of the Nigerian Laws and Practices on the Roles of Courts in Arbitration, Findings, and Conclusions, and Recommendations

Chapter Six

Analysis of the Interpretation and Conceptual related Problems emanating from the Court's Roles in Arbitration in Nigeria

6.0 Introduction

As explained in the various introductory sections to chapters three, four, and five, the findings garnered from the review of the three windows of judicial participation in arbitration, relating to the problems plaguing the current practice in Nigeria, are further consolidated in chapters six and seven, and then analytically appraised with the aim of understanding the root causes of the problems. Thus, while chapter six focuses on the problems relating to interpretation and application of statutory provisions and conceptual underpinnings the roles of the Nigerian courts in arbitration, chapter seven focuses on the problems relating to institutional regulation of the roles of the Nigerian courts in arbitration.

Therefore, this chapter investigates the factors responsible for the conflicting and inconsistent interpretations and applications of some statutory provisions and conceptual reasonings governing the roles of the Nigerian courts in arbitration, as earlier demonstrated in chapters three, four, and five. Essentially, the chapter conducts an analytical diagnosis of some relevant case laws on this subject with the aim of analysing and understanding the wordings of the relevant arbitration statutes and policy documents in Nigeria, and the reasoning of the judges in interpreting and applying the relevant laws and concepts. As stated in the methodology section in chapter 1, this chapter further engages the findings made from the above analytical diagnosis with the practices in the United Kingdom and some other jurisdictions, with the aim of drawing inspiration for the needed reforms in the Nigerian regime.

6.1 Summary of the Problems emanating from the Three Windows of Judicial Participation in Arbitration

The study conducted in Chapters 3, 4 and 5 has revealed several problems or gaps in the current regime on the roles of the Nigerian courts in arbitration, and these problems have caused uncertainty in the system,

and also paved way for the court's practice to undermine party autonomy. Accordingly, the problems uncovered in the last three chapters can be summarized under the following seven key themes:

1) Difficulties in defining the scope of or limits to the courts' roles in arbitration arising from unsettled interpretation of Section 34 of the Arbitration and Conciliation Act (the Act).
2) Conflicting wordings and phrasing of some other provisions of the Act relevant to define the scope of and limits to the courts' roles in arbitration.
3) Absence of default provisions in the Act regarding some subjects relevant to define the scope of or limits to the courts' roles in arbitration.
4) Uncertainties in defining the scope of or limits to the courts' roles in arbitration as arising from the undefined inherent constitutional authority possessed by Nigerian courts to involve in all cases.
5) Unsettled judicial positions on some matters relating to the scope of or limits to the courts' roles in arbitration, particularly on novel circumstances not covered by the Act.
6) Complexities arising from the question about which court is competent to play specific roles in arbitration.
7) The broad application of practices applicable to regular civil matters in defining courts' roles in arbitration.

As demonstrated and emphasized in the review conducted in the last three chapters, the problems or gaps revealed from the current regime do not only create a level of uncertainty in the system regarding the extent to which a Nigerian court should participate in arbitration, but also do undermine party autonomy. As such, in many cases, the current practice gives the courts a leeway to take advantage of the gaps in the system to participate in arbitration, sometimes as they wish, and even against the parties' agreement. The ultimate effect of these problems is that it makes the regime so unpredictable that it is difficult for the arbitration users and practitioners to relatively ascertain the exact limits of the court's involvement in arbitration in Nigeria.

Thus, the succeeding sections review the factors responsible for the conflicting and inconsistent interpretations and applications of relevant statutory provisions and conceptual basis underpinning the roles of the Nigerian courts in arbitration under three headings, using the practice in the United Kingdom and some other jurisdictions as the major comparators. These three headings are as follows:

1. The narrow phrasing of Section 34 of the Act and its failings to set out a definite limit to the roles of court in arbitration.
2. The open-ended wordings of Section 6(6) of the 1999 Constitution of Nigeria and the narrow application of the concept of constitutional supremacy in interpreting court's roles in arbitration.
3. Absence of a definite theory or ideology underpinning the courts' roles in arbitration in Nigeria.

6.2 The Narrow Phrasing of Section 34 of the Act and its Failings to Set out a Definite Limit to the Roles of Court in Arbitration.

6.2.1 The Current Phrasing and Objective of Section 34 of the Act

Section 34 of the Act is the umbrella and central provision in setting a boundary for the Nigerian courts to determine when, where, why, and how they should participate in arbitration.[1] It simply provides:

> A court shall not intervene in any matter governed by this Act except where so provided in this Act.

Historically, the wording of Section 34 of the ACA was first introduced into the Nigerian arbitration system in the 1988 Arbitration Decree, reviewed in Chapter 2. The earlier 1914 Arbitration Ordinance (later repealed) did not contain such or similar provision. In its stead, the repealed Ordinance listed some specific subject areas where a court should intervene, and Section 15 generally empowered Nigerian courts to intervene at any stage in an arbitration proceeding.[2] Thus, the introduction of Section 34 into the current Act was the first legislative attempt to curtail the general judicial power wielded by the Nigerian courts to participate in all cases, including

[1] Olakunke Orojo and Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Nig. Ltd., 1999) 313.

[2] Arbitration Ordinance 1914 (later re-enacted as Arbitraiton Act Cap. 13 Laws of the Federation of Nigeria, 1958), s 15; Olakunke Orojo and Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Nig. Ltd., 1999) 313.

arbitration.[3] Thus, being an umbrella provision, Section 34 is critical to the efficacy of every other provision in the Act that deals with the roles of Nigerian courts in more specific areas. Suffice to observe that the provision of Section 34 is an adaptation of Article 5 of the Model Law into the Nigerian Act. Manuel Gomez observes that it represents the most 'succinct provisions of the Model Law, but it is also essential.'[4]

The prevailing judicial position in Nigeria on the purpose of Section 34 is that it is a 'major barometer to tell' when, where and how a court should be involved or refuse to be involved in arbitration.[5] Moreover, in many of the policy documents and judicial pronouncements reviewed in chapters 3, 4, and 5, there have been consistent references to Section 34 as one provision that lays the groundwork for a 'non-interventionist' or 'minimal interventionist' regime in Nigeria. In a recent decision of the Supreme Court of Nigeria in *MT. Sea Tiger v. A.S.M.,*[6] the court observed:

> The position of Nigerian courts on holding parties to an arbitration clause/agreement bound by such agreement and their reluctance to interfere with the clauses in a contract by parties (and cases before arbitrators) has been consistent over the years in line with the provision of Section 34 of The Arbitration and Conciliation Act.[7]

Nigerian judges have, therefore, reiterated this position in many cases reviewed earlier, even before the *MT Sea Tiger's* case, which includes *Statoil (Nig.) Ltd. v. N.N.P.C.,*[8] *Nigerian Agip Exploration Limited & Anor. v. N.N.P.C. & Anor*.,[9] and *Shell v. Crestar*.,[10] etc. In these cases, it was held that Section 34 is mandatory and should be strictly interpreted and applied to cases by courts.

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3 Savoia v. Sonubi (2000)7 SC (Pt 1) 36

4 Manuel Gomez, 'Extent of Court Intervention' in Ilias Bantekas, Pietro Orlolani et. al., 'UNCITRAL Model Law on International Commercial Arbitration' (Cambridge University Press, 2020) 89.

5 Lucius Nwosu, *Commercial Arbitration Laws in Nigeria* (Rennaisance Publishers Abuja 2019) 410.

6 (2020)14 NWLR (Pt.1745) 418

7 ibid, 458-459, paras. H-C. The phrase "and cases" in the quotation is added by the researcher to contextualise the court's holding.

8 (2013) 14 NWLR (Pt.1373)

9 (2014) 6 CLRN 150 (at Page 174, lines 7 to 44; page 175 lines 1 to 5)

10 (2016)9 NWLR (Pt. 1517) 350.

David Williams also observed from a survey of some national arbitration provisions in other Model law jurisdictions similar to Section 34 of the Nigerian Act that it generally provides the 'basic rule for determining whether court intervention is permissible (or not)' in each circumstance.[11] In other words, the provision is meant to create a level of certainty in determining the scope of and limits to courts' roles in arbitration, such that can be ascertained to some extent by all stakeholders and which should check courts' encroachment on party autonomy.[12] Accordingly, practices relating to the courts' roles in arbitration in Nigeria, as discussed in chapters 3, 4 and 5, are essentially formed around Section 34.

However, as evidenced by the cases reviewed in chapters 3, 4 and 5, the Nigerian courts have not been consistent in their interpretation and application of Section 34. Accordingly, the provision has not really brought much-expected certainty in defining the courts' roles in arbitration.[13] Instead, including the provision has created some problems in the related area.[14] This is mainly because when the interpretation and application of an umbrella provision that defines the limits of courts' involvement in arbitration matters is problematic, it provides leeway for a court to become involved more or less than is expected or is necessary in an arbitration case. Moreover, such a situation resultantly erodes observance of the principle of party autonomy.

It is crucial, however, to observe that this experience is not peculiar to Nigeria as it is the same or similar in some other jurisdictions that have domesticated Article 5 of the Model Law.[15] David Williams observes:

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[11] David Williams, 'Defining the Role of the Court in Modern International Commercial Arbitration' (2014) Vol.10 Iss 2 *Asian International Arbitration Journal* in Kluwer Law Journal 145.

[12] United Nations Commission on International Trade and Law (UNCITRAL) Secretariat, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' (1985), Official document of the United Nations prepared and submitted to the UN General Assembly's Eighteenth Session, Vienna, June 1985 through the UNCITRAL, Aa/CN.9/264 25 March 1985, 18 <https://www.mcgill.ca/arbitration/files/arbitration/Commentaireanalytique-en.pdf> accessed 5 May 2019.

[13] ibid.

[14] Manuel Gomez, 'Extent of Court Intervention' in Ilias Bantekas, Pietro Orlolani etc., 'UNCITRAL Model Law on International Commercial Arbitration' (Cambridge University Press, 2020) p 84-95, 85-86.

[15] ibid.

> Article 5 of the Model Law was obviously an attempt to curb judicial excesses… (but undesirably, it) has created some difficulties of interpretation and application.[16]

Therefore, the phrasing and letters of Section 34 play a significant role in how Nigerian courts interpret and apply this blanket provision to cases. This is perhaps because, regardless of where a statutory provision is sourced from, its phraseologies in each jurisdiction, coupled with the prevailing judicial attitude, will largely determine how a national court approaches and applies them to cases.[17]

6.2.2 The Major Problems with the Narrow Phraseology, Wordings and Interpretation of Section 34 of the Act

Section 34 has progressed the Nigerian regime from an open-ended regime under the 1914 Arbitration Ordinance, when there was no limit at all placed on courts' participation in arbitration, to the current regime, where there is a statutory provision to at least define the scope of courts' roles in this area of civil jurisprudence. Nonetheless, the fundamental problem with the provision is that its current wording is still too narrow and restrictive, such that it becomes difficult for parties, arbitrators, practitioners, and even courts to ascertain precisely why, when, where, and how a Nigerian court participate in arbitration, particularly in some critical scenarios.

These problems are narrowed to three major areas, which are the difficulties faced by a court to apply the narrow wording of Section 34 to define their roles in the following areas:

(i) To participate in some critical issues not covered at all in the Act.
(ii) To participate in some critical issues impliedly touched by the Act.
(iii) Failure of the wording of Section 34 to provide 'how' a court should participate in arbitration.

6.2.3 Problematic Roles of Courts in Issues not Covered by the Act

In many of the problematic provisions of the Act reviewed in chapters 3, 4 and 5 regulating practices surrounding courts' roles in some specific

[16] David Williams (n 17) 146.
[17] Tinuade Oyekunle and Bayo Ojo, *Handbook of Arbitration and ADR Practice in Nigeria* (LexisNexis 2018) 61.

arbitration subjects in Nigeria, one of the reasons for the inconsistent and conflicting judicial decisions in determining courts' roles in those specific subjects is that some of the issues where courts' participation is requested are not covered at all under the Act. This is because, in practice, there are now novel subjects emanating from arbitration, where courts' participation is requested but not covered in the Act. Moreover, the dynamic nature of commercial transactions in this time of globalization appears to underpin the recurrent unforeseeable scenarios in arbitration practice where courts' participation has become essential but, unfortunately, not covered in the Act.

However, the current phrasing and letters of Section 34, which is supposed to cover the gaps in those specific provisions, simply further compounds the problem. This is because, by its narrow wording, caselaw are still unsettled in Nigeria concerning what the court should do when invited to participate in arbitration subjects not covered in the Act. Thus, as evidenced in the review in chapters 3, 4 and 5, the pattern emanating from the current regime is that each court is left with the choice of interpreting the extent to which it will participate in such circumstances, based on the facts of each case and according to the individual judge's persuasion. Moreover, it is observed that many of the judicial decisions on this subject were of the court of first instance, not appealed to the appellate court. Some specific areas where this problem is demonstrated from the review conducted in chapters 3, 4, and 5 are summarized thus:

(i) On the issue of the appointment of an arbitrator by a court, no provision of the Act expressly empowers a court to appoint an arbitrator for international arbitration. Nevertheless, the Nigerian courts have faced many cases where arbitral parties have submitted to the court's jurisdiction for the appointment of an international arbitrator. Worse still, Section 54(2) of the Act designates the office of the Secretary-General of the Permanent Court of Arbitration (SGPCA) at the Hague as the default appointing authority for international arbitration in Nigeria. The issue surrounding respect for party autonomy becomes a serious one, mainly where parties have approached a court but have been turned away, whereas in another

case, the courts have accepted a similar invitation and made an appointment for the parties. As a result, there have been inconsistent positions taken by the Nigerian courts. Judicial decisions discussed on this point include *Juli Pharmacy Ltd. v. Röhlig Logistics GmbH & Co. KG.*,[18] *Schroder & Co. v. Major & Co. (Nig.) Ltd.*,[19] *Kraus Thompson Organization v. N.I.P.S.S*.[20] *Mourg Press v. Bradley King,*[21] *Marco Bidetta v Omolayo Standard Press,*[22] and *Royland F.I.D.D v. Raymond Disney,*[23]etc.

(ii) Regarding issues relating to the joinder of parties, consolidation of arbitration cases, and third-party intervention, the earlier review conducted in Chapter 3 established that there is no express provision of the Act regulating this legal space. Moreover, there is no 'fallback' or default provision or rules regarding the number of arbitrators or modes of appointment in a multiparty arbitration under the Nigerian legal system. Nevertheless, arbitral parties continue to approach Nigerian courts on these issues. Consequently, the courts' decisions have been inconstant in this regard, and there is presently no prevailing position of the courts on these issues. A significant problem for the arbitration community regarding the current practice is that 'an unfettered judicial power over arbitration matters would open a floodgate to eclipse deference to party autonomy.'[24] Judicial decisions discussed regarding these issues include *U.A.C. Ltd. v. Agbomagbe Bank Ltd.,*[25] *West Atlantic Energy Ltd. v. Dafest*,[26] and *Statoil (Nigeria) Ltd & Anor. V. FIRS & Anor.*[27]

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[18] FHC/ADK/567/2000 Unreported Judgment of the Federal High Court Ado Ekiti, delivered 7/7/21 (Tawo J).
[19] (1989) 2 NWLR (Pt. 101) 1.
[20] (2004) 17 NWLR (Pt. 901).
[21] Judgment of the Federal High Court Abuja,in FHC/ABJ/CV/45/17 delivered 10/4/18 (Umar J).
[22] Judgment of the Federal High Court Enugu, in FHC/EN/CS/142/15 delivered 7/4/17 (Aluko J).
[23] Judgment of the Federal High Court Lagos,in FHC/LS/CV/413/14 delivered23/1/14(Yinusa J).

[24] Iyiola Onifade, 'What is the Problem with Section 34 of the Arbitration and Conciliation Act' (2021) Vol. 44 *University of Maidugri Law Journal* 87.
[25] Unreported Judgment of the High Court of Ondo State in OD/CV/NH/234/88, delivered 12/3/1989 (Kumuyi J).
[26] Judgment of the Federal High Court sitting in Delta State, Unreported Suit CV/CS/567/06.
[27] [2014] LPELR – 23144 (CA).

(iii) On the issue relating to the court's appointment of a substitute or replacement arbitrator in domestic arbitration, the earlier review conducted in Chapter 3 has established that, unlike Section 46(1) of the Act, which lays down the procedure to replace a dead arbitrator, for instance, in international arbitration, there is no corresponding provision for such power in domestic arbitration. This gap has created uncertainty in this legal space, which diminishes the expected deference to the right of the parties to approach a court for such an appointment which, by extension, undermines the principle of party autonomy. Some judicial cases reviewed to demonstrate this gap include *Techno Oil Ltd. v. Ascon Oil Coy Ltd.,*[28] AICO Company *v Societe Generale Bank,*[29] and *Coastland Energy Logistics Ltd. v. Honourable Justice Oseni & 4 Ors.*[30]

(iv) Regarding the power of the court to grant injunctions, the review conducted in Chapter 4 has shown that eight sections in the Act deal with the 'conduct of arbitral proceedings', and none of these provisions expressly provides for or prohibits courts from entertaining suits filed against ongoing arbitration by way of an application for injunctive relief.[31] There is no mention of injunctions or the use of injunctive powers of the court to assist or intervene in an ongoing arbitration at all in the Act. Nevertheless, the Nigerian courts have had cases to injunct ongoing arbitration. Besides the inconsistent decisions reached by Nigerian courts in this regard, the current practice has further created different regimes for domestic and international arbitration—while a Nigerian court could injunct an international arbitration whose seat is not Nigeria, it could not do so in domestic arbitration. Some judicial decisions reviewed on this point include *SP.D.C.N. Ltd. v. Crestar*,[32] *Rismic Resources v Tripple Tee*,[33] *Spring Bank Plc v. Leventis Autos.,*[34] and *Oceanview Inc v. Marine Platform Ltd.*[35]

[28] [2021] 45 v. 83 NCLRS 71.
[29] [1983] 5 V. 41 NCLRS 6.
[30] Judgment of the High Court of Ogun State, in CV/67/20 delivered 11/3/21 (Shina J).
[31] (n 2) Ss 14 – 22.
[32] [2016]9 N.W.L.R. Pt.1517 300 at
[33] [2021] 101 V 92 CLRNS 61.
[34] (2021) 103 V 98 CLRNS 12.
[35] [2021] 110 V 112 CLRNS 10.

(v) Further, the earlier review in Chapter 3 has also shown that Nigeria's current arbitration legislation and practice does not make provision for the appointment of arbitrators to multiparty and multiple-contract arbitration and other adjunct matters. As a result, the role of a court has become problematic in scenarios where a need arises for each party in multiple underlying contracts to appoint their respective arbitrator at the commencement of an arbitration, or appointment of arbitrators after the consolidation of arbitration cases, etc. Some judicial decisions reviewed on this point include *Kilima Groups v. Oceanwide Shipping Company China*,[36] *Champ v. Siegel Trading Co.,*[37] *Moaka Foams Ltd. Nigeria v. Qingdao Yuanyong Int'l Forwarding Co., Ltd.,*[38] and *Statoil (Nigeria) Ltd & Anor. V. FIRS & Anor.*[39]

(vi) Similarly, the statutory and case review conducted in Chapter 4 has shown that the Act does not expressly provide for the involvement of a court in the determination of an application challenging an arbitrator, but, in practice, Nigerian courts do participate in such a subject. Thus, the question as to which of the Nigerian courts should be involved in determining a jurisdictional challenge application has been answered differently by Nigerian courts. The *Associated Discount House Ltd. v. Amalgamated Trustee Limited*[40] case exemplifies the complications arising from the judicial decisions on this issue.

(vii) Further, the review conducted in Chapter 3 has revealed that the provisions of Section 12 of the Act and Article 21 of its Rules, as well as Article 16(3) of the UNCITRAL Model Law, do not expressly provide for the right of an arbitral party or applicant when an arbitral tribunal recuse themselves from an arbitral reference based on the jurisdictional challenge.

The above summarises the complications evidenced in the statutory and case review conducted earlier. The implication of this is that each decision

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36 [2019] 4 SCY 67.
37 55 F.3d 269 (7th Cir.) 1995.
38 [2019] 76 V.76 CLRNS 18
39 [2014] LPELR – 23144 (CA).
40 [2006] 5 SC (Pt.1) 32.

of the court stands on its own, it becomes subjective, and no precedent is created to guide parties and courts in subsequent cases, thereby undermining the principle of party autonomy. This is because when the question of whether a court is permitted to participate in or abstain from an arbitration matter cannot be answered with at least some level of clarity, the parties' agreement, or input as to where, how and when a court would be involved in such an elusive regime is exposed to being disregarded and undermined.

6.2.4 Problematic Roles of Courts in Issues Impliedly or Partly touched by the Act.

It can be further illustrated from the review conducted in chapters 3, 4 and 5 that arbitrating parties do invite Nigerian courts to determine issues emanating from a subject area covered by the Act, but the specific issue in question is not addressed at all under the Act. In other words, the general area under which an issue falls is covered by the Act, but the subject itself is not in any way covered. Unfortunately, in such cases, besides the close-ended phrasing of many of the specific statutory provisions regulating these issues, the current phrasing of Section 34 is not helpful. This is because in such circumstances, if the court is to narrowly interpret and apply the provision of Section 34 to the situation, it could decline jurisdiction on the basis that, though the subject area is governed by the Act, the specific issue in question is not.

Nevertheless, a court could still assume jurisdiction under a liberal interpretation of Section 34, meaning that the specific issue in question, having not been addressed by the Act, takes the case outside the purview of the Act, thereby foreclosing a court from participating. A more liberal interpretation could, however, be read by a court, that since the broader subject matter under which the issue in question arises is covered under the Act, it could be argued that the Act has impliedly covered the issue and a court lacks the jurisdiction to entertain such a case, as the phrase 'a matter governed by this Act' may be interpreted to include matters impliedly touched by the Act.

This situation arises in different variants, thereby, in practice, leaving each court in Nigeria with authority to interpret each case as the judge wishes

and then arrive at decisions not based on any ascertainable or uniform legal principle. Moreover, the ultimate effect of this problem is that with the uncertainty caused in the regime, parties' agreements are disregarded at the court's discretion. In other words, this gap weakens deference to party autonomy by the court because, regardless of the agreement of the parties on whether a court should be involved in a case in these circumstances, the court could still disregard the parties' agreement and choose to either participate or not in such a case. Some of the specific statutory provisions and areas of practice where this problem manifests itself, as discussed in chapters 3, 4 and 5 above, are summarised as follows:

(i) As discussed earlier in Chapter 4, for instance, this problem is demonstrated in the wording of Sections 9 and 10(b) and (c) of the Act, which simply states that the mandate of a non-performing arbitrator should be terminated for 'inability to perform,' without stipulating the specific actor (court or otherwise) to sanction the termination of the arbitrator's mandate in the circumstance. Some of the judicial cases exemplifying this concern are: *NNPC v Total E & P Nig. Ltd.,*[41] *Misr (Nig.) Ltd. v. Salah El Assad.*[42]

(ii) Another example from the earlier review is the provisions of Section 57(1) of the Act, which simply designates a 'High Court' as the proper court to be involved in arbitration cases whenever the law 'allows a court to intervene.' However, the provision, or any other arbitration laws, is not specific on which of the High Courts it refers to. Thus, the case of *Associated Discount House Ltd. v. Amalgamated Trustee Ltd.,*[43] reviewed earlier, demonstrates how arbitration cases become ensnared in jurisdiction conflicts between the High Courts in Nigeria, and Section 34 could not cover the gap.

The case was filed at the Federal High Court, but the court struck out the case on the grounds that it lacked the power to adjudicate

[41] Unreported Judgment of the Federal High Court Abuja in FHC/ABJ/CS/390/2018, delivered 1/3/2019 (Dimgba J).
[42] (1971) All NLR 175.
[43] [2006] 5 SC (Pt.1) 32.

the subject matter of the case and directed the parties to take the case to the High Court of Lagos State. At the latter court, the defendant again challenged the jurisdiction of the High Court of a State, but the Court dismissed the objection and assumed jurisdiction. The matter was appealed to the Court of Appeal, which decided that the proper jurisdiction lies in the Federal High Court and not the High Court of a State. However, on further appeal, the Supreme Court reversed the decision and held that the High Court of Lagos State had the jurisdiction. For almost ten years, the case was stalled at the High Court of Lagos State merely due to the question of jurisdiction between the two High Courts.[44]

This legal complication was borne out of the wording of Section 57 of the Act and the unsettled interpretation of Section 34. Perhaps if Section 57 could be further developed and made more explicit to make provisions for the distribution of arbitration cases among the High Courts, such complications could be avoided. Then again, in a complication such as this, the courts tend to disregard party autonomy, as it has no place in their determination regarding which court should be involved in an arbitration case.

(iii) Further, the review conducted about the provision of Section 48 of the Act in chapter 5 of this thesis exemplifies another instance of the problematic roles of courts in issues impliedly touched by the Act. As found in Chapter 5, Section 48 generally allows a court to set aside an award on ten grounds. However, as discussed in Chapter 5, the list of grounds upon which a court could set aside an award under the provision of Section 48 of the Act is far-reaching. Thus, the provisions were not specific enough to cover many scenarios that play out in practice, and the resultant effect is that it allows a court to set aside awards based on reasons impliedly traced to issues covered under the Act, and regardless of the parties' agreement or say on the issue. In *ACB Limited v Alao*,[45] for

[44] See also Oladipo v. Nigeria Customs Services Board (2009)12 NWLR (Pt.1156) 563.
[45] [1994]7 N.W.L.R. (Pt. 621).

instance, the Nigerian Court of Appeal held that no matter how huge the loss a party would incur or had suffered, or how long a case had been adjudicated, once an allegation of illegality (legal disability) is raised and proven concerning an arbitration agreement, it must be invalidated along with the entire proceedings conducted pursuant to the agreement. This is because the word 'misconduct' under the Nigerian arbitration law is open-ended.

In other words, because of the open-ended phrasing and wording of Section 57 of the Act, the grounds upon which a court would participate to set aside an award is with no definite limit. Moreover, Section 34 could still not regulate this confusing space.

6.2.5 Problematic Roles of Court in determining the Manner to involve in Arbitration even in the Statutorily Permissible Areas

The statutory and case laws reviewed in chapters 3, 4, and 5 have also shown that some of the provisions of the Act that expressly permit the courts' roles in certain areas of arbitration yet do not provide 'how' the court should play such roles. Then again, the wording of Section 34 of the Act, which is the umbrella provision to guide courts in their roles in arbitration, is not too helpful in addressing this issue. It is essential to observe that this problem was also envisaged by the maker of Article 5 of the Model Law (from where Section 34 is transplanted). Manuel Gomez stated that at the making of Article 5, major deliberations among the comity of nations were not on 'whether national courts should intervene or not at all, but on how and when such intervention might occur.' Nevertheless, some of the provisions of the Model Law only touch on 'where' without setting out 'how' a court should intervene in arbitration.[46]

Hence, the word 'where' in the phrase '…except where so provided…' under Section 34 may indicate that the law focuses on the areas within which to 'intervene', rather than how to intervene. Accordingly, a significant concern arising from this issue is the question relating to *how* a court

[46] Manuel Gomez, 'Extent of Court Intervention' in Ilias Bantekas, Pietro Orlolani etc., 'UNCITRAL Model Law on International Commercial Arbitration' (Cambridge University Press, 2020) p 84-95, 85-86.

would involve in arbitration, even within its permissible area of intervention, without undermining party autonomy.

The case of *Lakeside Autos v. National Peoples Bank Ltd.*,[47] presents facts exemplifying the concerns arising from some provisions of the Act that provide the 'where' but not the 'how' a court should be involved in arbitration and how divergent interpretations of Section 34 in such cases have resulted in inconsistent decisions of Nigerian courts in this space. As reviewed in Chapter 3, in *Lakeside's* case, a High Court judge appointed his former partner in a law firm as sole arbitrator in an application before it, and he dismissed a challenge application to the appointment. The dismissal was grounded on Section 7(2)(b) and (3)(c), which only empowers a court to appoint an arbitrator for the parties in default of the parties' agreement, yet it does not stipulate 'how' a court should make the appointment. Thus, the judge in *Lakeside's* case leveraged on this gap and exercised his seemingly broad discretion under the law to appoint his friend to the arbitral reference, even when it was against the parties' choice which undermines party autonomy.

However, unlike the *Lakeside's* decision, Nigerian courts took a different position in their application of Section 34 to an invitation to be involved in arbitration brought pursuant to Section 10(1)(b) and (c) of the Act. This provision states that an arbitrator's mandate should be terminated if the arbitrator shows an 'inability to function.' As reviewed in Chapter 3, in *NNPC v. Total E & P Nig. Ltd*.,[48] following the expression of their 'inability' to hear a Challenge application filed by a party, a court was approached to terminate the mandate of the arbitrators pursuant to Section 10(1)(b) and (c) of the Act. The court relied on the same Section 34 to decline jurisdiction. The court held that Section 34 precludes the court from entertaining such a case because Section 10 simply states that an arbitrator's mandate should be terminated, but it does not explicitly empower a court to do it or provide how to do it.

[47] [1962] 2 LWLQ 45.
[48] (n 47).

Although the court did not give a clear reasoning for its decision in *NNPC v Total*, a reasonable explanation would be that the court followed the position in Redfern and Hunter, which was referenced in the judgment, that when a provision of an arbitration law broadly covers a subject (like termination of an arbitrator's mandate for inability or refusal to perform for instance) without vesting the power in a court, judicial involvement in such a case is contrary to Article 5 of the Model Law (Section 34 of the ACA).[49] However, interpreting Section 34 as one excluding a court from involving in arbitration where the Act does not expressly direct a court regarding how to exercise a power like in *NNPC v. Total.,* enables a court to encroach on party autonomy. This is because the refusal of the court's involvement in such a case like this leaves the arbitrating parties in the middle of nowhere and mainly at the pleasure of an arbitrator, where the parties are unprotected by the courts.

Another case that exemplified this problem was the much earlier case of *Misr (Nig.) Ltd. v. Salah El Assad.,*[50] reviewed in chapter 3. The facts of the case demonstrate that the current reading of Section 34 allows the courts to decline jurisdiction in an arbitration matter, even where parties are left with no other forum to redress their grievances. The court in *Misr*'s case also refused to entertain the parties' grievance despite the evidence that the claimant's case would be left undetermined because it was impracticable that the arbitration could continue, coupled with the recalcitrant attitude of the opposing party. Braithwaite opines that in many circumstances where the courts have relied on Section 34 to decline involvement in arbitration, the parties are often 'left in limbo'.[51]

From the foregoing, the application of Section 34 to determine when a court would be involved in arbitration in Nigeria still primarily results in inconsistent interpretations and positions, and this gap does undermine party autonomy. This gap can be traced directly to the fact that Section 34 of the Act, as currently phrased, being the bedrock of all provisions and

[49] Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 512.
[50] (1971) All NLR 175.
[51] Tunji Braithwaite, *International Commercial Arbitration in Nigeria: Beyond the Populism and Façade* (Hoofbeat Lagos 1999) 69.

practices relating to court and arbitration relationship, in itself has attracted divergent interpretations from the Nigerian courts, thereby making subjective the roles of the Nigerian courts in arbitration. In other words, each judge or court now exercises discretion to interpret Section 34 and apply it to a case as it suits them.

6.3 A Look at the Practices Outside Nigeria

As noted earlier, Section 34 of the Nigerian Act essentially reproduces Article 5 of the Model Law. Thus, examining how Article 5 is domesticated, interpreted, and applied (to the areas where problems have been identified in the Nigerian regime) in some other jurisdictions will help to further appraise the Nigerian system. Following the reasons discussed in Chapter 1 (in the methodology section), the practice in the selected jurisdictions; the United Kingdom and some other jurisdictions in West Africa and beyond are examined here.

To begin, it is crucial to observe that in the making of the Model Law, and long before its adoption by the UN and its domestication into various national legal systems, concerns were raised about the problematic nature of the wording of Article 5 and its susceptibility to misreading, and particularly concerning its ineptitude to provide a definite scope for or limits to courts' roles in arbitration. Curiously, therefore, before the drafters of the Model Law—the Working Group on International Contract Practices of the UN—presented its final draft to the United Nations, it made the following critical observation about Article 5:

> This article (Article 5) relates to the crucial and complex issue of the role of courts with regard to arbitrations. The Working Group adopted it on a tentative basis and invited the Commission to reconsider that decision in the light of comments by Governments and international organizations… the desired balance between the independence of the arbitral process and the intervention by courts should be sought by expressing all instances of court involvement in the model law but cannot be obtained within Article 5 or by its deletion …[52]

[52] United Nations Commission on International Trade and Law (UNCITRAL) Secretariat, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' (1985), Official document of the United Nations prepared and submitted to the UN General Assembly's Eighteenth Session, Vienna, June 1985 through the UNCITRAL,

From the foregoing, the drafters of Article 5 acknowledged that the issue surrounding the courts' roles in arbitration is complicated and that Article 5, as it is currently worded, is not satisfactory in addressing the issue. Accordingly, the *Travaux Preparatoires* of the Model Law shows that at the drafting of Article 5, there were irreconcilable opinions among the member states about the problematic nature of the provision. Opinions were divided, ranging from jurisdictions favouring the retention of Article 5 because it aids more judicial control as a way 'to prevent abuse of the arbitration process' to those believing otherwise.[53] Poon investigates the efficacy of Article 5 in determining the scope of courts' roles in arbitration,[54] and in his review of the ways the provision has been interpreted by different national courts, particularly in Singapore and Hong Kong, found that Article 5 is susceptible to conflicting interpretations which create uncertainties in the system.[55] Nonetheless, at the submission stage for adoption at the General Assembly, the UN Working Group adopted Article 5 as a tentative provision and invited 'the Commission to reconsider', rephrasing it before adoption or in the near future.[56] However, the provision was still adopted in 1985 in its current problematic form and phrasing, and since then, it has been left unchanged, even in the 2006 amendment.[57]

Each jurisdiction's position regarding Article 5 at the drafting stage is then reflected in their domestication of the provision. Accordingly, among the UNCITRAL member states, three different legal arrangements have emerged regarding the domestication of Article 5 into their respective arbitration laws. These are (i) Jurisdictions where Article 5 is adopted into the national arbitration laws with significant modifications, (ii) Jurisdictions

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Aa/CN.9/264 25 March 1985, 18-19 <https://www.mcgill.ca/arbitration/files/arbitration/Commentaireanalytique-en.pdf> accessed 5 May 2019.

53 Manuel Gomez (n 53) 85.

54 Nicholas Poon, 'The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singaport' (2013) 25 *Singapore Academy of Law Journal* 244 – 294, 288.

55 ibid, 288.

56 United Nations, 'Report of the Working Group on Int'l Contract Practices on the Work of Its Seventh Session' (New York 6th - 7th 1984) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V84/828/46/PDF/V8482846.pdf?OpenElement> accessed 23 April 2023.

57 Manuel Gomez (n 53).

where Article 5 is wholly deleted from the national arbitration laws, and (iii) Jurisdictions where the letters of Article 5 are adopted with or without minor adjustments. As such, the approach taken by each jurisdiction in terms of Article 5 appears to contribute largely to their realization of the goal to balance the courts' involvement in arbitration and the observance of party autonomy. Thus, the divergent practices in these jurisdictions will be examined.

6.3.1 Laws and Practices in Jurisdictions where Article 5 of the Model Law is Substantially Modified in their Arbitration Law

Some examples of jurisdictions that adopted Article 5 with some modifications are England,[58] Scotland,[59] Singapore,[60] and India.[61] The domestication of Article 5 in these jurisdictions is unlike that in Nigeria where the provision was transplanted into the Nigerian Act with the almost exact phraseology and wording of the Model Law. Thus, the modifications applied to Article 5 in these jurisdictions establish a major striking difference between them and Nigeria, particularly in bringing certainty, at least relatively, to balancing the court's role in involving arbitration and deference to party autonomy. Consequently, London and Singapore are designated as being among the top destinations for arbitration disputes and preferred seats globally.[62]

At the making of Article 5, the English delegates argued against the current phrasing of the provision.[63] Consequently, the drafters of the English Arbitration Act rephrased the provision and embedded a modified version in the Act.[64] Accordingly, and modified from Article 5 of the Model Law, Section 1(c) of the English Act provides thus: 'in matters governed by this Part the court should not intervene except as provided by this Part.'

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58 Arbitration Act, 1996, England, Wales and Northern Ireland. s 1(c).
59 Arbitration (Scotland) Act 2010. s 1(c).
60 International Arbitration Act, 1994, Singapore, s 5.
61 Arbitration and Conciliation Act, 1996, India. s 5.
62 Sreenivasan Narayanan, Raja Bose, and Henry Kim, 'Singapore International Arbitration Alert' (published 7 June 2022) <https://www.klgates.com/International-Arbitration-and-the-Singapore-International-Arbitration-Centre-6-7> accessed 4 April 2023.
63 Michael Mustill, *International Commercial Arbitration* (Position paper presented on behalf of the United Kingdom before the UN Working Group of 309th Meeting) (1985) < 309meeting-e.pdf (un.org)> accessed 2 May 2022.
64 ibid.

The first striking modification in transplanting Article 5 into the English Act is that Section 1(c) of the Act changes the word 'shall' in Article 5 to 'should.'[65] The rationale behind this word substitution can be deduced from the UK's stance against the phrasing of Article 5 at the drafting of the Model Law[66] and also the findings of the drafters of the English Act, that is, the Department Advisory Committee on Arbitration Law (DAC), concerning Article 5 of the Model Law.[67]

The Second modification to Article 5 under the English Act is that Section 1(c) makes the modified provision of Article 5 an introductory provision rather than a substantive provision under the Act, in opposition to what the Model Law envisages. By this, Section 1(c) of the English Act simply expresses a general principle to guide an English court in performing its roles in arbitration rather than a provision conveying mandatory direction.

Curiously, at the making of Article 5, the UK delegates, led by Mustill, warned against transplanting the exact wording of the provision into any national law on the basis of four major concerns that it would be problematic for a court to determine: (i) what matters are, and are not, 'governed by the model law,' (ii) what stage of the arbitral process would the model law permit a court to intervene, (iii) what circumstances would a court appropriately intervene when it is proven that the award is the result of procedural injustice, and (iv) whether judicial involvement in arbitration could be varied by the parties consent.[68] The delegates then warned that the manifestation of these four concerns would create more uncertainties in the effort to balance the relationship between the courts and arbitration. To guard against these problems, therefore, the 1996 DAC's Report modified the provision by substituting 'shall' for 'should' and making the provision an introductory provision rather than a substantive provision in the Act. The DAC's committee concluded that the provision was designed to express a general principle upon which English courts rely 'to support rather than displace arbitral process.'[69]

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65 (n 64).
66 (n 69).
67 Mark Saville, 'The 1996 DAC Report on the English Arbitration Bill' (1997) Vol 13(3) *Arbitration International*, 275 – 316.
68 (n 69); Manuel Gomez (n 53) 87.
69 Mark Saville (n 73) 80.

Therefore, many of the gaps earlier identified in the Nigerian system, particularly concerning the existing uncertainties in striking a balance between when and how a court should be involved in arbitration and to avoid undermining party autonomy, were the same problems earlier envisaged by the UK delegates to the UN, and avoided by the DAC in the making of Section 1(c) of the English Act. The use of the word 'should' in Section 1(c) of the English Arbitration Act, therefore, removes the narrow and restrictive character (still in Article 5 of the Model Law and Section 34 of the Nigerian Act) and replaces it with some level of flexibility on the part of the English courts.[70] Moreover, Section 1(c) is not mandatory because it simply expresses the general 'pro-arbitration' principle to guide the English courts to decide when and how to involve in arbitration, using party autonomy as a significant barometer.[71] This contradicts the strict application of the provision under the Nigerian Act. Through this dissimilarity, it could be argued that the English jurisdiction has been able to lessen the uncertainties still witnessed in Nigeria.

For instance, the liberal phrasing of Section 1(c) of the English Act allows the English courts to avoid being prevented from being involved in similar problematic issues still experienced without remedy or a settled position in Nigeria. For instance, in *Hiscox Underwriting Ltd. v. Dickson Manchester & Co.,*[72] it was held that the English courts 'have general supervisory jurisdiction regarding matters not covered in the Act.'[73] This is unlike the position in Nigeria, which is borne out of the mandatory wording of Section 34 and its unsettled judicial interpretation. Thus, according to the 1996 DAC's Report, when an English court is facing the question of when and how to be involved in arbitration, it is not fixed by the wording of the Act because of the flexibility of Section 1(c) of the Act. Instead, it is guided by the goals of supporting justice delivery and observing party autonomy. This is expressed thus:

> Fairness, impartiality and the avoidance of unnecessary delay or expense are all aspects of justice... To our minds it is useful to

[70] SPDCN v. Crestar [2016]9 NWLR (Pt.1517) 300.
[71] Ibid.
[72] [2004]2 Lloyd's Rep. 438.
[73] Fraser Davidson, Hew Dundas, and David Bartos, *Greens Annotated Acts: Arbitration (Scotland) Act 2010* (Thomson Reuters 2010) 12.

> stipulate that all the provisions of the Bill must be read with this object of arbitration in mind. The second principle is that of party autonomy… Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted… In general, the mandatory provisions are there in order to support and assist the arbitral process and the stated object of arbitration.[74]

An English court, therefore, may rely on Section 1(c) to participate in arbitration where the issues to determine are not covered under the Act nor foreseen by the drafters, as long as it promotes party autonomy[75] or where the issues are not expressly covered but impliedly fall under some subjects covered under the Act,[76] or where the Act covers some issues but fails to guide the court about the ways to involve,[77] or in the exercise of injunctive powers of a court, etc.[78] This is because, unlike Section 34 of the Nigerian Act, Section 1(c) of the English Act is neither a strictly substantive provision nor a provision conveying a mandatory direction that could prevent the courts from participating in arbitration, even where there is oversight from the drafters of the Act, or the Act is silent over the court's involvement where necessary, or the enforcement of parties' agreement is in jeopardy, or justice delivery is threatened, etc.[79]

However, the leverage given to an English court to participate in arbitration, even outside the areas provided explicitly in the Act, is not without some checks from the arbitrating parties.[80] One instance is the power to make an order to assist during the proceedings, covered under Section 44 of the English Act. The court is empowered to make all orders a tribunal could make. However, Section 44(5) provides a qualification that, the court would participate if the tribunal or person designated by 'the

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[74] Mark Saville, 'The 1996 DAC Report on the English Arbitration Bill' (1997) Vol 13(3) *Arbitration International* p.78

[75] Thomas E. Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 *Tul. Mar. L.J.* 131, 134.

[76] ibid.

[77] ibid.

[78] Clifford CHance, 'Clarity over English court's jurisdiction to grant anti-arbitration injunction against foreign-seated arbitrations' (Published 26 September 2019) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/09/clarity-over-english-court%27s-jurisdiction-to-grant-anti-arbitration-injunction-against%20foreign-seated%20arbitrations.pdf> accessed 23 February 2020.

[79] ibid.

[80] (n 53).

parties to act is unable for the time being to act.' Thus, this framework still makes the court's powers subject to the parties' choice.

Then again, unlike in Nigeria, the English courts have granted injunctions against foreign arbitration in many cases, particularly where party autonomy is threatened.[81] In *SPDCN v Crestar*, the Nigerian Court of Appeal explained that Nigerian courts are not 'readily' persuaded by the English decisions to grant an injunction against a foreign arbitration (even where party autonomy is threatened) because the word 'shall' in Section 34 of the Nigerian Act is replaced by 'should' in Section 1(c) of the English Act which permits a liberal interpretation of courts' intervention. The Court reasoned:

> Article 5 of …(UNCITRAL) is incorporated in Section 34 of ACA; the use of 'should' (in Section 1c of English Arbitration Act) has been interpreted by English courts to be the basis upon its intervention, which is not expressly provided for in the Act, can be undertaken. *Vale Do Rio Doce Navega CAO SA v Shangai BAO Steel Ocean Shipping Limited (2000)2 C.C.C. 1200* to the effect that the basis upon which English court issue anti-arbitration injunction is not available in Nigeria.

The position taken in *SPDCN v Crestar* is echoed in many other cases including *Statoil v NNPC,*[82] where a Nigerian court of appeal further elucidated that the word 'shall' shows the mandatory nature of the court's duty to confine its involvement in arbitration matters to the subjects provided in the Act. Accordingly, despite the cautionary information given by the comity of nations to make some valuable modifications in Article 5 before transplanting it into national laws, drafters of the Nigerian arbitration laws did not heed the caution, hence the direct transplanting of the narrow phrasing and wording of the provision into the Nigerian system.

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[81] V.D.R.D.N. C SA v. Shangai Bao Steel Ocean Shipping Co.Ltd. (2000) 2 CCC 1200; Excalibur Ventures LLC v. Texas Keystone Inc. (2012) 1 All ER (Comm) 933; Clayton Engineering Services Ltd. v. TXM Olaj - ES Gazkutato KFT (No. 2) (2011) 1 All ER (Comm) 128.

[82] [2013]14 NWLR Pt. 1373 p.29 Para D-E

In Scotland, too, the phrasing and wording of Article 5 of the Model Law is modified in the Scottish Arbitration Act by deletion.[83] Thus, Section 1(c) of the Scottish Act removes from the act the opening phrase 'in matters governed by this law' and substitutes the word 'shall' for 'should,' leaving the provision simply to read that 'the court should not intervene in an arbitration except as provided by this Act.'[84] Although it has been argued that the provision still draws its inspiration from the English Act rather than the Model Law,[85] Section 1(c) of the Scottish Act is expressly regarded as one of the founding principles upon which the arbitration system is founded in the Scottish jurisdiction.[86] It is observed that the other founding principle is to ensure party autonomy. Thus, it is observed that the removal of these introductory words would ordinarily prevent the Scottish courts from involving themselves in matters not stated in the Act. However, because this provision is enacted as a guiding principle without much legislative weight, the Scottish courts can still involve themselves in matters not listed in the Act.[87] The implication is that a review of Nigerian legislation along these lines may address some of the problems identified f in the Nigerian system.

In this same English and Scottish way, Singapore also did not transplant Article 5 into her laws using the exact phrasing and letters as Nigeria did. Instead, the country first has separate legislation for domestic and international arbitration.[88] For domestic arbitration, it adopts a liberal approach by deleting Article 5 and retaining only its object but reworded it in Section 31 of the Singaporean Act.[89] However, it retains Article 5 for international commercial arbitration.[90] Section 31 of the Singaporean Arbitration Act (for domestic arbitration) serves as the umbrella provision that defines the limits to the court's involvement in arbitration matters. Thus, while Section 28(1) of the Singaporean Act gives the arbitral parties

[83] Arbitration Act, Scotland, 2010, s 1(c).
[84] ibid.
[85] Fraser Davidson, Hew Dundas and David Bartos, *Greens Annotated Acts: Arbitration (Scotland) Act 2010* (Thomson Reuters 2010) 11.
[86] ibid.
[87] Fraser Davidson, et al., p.13; Vale do Rio Doce Navegacos SA v. Shanghai Bao Ocean Shipping Co Lt [2000]2 All E.R. (Comm) 70.
[88] Arbitration Act, 2001, Singapore; International Arbitration Act, 1994, Singapore.
[89] Arbitration Act, ibid, s 31.
[90] International Arbitration Act, (n 94) 5.

almost unlimited powers to determine the scope of the tribunal's authority, Section 31 of the Singaporean Act states, however, that the court could exercise all the powers wielded by a tribunal but only in the absence of a contrary agreement by the parties or tribunal.

The Singaporean approach places party autonomy above the court's intervention, at least for the domestic arbitration, while allowing the court to cover the field in any space not covered by the law or parties. The Singaporean delegates were also among those who argued that national laws should alter the phrasing and letters of Article 5 in such a way as to promote party autonomy and 'prevent abuse of the arbitration process.'[91] Similarly, the UK delegates at the UN Working Group meeting on UNCITRAL canvassed an argument that the most practical way to balance adherence to the principle of party autonomy and the need to maintain minimum judicial control on arbitration was to allow parties to determine when and how to make recourse to court instead of the mandatory nature of Article 5.[92]

From the foregoing, the common denominator in the three jurisdictions reviewed so far is that, unlike Nigeria, they did not transplant the exact wording of Article 5 into their national laws. Instead, they all substantially altered the phrasing and letters to allow the courts to cover the space. The narrow wording of Article 5 would have prevented this and caused uncertainties in the system. Moreover, the liberal phrasing of Article 5 in those jurisdictions makes courts defer more to the principle of party autonomy. It could be argued, therefore, that the English, Scottish, and Singaporean approaches could be a more helpful method to circumvent some of the problems identified in the Nigerian legal space. In other words, the direct transplantation of the letters and phrasing of Article 5, without some necessary modifications, into Nigerian arbitration laws has been shown to have lessened adherence to party autonomy. One of the reasons is that under such a regime, the courts believe that their roles are strictly cast in stone without any flexibility.

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[91] See: Comment delivered by Mr Goh (Singapore) in the *Travaux Preparatoires* (n 69). Yearbook of the United Nations Commission on International Trade Law, 1985, Vol. XVI p.416.

[92] n 69.

6.3.2 The Laws and Practices in Jurisdictions where Article 5 of the Model Law is removed from their Arbitration Law

Unlike Nigeria, or England which still have some residue of Article 5 in her national arbitration legislation, some jurisdictions delete the provision from their arbitration laws instead of retaining or modifying it. These jurisdictions include Ghana,[93] France,[94] member states of the Organisation for the Harmonisation of Business Law in Africa (OHADA),[95] Finland,[96] The United Arab Emirates,[97] etc. Many of the UNCITRAL states that have removed Article 5 from their arbitration legislation were mostly nations that argued against its inclusion in the Model law at the drafting stage too.[98]

Accordingly, no umbrella provision like Section 34 sets a minimum standard for judicial involvement in arbitration in those jurisdictions. It may then be argued that perhaps the removal of Article 5 may translate to uncontrollable court involvement in arbitration matters in those jurisdictions, but this is not the case. In its stead, it is observed that the laws in many of those jurisdictions, when compared to the Model Law, provide more specific roles for courts in arbitration matters, provide more particulars about the roles assigned to a court in the specific areas of intervention, reduce the numbers of mandatory provisions, and defer first to the agreement of the parties on the courts' roles in arbitration that are not covered under the national legislation.

Thus, even though these jurisdictions do not follow the Model Law because they exclude Article 5 from their national laws, it is observed that their approach still yields adherence to the basic principle of party autonomy by enabling 'commercial men to have their arbitrations conducted in whatever way they have agreed to be suitable.'[99] The Ghanaian framework is a typical example to demonstrate this finding. For instance, the Ghanaian

[93] Alternative Dispute Resolution Act, 2010, Ghana.
[94] Arbitration Ordinance, 2011 (Decree No. 2011-48 of 13 January 2011) NOR JUSC1025421D.
[95] Uniform Act on Arbitration <OHADA - Uniform Act on arbitration (www.droit-afrique.com)> accessed 27 February 2021.
[96] Arbitration Act, No. 967 1992, Finland (Amended in 2015 as No. 745).
[97] Arbitration Law, No. 6 of 2018 Federal Law, United Arab Emirate.
[98] n 69.
[99] ibid.

Alternative Dispute Resolution Act (Ghanaian Act) removed Article 5 and further provided more details of courts' roles in arbitration. For instance, on the issue of stay of litigation for arbitration, unlike Nigeria, where Section 5 of the Act is still unsettled on the mandatory nature of the duty on the courts, Section 6 of the Ghanaian Act expressly allows the parties to apply to transfer (refer) a matter pending before it to arbitration without the onerous conditions stipulated in the Nigerian Act.

The difference in the practice between the two jurisdictions is that in the Ghanaian setting, what is key is the parties' agreement, and arbitral parties do not have to fulfil many legal conditions to enforce an arbitration agreement. This is because the only condition to be fulfilled by an applicant under Section 6(2) of the Ghanaian Act is to show that there is an arbitration agreement between the parties. This is unlike the Nigerian framework where a party may not be able to enforce an arbitration agreement, as discussed earlier in Chapter 4, (i) if an applicant has 'taken a step' beyond entering an appearance, (ii) if the court resolves that there is no sufficient reason why the matter should stay in court, (iii) if the court believes that the applicant is not willing or ready for the arbitration, etc.[100]

Further, what a court does under the Ghanaian system is to transfer the case before it to the arbitrator with an option to stay litigation for arbitration. This is unlike the Nigerian system where a court will either stay or proceed with the action. The Ghanaian system operates in this way because, by Section 7(3) of the Ghanaian Act, a court is to transfer a case to arbitration together with the pleadings and other processes already filed by the parties before the court. Moreover, Section 6(4) of the Ghanaian Act provides that all orders already granted by a court before transferring a case to arbitration are valid and applicable in the arbitration case. More fundamental is that Section 7(1) of the Ghanaian Act provides that a court could, on its own motion, transfer a case to arbitration when a judge feels that such a case can be resolved through arbitration. In these circumstances, the court would just obtain the parties' consent in writing and then attach copies of all the processes already filed in the case and

[100] (n 2) s 5(2).

send them to the arbitrator. Section 7(3) allows the arbitrator to use the pleadings transferred from a court as the parties' pleadings in arbitration as long as the parties' consent is sought. It could be argued that the Ghanaian system observes the principle of party autonomy and increases the options given to the court and the parties on this subject.

Another area where Ghanaian legislation and practice covers areas still left unclear under Nigerian laws is the role of a court in a challenge application and the removal of an arbitrator. Besides the general rules that the parties may determine the procedure to be followed in this subject, which is the position under the Model Law and in both Ghana and Nigeria,[101] where there is no such agreement by the parties, Section 18 (1) of the Ghanaian Act expressly directs the parties to approach a High Court for an order to remove an arbitrator on grounds such as mental incapacity, improper conduct of the proceedings, and allegation of substantial injustice caused to the applicant, etc. Meanwhile, even where the parties vest the arbitrator's removal power in another person rather than a court, the Ghanaian law empowers a High Court to review the person's decision if a party is aggrieved.[102] It is apparent that the Ghanaian Act not only adds more grounds upon which a court could entertain a challenge application than the Model Law and Nigerian laws, but it also clearly states the roles of a court on such subject matter. This is unlike the laws and practices in Nigeria. As discussed in Chapter 2, the roles of a court in a challenge application are not stipulated at all in the ACA, and are left within the discretion of each High Court.

Another innovation brought into the Ghanaian legislation is that Section 18(5) of the Ghanaian Act allows the challenged arbitrator to make representation to the court regarding a challenge application. This space is not covered by Nigerian law. Meanwhile, in Nigeria, there has been an issue regarding the right of an arbitrator to make a representation before a law court in a challenge application but without a settled judicial position. In *SaroAfrica International Ltd. v. Unilever*,[103] an arbitral party

[101] (n 99) s 18(3); (n 2) s 9; The UNCITRAL Model Law 1985 (Amended in 2006), Article 13.
[102] (n 99) s 18(3).
[103] [2022] 7 SCY 62, p.51. par 13.

applied to remove an arbitrator for not conducting the proceedings with reasonable dispatch. The arbitrator dismissed the application because he was hospitalized around the time in issue. When the dismissal decision came up for a review at the Federal High Court, the arbitrator sought to be joined in the matter. Even though the parties did not object to the joinder application, it was refused by the court on the basis that under the Act, an arbitrator could not put up a representation in a challenge application that affects him. This decision and the current practice do not respect the principle of party autonomy. This is because since the choice to allow an arbitrator's appearance in a court is discretionary for a court, the parties' agreement in this respect could be disregarded by a court, and this is a vital area which Section 18(5) of the Ghanaian Act has covered.

The Ghanaian approach could also address the gap identified earlier regarding the provision of Section 10 of the Nigerian Act. The provision is silent about the role of a court in terminating an arbitrator's mandate, thereby making subjective the extent of the court's involvement in the subject and affecting the extent to which a court would defer to party autonomy. As exemplified in the facts of *NNPC v Total* earlier reviewed in Chapter 2,[104] that is, because of the passive language used in Section 10 of the Act, which simply states that 'the mandate of the arbitrator shall terminate' for some reasons but without stating whether a court has the power to carry out the duty. Thus, in *NNPC v Total E & P Nig. Ltd*.,[105] one of the issues raised in the case tested the court's power to intervene regarding removing an arbitrator, which is already covered (but somehow incomplete) under Section 10 of the ACA. In this case, the Respondent (in the ongoing arbitration) submitted a Challenge Application before the arbitrators and applied for an in-person hearing of the application in Nigeria (the seat of arbitration). The three arbitrators resided in different jurisdictions: Switzerland, Canada and Nigeria. The arbitrators refused the application and asserted, among other things, that it was 'impracticable' for them to conduct in-person hearings for the Challenge Application.

[104] (n 47).
[105] ibid.

The Respondent (now Claimant) approached the High Court for assistance to terminate the arbitrators' mandate pursuant to Section 10 (b) and (c) of the Act. The other party opposed the suit and relied on the provision of Section 34 of the ACA to urge the court not to intervene. The trial court refused to intervene on the basis that it was precluded under Section 34 of the Act and that nowhere is the court's name mentioned in the Act as being the body to carry out the duty to terminate a mandate as stipulated in Section 10.

A plausible explanation for this decision is that the court followed the reasoning that since the provision of Section 10 of the Act specifically covered the subject in contention (termination of arbitrator's mandate for inability or refusal to perform) which does not vest power in the court to intervene, any intervention would contravene Section 34 of the ACA. However, even though the subject matter of the case broadly falls under the issues covered by Section 10 of the Act, the provision is not inclusive enough because it does not address the specific issue before the court—its provision does not provide for what to do if the tribunal refuses to withdraw.

Thus, *NNPC v. Total*[106] exemplifies the weakness in the narrow interpretation of Section 34 of the ACA and the Nigerian approach of word-for-word transplantation of the Model Law. The difference between the Nigerian regime and some other jurisdictions, like Ghana, and even England, on this matter is that such issues are not left to conjecture under their arbitration laws. The role of a High Court is stipulated under Section 18 of the Ghanaian Act. Also, for England, Section 24(1) of the Arbitration Act explicitly allows parties to apply to the English court to remove an arbitrator.[107]

English legislation further provides that even if the parties' agreement allows them to approach anybody for the removal order, it does not affect the authority of the court to entertain the case. However, the court must ensure that the applicant 'has first exhausted any available recourse' to

[106] (n 47).
[107] Arbitration Act (n 64).

the forum in the agreement.[108] Thus, the decisions of the English courts in *Euro Com. Ltd. v. Siemens Plc.*[109] and *Cofely Ltd v. Anthony Bingham v. Knowles Ltd.*[110] were all based on this position. Noteworthy is that the facts of these English cases were like the Nigerian case of *NNPC v Total E&P Nig. Ltd.,* but with different verdicts. In the English cases, the court assumed jurisdiction to determine a removal application on the reasoning that it had the inherent duty to adhere to the 'agreement of the parties' and safeguard the integrity of arbitral proceedings seated or to be enforced in the United Kingdom.[111]

In all, Ghanaian and English arbitration legislation has exemplified a jurisdiction that provides more specific roles for a court in an arbitration, more details about the roles assigned to a court in each specific area of intervention, a reduction in the number of mandatory provisions, and deference first to the agreement of the parties on the courts' roles in arbitration that is not covered under the national legislation. Some other provisions of the Ghanaian Act that exemplify the above features are Sections 19, 22, 25, 26, 28, 39, 40, 56, 57, 58 and 59. For instance, Sections 19 and 22 allow a court to entertain a suit from a resigned or removed arbitrator on issues relating to his fees. While Section 25 reiterates the *Kompetence-Kompetence* rule on who can determine a jurisdictional challenge application, Section 26 was added by the Ghanaian legislation, and this expressly empowers a party that is dissatisfied by a tribunal's ruling on jurisdiction to approach a High Court for a review of the ruling. Moreover, unlike Nigerian arbitration practice where the roles of a court in a joinder, consolidation or third-party intervention in an arbitration case are left to conjectures of the parties and courts, Section 28 of the Ghanaian Act expressly apportions such a role to a High Court.

Similarly, unlike Nigerian arbitration practice where the court's roles during arbitration proceeding are largely left to the discretion of a court, except for the roles relating to issuance of a writ of *subpoena a testificandum* or

[108] (n 64) s 24(2).
[109] [2014] EWHC 3710 (TCC)
[110] [2016] EWHC 240 (Comm)
[111] Onifade (n 30) 95.

of *subpoena duces tecum* and *habeas corpus ad testificandum*,[112] the Ghanaian Act in Section 39 expressly highlights the roles of a High Court during arbitration proceeding. A striking feature in the provision of Section 39 is that a court is allowed to issue all orders that an arbitrator can issue, but it is permitted to do so where the parties and arbitrators are unable to do so. Meanwhile, whenever the arbitrator or parties decide otherwise, any order already made by a court would cease to be effective.[113]

6.3.3 Laws and Practices in Jurisdictions where Article 5 of the Model Law is transplanted into their Arbitration Law without Modification.

The Nigerian regime falls under this category, where the provision of Article 5 is directly transplanted into the ACA (as Section 34) without any significant modification, and as observed earlier, such transplantation is often followed by many interpretation problems associated with Article 5 of the Model Law. However, it is crucial to observe that the difference between the Nigerian regime and some other jurisdictions that retain Article 5 as it is, such as Kenya[114] and India,[115] is that they have ample statutory annotations or explanatory notes which, in further detail, guide the courts to interpret the purports of some key provisions in the Act, which include those provisions the define the scope and limits of courts' roles in arbitration.

For instance, the annotation to Section 8 of the Indian Act clarifies that where an application to stay litigation for arbitration does not contain the arbitration agreement because the defendant refused to release it, based on a petition, the court could order production of documents.[116] Further, in Section 14 of the Indian Act, there is a clarification that when an arbitrator who is unable to perform his duty has still refused to recuse himself from the reference, the court has the power to intervene and terminate his mandate. Another example is Section 82 of the Indian Act, where its annotation further clarifies that instead of resorting to the court's Rules on

[112] (n 2) s 23.
[113] (n 99) s 39(5).
[114] Arbitration Act, Cap 49 2012, Kenya, s 10.
[115] Arbitration and Conciliation Act, India, 1996, s 5.
[116] ibid.

regular civil cases, the court should make special Rules for arbitration cases before it, etc.

On a final note, the foregoing shows that in as much as the Nigerian experience reviewed in chapters 3, 4, and 5, demonstrates that a jurisdiction with direct transplantation of Article 5 of the Model Law, without more, is liable to be plagued with interpretation problems and the courts' tendencies to undermine party autonomy, the current practice in India has, however, shown that this is not the case in all jurisdictions with direct transplantation of Article 5.

6.4 The Problems with the Interpretation of Section 6(6) of the Constitution and Constitutional Supremacy

From the judicial decisions reviewed in chapters 3, 4, and 5, the 1999 Constitution of Nigeria is one of the recurring authorities on which the Nigerian courts place reliance in overriding or justifying a disregard of Section 34 and other specific provisions of the Act that expressly set a limit to courts' roles in arbitration. More commonly too, where the Act is silent on the role of a court in arbitration, or it is not specific as to the extent of the courts' roles, the Nigerian courts have, in several cases, claimed to exercise their inherent powers to intervene 'as they deem fit.'[117] Thus, whether or not the Act is amended to remove or modify Section 34 to redefine the scope or limits to the courts' participation in arbitration, party autonomy may still be undermined because of the leeway available to the Nigerian courts to override the Act through the concept of constitutional supremacy.

Nigeria practices a written constitutional system. By this, there is a specific written document, known as the Constitution, which is superior to all other sources of law in Nigeria. Under the concept of constitutional supremacy, therefore, all laws, regulations, policies, and practices of both private and public bodies in Nigeria are submissive to the Constitution.[118] Thus, under the concept, any power granted to a public or private body or person by a

[117] Shell Nig. E.&P. & 3 Ors. v. FIRS & Anor. (Unreported judgment of the Nigerian Court of Appeal Abuja Judicial division in CA/A/208/2012 delivered 31 August 2016.)
[118] Albert Venn Dicey, *The Law of the Constitution* (OUP Oxford 2013) 52.

Constitution, like a law court, for instance, cannot be curtailed or overridden by any other law except the Constitution itself.[119] However, it is essential to observe that, historically, the core of the principle of constitutional supremacy is to protect individual freedoms, like the freedom of contract, by providing a legal framework against which the actions of public authorities, such as courts, could be measured and questioned.[120] The extant Constitution in Nigeria is the 1999 Constitution (as altered in 2023).[121]

As discussed in the historical development of courts in Chapter 2, being the third organ of government, the law courts in Nigeria are inherently vested with the judicial powers in the country. Thus, Section 6 of the Constitution empowers all the superior courts in Nigeria or judiciary to oversee the settlement of disputes in the country. This power, often described as 'inherent judicial power', is conferred on a court by virtue of Section 6(1) and (6) of the Constitution, which provides:

> 6—(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation…
>
> (6) The judicial powers vested in accordance with the foregoing provisions of this section—
>
> a) Shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law.
>
> b) Shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[122]

Under its wording, the judicial powers vested in Nigerian courts by Section 6 are broad and unqualified, which means that the courts can entertain or intervene in any dispute in Nigeria. Further, the phrase 'all inherent powers and sanctions of a court of law' in subsection (6)(a) is interpreted to mean that even where no law has expressly vested a court with the power to participate in a case, it is the court's 'intrinsic' power to settle

[119] Hilaire Barnett, *Constitutional and Administrative Law* (14th edn Routledge 2021) 311.
[120] Lewis Davis Campbell, *Supremacy of the Constitution and Laws* (Library of Congress 1856) 16.
[121] Constitution of the Federal Republic of Nigeria, 1999 (Altered in 2023).
[122] ibid, s 6(1) and (6)(a) –(b).

dispute in any case.[123] Then again, subsection (6)(b) inherently vests all superior courts in Nigeria with the judicial powers to settle disputes in 'all actions and proceedings…for the determination of any question as to the civil rights and obligations.'[124] In some cases, this constitutional power is described as a 'residuary' or 'reserved' power in a court and can readily exercise to determine disputes submitted before it.

In *Statoil v.* SCC Ltd.,[125] it was held that 'all actions and proceedings' referred to in Section 6 of the Constitution include arbitration matters and proceedings. Against this background, some Nigerian judges have reasoned that a court is duty-bound to use its inherent power to cover gaps in an Act like the Arbitration and Conciliation Act.[126] Moreover, some judges have held that by constitutional supremacy, an Act cannot narrow a court's inherent power to certain matters or foreclose courts from entertaining some matters like Section 34 of the Act does.[127] Accordingly, this interpretation has given the Nigerian courts the latitude to use Section 6 of the Constitution to participate in arbitration even in subject matters not covered at all by the Act, or where the Act has not assigned a role to a court.

Moreover, besides the Constitution, each piece of legislation establishing a superior court in Nigeria (and the procedural rules of each court) contains some provisions that allow a court to be involved in 'actions or proceedings' emanating from within their jurisdiction. Some instances are Section 7(1) of the Federal High Court Act,[128] Section 12 of the Rivers State High Court Laws, and Section 10 of the Lagos State High Court Laws, etc., which broadly empower the various High Courts to involve themselves in the determination of both civil and criminal matters within their jurisdiction. Indeed, some provisions expressly stipulate specific

[123] A.G. Fed v. A.G. Lagos State (2013) 16 NWLR (Part 1380) 249 SC.
[124] (n 127) s 6(1)(6).
[125] (2021) 10 SCY 27.
[126] A.G Lagos State v. Eko Hotels, (2017) LPELR-43713(SC); Adetona v. Attorney General of Ogun State [1984] 5 NCLR 299; Fawehinmi v. Babangida. (1987) 1 NWLR (pt. 67) page 797SC.
[127] Umeh v. Iwu (2007) 6 NWLR (Pt 1030) 416 at 428; Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 427 at 597; Stowe v Stowe (2000) FWLR (Pt. 24)1424 at 1434.
[128] Federal High Court Act, Nigeria, LFN Cap F12, 1990.

powers that a court could generally exercise in their intervention in cases. For instance, Section 13 of the Federal High Court Act provides:

> 13—(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 unconditionally or on such terms and conditions as the Court thinks just."[129]

Thus, besides the Constitution, Nigerian courts also interpret, as inherent, the powers created in its respective establishing laws as ones that allow Nigerian courts to involve in any matter, including arbitration.[130] Moreover, the courts rely on the powers vested in them under their respective practice and procedural rules relating to arbitration matters.[131] For instance, Order 52, Rules 1 - 17 of the Rules of the Federal High Court reproduces the major permissible areas of courts' participation listed under the Arbitration and Conciliation Act but further provides more permissible areas of the court's involvement in arbitration than what is contained in the Act. For instance, the Rules empower a High Court to refer a suit to arbitration and even fix a time for the award delivery.[132] Meanwhile, where there is no adequate provision in the Rules to guide a court on how to involve themselves in a case, including arbitration, many of the establishing laws allow the courts to use their inherent judicial power to 'adopt such procedure as it deems fit to do substantial justice between the parties concerned.'[133]

The resultant effect of the above is that the broad inherent judicial powers ascribed to Nigerian courts weaken the efficacy of the Act (particularly Section 34) to define the scope of and the limits to the courts' roles in arbitration, which undermines party autonomy. The differing positions of Section 34 of the Act and Section 6 of the Constitution have, therefore, created a space for Nigerian judges to, sometimes when they deem fit, participate in arbitration, mainly based on justification to fill gaps in the

[129] ibid, s 13(1)-(2).
[130] (n 133).
[131] Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 427 at 597.
[132] Federal High Court of Nigeria (Civil Procedures) Rules, 2018, Nigeria, Order 52 Rule 3.
[133] (n 134) s 9(2).

Act,[134] thereby causing inconsistencies and uncertainties in the system, which is a veritable space to undermine party autonomy. Thus, on many occasions reviewed in chapters 3, 4, and 5, Nigerian courts have resorted to the foregoing sources to exercise what they often refer to as 'inherent judicial power' to involve themselves in all matters, including arbitration. Some instances already reviewed are *NNPC v Esso*, *SPDCN v Crestar*, *Shell v. FIRS*, etc., when the court intervened in arbitration pursuant to their inherent power amidst critique on whether their participation was justifiable in disregarding Section 34. Also, in *Lakeside Autos v. National Peoples Bank Ltd.*,[135] reviewed earlier, a judge relied on inherent power to justify appointing a partner in his former law firm as sole arbitrator against the parties' protest and choice.

Also, the court of appeal relied on 'inherent judicial power' in *Statoil v. FIRS & Anor.,*[136] to allow a third party to injunct arbitration proceedings, even when the process is unknown to the Act. Further, in the more recent case of *Shell Nig. E.&P. & 3Ors. v. FIRS & Anor.*,[137] against the settled position that the law does not permit the court to intervene in set-aside proceedings, by reviewing the originating documents filed at the arbitral tribunal,[138] the court of appeal still set aside an award, pursuant to its inherent judicial power. This was on the basis that the notice of arbitration was defective because it was signed by a foreign lawyer, thereby undermining the long-time established liberty available to the arbitrating parties in an arbitration to engage the preferred counsel of their choice.[139]

Thus, the major problem with the courts' approach of exercising 'inherent judicial powers' in arbitration is that it makes its participation unguarded, even against the parties' agreement, only through which party autonomy is guaranteed. This is because the concept of 'inherent judicial power' is broad, undefined and nebulous. In *Covalent Oil Gas Services Ltd v.*

[134] (n 133); (n 132).
[135] [1962] 2 LWLQ 45.
[136] [2014] LPELR – 23144 (CA).
[137] Unreported judgment of the Nigerian Court of Appeal Abuja Judicial division in CA/A/208/2012 delivered 31 August 2016.
[138] (n 2) s 48.
[139] Legal Practitioner Act, Nigeria, Cap L15, Laws of the Federation of Nigeria, 1990, Section 24; Gary Born, *International Commercial Arbitration* (2nd edition, Wolters Kluwer 2014) Vol 2 page 2833 paragraph 21.01.

Ecobank (Nig.) Plc,[140] the court of appeal described the inherent powers of a Nigerian court as 'innate powers' and 'second nature powers', which could be invoked by a court at any time and in any case as long as the purpose is to 'ensure smooth running of the machinery of justice.' Some other judicial decisions by the Nigerian courts have held that the only test to check the extent to which a court would involve in a case base on its inherent power is that it must be accord with 'good reasons, sound judgment, and the demand of justice' which are largely subjective.[141] Then again, in the recent decision of the Supreme Court of Nigeria, *Okeke v. Nwigene*,[142] the Apex court confirmed the subjective nature of the court's inherent power when it reasoned that 'all superior courts of record (in Nigeria) possess inherent powers not necessarily derivable from any law.'[143]

Thus, in recent times, reliance placed by courts on their inherent power as leeway to involve themselves, anyhow and anytime, in arbitration has become widespread,[144] particularly among the courts of first instance in Nigeria.[145] One of the significant areas of concern in arbitration where the irreconcilable stance of Section 34 of the Act and Section 6 of the Constitution do recur is the use of the injunctive power of a court to restrain arbitration.[146] Additionally, the controversy surrounding the inherent power of courts to involve in arbitration is also connected with the broad phrasing and wording of Section 34 of the ACA (and, by extension, the Model Law).[147] As discussed in Chapter 4, the interpretation of Section 34 of the Act is often brought to bear whenever a court decides whether or not to use its injunctive power to involve itself in arbitration. This is because the silence of the Model Law and the Act on the use of injunction

[140] [2021] 10 NWLR (Pt. 1784) 252, 278 pars B-C.
[141] Mekwunye v. Carnation Registrars Ltd. [2021] 15 NWLR (Pt. 1798)1, 34 paras F-G
[142] [2022] 3 NWLR (Pt. 1817) 313, 365 pars A-B, E.
[143] See also: Mainagge v Ewamma [2004]14 NWLR (Pt. 893) 323.
[144] Andrew Bell, 'The Rising of the Anti-Arbitration Injunction' (Paper delivered by Justice A.S. Bell on 15th October 2020— at the Annual Supreme Court ADR Address of the Supreme Court of New South Wales Australia).
[145] Paul Idornigie and Enuma Moneke, 'Anti-Arbitration Injunctions in Nigeria' (2016) 82 Iss 2 *Arbitration* 442.
[146] ibid.
[147] ibid.

literally means that exercising such power is neither prohibited nor approved under the law.

Accordingly, a court that interprets Section 34 to mean that issues not expressly covered in the Act are within the residuary powers of the court would readily injunct an arbitration if the Act does not expressly outlaw it. Moreover, in this case, the unqualified exercise of injunctive power would ignore deference to party autonomy, which could also lead to delays in arbitration. On the other hand, when Section 34 is interpreted as excluding the power of courts in those matters not covered by the Act, it would ordinarily mean that the use of injunctive powers in arbitration is prohibited in the areas where the court is not expressly allowed to involve itself in arbitration, even if it is the most effective way to prevent abuse in the circumstance. However, in all these, a court which believes that the power of injunction is inherent to the court regardless of the provision of the Act would readily injunct arbitration in any circumstance. Some inconsistent judicial decisions on this issue, as reviewed in Chapter 4, include *Okonkwo Enterprises* v. *DHL., Unilever* v. *Coalbury ShippingLine, Statoil* v*. NNPC*, *SPDCN* v. *Crestar INR Ltd.,* and *Nigerian Agip Exploration Ltd.* v. *NNPC,* etc.

In *T.E.S.T. v. Chevron.,*[148] the Supreme Court held that:

> … there is a need for arbitrators to act within the agreement of the parties, and when an arbitrator veers off the track, the necessity of the court as was done in the case in hand to right the wrong is inherently vested in every court.[149]

Thus, the decision in both *T.E.S.T. v. Chevron* and *Agip v NNPC* not only contradicts the strict and general position in the earlier cases that Section 34 prohibits the use of courts' injunction in arbitration, but the conflicting stance further creates uncertainties regarding the position under Nigerian law. The same Court of Appeal made conflicting decisions in *Agip v NNPC* and *Statoil v NNPC*. This is often so because the Nigerian courts of appeal currently sit in twenty-one divisions, which creates the possibility of a

[148] [2017] 11 NWLR (part 1576) 187.
[149] ibid, 210 paras A-B.

decision delivered in one division conflicting with another.[150] What further complicates this issue is the position in the jurisprudence of court precedent in Nigeria, that when a division of a Court of Appeal or a lower court is faced with conflicting decisions of two Courts of Appeal, they are at liberty to follow any of the conflicting decisions.[151] The danger in the current regime, therefore, is that it opens a wide door for a court to freely choose when or not to involve itself in arbitration, as each court relies on its inherent judicial power, thereby creating uncertainty within the system and acting against deference to party autonomy.

Furthermore, the subsequent decisions of the High Courts in *Econet Wireless Ltd. v. Econet Wireless Nigeria Ltd*[152] and *Lagos State Government v. Power Holding Company of Nigeria,*[153] reviewed in Chapter 4, exemplified the adverse effect of the uncertainties created by the letters of Section 34 and the inherent power conferred on the same courts under the Constitution. On a final note, and as reviewed in Chapter 4, the 2017 Practice Direction jointly issued by the Supreme Court and the Nigerian Judicial Institutes to address, among other things, the problem of 'almost uncurtailed judicial involvement' in arbitration borne out of the conflict between Section 34 of the Act and the inherent power vested in courts, has not really inspired much visible change in the way Nigerian courts exercise their inherent powers in arbitration.[154]

6.5 Lack of Definite Theory and Ideology Underpinning Court's Participation in Arbitration in Nigeria

The study conducted in Chapter 2 has revealed that four basic theories, have crystallised over time to explain how the arbitration system is perceived differently across jurisdictions, known as the theories of arbitration.[155] These theories are contractual, jurisdictional, hybrid, and autonomous or delocalisation. It was further observed in Chapter 2 that

[150] Onagoruwa v State (1992)5 NWLR (Pt. 244)713, 732 paras B-C.
[151] Oliko & Anor v. Okonkwo & Ors, (1977) N.C.A.R. 368; Onwumelu v Duru (1997)10 NWLR (Pt. 525)377, 405-406 paras H-B.
[152] Unreported Judgment of the Federal High Court Lagos Division in Suit No: FHC/L/CS/832/2003.
[153] (2012) 7 CLRN 134.
[154] (n 3).
[155] Ilias Bantekas, *An Introduction to International Arbitration* (CUP Cambridge 2015) 2.

the stance a national court or law takes on the extent to which the principle of party autonomy should impact the relationship between arbitration and the national courts largely depends on the prevailing theory of arbitration deployed in a jurisdiction. According to Belohlavek, these theories characterise the essence of arbitration as a method of dispute resolution in a jurisdiction and describe it as *sui generis.*[156]

However, it is observed that, in practice, though there is no jurisdiction or national law that follows only a theory of arbitration, nevertheless a jurisdiction could be identified with the prevailing theory underpinning her system, and this, in turn, reflects on the extent to which the courts in a jurisdiction would involve in arbitration or uphold the principle of party autonomy.[157] Suffice to observe that the practical way to be able to understand the theory of arbitration which a jurisdiction is identified with, is by looking at the underpinning objectives of her arbitration legislation and also the reasoning of the judges on their understanding of the arbitration system as can be gleaned particularly from their arbitration statute and relevant case laws.

Curiously, a recourse to the practice in Nigeria, discussed in chapters 3, 4, 5 and earlier in this chapter, would show that the arbitration laws and judicial decisions in Nigeria neither follow a definite theory of arbitration nor a prevailing theory. In other words, the absence of a specific theoretical basis for the Nigerian court's involvement in arbitration uncovers its lack of a clearly defined theoretical position or set of principles that guide the courts to determine when and how to involve in arbitration. Without a specific theoretical basis, the court's involvement in arbitration would lack a coherent and predictable disposition towards arbitration. As discussed earlier, this situation will often lead to uncertainties in the case laws as different judges would apply different principles, ideals, and ideas in their decision-making process. It also creates uncertainty for the arbitrating parties, which may be unsure of the underlying theoretical framework to sway the court.

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156 Alexander Belohlavek 'Arbitration and Basic Rights: Movement from Contractual Theory of Jurisdictional Theory' in Laszlo Kecskes *Unnepi Tanulmanyok* (Universitas Quinqueecclesiensis Pees 2013) 47.

157 ibid, 3.

To this end, it will be observed that a significant reason for the gaps earlier identified in the Nigerian jurisdiction in terms of the imbalance, particularly in terms of inconsistent interpretation of Section 34 of ACA and other relevant provisions of ACA, particularly surrounding the roles of courts in arbitration, is that the Nigerian courts are not guided by any specific or prevailing theoretical or ideological jurisprudence within which they could play their roles to involve in arbitration. The implication of this gap is that, ideologically, it creates a broad space which allows haphazard involvement of the Nigerian courts in arbitration without a guiding principle, thereby exposing the party autonomy to being undermined by the undefined power of the court.

6.5.1 A Look at Practices beyond Nigeria: English and Other Examples

As discussed earlier in Chapter 2, recourse to some relevant provisions of ACA will show that, unlike some other jurisdictions like the United Kingdom and China, ACA as a parent arbitration legislation in Nigeria does not provide for any underpinning ideology or principle upon which the Nigerian laws would relate with the arbitration system or the perspective from which a Nigerian court should view the arbitration system. In the English jurisdiction, for instance, Section 1 of the English Act clearly states the principles upon which the arbitration regime is founded, which are that (i) arbitration is a system borne out of the freedom of contract wielded by the citizens under the contract law to be able to agree how their disputes are resolved,[158] (ii) the object of an arbitration system must be to have an impartial tribunal to dispense fair resolution of disputes and do so without unnecessary delay or expense,[159] and (iii) the court should not intervene in arbitration matter expect where the arbitration law wants the court to do so.[160] Likewise, but in sharp contrast to the English jurisdiction, Article 1 of the Chinese Arbitration Law clearly states the ideological perspective from which the arbitration system is viewed in the Chinese legal space, which is to:

[158] The English Arbitration Act, 1996, s 1(b).
[159] ibid, s 1(a).
[160] ibid s 1(c).

> …ensuring the impartial and prompt arbitration of economic disputes, protecting the legitimate rights and interests of the parties, and guaranteeing the sound development of the socialist market economy.[161]

It will be observed that the ideological directions respectively expressed in Article 1 and Section 1 of the Chinese and English arbitration laws are though diametrically dissimilar but communicates the nature of arbitration from the perspective of each legal system. While the Chinese legal system views arbitration as a private dispute resolution system which the resultant essence is to achieve the development of the Chinese socialist market economy,[162] the English legal system posits that citizens should deploy arbitration to settle disputes within the confines of the freedom of contract guarantee under the contract law, of which upholds free market and control.[163]

For instance, the different goals expressed by these two legal systems could be argued to be responsible for why the Chinese arbitration regime tilts more towards a jurisdictional theory of arbitration than the English jurisdiction.[164] This is because, being a socialist jurisdiction, the tendency for public institutions to exert more control and monitoring even in a would-be private space like arbitration becomes acceptable. Thus, even though the fundamental objectives express by these two arbitration laws (Chinese and English) agree on impartiality, speedy proceedings, and protection of the rights of the arbitrating parties, they differ in terms of the ultimate goal of arbitration. Thus, the express mention of these underlying ideologies about the nature of arbitration influences how a Chinese or English court would view arbitration and deal with issues arising from arbitration.[165] In contrast, the Nigerian Arbitration and Conciliation Act does not contain any provision on its fundamental principle, thereby not providing any theoretical or ideological direction to guide the Nigerian courts' relationship with arbitration.

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[161] The Arbitration Law of the People's Republic of China, 2021, Article 1.

[162] Zhao Xiuwen and Lisa Kloppenberg, 'Reforming Chinese Arbitration Law and Practices in the Global Economy' (2006) 31 *U. Dayton L. Rev.* 421 p. 428.

[163] Mark Saville, 'The 1996 DAC Report on the English Arbitration Bill' (1997) Vol 13(3) *Arbitration International* 280.

[164] Zhao Xiuwen and Lisa Kloppenberg, 428.

[165] ibid.

It is further observed that the expression of the foundational principle or theory behind the way arbitration is viewed in a jurisdiction, as respectively expressed in Section 1 and Article 1 of the English and Chinese laws, would translate to the extent to which the arbitration laws in these jurisdictions would observe some basic features of arbitration such as the principle of party autonomy. For instance, it would not be expected of the arbitration law from a socialist regime like China to embrace an 'autonomous theory' or a complete 'contractual theory' of arbitration. Rather, it would be expected, which is so in practice, that the Chinese 'socialism-promotion-focused' arbitration regime will tilt more in line with the jurisdictional theory of arbitration. By this, the supervisory power of the People's Courts, the China Arbitration Association, the Arbitration Commission, and other constituted public authorities expressly resonated in almost all the provisions of the Chinese arbitration legislation.[166] This is because the 'socialist model of development and regime emphasised a centrally controlled or supervised system', including a dispute resolution system, rather than a free or less controlled regime.[167]

Thus, flowing from the prevailing jurisdictional theory of arbitration in China, which perceives arbitration as a forum that, above all, is to promote the Chinese socialist economy as provided in Article 1 of the Chinese Act, the jurisdictional approach to arbitration explained in chapter 2 could be seen in the provisions of the Chinese Act, particularly the provisions dealing with the involvement of public institution or courts in arbitration. Instances are Articles 2, 4, 10, 12, 13, 15, 24-37, 42, 58, and 66 of the Chinese Act, etc. Article 2 extends arbitration to property ownership matters in China, Articles 4 and 66 create public institutions, respectively known as the Arbitration Commission and Foreign-related arbitration, to centrally supervise both domestic and international commercial arbitration throughout the country. The Commissions have branches in all provinces that practically handle almost all the administrative and managerial matters relating to all arbitration in China, from the filing of Notice of

[166] These are the Arbitration Act of 2021, the Civil Procedure Law 1994, the Uniform Contract Law 1999, etc.

[167] Stanley Fischer and Alan Gelb, 'The Process of Socialist Economic Transformation' (1991) Vol. 5 No. 4 *Journal of Economic Perspectives* 92.

Arbitration and other processes to the appointment and monitoring of arbitrators to issues surrounding the withdrawal of an arbitrator[168] to the maintenance of a roll of arbitrators in the country[169] to the rescission of an award,[170] etc.

Then again, the China Arbitration Association created by Article 15 was made a 'social organisation' which all the members of the Arbitration Commission must be drawn from.[171] Ultimately, the legislation assigns some roles in arbitration to the Chinese People's Court but with close monitoring by other public institutions. It is curious to observe that even though the current arbitration legislation in China draws inspiration from the Model Law, its theoretical leaning is still well-defined (as a fundamental principle) in the law, which could guide the Chinese People's courts in their involvement in the arbitration. Xiuwen and Kloppenberg explained the Chinese regime thus:

> The CAL (China Arbitration Law) was adopted and promulgated… as China began to implement a (socialist) market economy. The law drew upon international arbitration legislation and practices, especially provisions in the New York Convention … and the Model Law … (It) reflects the characteristics deemed essential to modern international commercial arbitration law. First, promoting party autonomy is one of its primary goals, although in alignment with building a socialist market system.[172]

Unlike China and England, the Nigerian ACA does not have a provision that expressly states the ideological or theoretical direction upon which the law itself or its implementers (such as the courts, arbitrators, arbitrating parties, arbitration institutions, and the arbitration practitioners, etc.) could draw inspiration or sense of direction as to how the Nigerian legal system views arbitration and intends to treat or relate with it. Accordingly, it could be argued that the absence of such a vital provision or ideological underpinning in the Act could be said to be one of the factors responsible for the gaps in the way the Nigerian courts deal with arbitration issues

168 Arbitration Act of the People's Republic of China, 2021, Articles 24- 37.
169 Arbitration Act of the People's Republic of China, 2021, Article 13.
170 ibid, Article 58.
171 Arbitration Act of the People's Republic of China, 2021, Article 15.
172 Zhao Xiuwen and Lisa Kloppenberg, 'Reforming Chinese Arbitration Law and Practices in the Global Economy' (2006) 31 *U. Dayton L. Rev.* 421 p. 428.

such as inconsistent decisions of the courts on arbitration issues, narrow interpretation of the provisions of ACA, confusing decisions on novel cases arising from arbitration but not expressly covered under the Act, etc., all which have the tendencies of undermining the principle of party autonomy.

The lack of theoretical explanation of the Nigerian arbitration regime simply makes the jurisdiction one without an ideological substructure, at least by the provision of her arbitration statute, upon which the courts would operate. The significance of the theoretical or ideological direction is more pronounced in the fact that no arbitration statute would be able to address all arbitration issues. Still, a theoretical direction would guide the stakeholders even in the areas not covered. For instance, in the DAC's report, the importance of the inclusion of Section 1 of the English Act providing a theoretical or ideological direction for the English arbitration community is explained thus:

> The DAC was persuaded by the significant number of submissions which called for an introductory clause setting out basic principles. This Clause sets out three general principles. The first of these reflects what we believe to be the object of arbitration…Fairness, impartiality and the avoidance of unnecessary delay or expense are all aspects of justice… To our minds it is useful to stipulate that all the provisions of the Bill must be read with this object of arbitration in mind.
>
> The second principle is that of party autonomy… In some cases, of course, the public interest will make inroads on complete party autonomy, in much the same way as there are limitation on freedom of contract… Again, as appear from the mandatory provisions of the Bill, there are some rules that cannot be overridden by parties who have agreed to use arbitration. In general, the mandatory provisions are there in order to support and assist the arbitral process and the stated object of arbitration.[173]

The above reasoning behind the inclusion of Section 1 in the English law explains why the English jurisdiction could not, at least at a glance, be described as one that treats or views arbitration from the background of a complete 'contractual theory' or 'autonomous theory', or a complete

[173] Mark Saville, 'The 1996 DAC Report on the English Arbitration Bill' (1997) Vol 13(3) *Arbitration International* 279.

'jurisdictional theory.' Thus, going by the basic principle expressed in her arbitration statute, the English jurisdiction would be rightly described as one following the hybrid theory of arbitration, with more elements from the contractual theory and far from 'autonomous theory.' Paulsson, citing the English Court of Appeal's decision in *Dallah v. Pakistan,*[174] demonstrated the sharp contrast between the French lenience on the 'autonomous theory' and the English bias against the theory. Paulsson argued that the stance taken by the English court in the *Dallah*'s case against the French position that an arbitrator could derive its authority from a transnational legal order was borne out of the idea of arbitration (autonomous theory) from the French 'theory of arbitration' not recognised in England.'[175] Simply put, the point made here is that one of the ways by which the gap in the relationship between the courts and arbitration in Nigeria could be addressed is, like the UK, France, and China, to expressly provide in the ACA the basic principles or theory from which arbitration is viewed in the jurisdiction.

Besides the statutory provisions, it would be further observed from the Nigerian case law reviewed in Chapters 3, 4, and 5 that, in practice, the involvement of the Nigerian courts in arbitration and their interpretation and application of the provisions of ACA is not founded on any of the established theories of arbitration. More so, unlike many other jurisdictions that do not follow a specific theory but still have a prevailing theory they tilt towards, such as the UK, US and Ghana, it is still difficult to point at a specific prevailing theory in Nigeria. Accordingly, despite many judicial decisions in Nigeria, the 2017 Supreme Court's Directive on Arbitration, and many academic pieces aspired that Nigerian courts be arbitration-friendly and party autonomy driven, there is no pattern in the case law to deduce which theory or prevailing theory out of the four established theories of arbitration reviewed in chapter 2, that informed the Nigerian court's decisions in arbitration. Therefore, the Nigerian regime could be described as either a mix of various theories or a mix-match space where

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[174] [2009] EWCA Cir 755; [2009] 30 E G 67 (CS); Jan Paulsson, *Arbitration in Three Dimensions* (A Working Paper presented to the London School of Economics and Political Science's Society and Economy, 2010) < https://eprints.lse.ac.uk/32907/1/WPS2010-02_Paulsson.pdf> Accessed 3 April 2023.

[175] ibid p.14.

there is no prevailing philosophical rationalisation of the court's involvement in arbitration. What this kind of disparate regime does is that it perpetuates uncertainties in the system, and in such a regime, it would be difficult to guarantee that the courts would prioritise adherence to the principle of party autonomy in dealing with arbitration matters.

6.6 Summary of Discussions, and Conclusion

This chapter examines the factors responsible for the problems relating to inconsistent interpretation and application of statutory provisions and concepts underpinning the roles of the Nigerian courts in arbitration. The chapter uncovers three key factors in this respect. First, is that the narrow phrasing of many provisions of the Arbitration and Conciliation Act that regulates the roles of the courts in arbitration, particularly Section 34 of the Act, makes the provisions incapable of guiding the courts to set a definite limit to their roles in arbitration. Second, is that the far-reaching wordings of Section 6(6) of the 1999 Constitution and the application of the concept of constitutional supremacy give the courts the leeway to participate in arbitration even beyond the limits relatively set by the Act. Third, is that the absence of a definite theory or ideology underpinning the decisions of the Nigerian courts on their roles in arbitration do create some level of uncertainty in the system.

Further, this chapter also studied what is obtainable in the identified areas of practice in the United Kingdom and some other jurisdictions, and found that, like these jurisdictions, some efforts have been made in Nigerian to have a comprehensive arbitration statute based on UNCITRAL Model Law, which also incorporates the New York Convention, couple with a Practice Direction from the apex court. Nevertheless, the foregoing methodical analysis of the Nigerian regime still shows that the current regime is yet to create an effective framework in some areas of judicial participation where the courts could categorically define their roles in arbitration. These comparators are considered useful to inspire reforms in the Nigerian system. Hence, in some ways, the current regime has created more

problems than it supposed to resolve, particularly in terms of the inconsistency created in terms of where a court should draw the line in its involvement in arbitration, and inspiration from the practices in the understudied jurisdictions outside Nigeria is expedient.

Chapter Seven

Analysis of the Problems relating to the Institutional Regulation of the Court's Roles in Arbitration in Nigeria

7.0 Introduction

Besides the problem relating to the wordings of the Act and interpretation of its provisions and concepts, analysed in chapter six, this chapter analyses the problems relating to the institutional regulation of the roles of the Nigerian courts in arbitration. The chapter conducts a methodical diagnosis of the institutional and regulatory frameworks governing the roles of the Nigerian courts in arbitration. The analysis is conducted with the aim of uncovering the underlying factors responsible for the failure of the current supervisory institutions and organisations to create a level of certainty in the court's roles in arbitration in Nigeria.

Thus, this subject is analysed from two perspectives. First is the absence of institutionalized tracking and periodic recalibration of the relationship between the courts and arbitration. Second is over-judicialization or over-judicialization of what should be 'administrative' roles of the courts in arbitration. In investigating this problem from the two perspectives stated above, the chapter studied the similar practice in the United Kingdom and some other jurisdictions to engage the system in Nigeria.

7.1 Absence of Institutionalized Tracking and Periodic Recalibration of the relationship between Courts and Arbitration.

The historical and theoretical review of the relationship between courts and arbitration conducted in Chapter 2 has shown that the roles of courts in arbitration (both domestic and international) evolve in all jurisdictions. For example, it is evidenced in Chapter 2 that, over the recent centuries, the roles of English courts in arbitration have been steadily transformed from a totally unregulated relationship to the introduction of some forms of regulations by the royal courts, to a statutorily regulated policy, and continue to evolve. Likewise, the review in Chapter 2 shows that in Nigeria, the relationship between the courts and arbitration has evolved

from indigenous frameworks, without clear boundaries of jurisdiction between traditional court-like institutions and arbitration-like institutions, to the colonial period where statutory regulation was introduced into the system, and to the post-colonial period with policies and statutes regulating the relationship between the courts and arbitration. It could be argued that the recurring need for transformation in the ways that the courts and arbitration interact is inevitable because, as societies evolve and globalization spreads to more jurisdiction, trade, investment, and commercial activities inevitably become more complex. Likewise, the nature of disputes arising from commercial activities and the corresponding ways to settle them.[1]

Accordingly, a major way to achieve economic prosperity and maintain law and order among businessmen in any jurisdiction, particularly in the face of the continual increase in complex commercial activities and disputes, is a regular review of the systems of dispute resolution. This is necessary to enable the regime measure-up with the realities of time and provide effective and up-to-date systems.[2] Experts from diverse backgrounds have reasoned that people in business (both domestic and foreign) are more likely to do business in a jurisdiction where the commercial dispute resolution system is regularly reviewed to cope with the dynamic nature of the business world and to reduce their risk, and enhance confidence in a legal system.[3] This position is also relevant to the expected synergy between arbitration tribunals and the courts when settling commercial disputes. For instance, the 2021 Queen Mary's International Arbitration Survey observes that the top three factors considered by arbitrating parties in selecting a seat of arbitration, even during the Covid19 pandemic, were: the modernity of 'the legal regime regulating the relationship between the courts and arbitration, increased neutrality and

1 Mireille Delmas-Marty, 'Governing Globalisation through Law' (2020) 11 *Eur J Risk Reg* 195 200.

2 Richard Shaffer, Filiberto Agusti and Lucien Dhooge, *International Business Law and Its Environment* (8th edn, Cengage Learning 2020).

3 William Park, *International Commercial Arbitration and the Arbitrator's Contract* (Oxford University Press 2013); Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999); Richard Shaffer, Filiberto Agusti and Lucien Dhooge, *International Business Law and Its Environment* (8th edn, Cengage Learning 2020); and William Park, *International Commercial Arbitration and the Arbitrator's Contract* (Oxford University Press 2013).

impartiality of the local legal system,' and a 'better track record in enforcing agreements to arbitrate and arbitral award.'[4]

As revealed earlier, therefore, a significant way to achieve these goals is for the appropriate authorities to keep tracking what is changing in the commercial world, how arbitration practice and practitioners are responding to the change in the commercial world, what the impacts on the dispute resolution system through arbitration are, and how should or how is the court system reacting or adjusting to the changes. Lord Saville, the chairman of the defunct Departmental Advisory Committee on Arbitration Law (DAC), further added to these targets by observing that businessmen do avoid jurisdiction where the regimes governing the relationship between the tribunals and courts are not regularly reviewed and adjusted to keep in tune with international best practice because such situation courts 'do naively or deliberately resort to unguarded supervision of arbitration.'[5] Thus, the importance of regular review and adjustment of a country's arbitration laws cannot be overemphasized.

In retrospect, however, the review conducted in Chapter 2 traces the development in practice relating to the roles of courts in arbitration from the pre-colonial days to the present time, through the lens of statutory regulations. The review shows that since Nigeria inherited the repealed 1889 English Arbitration Act from the British colonial government in 1900, there had never been a purposely legislated arbitration statute originally drafted by the Nigerian parliament. Moreover, no dedicated body (private or public) has made conscious effort to track the challenges ensuing from the courts' roles in arbitration as they emerge. Furthermore, even though scholars, through academic papers, symposia, workshops, seminars, etc., sometimes evaluate Nigerian practice and make recommendations, their recommendations have hardly developed into a regular or major reform of

[4] School of International Arbitration and White and Case, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Queen Mary University) (2022) < https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/> accessed 22nd February 2023.

[5] Justice Saville, '1996 Report on the Arbitration Bill- Explanatory Note' (1996) Vol13 No3 *Arbitration International* 275-316.

the laws governing the roles of the Nigerian courts in arbitration.[6] Finally, even on the few occasions that the arbitration regimes in Nigeria have experienced some reforms, these were carried out simply to catch up legislation considering the local peculiarities of the Nigerian system.[7]

Thus, the historical review in Chapter 2 on the courts' roles in arbitration reveals that the first attempt to regulate arbitration practice in Nigeria was through the 1914 Arbitration Ordinance. It was found that the said Ordinance did not pass through the rigours of the law-making process because the then Nigerian Council did not make the Ordinance. Instead, it was solely prepared by the then Attorney General and approved by the then governor general, but only perused by the Council.[8] There was, therefore, no consultation with the Nigerian business community, jurists, arbitrators, academics, practitioners, etc., for practical contributions, particularly in terms of the roles that the courts should play in arbitration in Nigeria.

Moreover, worthy of note from Chapter 2, is that the Ordinance simply selected some portions of the 1889 English Act to make applicable in Nigeria. The Ordinance made arbitration an appendage of the Nigerian courts. Curiously, despite the failings of the Ordinance, it remained the major legislation that governed the roles of Nigerian courts in arbitration for Seventy-Five years (1914 to 1988) and till date.

As also discussed in Chapter 2, though Arbitration Laws existed in various Nigerian Regions in 1958, the legislations were merely a renaming of the 1914 Ordinance to a Law towards the independence of the Republic in 1960. Records have shown that between 1914 and 1960, the number of courts in Nigeria increased from 3 to 25 in 1958, with 18 defunct courts and nearly 83 court divisions in 1989.[9] The Nigerian population also grew

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6 Please see: Papers delivered at the 2nd SOAS Arbitration in Africa Conference: 'The Roles of Courts and Judges in Arbitration,' held in Lagos Nigeria, on 22 – 24 June 2016. Available at <http://eprints.soas.ac.uk/22727/> accessed 12 April 2019; Emilia Onyema, *Rethinking the Role of African National Courts in Arbitration*, Chapter 3 (Wolters Kluwer 2018) 67 – 96.

7 Onifade (n 30).

8 Isaac Olawale Albert, *Nigeria: The Legal Foundations of Society* (1st edn Sweet & Maxwell London 1961) 177.

9 Adefi Olong, *The Nigerian Legal System: An Introduction* (Malthoiuse Press Nigeria 2017) 74; Niki Tobi, *Sources of Nigerian Law* (MIJ Professional Publishers Ltd Benin 1996) 112.

from 18 million in 1914 to 90 million in 1988.[10] International trade and investment also increased, with the country's GDP growing from 11% in 1900 to 65.4% in 1988, [11] and the country's Gross Domestic Product (GDP) grew from 0.2 to 11.8 in 1990.[12] However, despite all the changes in the numbers and hierarchy of the courts, the geometric increase in the volume of commercial activities, growth in GDP and the complexity of the economy, and the sporadic population growth in the country, it is crucial to find that the relationship between the courts and arbitration in the country was left to be regulated by a sketchy 1914 colonial legislation of 15 provisions for more than 7 decades without a major amendment.

The 1988 Arbitration Decree (later relabeled an Act and still extant) was promulgated to replace the 1958 legislation. Though many authors have attested that the 1988 legislation was a major reform in Nigerian arbitration practice,[13] a closer insight into the creation and the contents of the legislation shows that it was not yet based on wide consultation or borne out of the experiences garnered from the issues or gaps found in practice, nor from an effort to correct such challenges in the system. In contrast, the promulgation of the Decree was driven by the motive to simply catch up with the Model Law. This is more evident from the fact that after Nigeria had ratified the Model Law on 17 May 1988, it simply took a routine step to domesticate the Model Law by coupling its provisions with the 1958 legislation to form a single national legislation (the 1988 Decree). This was done to simply replace the 1958 Laws.

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[10] The National Archives, '100 Nigeria in 1914' <https://www.nationalarchives.gov.uk/first-world-war/a-global-view/africa/nigeria/#:~:text=At%20the%20outbreak%20of%20war,population%20of%20approximately%2018%20million.> Accessed 21 January 2023; Microtrend, 'Nigeria Population Growth Rate 1859-2023' <https://www.macrotrends.net/countries/NGA/nigeria/population-growth-rate> Accessed 15 December 2022.

[11] Samuel Shokpeka and Odigwe Nwaokocha, 'British Colonial Economic Policy in Nigeria, the Example of Benin Province 1914-1954' (2009) Vol 28(1) *J Hum Ecol.* 57-66, 61; Udeme Usoro, 'Colonial Economic Development Planning in Nigeria, 1919-1939: An Appraisal' (1977) Vol 19 *Nigerian Journal of Economic and Social Studies* 121-136.

[12] Peter Thomas Bauer, 'The Economic Development of Nigeria' (1955) Vol. 63, No. 5 *Journal of Political Economy* 398-411; Efiong Isaac Utuk, 'Britain's Colonial Administrations and Developments, 1861-1960: An Analysis of Britain's Colonial Administrations and Developments in Nigeria' (1975) A Masters Thesis submitted at the Portland State University; The World Bank, 'The Growth (Annual%)-Nigeria' (2022) <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=NG> Accessed 12 January 2023.

[13] Tinuade Oyekunle (n 23) 6; Olakunle Orojo and Olawale Ojomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Association Nigeria Ltd., Lagos 1999) 87.

Besides the fact that it was a military era (when there was no democratic parliament to draft a purposely-made arbitration legislation), the then Attorney General stated the purpose of the legislation thus:

> The promulgation of this Decree has long been overdue. The most pressing need was because it has become obligatory for our government to domesticate the UNCITRAL Model Law on International Commercial Arbitration to catch up with our counterparts in the global business space…[14]

The foregoing shows that the rationale for the promulgation of the 1988 Decree was simply that the country wanted to be seen as a pro-UNCITRAL jurisdiction among the comity of nations. It is worth noting that Nigeria did not have a representative in all the meetings 'devoted to the preparation of the Model Law,' nor did she contribute to the commentaries or documentary presentations at related UN meetings.[15] For instance, at the 309th Meeting of the United Nations on the Model Law, where the issue surrounding courts' roles in arbitration (Articles 5 and 6 of Model Law) was specifically discussed, Nigeria did not submit a written comment, even when Egypt, another African country, was represented.[16] It can then be understood why the challenges already envisaged by some countries about directly transplanting some provisions in the Model Law (such as Article 5) were not considered in the 1988 Nigerian Decree. Moreover, it can be understood why the Model Law, made mainly for international arbitration, was transplanted for domestic and international arbitration in Nigeria. Worse still, from 1988 — three decades later— the Act remain the principal legislation governing courts' roles in arbitration in Nigeria. Despite some significant changes to the 1985 version of the Model Law, particularly in 2006 and 2010, Nigeria has continued to operate the 1985 version of the Model Law with more renaming.

[14] Gazette 980013 No. 34 1988 Decree No. 36 Arbitration, Nigeria, Preamble to the Gazette.
[15] United Nations Commission on International Trade Law, 'Travaux Preparatories: UNCITRAL Model Law on International Commercial Arbitration (1985)' < https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux>
[16] United Nations Commission on International Trade Law, *309th Meeting on the UNCTIRAL Model Law on International Commercial Arbitration* (A/CN-9/246, annex A/CN-9/263 and Add.1-2, A/CN.9/264) < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/309meeting-e.pdf> Accessed 21st October 2022.

The foregoing would, therefore, explain a major reason behind some of the critical problems with the roles of Nigerian courts in arbitration, as revealed earlier in Chapters 3, 4 and 5. For instance, the hurry to couple the 1958 Act (for domestic and international arbitration) with the Model Law meant primarily for international commercial arbitration could explain the reason for the inconsistent decisions of the Nigerian courts on whether the roles vested in a court under the provisions exclusively dedicated to international arbitration (Sections 43-46 of the ACA) should apply in defining the roles of a court in domestic arbitration. Furthermore, it could be argued that the inclusion of the all-important provision of Section 34 (Article 5 of the Model Law) in the Decree, without considering the damning caution by other nations on the risk of direct transplantation, might have swayed the drafters of the Decree to avoid such a mistake or to modify the language of the provision.

It could be argued, therefore, that if the 1988 Decree had passed through parliamentary deliberation and there had been a period review of the law and the practice surrounding it, perhaps many of the problems exposed in chapters 3, 4, and 5 regarding current practice would have been addressed. For instance, the inconsistent interpretation of Sections 12 of the ACA and Article 21 of its Rules on the problematic roles of a court, where a tribunal declines jurisdiction, has lingered on for more than four decades. The arbitration reference that led to the case of *Misr (Nig) Ltd. v. Salah el Assad*[17] , which compounded the problem ensued in 1968, and the judgment was delivered in 1971, yet the experience remains the same because of a lack of a periodic review of Nigerian arbitration practice. Another example is the jurisdiction conflict among the three levels of High Courts in Nigeria (Federal High Court, High Court of the Federal Capital Territory, and the High Court of 36 States) as to which court is empowered to entertain a case from an arbitration tribunal has lingered on for more than two decades now. The case of Statoil v FIRS, discussed in Chapter 4, was decided in 2014, and to date, the problem lingers on without a follow-up amendment to the Act.

[17] [1971] ALL NLR 175.

Other examples of the problems with the Nigerian system which have lingered as a result of a lack of periodic review, as discussed in chapters 2, 3 and 4, are: the questions surrounding the inconsistent court decisions on the finality of the tribunal's decision, which calls for a review of the provision of Section 31 and 32(2) of the Act as it came up in the case of *Nigerian Agip Oil Co. Ltd. v. Kemmer;* questions concerning conflicting decisions of courts on how far a court should defer to a tribunal's decision in its review process, which was brought to the light in 2010 by the decision in *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan;*[18] questions arising from conflicting decisions on the practice relating to the roles of courts in a qualification challenge application which should call for a review of Sections 8,9, and 45 of the Act, the questions relating to conflicting interpretations of Sections 4 and 5 of the ACA as it relates to the mandatory or discretionary power of a court to stay litigation for arbitration, questions surrounding the courts' conflicting decisions on the proper roles of a court to support arbitration during a hearing which has made a review of Sections 14, 15, 16, 17, 18, 19, 21, and 23 of the ACA long overdue, etc.

The most recent example of a fundamental gap leading to conflicting decisions of courts and even clamour from within and outside of the Nigerian arbitration community, yet left without review, is the issue raised in *Statoil (Nigeria) Ltd & Anor. v. FIRS & Anor.,*[19] where the court allowed a third party to injunct and nullify ongoing arbitration, and a court also declared government revenue-related cases inarbitrable in Nigeria.

Therefore, it is submitted that arbitration legislation in Nigeria should not have been left for more than three decades despite its many inadequacies, particularly in terms of the imbalance and inconsistencies plaguing the courts' roles in arbitration. Today, arbitration laws and practices in Nigeria are not kept under regular and constant review by any private or public authorities. Besides some once-in-a-while symposia and commentaries

[18] [2010] UKSC 46.
[19] [2014] LPELR – 23144 (CA).

that examine the trends in arbitration practice and the roles of courts, there has not been (and there is no) deliberate or organised team to track practical issues or challenges emanating from the application of the legislation in practice, the new trends in the international arbitration space and to the need to incorporate them to keep fine-tuning the Nigerian system.

The far-reaching negative impact of the absence of a standing arrangement for a periodic review of the arbitration laws and practices in Nigeria, particularly of the roles of courts, is better appreciated from the perspective that most of the problematic judicial decisions revealed in chapters 3, 4 are the decisions of the court of first instance. This experience implies that, while the apex court is hardly best placed on harmonizing the conflicting decisions of the subordinate courts, its few unsettled decisions will naturally propagate a more confusing position among the High Courts because of the principle of judicial precedent. This principle mandates subordinate courts to trustingly follow the decisions of the higher courts, no matter how controversial they are. In fact, in the face of conflicting decisions of the court of appeal, Nigerian High Courts are allowed to follow any of the conflicting decisions of the higher courts.[20] The ripple effect of this practice is that an inconsistent or erroneous interpretation of any provision of the Act by an appellate court is binding on the High Courts, where many of the arbitration cases go to, and will subsequently spread the controversial practice across jurisdictions, unless there is a prompt and continuous review and amendment of the Act.

6.5.1 A Frail Attempt at Reviewing the Nigerian Arbitration Laws

It is essential to observe that in 2006, after the infamous Supreme Court case *NNPC v. Lutin Invest. Ltd.*,[21] an international arbitration seated in Nigeria which was injuncted for more than a decade on a simple challenge against an arbitrator's discretion under Section 16 of the Act to decide the 'place' of arbitration, the government of Nigeria then tried to review the current arbitration law and practices. The National Committee on the

[20] G.T.B Plc v FADCO Ind. Ltd (2007) 7 NWLR (pt. 1033) 307; Mohammed v Martins Electronics Company Ltd (2010) 2 NWLR (pt. 1179) 473 at 506.
[21] [2006]2 N.W.L.R. (Pt.965) p. 506.

Reforms and Harmonization of Arbitration and ADR Laws in Nigeria was established to review and harmonize the various laws governing arbitration and alternative dispute resolution in Nigeria, headed by the late Olawale Orojo (Orojo's Committee).

The Committee had, since 2007, proposed a new bill, the Arbitration and Mediation Bill, to replace the current legislation, which is yet to become law.[22] However, the proposed bill did not touch or address many of the problems plaguing the courts' roles in arbitration in Nigeria, as discussed in chapters 3, 4 and 5. Besides the proposed Section 5(1) which collapses the former Sections 4 and 5 into one provision on stay of proceedings, and Section 57, which removes the grounds of 'misconduct' and 'error on the face of an award' to set aside an award, other provisions of the proposed bill focused predominantly on four innovations: (i) the introduction of a third party funding system into the Nigerian arbitration practice,[23] (ii) the introduction of an emergency arbitrator system as a stop-gap between arbitration and court,[24] (iii) the establishment of a body known as the Arbitration Review Tribunal (ART) as a stop-gap between arbitration and court,[25] and (iv) the substitution of the hitherto provisions on 'Conciliation' with 'Mediation.'[26] For instance, the introducing ART into the current system which is already bogged down by the formalistic procedures of the appellate court will simply create another layer of institution which will further delay enforcement of award and undermines parties' agreement. More so, the use of ART is not optional but made mandatory to be used by parties. However, the introduction of an emergency arbitrator system to catch-up with the international best practice is the only welcoming proposal that may impact the subject of this research. This is because the use of emergency arbitrator may solve many problems relating to delays when applying for stay of proceeding pending arbitrator.

Though the Orojo Committee claimed that it carried out a wide consultation in its reform exercise, it is crucial to observe that the Committee was constituted

[22] Commercial Law Research Network Nigeria, 'CLRNN Conversations with Prof Idornigie SAN II' (13 March 2022) <https://www.youtube.com/watch?v=ZKuge-RV5JE> accessed 23 June 2022.
[23] Proposed Arbitration and Mediation Bill (re-submitted to the Nigerian Senate 6 July 2010), Nigeria, s 52 and 85.
[24] ibid, Ss 18 and 19.
[25] ibid, s 56(6).
[26] ibid, s 66-88.

in 2006 and had prepared a proposed bill by the following year. When the Model Law on Conciliation was changed to Mediation, the Committee recalled the proposed bill to effect the change to the Model Law in the bill. In fact, upon the completion of the bill, it was first submitted to the UN Commission on International Trade Law for a reconciliation of its provisions with the Model Laws.[27] Thus, the reforms being proposed in the bill, though laudable, still follow the usual approach in Nigeria, that is, to simply catch-up with the letters of the Model Laws, just like the 1988 Act, rather than looking proactively and inwardly into the problems ensuing from the transplantation of the Model Laws into Nigerian practice. Therefore, besides the catch-up provisions from the Model Law, a deeper insight into the bill, as discussed so far, shows that the current principal legislation regulating arbitration practice in Nigeria is still substantially the English 1889 Arbitration Act, transplanted into the country as the 1914 Ordinance, relabeled as the 1958 Arbitration Act, and later imported into the current 1988 Decree (now Act) with the addition of the Model Law.[28]

7.1.1 A Look at Practices Outside Nigeria

It is important to first observe that, besides the United States, where her current arbitration law dates to the 19th century,[29] Nigeria is another country that has implicitly retained the remnants of the 1889 English Act without attempt at major reforms except the direct transplantation of the Model Laws through a catch-up approach. Many other jurisdictions with some ties to the English legal system have not only carried out a major overhauling of the laws inherited from Britain but also continued to track and amend their arbitration laws and practices. For instance, since the 1889 English Act was imported into India as the 1899 Indian Arbitration Act, the country has amended its arbitration laws around eight times – 1937, 1940, 1961, 1996, 2015, 2019, and 2021.[30] Kenya, which also received her 1914 Arbitration Act almost simultaneously as Nigeria, has

[27] Paul Idornigie (n 182).
[28] Commonwealth, *A Study of International Commercial Arbitration in the Commonwealth* (Commonwealth Secretariat 2020) 30.
[29] Federal Arbitration Act, US, 1925 (9 U.S.C. § 200).
[30] Sumit Kumar, 'Historical Growth of Arbitration Law in India' (2017) Vol.10 No.2 *Ijitkm Csjournals* 118-135; See also: The Arbitration and Conciliation (Amendment) Act, India, 2019 and 2021.

witnessed around five landmark amendments up until 2013.[31] Thus, being the major comparators for the comparative part of this study, it will be worthwhile examining the framework and activities of the UK Law Commission and the Ghanaian Law Reform Commission concerning the tracking of the courts' roles in arbitration and the resultant reforms in their laws and practices.

The review conducted in Chapter 2 reveals that since the 1889 English Arbitration Act was transplanted into Nigeria in 1900, English arbitration laws have undergone four major reforms in 1934, 1950, 1975 and 1996, culminating to the 1996 Arbitration Act. These reforms have significantly changed English arbitration laws and practices, including creating a new statutory regime for international arbitration and introducing a more modern and comprehensive framework for arbitration in English jurisdiction.[32] This is unlike Nigeria, which still uses its inherited 1889 Arbitration Act with some catch-up additions from the Model Laws. The focus of the English law reforms has been to ensure a more effective arbitration system that guarantees party autonomy with the courts' support.[33] Even though many commentators have recently argued that the 1996 Act should be further amended,[34] in 2021, the Queen Mary's International Arbitration Survey still ranked the English jurisdiction (London) as the most preferred seat of arbitration globally, followed by Paris and Singapore.[35] Again, though projections showed that English jurisdiction would lose this leading position after Brexit, the case has been otherwise.[36]

[31] Kariuki Munigua, 'A Review of the Arbitration Act, 1995 of Kenya viz-a-viz Arbitration Act 1996 UK' (A lecture delivered at the Chartered Institute of Arbitrators, Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008); See also: International Arbitration Act, Kenya, 2013.
[32] Justice Saville, (n 165) 275-316.
[33] ibid.
[34] Elizabeth Gloster, 'Symbiosis or Sadomasochism? The relationship between the courts and arbitration' (2018) Vol. 34 *Arbitration International* 322; Naomi Jeffreys, 'UK Arbitration Act: Time for a revamp' (published 12 November 2018) < https://www.4newsquare.com/uk-arbitration-act-time-for-a-revamp/> accessed 10 December 2022;
[35] (n 164) 2.
[36] Sadhana Sivasankara and Bhuvaneswaris Sadhana, 'A Research on International Commercial Arbitration with Reference to the Brexit' (2019) Vol. 9 Iss 1 *Int'l Journal of Innovative Tech and Exploring* 334; Naomi Jeffreys (n 194).

It is essential to observe that some of the primary reasons for the preference for English jurisdiction were not because of how English laws have been able to catchup with the Model Laws like in Nigeria.[37] Instead, the jurisdiction's success is largely traced, among other things, to the relative certainty created in the system by regular tracking and reforms of its arbitration laws, particularly in sustaining respect for party autonomy, and as the 'courts and judiciary could relatively ascertain when and how to involve in arbitration.'[38] The feat has been adjudged to have 'increased perception about the neutrality and impartiality of the English legal system in international arbitration.'[39] However, this is not to say that English arbitration laws and practices are perfect or flawless.[40]

7.1.2 Practice Examples of Regular Tracking and Law Reforms in Other Jurisdictions

Thus, the relevant key experience from the English jurisdiction to engage the Nigerian regime is that its relative track records have been traced severally to its conscious, regular, and systemized tracking of the English courts' attitudes and practices toward arbitration and the continual law reviews that often follow.[41] To achieve this, the authority in charge of reforming the roles of English courts in arbitration, among others, is the Law Commission. This is an independent body with perpetual succession, whose purpose is to 'keep the laws of England and Wales under review and to recommend reform where it is needed.'[42] Like other areas of law and practice, the Commission engages legal practitioners and other professionals to, among other functions, 'research the arbitration laws and how they work in practice, both in the UK and overseas,' 'analyse

[37] Law Commission, 'Law Commission to Review the Arbitration Act 1996' (published 30th November 2021) < lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/> accessed 9 February 2022.
[38] (n 165); Olawale Orojo, *Commercial Arbitration: England Today and Africa Tomorrow* (Mbeyi Publishers Lagos 2018) 98.
[39] (n 165).
[40] Griesrson Jacob, 'Two Brief Comments on the Law Commission's Proposed Reform of the Arbitration Act 1996' (2022) Vol. 39 Iss 6 *Journal of Int'l Arbitration* 765-774.
[41] Saville (n 218); Jain Vivek, et al., *Comparative Analysis of Interim Measures— Interim Remedies (England & Wales) v. Preservative Measures (China)* (Taylor ad Francis London 2022); Olawale Orojo (n 224) 110; Law Commission, 'New Reforms to Ensure UK retains position as a leader in International Arbitration' (published 22 September 2022) < https://www.lawcom.gov.uk/new-reforms-to-ensure-uk-retains-position-as-a-leader-in-international-arbitration/> accessed 3 April 2023.
[42] Law Commission, 'Welcome' < https://www.lawcom.gov.uk/>

problems with the arbitration laws, identify options for reform and testing potential solutions,' and 'engage with stakeholders (both inside and outside government),' etc.[43]

Guided by its establishing law, the Law Commission publishes its programmes of Law reform every five years.[44] Since its creation in 1965, it has published fourteen programmes of law reform, out of which four programmes including the current 14th programmes titled 'Modernising the Arbitration Act, English arbitration laws and practices' have been at the core of its focus[45] Its statutory activities often span four significant stages; (i) The initiation stage where its terms of reference for a programme are determined with the lead government department, (ii) The pre-consultation stage where key interest groups and specialists are consulted to finalize the terms of reference, (iii) The consultation stage where views are garnered from practitioners, judges, academics, relevant institutions, members of the public, universities, international space, etc., and (iv) The reportage stage where recommendations are usually made to the government regarding law reforms.[46] Further, the Commission maintains an active website where the status of every proposed reform and relevant documents are accessible and through which contributions are made by the members of the public.[47]

This above is unlike the experience in Nigeria, where the few amendments carried out in arbitration law and practice were carried out by private practitioners functioning as *ad hoc* bodies without precise engagement with members of the public, jurists, and practitioners in their deliberations. Then, the English experience is unlike Nigeria, where the terms of reference, for instance, the Orojo Committee focused primarily on catching up the Nigerian laws with the Model Laws. For instance, in the ongoing 14th programme of reforms to the 1996 English Arbitration Act, the term of reference is to track the development in the field, 'review the Act… to

[43] ibid; See generally: <https://www.lawcom.gov.uk/law-reform-lawyers/>
[44] Section 3 of the Law Commission Act Cap. 22 UK Public General Act, 1965.
[45] Lisa Dubot, et al., 'Modernising The Arbitration Act 1996: A Critique of the Law Commission's Proposed Reforms' (Kluwer Arbitration Blog, published 21 November 2022).
[46] Law Commission, <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>
[47] ibid.

maintain the attractiveness of England and Wales as a 'destination' for dispute resolution and the pre-eminence of English Law as a choice of law.'[48] This amendment exercise looks inward into the peculiarity of English domestic space.[49]

It is also imperative to observe that the predecessor to the English Law Commission, the Departmental Advisory Committee on Arbitration Law (DAC), followed the same approach. The DAC was responsible for the drafting of the current 1996 Act.[50] It conducted more than six consultative fora that garnered contributions from stakeholders, including jurists and practitioners within and outside the English arbitration community, culminating in its Report and the resultant legislation.[51] One consistent approach in these bodies is that they do not slavishly follow the Model Law like the Orojo Committee in Nigeria. Instead, they keep track of the development in their caselaw by studying the courts' interpretation of current legislation and emerging practice. Then, they engage stakeholders to rationalize the enactment of the emerging practice or craft a provision to prohibit or manage it. This approach introduced many new provisions into the 1996 Act, deliberately tailored to address the previous challenges in the relationship between courts and arbitration.

For instance, in the 1975 English Act, the power to order security for costs in arbitration was solely vested in a court.[52] However, this power was removed and given to arbitration tribunals under Section 38 of the 1996 Act. In the DAC Report, it was stated that the removal of the power from the courts was substantially due to the abuse of power by the English courts experienced under the 1975 regime. The experience garnered from the infamous decision of the House of Lords in *S.A. Coppee Lavalin NV v. Ken-Ren Chemicals and Fertilisers,*[53] which 'has received universal condemnation in the context of international arbitrations' was an anchor upon which the amendment was made.[54] Another example is the current

[48] La Commission (n 201).
[49] ibid.
[50] Mark Saville, (n 218) 275-316.
[51] ibid.
[52] English Arbitration Act, 1975, s 38.
[53] [1994] 2 WLR 631.
[54] Mark Saville, 305-306.

provision of Section 39 of the 1996 Act. Before its enactment, a tribunal could exercise power to make provisional orders in arbitration, and the DAC initially intended to retain that power without involving a court. However, it was reported that following several judicial decisions against this position, particularly in *The Kostas Melas'* case[55] where the court reiterated that 'it was no part of an arbitrator's function to make temporary or provisional financial arrangements between the parties,' the Committee resolved to take the power away from the tribunal, except where the parties state otherwise, and the exercise of the power is subject to the court's power to review.[56] Regarding this provision, the DAC's Report stated thus:

> "As can be demonstrated by the abundance of court cases dealing with this subject … enormous care has to be taken to avoid turning what can be a useful judicial tool into an instrument of injustice. We should add that we received responses from a number of practicing arbitrators to the effect that they would be unhappy with such powers and saw no need for them. We should note in passing that the July 1995 draft would arguably (and inadvertently) have allowed arbitrators to order *ex parte Mareva* or even *Anton Piller* relief. These Draconian powers are best left to be applied by the Courts."[57]

A further example is the introduction of Section 44(6) of the 1996 Act which addresses the general powers of a law court in support of arbitral proceedings in terms of the taking of evidence of witnesses, preservation of evidence, order for inspection, photographing, preservation, custody, or detention of property, etc. Besides the fact that these powers correspond with Article 9 of the Model Law and the previous 1975 English Arbitration Act, it was reported that the DAC considered how English courts had abused power to undermine party autonomy and the powers of a tribunal over the years. It introduced subsections 5 and 6 to the effect that a court would only exercise its power under this provision when the parties or the arbitrator cannot act or act effectively and that even where the court has acted, it should handover to the tribunal the 'task of deciding whether or not that order should cease to have an effect.'[58]

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[55] [1981] 1 Lloyd's Rep. 18, 26, Goff J.
[56] Mark Saville, 307.
[57] ibid.
[58] ibid; (n 212, 1996) s 44(6).

Many other novel provisions were introduced into the 1996 Act out of the understudying of English courts' decisions, practice experience and patterns. Examples include the introduction of subsection 5 to the provision of Section 9 of the Act on the court's power to stay litigation for arbitration. The DAC reported that this novel provision was introduced to the Act out of their reflection on the *dicta of* Lord Mustill in *Channel Tunnel v Balfour Beatty.,*[59] and also the decision in *Hayter v Nelson.*[60] The newly introduced subsection (5) clears the air around the controversy that, where the court refuses to stay the legal proceedings, 'any term making an award a condition precedent to the bringing of legal proceedings (known as *Scott v. Avery* clause) will cease to have effect.'[61] Another example is the introduction of an additional duty on a party appointing a sole arbitrator to inform the other party that he has done so.[62] The DAC reported that such an addition was borne out of the practice experience that where the 'defaulting party was under no obligation to say that he has made an appointment' caused unnecessary delay and the setting aside of proceedings by the law court.[63]

Furthermore, in some cases, the DAC also studied the practice in some other competing jurisdictions to avoid having the negative effect of what is considered to be wrongly established practice surrounding the courts' roles in arbitration. In such cases, the Committee introduced some provisions in the English Act to guide the English courts against leaning on such 'bad' practices. A practical example is the codification of the long-time English common law principle of privacy and confidentiality into the 1996 Act. The DAC reported that following the radical decision against the settled principle taken in the 1995 Australian decision in *Esso BHP v Plowman.,*[64] the Committee felt the need to codify the hitherto general principle to avoid ambiguity on the stance of English jurisdiction.[65] Finally, regarding Section 1(c) which is the umbrella provision that defines the boundary of

[59] [1993] AC 334.
[60] [1990]2 Lloyd's Rep. 265.
[61] Mark Saville, (n 218) 286.
[62] The English Arbitration Act 1996, s 17.
[63] Mark Saville, (n 218) 290.
[64] [1995] HCA 19; 183 CLR 10.
[65] Mark Saville, (n 218) 278.

the courts' involvement in arbitration, like Section 34 of the ACA and Article 5 of the Model Law, the drafting Committee observed thus:

> "There is no doubt that our law has been subject to international criticism that the Courts intervene more than they should in arbitration process…Nowadays the (English) Courts are much less inclined to intervene in the arbitral process than used to be the case… … … the Courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach, and it seems to us that it should be enshrined as a principle in the Bill."[66]

To this end, Section 1(c) of the 1996 English Act was enacted as the general principle upon which the English legal system draws the boundary between the courts and arbitration. The provision was similar to Article 5 of the Model Law except for using the word 'should' instead of 'shall.' The drafters of the English legislation ascribed the reason for the amendment to the objection raised by Mustill at the making of the Model Law, as discussed earlier, as being that English arbitration laws and practices evolve through its domestic legislation and case law rather than hurriedly copying the Model Law or practices from other jurisdiction, as in Nigeria.[67] As a result, many novel provisions in the 1996 English Act are without corresponding provisions in the Model Law. Some examples are Sections 15, 16, 45, 69, 52(4), 67(3), etc. Finally, even though DAC has since been dissolved, its successor, the Law Commission, still follows these steps by regularly tracking courts' practices and keeping tabs on how to continue calibrating the relationship between courts and arbitration.

Some acclaimed arbitration-favoured jurisdictions such as Malaysia,[68] Hong Kong,[69] and South Africa[70] have also passed current arbitration laws that have introduced novel provisions to advance party autonomy in their respective jurisdictions, even departing from the Model Law. Some novel provisions in the 2010 Ghanaian Act include the removal of Article 5 of the Model Law, thereby avoiding inconsistent judicial decisions trailing the provision, unlike Nigeria. Moreover, Section 18(2)(c) of the Ghanaian Act

[66] Mark Saville, (n 218) 280.
[67] Marlk Saville, (n 218) 282.
[68] International Arbitration Act, Singapore, 2021.
[69] Arbitration Ordinance, Hong Kong, Cap 609, 2011.
[70] International Arbitration Act, South Africa, Cap 15 2017.

includes physical and mental capacity as grounds for a court to remove an arbitrator, Section 18(5) expressly allows an arbitrator to appear before a court to defend his actions in an arbitration reference subject to parties' agreement, Section 22 expressly allows a High Court to decide disputes regarding arbitrator's fees, and Section 30 mandates every arbitrator to convene a conciliation conference to resolve a dispute before arbitration subject to parties' agreement, etc.

7.1.3 Comparing the Practice in the Other Jurisdictions with the Nigerian Regime

Efforts are ongoing in Nigeria to amend the current arbitration legislation. This has led to the drafting and passage of the controversial Arbitration and Mediation Bill 2022 (awaiting presidential assent.)[71] Nevertheless, there are many lessons still to learn from the practices in the jurisdictions reviewed above, because the focus of the current reforms in Nigeria is still on the usual catch-up approach, without resolving the damning gaps in the system as found in chapters 3, 4, and 5.

Firstly, besides the fact that Nigeria's current arbitration law is more than a century old, as explained earlier, the current approach to its reform shows that it is not being supervised by a purposely established or institutionalized body or system like other jurisdictions analyzed earlier. Instead, the past and current efforts to amend the arbitration laws have been and are being overseen by some selected private legal practitioners with limited membership and scope of consultation, incomparable to the other jurisdictions discussed earlier.[72] For instance, it is curious to note that not one serving or retired judge or an official of a Nigerian court or judiciary was a member of the Orojo's committee, which drafted the currently pending bill. This is unlike the other jurisdiction reviewed earlier. For instance, Mustill and his successor, Saville, who headed UK's DAC, were renowned arbitration practitioners and justices of English commercial courts. Saville rose from private practice in arbitration to become a judge

[71] TEMPLARS LLP, 'Templars Legislative Watch' (Published 7 June 2022) <https://www.templars-law.com/app/uploads/2022/06/20220528-Analysis-of-the-Arbitration-and-Mediation-Bill-54-003-SUN.pdf> accessed 3 April 2023.
[72] (n 182).

in charge of the commercial court for many years before his further elevation to the Court of Appeal.[73] Moreover, the DAC still recorded, among others, about six Queen's Counsel representatives and four professors of arbitration law.[74]

Likewise, in other jurisdictions like Ghana, her 2010 ADR Act was drafted and overseen by the state's Ministry of Justice and attorney general department (AG),[75] South African's International Arbitration Act of 2017 was overseen by the Department of Justice and Constitutional Development,[76] and the 2011 revised Hong Kong Arbitration Ordinance was supervised by the Hong Kong Institute of Arbitrators and the Hong Kong International Arbitration Centre, etc.[77] What is common among these jurisdictions that is missing in the Nigerian space is that the obligation to track the practices or challenges around arbitration in order to address those concerns through amendment of the law was spearheaded by purposely established or institutionalised bodies, with membership cutting across major stakeholders such as the judiciary, academics, and legal practitioners, unlike Nigeria.

It is noteworthy that mere membership of or consultation with the judiciary, among others, would not automatically translate to perfect arbitration laws. However, an institution charged with the amendment of arbitration laws will be more consistent in tracking the problems within the system and the follow-up on necessary amendments rather than an *ad hoc* privately selected committee, as in the Nigerian case. Moreover, it is rational to submit that an overseeing of amendments by a body

[73] Arbitrators 'Lord Saville Newgate' (published 2 June 1999) <Lord Saville of Newdigate - Arbitrators at 24 Lincoln's Inn Fields (arbitratorsinternational.com)> accessed 3 January 2023.

[74] See the list of DAC's member in Mark Saville, 'The 1996 DAC Report on the English Arbitration Bill' (1997) Vol 13(3) *Arbitration International* p.275-316.

[75] Elijah Tukwariba Yin and Nelson Kofie, *Advancing Civil Justice Reform and Conflict Resolution in Africa and Asia: Comparative Analyses and Case Studies* (IGI Global, 2021) 110.

[76] Mark Baker, Pierre Bienvenue, et al., *International Arbitration Report* (Nort Rose Fulbright Iss 8 2017) 28-29 <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-8.pdf?revision=&revision=461168601842738790 4> accessed 23 April 2023.

[77] Clifford Chance, 'New Arbitration Law for Hong Kong' (published 30th January 2011) <represents the culmination of many years of discussion and consultation and marks a significant milestone in the development of Hong Kong as a world-class international arbitration centre> accessed 25 April 2023.

comprising members spread across the major stakeholders in arbitration practice, like the judiciary and academics, will produce quality reforms to balance the relationship between the courts and arbitration better than an *Ad hoc* committee comprising only private lawyers and arbitration practitioners, as in the case in Nigeria.

Further, it could be argued that the more institutionalized an amendment process is, the more likely it is to be consistent in tracking the problems with current law and practice and in making amendments. Moreover, the wider the consultation, the more prospect of wide-ranging and balanced amendments. Curiously, the previous amendment committees and the last, the Orojo Committee, in charge of reforms in arbitration practice in Nigeria, have enjoyed the endorsement of the AGF and reported that they undertook wide consultation before drafting the bill. It was reported that the Committee had liaised with the Nigerian Bar Association, the Chartered Institute of Arbitrators, and the Nigerian National Assembly and collaborated with the UNCITRAL Committee.[78] Nevertheless, unlike the other jurisdictions reviewed earlier, AG's endorsement did not make the Orojo Committee an institution permanently charged with law reforms, resulting in a continued lack of consistent tracking of the problems with Nigerian arbitration laws and practices. Such an *Ad hoc* Committee has fixed terms of reference and a timeframe within which to work, adversely impacting its quality of amendments. For instance, while the current pending Bill in Nigeria was drafted within 16 months,[79] Hong Kong's revised 2011 Arbitration Ordinance represents 'the culmination of 10 years of consistent consultations and tracking of the development and challenges in the relationship between court and arbitration practices.'[80]

Further, as discussed earlier, the UK Law Commission runs an active website, e-mail, social media outlets, etc., available to members of the profession and the public for contributions towards reform in any field and

[78] Bola Ajibola, *2007 Report of the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria* (Mbyeti Publishers 2009) 72.
[79] Enehuwa Adagu, 'Nigeria's New Arbitration and Mediation Bill' (published 19th July 2022) <https://www.ciarb.org/news/nigeria-s-new-arbitration-and-mediation-bill/> accessed 3 February 2023.
[80] Clifford Chance, (n 237) 3.

to follow-up. Moreover, under its mandate, the Law Commission conducts a periodic programme of law reforms with at least two major consultative sessions with all stakeholders before any amendment.[81] This was done in the 1996 reform and the ongoing one, which contributes to the quality of reforms derivable from such a body. Further, its organised information-gathering system enables a relatively efficient follow-up and tracking of the court's responses toward any amendment and practice performance trailing. In contrast, since the creation of the Nigerian Law Reform Commission (NLRC) in 1979, it is yet to track or propose reforms to Nigerian arbitration law and practice despite the long-time clamour for reforms.[82] Even if it does, NLRC's system is not as systemized and accessible as its counterpart in the UK.[83]

Further, when an amendment is supervised by an institution rather than an *ad hoc* body, as in the Nigerian case, it enables a consistent follow-up on the interpretation and application problems that legislation has in practice, thereby leading to informed and prompt amendments. For instance, reference to the DAC Report would show that many novel provisions introduced to the 1996 Act were enabled by consistent tracking of the development in the relevant areas of arbitration practice. An earlier review shows that some foreign cases, such as *Esso/BHP v Plowman, Commonwealth of Australia v Cockatoo Dockyard Pty Ltd., etc.,* were reported to have influenced the decision of the DAC to make some novel provisions in 1996.[84] In comparison, such a proactive approach taken by the DAC was not echoed in the Orojo Committee's Report on the proposed amendments to current arbitration law in Nigeria.

The above highlights why many critical problems identified in chapters 2, 3 and 4 are still unaddressed, even in the pending Bill in Nigeria despite its wide acceptance. For instance, since the infamous decisions in *Shell v.*

[81] Law Commission (n 206).
[82] Bola Ajibola, *Arbitration: A Catalyst to Economic Transformation in Nigeria* (Ceenia Publishers Lagos 2005) 119.
[83] Ameh Ochojila, 'Reforming the Reformer: Challenges before Nigerian Law Reform Commission' (published 7th June 2022) < Reforming the reformer: Challenges before Nigerian Law Reform Commission | The Guardian Nigeria News - Nigeria and World News — Features — The Guardian Nigeria News – Nigeria and World News> accessed 20 February 2023.
[84] Mark Saville, (n 218).

FIRS[85] foreclosing foreign lawyers from signing arbitration notices in an arbitration seated in Nigeria, the Legal Practitioner Act, which forms the basis of such judgment, is yet to be amended, and there is presently no proposition to amend the arbitration law to correct the position, even in the Bill. Further, since the decisions in the two cases of *Esso v. Total & 2 Ors,*[86] which handed down contradictory positions on whether a court is empowered to review a tribunal's decision on the termination of an arbitrator's mandate, no amendment has been proposed in this direction. Moreover, since the problematic decision in *ConOil v. Vitol SA,*[87] on whether it is the subject matter of a dispute decided by a tribunal that would determine which court out of the various High Courts is to entertain the set-aside proceeding, no amendment has been proposed in that direction, etc.

Additionally, despite the Nigerian Supreme Court's Practice Direction on Arbitration published in 2017, no court has made follow-up Directions to implement the Supreme Court direction as directed. Such gaps would rarely occur if a standing institution were charged with tracking the development in arbitration practice and the necessary reforms. In comparison with Ghana, following the 2010 Ghanaian Act, in the subsequent 2020 High Court Rules,[88] the Ghanaian Ministry of Justice inserts a provision that mandates a High Court in all cases to 'enquire from parties about their willingness to attempt settlement of their case by alternative dispute resolution' before litigation.[89] Further, in the 2020 amendment to Ghana's Land Act, arbitration is now made mandatory in land disputes. [90]

Further, as discussed earlier, the amendment process to the arbitration laws in the English jurisdiction is not aimed at 'catching up' with the Model Law, instead, it considers what would work for the UK. For instance, the

[85] ibid.
[86] ibid.
[87] ibid.
[88] High Court (Civil Procedure) (Amendment) Rules of 2020, CI 133, Ghana; See also De Simone Limited v. Olam Ghana Limited [2018] GHASG 22.
[89] Audrey Naa Dei Kotey and Samuel Alesu-Dordzi, 'Recent Developments in Arbitration in Ghana' (Global Arbitration Review, published 29 April 2022) Accessed 5 June 2022.
[90] The Land Act, Ghana, Act 1036 2020, s 989(1).

DAC Report states that it made a recommendation against the adoption of the Model Law and proposed new, improved legislation that is 'not limited to the Model Law.'[91] In contrast, the terms of reference for promulgating the Nigerian Act were to 'bring the legislation in tandem with the Model Law.'[92] Additionally, for the current Bill, the mandate was to "bring the law in line with modern trends and international practice."[93] Understandably, a reform with the primary aim of a 'catch-up' with international practice or instruments would not address many of the local problems discovered in chapters 3, 4 and 5, peculiar to Nigerian arbitration practice. Indeed, the same 'catch-up' approach was responsible for direct transplantation into Nigeria of some of the provisions of the model already complained against and avoided or modified by some advanced jurisdictions, as demonstrated earlier.

It is crucial to observe that when the draft copy of the pending Bill was to be presented to the Senate in 2017, it was first sent to the UNCITRAL for review and approval.[94] Moreover, when the 2018 Singapore Convention was established, the Nigerian bill was again recalled from the Senate to bring it in line with the Convention. In as much as this approach could bring the legislation in tandem with the Model Law, it may not have helped address problems peculiar to Nigeria.

In the final analysis, it is submitted that the problems in the relationship between the Nigerian courts and arbitration, evidenced in chapters 3, 4, and 5, are borne out of the fact that the parent legislation governing arbitration in Nigeria is, essentially, in content, still the 1889 English Arbitration Act— mixed with the UNCITRAL Model Law. In the past and up to the present time, there have been some attempts to amend the law to address some of the system's problems, including the courts' roles in arbitration. However, it is found that all the attempts made to amend the laws in 1958, 1988, and now (2023) were not really geared towards reforming the laws as it is being practised, but rather, to 'catch-up' with

[91] Mark Saville, (n 218) 276.
[92] Ismaila Mohammed, *Commercial Arbitration in Francophone and Anglophone Africa: A Comparative Study* (Myangar Publishers Yaounde 1999) 65.
[93] Paul Idornigie, (n 182).
[94] Paul Idonigie, (n 182).

the Model Law. To this end, the attempts to amend the Nigerian arbitration law could not achieve the desired result. Moreover, compared to other jurisdictions, especially England, which is a favoured seat in the arbitration community, and Ghana, which has the most recently amended arbitration law in sub-Sahara Africa, there are many lessons Nigeria could draw on regarding having a more effective arbitration law reform.

7.2 Over-Judicialisation of Administrative Roles of Courts in Arbitration.

From the review conducted in chapters 2, 3, 4, and 5, it will be observed that some of the problems unraveled from the court's practices in Nigeria are traceable to the point that there are some of the roles played by the courts in arbitration that are to be carried out administratively or with minimal judicial process, but instead, they are subject to the full judicial process. Thus, 'over-judicializing' those roles, coupled with the bureaucratic nature of the Nigerian civil justice system, do increase the discretionary powers wield by a judge in arbitration matters and reduce regard for parties' agreements, thereby undermining the principle of party autonomy.

To begin, it will be observed from the historical emergence of the court system and their workings in the society, conducted in chapter 2, that the roles played by the courts in a society are not limited to adjudicative roles but also extended to some ancillary administrative or less judicial roles. For simplicity, the adjudicative role of a court is mostly to decide a case by judging or resolving disputes.[95] However, a court's administrative or less judicial roles will include some roles outside its adjudicative roles, such as jury selection, making rules of procedure, case management, expert witness appointments, document filing and servicing, compliance, court's budgeting, etc.[96]

Although the roles highlighted above are clear-cut administrative or less judicial roles of a court, it is submitted that some other roles of a court are administrative but may appear like (and have severally been confused as)

[95] Bryan Garner, *Black's Law Dictionary* (Deluxe 9th edn, Thomson Reuters Business 2004) 47.
[96] Olumide Babalola, *Babalola's Law Dictionary of Judicially Defined Words and Phrases* (Noeticl Repertum Inc., Lagos 2018) 210.

adjudicative or judicial roles. These include the courts' roles in issuing writs or summonses and other legal processes, administering oaths, document certification and sealing, issuing orders, judgement registration, registration of probate instruments, execution of courts' verdicts, etc. Even though judges sometimes carry out these roles, they are not adjudicative in nature because they do not entail dispute settlement. As a result, when a court is synonymous with the judiciary, it defines the character of the institution called a 'court' to mean an arm of a government that is generally responsible for the administration of justice in a state.[97] This suggests that in its duty to administer justice, the court plays more than just an adjudicative role but also incidental administrative roles. Accordingly, where a court invokes its adjudicative power to perform a duty that simply requires an exercise of its administrative power, the attendant consequence may be abuse or misappropriation of power, delay, or injustice.

Collins English Dictionary defines an administrative role to include 'organizing and supervising an organization or institution.'[98] Babalola further expatiates on what administrative tasks are by defining them as including 'personnel recruitments and appointments, document scrutinizing, the execution of decisions, supervision, registration and record keeping, documentation, work assessments and regulations, task scheduling, etc.'[99] Thus, some of the court's duties that involve assisting arbitration to appoint personnel (an arbitrator), the issuance of a subpoena to bring witnesses before an arbitrator, the issuance of writs to produce documents, assisting the arbitration proceedings generally, registering or recognising awards, executing or enforcing awards, etc., should fall under the definition of an administrative function rather than an adjudicative function of a court.

In focusing the above analysis on the problems plaguing the relationship between courts and arbitration in Nigeria, as discussed in chapters 3, 4 and 5, particularly regarding how the gaps in the current system

[97] Bray Garner, (n 255) 924.
[98] Collins English Dictionary, <Administrative role definition and meaning | Collins English Dictionary (collinsdictionary.com)> accessed 12 July 2022.
[99] (n 255) 211.

undermine party autonomy, therefore, it will be observed that some of the roles expressly assigned to a court under the Act (and even under the Model Law) should and could be performed by a court without undermining party autonomy if they are kept less-judicial or within the administrative functions of a court. An instance is the role of a court in appointing an arbitrator (either because of defaults of parties or arbitrators). The over-judicialisation of this role in Nigeria (and many jurisdictions) shows its mischaracterization as a full adjudicative role, like settlement of disputes.

To follow the logic of the analysis made earlier on the divide between the adjudicative or judicial and administrative roles of a court, it will be observed that the role of appointing an arbitrator does not primarily fall within a role to settle disputes. However, it is not to be oblivious that a request made to a court to appoint an arbitrator could involve dispute settlement, but not primarily or all the time. This is because the arbitrator-appointment role (whether by a court or any person) primarily and simply involves comparing a list of potential arbitrators and their qualifications or profiles with the relevant portion of the arbitration agreement and making a selection. From the Analytical Commentary on the Model Law, the administrative nature of the court's duty to appoint an arbitrator was noted in the following words:

> Finality seems appropriate in view of the administrative nature of the function (to appoint an arbitrator by a court) and essential in view of the need to constitute the arbitral tribunal as soon as possible. [100]

Notably, the nations that contributed to the above document agreed with or understood that a duty to appoint an arbitrator is primarily administrative. However, it is still curious to find that many jurisdictions modelled after UNCITRAL Model Law still 'over-judicialise' the court's power to appoint an arbitrator by mandating parties to apply to a court,

[100] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (Report of the Secretary General of the United Nations, 18th Session Vienna) 3-21 June 1985. P. 29. The words in the bracket are those of the researcher for contextual understanding of the quote.

like any other civil suit through the formalities of a full oral hearing, before an appointment is made, thereby undermining party autonomy.[101]

However, if the above-quoted reasoning from the Model Law is followed, it would mean that an applicant should not be made to file an originating process when requesting the court's assistance to appoint an arbitrator or that parties should have the option to decide how to approach the court in this regard, between its administrative or adjudicative jurisdiction. In other words, a request for an appointment of an arbitrator should not be made to undergo the rigours of a regular civil suit or application, or the delivery of a court's ruling, etc. To put it simply, if the default provision regarding a court-appointed arbitrator, like Section 7 of the ACA, fixes the duty of a court to appoint an arbitrator in its proper place as a simple administrative role, a judge could exercise such power in his chambers without resorting to a judicial proceeding, just the same way an arbitrating party or other appointing authority appoints arbitrators without a judicial proceeding, thereby allowing parties to still have their say on the process rather than the default rules where party autonomy is entirely disregarded. After all, when a private body is designated to appoint an arbitrator, it is done administratively without resorting to the rigours of the judicial process.

For instance, the Law Society of England and Wales has a guideline regulating its procedure to appoint an arbitrator whenever it is requested to do so.[102] An applicant is to request by filling out and submitting a form through e-mail to the Society, attaching the arbitration agreement and application fee. The form is passed to the Law Society's Arbitration Consultant, who advises on whom to appoint. The Society then notifies the appointed arbitrator and the parties.[103] This approach demonstrates that a request to appoint an arbitrator for arbitrating parties is primarily a call to discharge an administrative duty. However, where there is a challenge, the challenger is allowed by the Law Society's guidelines to commence an

[101] Order 34(6) Federal High Court Civil Procedures Rules, Nigeria, 2009; Section 112 Civil Rules Code, Cameroon, 2010; Rule 32(XVII) High Court Civil Procedure Code, Benin, 2019.
[102] The Law Society, *Appointment of Arbitrator: Application Guideline Notes* (2017 LS Print) retrievable from <Appointment of arbitration application guidance notes.pdf> accessed 14 July 2022.
[103] ibid, 4-5.

action in a law court. It would be reasoned, therefore, that when a court is to make the same appointment, it should not change the nature of the role from an administrative to an adjudicative one.

To this end, under the Nigerian arbitration law, for instance, instead of the mandatory provisions of the Act on the judicial formalities to follow regarding court-appointed arbitrators, an amendment to allow the parties to decide whether a judge could appoint an arbitrator administratively would not only save time but avoid many challenges ensuing from those statutory provisions.[104] The practice under English arbitration laws, for instance, requires an applicant to commence a proceeding through an Arbitration Claim Form supported by a witness statement.[105] The other party is put on notice, and a hearing conducted before a court will appoint an arbitrator.[106] Then again, English case laws have added more conditions; an applicant will adduce evidence to establish that the court has jurisdiction and that there is an "arguable case" or a "good arguable case."[107] These are the ways a simple administrative role in appointing an arbitrator is judicialised, and the practice in Nigeria follows this English way.[108]

Further to this, more of the courts' roles in arbitration which could be dealt with administratively in the first instance (except if a resultant dispute ensues), are: (i)stay of litigation pending arbitration, (ii)the issuance of a subpoena to produce document or witness, (iii)oath administration, (iv)emergency arbitration, (v)interim measures of protection, etc. The default rule could be to make a court deal with these roles administratively in the first instance or that the parties, by agreement, could opt in or out of the judicial approach. Further, post-award roles such as registration and execution of the award, remission of award for correction, etc., could also be dealt with administratively initially, except where parties opt out in

[104] The Arbitration and Conciliation Act, Nigeria, Cap A18 LFN 1990, Ss 7(2) and 11.
[105] The English Arbitration Claim Form is downloadable from < Claim form (Arbitration): Form N8 - GOV.UK (www.gov.uk)> accessed 23 February 2023; See also English Arbitration Act 1996, Section 18(3); Silver Dry Bulk Company Limited v Homer Hulbert Maritime Company Ltd. [2017] EWHC 44 (Comm).
[106] Man Enterprise Sal v. Al-Waddan Hotel Ltd [2013] EWHC 2356 (TCC).
[107] Noble Denton Middle East and Another v. Noble Denton International Ltd. [2010] EWHC 2574 (Comm).
[108] Berliet (Nig) Ltd. v. Kachalla (1995)9 NWLR (Pt. 420)478, 489 paras F-G.

their agreement. This approach will guarantee party autonomy and procedural flexibility in the performance of the courts' roles in arbitration, even at the post-award stage when the tribunal has become *functus officio* of the case, and also reduce delays connected to post-award processes, particularly in Nigeria.[109]

7.2.1 A Look at the Practice Outside Nigeria

Many arbitration laws and jurisdictions fashioned after the Model Law often provide that a court perform the roles identified earlier using their adjudicative or judicial formalities, like any civil case.[110] However, the degree to which such roles are judicialized still varies from one jurisdiction to another. While some courts in some jurisdictions emphasize the formal exchange of processes, the conduct of oral hearings, and formal decision-making processes in involving themselves in arbitration matters like any ordinary civil matter, some other jurisdictions have used their Rules of their various courts to provide a more simplified or expedited process for arbitration matters in their law courts.[111] However, there remain arbitration laws and practices in some other jurisdictions, such as Japan, China, Ghana, and Singapore, etc., that still somehow lend credence to the submission made towards cutting the judicialization of the would-have-been administrative roles of a court in arbitration, particularly in the areas identified earlier.

For instance, the default appointing authority in Malaysia is not a court, but the Director of the Asian International Arbitration Centre (Malaysia) (AIAC), who can appoint an arbitrator where parties have so failed.[112] The parties are only allowed to write to a court where the Director of AIAC fails to act and then may appoint in chambers.[113] This is like the practice in Hong Kong, where the Hong Kong International Arbitration Centre (HKIAC) acts as the default appointing authority instead of a law court, and where

[109] ibid.
[110] See Arbitration (Scotland) Act, Scotland, 2010; n 264; Arbitration Act, Malaysia, Act 646 2005.
[111] See English Arbitration Act 1996, Section 18(3); Silver Dry Bulk Company Limited v Homer Hulbert Maritime Company Ltd. [2017] EWHC 44 (Comm), Cf Order 32 Rivers State High Court Civil Procedure Rules, 2010, Nigeria.
[112] Arbitration Act, 2005, Malaysia. Section 13 (5) and (6).
[113] ibid, s 13(7).

a court is involved, it appoints administratively.[114] Further, the practice in Scotland is more 'less-judicialized' in that, even though it allows parties to make a court their final resort, it provides for an 'arbitral appointments referee' who is charged with the default responsibility to appoint an arbitrator for parties where other arrangements fail.[115]

In the same way, French law empowers a judge 'acting in support of arbitration' to exercise the default appointing authority rather than a court.[116] The significance of the distinction in the French law strikes between a 'judge' (person), and a 'court' (institution) is clearer from the latter interpretation provision, which singled out the 'President of a Tribunal *de grande instance'* or the 'President of a *Tribunal de commerce' (*as the case may be) as the only judge designated to exercise the default authority.[117] The implication is that the designated person (as opposed to an institution) takes control of the application, and the law requires that the petition be administered in an 'expedited proceeding (*refere).'*[118]

The practice in Malaysia, Ghana, Hong Kong, and France buttress the point that the authority to appoint an arbitrator,[119] whether vested in private bodies or courts, is, firstly, a role to be discharged administratively. Thus, the 'judicialization' or prolonged disputes relating to the court-assisted appointment of an arbitrator or the disregard for parties' wishes may be better managed if arbitration laws or rules are couched to reflect the administrative nature of this role.

Further, there are some other jurisdictions that provide a simplified (administrative) way a court would be involved in arbitration in roles additional to appointment roles. For instance, under Japanese arbitration law, instead of entertaining an application for a stay of litigation pending arbitration, the law mandates a court to dismiss (in the chambers or at the

[114] Arbitration Ordinance, Cap 609, Laws of Hong Kong 2011, Hong Kong. Ss 13 and 24.
[115] Arbitration (Scotland) Act, 2010, Schedule 1 Rule 7.
[116] Arbitration Decree (No. 2011-48), France, January 2011. Article 1452.
[117] ibid Article 1459.
[118] ibid, Article 1460. See generally: Maroe-Laure Cartier, Alexandre Meyniel, and Yann Schneller, *International Laws and Regulations France* (2022, ICLG) 5.
[119] See: The French Decree No. 2011-48 of 13 January 2011, Article 1452, which, instead of making a court a default appointing authority in line with UNCTIRAL Model Law, it departs a bit from the Model Law and vests the authority in any 'judge acting in support of the arbitration.'

registry) any suit filed on the subject of arbitration.[120] In the report submitted by the Legislative Council's Subcommittee on the Reform of Arbitration-Relation legislation in 2021 to amend the current law, the provision of Article 14 is retained on the reasoning that it has contributed immensely to the need to 'increase procedural flexibilities and decongest arbitration cases in courts.' Additionally, regarding all the cases emanating from arbitration, Article 6 of Japanese Arbitration Law provides that the court may determine it without an oral hearing.[121] This provision ensures that many non-contentious applications in respect of arbitration matters can be dealt with in chambers by the Japanese courts.[122]

The practice in China is like that of Japan. Article III of the Rules of the Chinese People's Court provides that if the court's registry detects that a suit to be filed is a subject of arbitration, the registry is mandated 'to notify the plaintiff to apply to an arbitration agency for arbitration' and dismiss the suit.[123] Moreover, if such a case inadvertently gets to court, Article 5 of the Chinese Arbitration Law provides that 'the Peoples' court shall not accept the case.[124] In as much as the focus of the Chinese arbitration law is to develop a 'socialist market economy,'[125] which may not make its system directly useful for a capitalist economy like Nigeria, the primary focus of the regime is to protect party autonomy which is fundamental to arbitration practice generally.[126] Singapore is one of the Model Law jurisdictions that have learnt from the Chinese approach. Section 19B of the International Arbitration Act of Singapore provides for a 'Simplified Application Procedure' to enforce an arbitration award, which is a special and flexible procedure that tilts more towards an administrative role, different from the regular highly judicialised enforcement of court judgments that arbitration awards have been subject to in other jurisdictions, including Nigeria.

[120] The Arbitration Law, Japan, Law No. 138 2003, Article 14.
[121] ibid, Article 6.
[122] Carl Goodman, *Justice and Civil Procedure in Japan* (Oceana TM USA 2004) 119.
[123] Article III Civil Procedure Law of the Peoples' Republic of China, 1999.
[124] The Arbitration Law, China, 2017, Article 5; See also Article 26.
[125] ibid, Article 1.
[126] ibid, Article 1.

In the final analysis, the effect of over-judicialising what a court's administrative or minimal judicial roles in arbitration is twofold. First, once such a role is being performed strictly within the formalistic way of the civil jurisdiction of a court, parties can no longer have their way. Second, it creates an unnecessary bottleneck which delays a process that should ordinarily be speedily dealt with administratively, which is the primary objective of arbitration and the aim of the arbitrating parties. As discussed in Chapter 2, an average period of an arbitration matter as determined in the Nigerian courts is eighteen months, which is borne out of the 'over-judicialisation' of the appointment process by the courts.[127]

7.3 Summary of Discussions, and Conclusion

This chapter investigates the underlying factors responsible for the failure of the current supervisory institutions and organisations to create a level of certainty in the system, such that the court's roles in arbitration in Nigeria could not be relatively ascertained with some sort of exactitude in any given instance. Thus, the review conducted in this chapter finds two problematic areas which are: (i) the absence of institutionalized tracking and periodic recalibration of the relationship between the courts and arbitration, and (ii) over-judicialization or over-judicialization of what should be 'administrative' roles of the courts in arbitration. The chapter further conducts a comparative study of these two problematic factors with the practices in the United Kingdom and some other jurisdictions on this subject in order to identify the areas to reform in the Nigerian system.

[127] Templars, *Templars Arbitration Report on Nigeria 2021* (Templars e-publising 2022) < TEMPLARS Arbitration Report on Nigeria 2021 | TEMPLARS Law (templars-law.com)> accessed 3 January 2023.

Chapter Eight

Summary, Conclusions, and Recommendations

8.0 Introduction

As noted in chapter 1, the research aimed to examine the practices and concepts of party autonomy and judicial participation in commercial arbitration in Nigeria, with the view to unravel the problems and recalibrate or reposition the roles that the Nigerian courts play in commercial arbitration under the Nigerian legal system. The thesis has therefore examined, extensively, the current legal framework that determines the roles of the Nigerian courts in commercial arbitration. It has critically analysed the scope and extent to which the legal regime enables the Nigerian courts to observe or undermine the principle of party autonomy while playing their roles in arbitration. Thus, analysis conducted in Chapters 6 and 7 has found that even though the general assertion from many writers, practitioners, and judges on the Nigerian regime is that it guarantees party autonomy and is arbitration-friendly, the letters of some relevant provisions of the Act and their judicial interpretations do not wholly corroborate this general assertion. Instead, it is found that even though there have been progress in this subject this assertion is still largely aspirational in Nigeria.

Thus, the findings in Chapters 3, 4, and 5 have shown that the three major windows of judicial participation in arbitration in Nigeria are still immersed in some uncertainties and inconsistencies. As a result, many statutory provisions relevant to define the scope and limit of the court's roles in arbitration are still self-contradictory, ambiguous, and indefinite, etc. To this end, many critical areas of arbitration where the courts are often invited to involve end up being left to the discretion of each judge to decide, thereby giving the Nigerian courts leeway to disregard or override parties' views or choices. In other words, the Nigerian courts, like many other jurisdictions, are caught between the duty to uphold the principle of party or arbitral autonomy by allowing the parties to construct their arbitration proceedings as they wish and balancing this with the court's

duty to participate in arbitration within the confines of the law which is still indeterminate in many respects.

Thus, the analytical and comparative reviews further conducted in chapters 6 and 7 to understand the underlying factors responsible for the problems in the system, and how they affect the balancing of court's roles in arbitration and their duty to uphold the principle of party autonomy, has further revealed five major undercurrents responsible for the problems plaguing the Nigerian system. These problematic factors range from the direct transplantation of the provisions of the Model Law into the Nigerian law such as the transplantation of Article 5 of the Model Law (as Section 34) into the Nigerian Arbitration Act without modification despite the warnings from the drafters of the Model Law; to the operations of the concept of Constitutional Supremacy, which appears to have been interpreted to vest unlimited powers in the Nigerian courts to involve in arbitration; absence of a definite theory or ideology to direct court's roles in arbitration in Nigeria; absence of institutionalised tracking and periodic recalibration of the relationship between Nigerian courts and arbitration; and over-judicialisation of what should be administrative roles of courts or where courts should have maintained minimal judicial process in arbitration.

Further, for a better appreciation of the adverse impact of the underlying factors responsible for the current problems found in this study, an analysis of related practices in some other jurisdictions, such as the United Kingdom, Ghana, Malaysia, etc., was conducted in Chapters 6 and 7, from which the study has deduced what could be described as the best practices for the necessary reforms in Nigeria. From the foregoing, it is suggested, first, that there is an urgent need for an amendment to the current arbitration statute in Nigeria. The specific affected provision of the Act and the researcher's suggestions are contained in Appendix II annexed to this Thesis. Further suggestions and recommendations on a short- and long-term reforms to the current regime are also contained in Appendix III and further discussed below.

8.1 Summary and Recommendations

8.1.1 On the Interpretation Problems traceable to Section 34 and other Provisions of the Act

As earlier found in Chapter 6, Section 34 of the Act is the umbrella provision critical to the efficacy of every other provision that defines the court's roles in arbitration in Nigeria. It is enacted to provide a general cover-up where it is unclear or difficult to determine the scope and limits of the court's roles in arbitration by those specific provisions. However, the study conducted in Chapters 2, 3, 4, and 5 has shown that Section 34 of the Act has failed to meet this expectation. Accordingly, the provision has not really brought much-expected certainty in defining the courts' roles in arbitration, thereby leading to inconsistent interpretation and application of the provisions to cases which makes courts to undermine party autonomy.

Further analysis of Section 34 in Chapter 6 shows that the major problem with the provision is its narrow phrasing, which was a direct transplantation from the Model Law into the Nigerian Act without modification. Thus, related laws and practices outside Nigeria were analysed in Chapter 6, it was found that not all Model Law states transplanted the provision of Article 5 of the Model law directly into their national laws like Nigeria did. From practices across nations, therefore, three patterns have been deduced: (i) those jurisdictions that delete Article 5 from their national laws like France, Ghana, UAE, etc., (ii) those jurisdictions that transplanted Article 5 into their laws with substantial modification like England, Scotland, Singapore, etc., and ((ii) those jurisdictions that transplanted Article 5 into their laws without modification like Nigeria, Kenya, etc. The lesson from these choices is that many jurisdictions that have consistently maintained the global record of the top five most preferred seats for arbitration have either deleted or substantially modified the wording of Article 5 in their domestic laws. Then, the jurisdictions falling within the first two categories have more global records as those with 'greater support for arbitration by local courts and judiciary.' Further, they are jurisdictions with 'increased neutrality and impartiality of the local legal system' and 'better track record in enforcing

agreements to arbitrate and arbitral awards.' These jurisdictions include London, Paris, Singapore, Hong Kong, Geneva, etc.[1]

Further, even some jurisdictions that made the same choice as Nigeria, like India and Kenya, have been able to relatively strike a difference from the Nigerian regime because, in addition to the transplantation of Article 5, their national laws further made clarifications on the court's roles in arbitration through annotations or enactment of more provisions than the Model Law on specific roles of courts in arbitration.

Finally, the fundamental experience gained from this analysis is that the efficiency of arbitration practice and observance of party autonomy does not depend on the extent to which the courts are pushed back from involving in arbitration but rather, the extent to which the national arbitration laws are definite as to the roles of the courts in arbitration with less ambiguities.

To this end, it is recommended that Section 34 of the Act be altered to allow Nigerian courts to participate in both issues provided in the Act and otherwise. Then, the Act should unambiguously provide for the specific areas 'where' and 'how' courts should not participate at all in arbitration. In other words, the Act should define what a court should not do in arbitration matters rather than what it could do. This will not only bring more certainty into the scope and limits of the court's roles in arbitration regarding what a court ought not to do and not what they could do, but also preserves the party autonomy in the areas specifically foreclosed from judicial participation in arbitration.

Further, it is not recommended that Section 34 should be removed from the Act as it is done in Ghana and France because of the floodgate that might be opened to many recalcitrant parties and hostile jurists to meddle in arbitration affairs against parties' agreements. Meanwhile, if the provision is perhaps removed, the amended legislation should then revise those other provisions of the Act dealing with more specific issues on this subject in order to make more explicit the limits of the court's participation

[1] Queen Mary's School of International Arbitration, *International Arbitration Survey: Adapting Arbitration to a Changing World* (QMU London 2018). <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf > accessed 12 January 2023.

in arbitration, and also to create more specific roles for courts in arbitration. Like the Ghanaian laws, it is recommended that the court be designated the default authority to carry out all that a tribunal could do but only when the tribunal has failed to, or it is practically impossible. Parties should be allowed to opt in or out of this default arrangement.

Also, suppose the legislators are minded to retain Section 34 as it is in the Act and even reproduce it in the pending amended Bill before the Presidency. In that case, it is recommended that Section 34 and other specific provisions of the Act on the roles of courts in arbitration should be complemented by a new Section 1 which gives the general theory or ideology underpinning the court's relationship with arbitration like in China and England, and also Explanatory Note or Annotations, like in India, to clarify further the scope and limits of court's roles as provided in those provisions. This will give the courts a practical guide when determining where and how to participate in arbitration.

Finally, it is crucial to note that these recommendations are not made out of oblivious to the fact that statute amendment process in Nigeria is cumbersome because research shows that it takes an average of seven years to enact legislation in Nigeria.[2] More so, there is an Arbitration and Mediation Bill amending the current Act and awaiting the president's assent— a product of about ten years, yet not considered the problems addressed in this study. Thus, considering this background, it would be too idealistic to hope for immediate amendment to the Act. The above recommendations, therefore, are for long-term plans and major reforms in the system.

In the interim, it is suggested that the immediate solution to resolve the problems plaguing Section 34 and those other specific provisions of the Act, as reviewed in Chapters 3, 4, 5, and 6 is for the Attorney General of the Federation (AGF) to include the above corrections and those in Appendix 1 in a National Arbitration Policy which will, for now, complement

[2] Policy and Legal Advocacy Centre, *A Step-by-Step Guide to the Process of Amending the Nigerian Constitution* (Plac Publishers, 2014) <Step-by-Step-Guide-to-the-Process-of-Amending-the-Nigerian-Constitution.pdf (placng.org)> accessed 3 May 2023; Olatunbosun Ademola, 'Resolving the Problems of Backlog of Bills in the Nigerian National Assembly' (2021) Vol 54 Issue 23 *Nigerian Bar Journal* 45.

the current Act. Suffice to observe that currently, there is a proposed National Arbitration Policy Committee set up by the AGF in Nigeria sometime in 2023[3] However, because of the recent change in government, the new administration has suspended the Committee, and the hope to have the National Arbitration Policy document come to fruition is dim. It is recommended that the Committee be revived, or a new Committee be set up to urgently make a National Arbitration Policy, including the corrections highlighted in Appendix 1. Such a Policy document is though a secondary source of law, but it will guide Nigerian courts in their interpretations of the problematic provisions reviewed in the preceding chapters.

8.1.2 On the Problems traceable to the Concept of Constitutional Supremacy and Section 6 of the Constitution

In Chapter 6, it was found that even though the concept of constitutional supremacy was initially envisioned to sustain the rule of law in a democratic state like Nigeria, unfortunately, in practice, it has given leeway to the Nigerian courts to justify their participation in arbitration particularly to undermine party autonomy. The long-term solution to this problem is perhaps to amend the Constitution to include a *proviso* to Section 6(6) of the Constitution, which would bar the courts from overriding the provisions of the Arbitration and Conciliation Act, particularly on issues where there is a valid parties' agreement. However, such *proviso* should still be subject to the principle against public interest, illegality, and public policy.

In other words, the *proviso* should be drafted to qualify the seemingly unlimited judicial powers vested in a court under Section 6 of the Constitution such that the court's judicial power will be subject to parties' agreement in arbitration except where it is illegal, against public policy and interest. However, it is imperative to note that this recommendation is not oblivious of the reality that the most tedious law amendment in Nigeria, like any other written constitutional legal system, is the Constitution. The

[3] Jedy Agba, 'National Arbitration Policy aims at making Nigeria African's Arbitration Hub' published 20 March 2023 <https://fmic.gov.ng/national-arbitration-policy-aims-at-making-nigeria-africas-arbitration-hub-jedy-agba/#:~:text=The%20goal%20of%20National%20Arbitration,contracts%20especially%20with%20foreign%20entities.> Accessed 9 May 2023.

1999 Constitution is the *grund norm,* that is, the parent laws from which other laws in Nigeria are derived. Thus, by Sections 8 and 9 of the Constitution, its amendment requires an absolute majority decision of all the legislative houses in Nigeria (36 houses of assembly, the House of Representatives, and the Senate). Research has shown that Constitutional amendment in Nigeria takes at least six years.[4] Consequently, the above-recommended amendment to the constitution, coupled with those in Appendix 1, is the long term solution to this problem.

In the interim, therefore, it is recommended that the Chief Justice of Nigeria (CJN) amend the 2017 Practice Direction on the Court's Roles in Arbitration, or to make a new Practice Direction on this subject. As observed in Chapter 6, besides the fact that the current Practice Direction is too short in words and ambiguous in purport, none of the Chief Judges of the various High Courts have responded to it by making their corresponding Practice Direction to guide judges of High Court on their roles in arbitration. Thus, the recommended amended or new Practice direction should first make provision to expound on the seemingly unlimited judicial powers vested in a court under Section 6 of the Constitution such that the courts would be enjoined to exercise restraint in using their judicial powers to override parties' agreements in arbitration except when the agreements are illegal, or against public policy and interest. Secondly, the Practice Direction should make comprehensive provisions to complement the specific provisions of the Arbitration and Conciliation Act on the roles of courts such that they will correct the problems reviewed in chapters 3, 4, 5, and 6.

Practice Direction of a court in Nigeria is made by the Chief Justice of Nigeria or Chief Judges (CJs) of the various High Courts, as the case may be.[5] Although a Practice Direction is generally classed as a secondary source of law in Nigeria, it enjoys a special status like a primary source of law because it derives its source from the Constitution.[6] This is because

4 Olatunbosun Ademola, 'Resolving the Problems of Backlog of Bills in the Nigerian National Assembly' (2021) Vol 54 Issue 23 *Nigerian Bar Journal* 45.

5 Sections 46(3), 254, 259, and 274 of the Constitution of the Federal Republic of Nigeria, 1999 (as Altered 2023).

6 Oraekwe v. Chukwuka (2010) LPELR-9128 CA.

the power vested in the CJN or the various CJ to make Practice Directions for their courts is directly sourced from the Constitution. Thus, it has been held severally by the Supreme Court that a Practice Direction enjoys a sort of constitutional force of law.[7] For instance, Section 274 of the Constitution states that:

> Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make Rules for regulating the Practice and Procedure of the High Court of the State.

As observed in the preceding Chapters, most of the problematic judicial decisions revealed in chapters 3, 4 are the decisions of the courts of first instance. Thus, the implication of having a Practice Direction that makes clarifications about when and how a court should exercise its judicial powers in arbitration without undermining party autonomy is that it gives the Nigerian courts a more precise direction on their roles in arbitration rather than the blanket use of Constitutional power to override the provisions of the Act and parties' agreement.

8.1.3 On the Problems Traceable to the Absence of Institutionalised Tracking and Periodic Recalibration of Court's Roles in Arbitration.

As earlier observed in chapters 2 and 7, the historical and theoretical review of the relationship between courts and arbitration shows that the court's roles in arbitration evolve in all jurisdictions. This is primarily because of globalisation, hence, the need for a regular review of the systems of dispute resolution in order to measure up with the realities of time and provide practical and up-to-date systems.[8] Unfortunately, the earlier review has shown that since Nigeria inherited the repealed 1889 English Arbitration Act from the British colonial government in 1900 and 1914, there had never been a purposely legislated arbitration statute originally drafted by the Nigerian parliament. This is not to say there have not been some forms of amendment or reforms in the system. On the contrary, the Nigerian arbitration systems have witnessed some

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7 Buhari v. INEC (2008) 19 NWLR Pt. 1120 Pg. 246; Abubakar v. Yar'adua (2004) 4 NWLR (Pt.1078)465, 511.

8 Richard Shaffer, Filiberto Agusti and Lucien Dhooge, *International Business Law and Its Environment* (8th edn, Cengage Learning 2020).

commendable efforts at reforms and amendments in 1988, 2006, and 2023. However, the findings in chapters 2 and 7 have shown that the amendment efforts were carried out by private individuals without involving some major stakeholders like the judiciary, and also not proactive because their primary focus was just to catch up with international instruments such as New York Convention and UNCITRAL Model Law. Their focus was not to track the domestic problems with the roles of courts in arbitration and its adverse effects on party autonomy in the Nigerian space through case laws before offering amendments.

To this end, it is recommended that the Attorney General of the Federation should set up a dedicated body, with public status, to comprise stakeholders from the judiciary, academics, practitioners, and arbitrators, for a conscious effort to track the challenges ensuing from the courts' roles in arbitration or arbitration practice as they emerge. Thus, the starting point or initial working document for such a Committee could be the amendments suggested in Appendix I of this Thesis and the intensive survey already carried out by Templars LLP, which reviewed almost all arbitration cases where Nigerian appellate courts have participated in arbitration, spanning from the 1990s to 2021.[9] With these two documents, the Committee would comprehensively review many problematic issues and case law affecting party autonomy in the Nigerian space.

Meanwhile, a draft organogram of the proposed Arbitration Law and Practices Reform Committee is annexed as Appendix II to the thesis. The Committee is to be headed by a retired judge of the Supreme Court of Nigeria because such a person will have insightful understanding of the two key areas in this subject, that is proper exercise of the judicial power and the demand of arbitration practice. More so, from his practice experience (and now retired), he will be in a good position to stay back and objectively assess the problems with the relationship between courts and arbitration. Further, the two persons to assist the chairman (secretary and deputy) are selected from both public and private bar which are two

[9] Templars LLP, *Templars' Arbitration Report on Nigeria 2021* (2021) (Vol. 1) <TEMPLARS ARBITRATION REPORT ON NIGERIA 2020.cdr (templars-law.com)> accessed on 4th February 2022.

essential branches of the law practice. More so, the other members cut across the major stakeholders in the two fields, such as academics, writers, practitioners, judges, business community, arbitrators, etc.

As earlier observed, there is already a Bill to amend the present law, which unfortunately does not address many of the problems found in this research, and it would be a herculean task to propose another amendment soon. Thus, the proposed Arbitration Law and Practices Reform Committee should not be a mere *Ad hoc* Committee of few years' standing, and examples should be borrowed from the English jurisdiction's DAC Committee, which functioned for more than a decade before it wound up. Thus, it is recommended that the Committee should be a Standing Committee of at least twenty years standing. The long period of existence will enable them to keep arbitration laws and practices in Nigeria under regular and constant review by tracking problematic issues through case law, the trends in the international arbitration space and suggest informed amendments to fine-tune the Nigerian system. It will also help to harmonise the conflicting decisions of the Nigerian courts.

Besides this standing Committee, the review conducted in Chapter 6 further shows that, like English jurisdiction, Nigeria also has the Nigerian Law Reform Commission (NLRC), which is vested with the duty to follow up on the interpretations and applications of laws in the Nigerian courts and recommend law amendment where necessary to the Attorney General. In contrast to such public bodies in other jurisdictions reviewed earlier, since the creation of NLRC in 1979, it is yet to track or propose reforms to Nigerian arbitration law and practice despite the long-time clamour for reforms,[10] and even if it does, NLRC does not function like other advanced jurisdictions.[11]

It is therefore recommended that the Attorney General should prompt NLRC to look in the direction of arbitration laws and practices in Nigeria

[10] Bola Ajibola, *Arbitration: A Catalyst to Economic Transformation in Nigeria* (Ceenia Publishers Lagos 2005) 119.

[11] Ameh Ochojila, 'Reforming the Reformer: Challenges before Nigerian Law Reform Commission' (published 7th June 2022) < Reforming the reformer: Challenges before Nigerian Law Reform Commission | The Guardian Nigeria News - Nigeria and World News — Features — The Guardian Nigeria News – Nigeria and World News> accessed 20 February 2023.

and mandate it to work like their counterparts in other advanced jurisdictions. As observed in Chapter 6, this means that NLRC should engage legal practitioners and other professionals to, among other functions, 'research the arbitration laws and how they work in practice, both in the UK and overseas,' 'analyse problems with the arbitration laws, identify options for reform and testing potential solutions,' and 'engage with stakeholders (both inside and outside government),' etc. Afterwards, it should submit to the AG a further amendment proposal (including the amendment suggested in Appendix 1) within a considerable period.

Moreso, like the English Law Commission, NLRC should be mandated to publish its Law reform programmes regularly. It should also maintain an active website where the status of every proposed reform and relevant documents are accessible and through which the public can make contributions. Further, it has been observed that the wider the consultation, the more prospect of wide-ranging and balanced amendments. Thus, it is recommended that NLRC should involve as many as possible from different stakeholders involving in arbitration laws and practices in Nigeria.

8.1.4 On the Problems Relating to 'Over-Judicialisation' of Administrative Roles in Arbitration.

From the review conducted in chapters 2, 3, 4, 5, 6 and 7 has traced some of the problems with the Nigerian regime, and by extension, other Model Law jurisdictions, to the fact that some of the courts' roles in arbitration that are supposed to be carried out administratively or with minimal judicial process are being bogged with full judicial process, thereby given the court the leeway to undermine party autonomy. Some of the roles in question here include the court's role to appoint an arbitrator, to stay litigation pending arbitration, to issue subpoenas to produce documents or witnesses, to administer oaths for witnesses, in emergency arbitration, to order interim measures of protection, etc.

It is, therefore, recommended first that relevant specific provisions of the Act be amended to make default rule on these roles to mandate a court to deal with them administratively in the first instance or that the parties, by agreement, could opt in or out of the judicial approach. Further, the

amended law should make post-award roles such as registration and execution of the award, remission of award for correction, etc., to be dealt with primarily administratively, except where parties opt out in their agreement. As observed earlier, this approach will guarantee respect for party autonomy and procedural flexibility in the performance of the courts' roles in arbitration, even at the post-award stage when the tribunal has become *functus officio* of the case, and also reduce delays connected to post-award processes, particularly in Nigeria.[12]

However, considering the observation made earlier concerning the long-time frame to amend statutes in Nigeria, and also for the fact that there is an amendment of the national arbitration law as recent as 2023, it is further recommended that the immediate or short-term solution is that such provisions should be captured in the amended 2017 Practice Direction or a new one as proposed earlier. It is also crucial to note, as observed earlier that this subject is not limited to Nigeria, but the degree to which the court's roles are judicialised in Nigeria is problematic. For instance, the default appointing authority in Nigeria could be changed from a court to the Director of the Multi-door courts in each state in Nigeria, following the Malaysian approach.[13] By this, arbitrating parties should only be allowed to write to a court where the Director fails to act and then may make the appointment in his chambers.[14] As discussed earlier in Chapter 6, it is recommended that the practice in Malaysia, Ghana, Hong Kong, and France on this subject should be used as the model to amend the Act or Practice Direction, as the case may be.

8.2 Synchronising the Research Problems with the Objectives achieved in the thesis

This study has investigated the extent to which the Nigerian courts observe or undermine the principle of party autonomy in their participation in the commercial arbitration cases under the current regime in Nigeria, and how the court's roles to involve in arbitration but also to uphold party autonomy could be balanced such that it will create some certainty for the

[12] ibid.
[13] Arbitration Act, 2005, Malaysia. Section 13 (5) and (6).
[14] ibid, s 13(7).

users of arbitration under the Nigeran legal system. Further, in achieving the research aim, the study has distilled four key objectives which have now been achieved.

The first objective achieved in this research was that it critically examined the current legal framework underpinning the present practices on the roles of the Nigerian courts in commercial arbitration in Nigeria. In accomplishing this objective, the study reviews all the important concepts, statutes, policy documents and international instruments, and some case laws that are the primary source of authority to determine when, where, and how the Nigerian courts will involve in arbitration. This is the core of the discussions in chapter 2 and the introductory section to chapter 3 of this thesis. Further, the discussions in chapters 3, 4, and 5, have achieved the second objective of this research when it analytically reviewed the extent to which the principle of party autonomy is observed or undermined when the Nigerian courts participate in arbitration under the current regime. From the discussion, the research is able to signpost the gaps or problems plaguing the current system in Nigeria that needed to be addressed. Simply put, the discussions in chapters 3, 4, and 5 of the thesis have achieved the second objective sets in chapter 1 for this thesis.

However, before discussing the solutions to the problems unravelled in chapters 3, 4, and 5, it was necessary to further investigate the underlying causes of the problems so unravelled. Thus, the discussions in chapters 6 and 7 further appraised, methodically, the problems elicited from the current practice with the aim of identifying the foundational causes of the problems. This is the core of the third research objective set in chapter 1 of this thesis. The review conducted in chapters 6 and 7 revealed two major causes of the problems plaguing the current practice in Nigeria, which is interpretation and institutional regulatory problems. Further, in chapters 6 and 7, relevant practices in some other jurisdictions, such as United Kingdom, Ghana, Malaysia, etc., were comparatively studied to gain understanding of the best practices in other jurisdictions. Detail of how the research approaches the comparative element of the research is discussed under the methodology section in chapter 1 which is

accomplished in chapters 6 and 7 of the thesis. The ultimately aim of the comparative study is to inspire informed reforms for the Nigerian system.

Thus, in achieving the last objective set for this research, lessons drawn from the analytical review conducted in chapters 3, 4, 5, 6, and 7, were garnered to recommend ways to answer the research question raised in chapter 1. That is, to find the extent to which the Nigerian courts observe or undermine party autonomy in their participation in the commercial arbitration cases under the current regime in Nigeria, and how to rebalance (recalibrate) the court's roles to involve arbitration on one hand and its roles to uphold party autonomy on the other hand, which will restore a level of certainty for the users of arbitration under the Nigeran legal system and make Nigerian jurisdiction more attractive to the global business community. This chapter has, therefore, achieved the last research objective and answered the research question as set out in chapter 1.

Appendix I

Suggested Amendments to Specific Statutory Provisions in Nigeria

***Note:**
This table shows the researcher's suggested amendments to specific problematic provisions of the Act (and the Constitution), as discussed extensively in Chapters 3, 4, 5 and 6 of the Thesis.

*** Keys to read the table:**

- Suggested insertion of new provision
- Suggested deletion of old provision
- Suggested addition or alteration to old provision

S/N	Problematic Provision of the Act	Major Controversial Court Cases cited on the Problematic Provisions	Action to be taken	Jurisdiction outside Nigeria to look up to for guidance on the Suggested Action
1	Section 34 of the Arbitration and Conciliation Act, Cap A18 LFN, Nigeria 2004.	S.P.D.C.N v. Crestar	(i) To delete Section 34 from the Act and to be more specific on the roles of courts in other relevant provisions of the Act, or	i. Ghana ii. Member states of the Organisation for the Harmonisation of Business Law in Africa (OHADA)
			(ii) To alter the current wording of Section 34, such that it would be clearer whether a Nigerian court is outrightly foreclosed from participating in issues not covered at all or partly covered in the Act.	England, Scotland, and Malaysia
2.	Section 6(6) of the 1999 Constitution of the Federal Republic of Nigeria	*1.* Statoil v. SCC Limited. *2.* T.E.S.T. v. Chevron.	To add a *proviso* to the provision that will qualify the inherent powers vested in a court to participate in all cases in Nigeria, including arbitration that subject such	Malaysia

			power to a valid arbitration agreement of the parties.	
3.	Section 7(4) of the Act	Ogunwole v Syrian Arab Republic Nigerian Agip Oil Company Limited v. Kemmer & Ors	To delete the provision from the Act, and include a provision that will allow parties to ventilate their grievance against an appointment made by a court at the appellate court.	Ghana
4.	Section 7(5)	Lakeside Autos v. National Peoples Bank	To expand the provision to include detailed procedures to be followed by a court when appointing arbitrators for the parties as a default appointing authority.	Ghana
5.	Section 44 of the Act	Lakeside Autos v. National Peoples Bank	To alter the provision, such that it will not only apply to international arbitration but also to domestic arbitration.	England
6.	Section 43 of the Act	Lakeside Autos v. National Peoples Bank	To alter the provision, such that it will extend all the provisions applicable to international arbitration also to domestic arbitration.	England
7.	Section 10 of the Act	NNPC v. Total E & P Nig. Ltd	To add to the wording by vesting the authority in a court or any other person to terminate an arbitrator's mandate for inability to perform.	Ghana
8.	Section 11 of the Act	Techno Oil Ltd. v. Ascon Oil Coy Ltd	To add more words to the provision, which would provide a detailed procedure on how a court should appoint a	Ghana

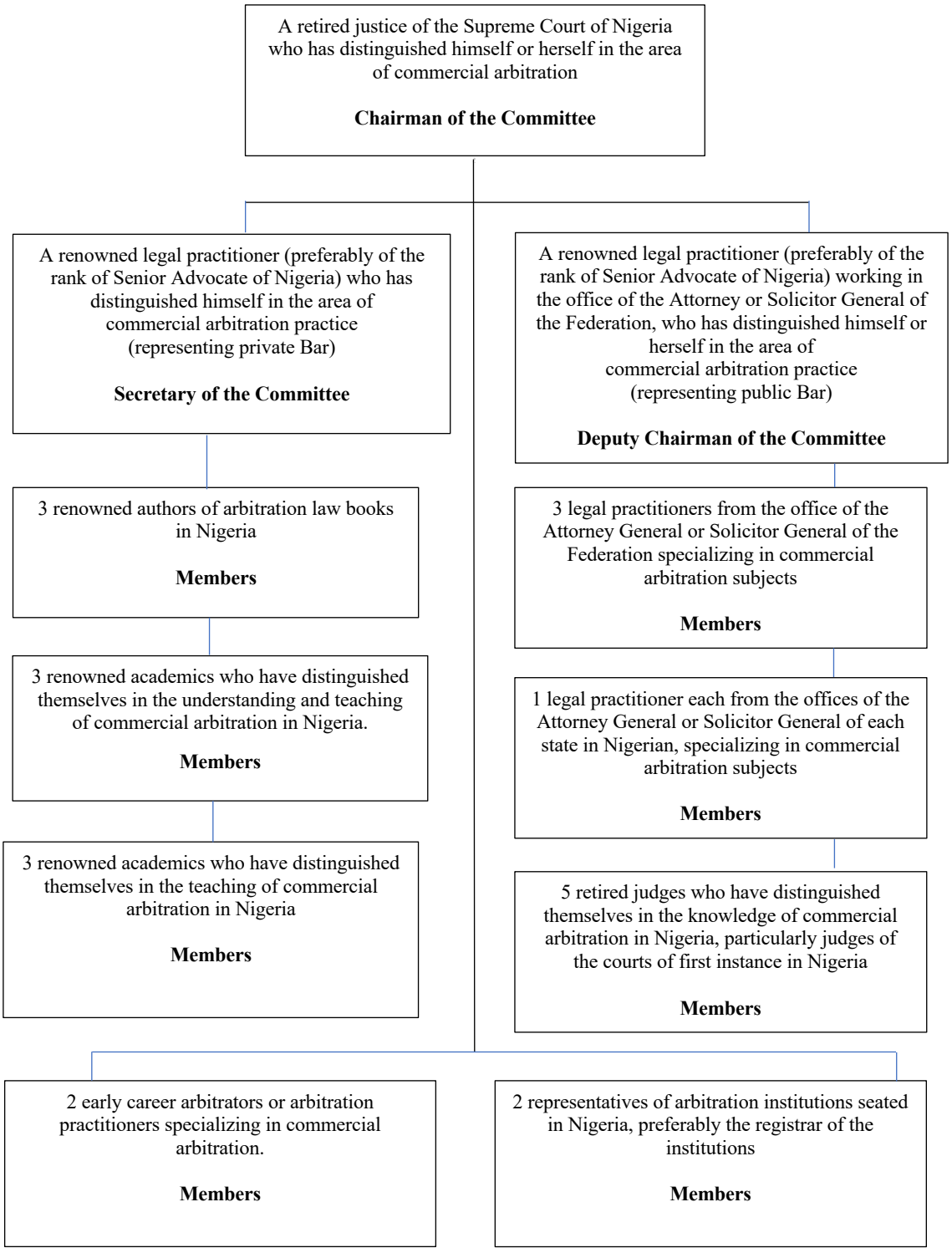
		Zercom Systems Ltd. v. TI Tech	substitute arbitrator in domestic arbitration.	
9.	Sections 44 and 46 of the Act		To harmonise these provisions with Sections 7 and 11 by sticking to either the court or Secretary-General of the Permanent Court of Arbitration as the default appointing authority in both domestic and international arbitration	England
10.	Section 11(e)	Kilima Groups v. Oceanwide Shipping Company China	To provide an addition subsection to Section 11 of the Act [sub e], which will provide for the procedure that a court should follow when appointing arbitrators in a multi-party arbitration.	Malaysia
11.	Sections 8(3) and 9(1)-(3) of the Act	Nigerian Agip Oil Co. Ltd. v. Kemmer	To add to the provisions, the role of a court to entertain a challenge application relating to the removal of an arbitrator.	India
12.	Section 12 of the Act	Associated Discount House Ltd. v. Amalgamated Trustee Ltd.	To expressly provide that a court could entertain an application to review the tribunal's decision on a jurisdictional challenge.	Ghana
13.	Section 12 (5)	Chevron USA Inc. v. Britannia-U Nigeria Ltd FUTA v. BWA Ventures Nigeria Ltd.	To add a provision after Section 12(4), which will specifically state the exact court to entertain jurisdictional	England

			challenge from arbitration.	
14.	Sections 14, 15, 16, 17, 18, 19, 20, 21, and 22 of the Act	Confidence Ins. Ltd. V. Trustees of O.S.C.E	To insert provisions that generally allow the court to assist in the course of arbitration proceedings. Such provision should allow that court to do all the roles of an arbitrator but only as a default authority where parties or arbitrators fail to perform the duty.	Ghana
15.	Sections 4 and 5 of the Act		To delete Section 4 of the Act and leave only Section 5. This is because the co-existence of these contradictory provisions has caused more uncertainty in the system than progression.	England.
16.	Section 23 of the Act		The provision should be altered to allow the parties to agree to a judge exercising the authority to compel a witness or produce a document in arbitration administratively.	China
17.	Section 22 (5)	SPDCN v. Crestar Eyitayo Cooperative v. Union Bank	To insert a new provision immediately after Section 22(4) that would expressly prohibit anti-arbitration	Ghana

			injunction by a court, or To expressly allow a court to grant an anti-arbitration injunction in domestic and international arbitration when necessary.	
18.	Sections 29 and 30 of the Act	Oyedele Motors v. Maersk	To harmonise the time within which parties could apply to set aside an award under the two provisions. Currently, while Section 29 provides for 3 months, Section 30 is silent over the timing.	England
19.	Section 1		Insert a new provision which specifically provide for the general principle or ideology upon which the Nigerian courts should participate in arbitration.	England.

Appendix II

Suggested organizational structure for the proposed Arbitration Reform Committee.



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